No. _____

In the
Supreme Court of the United States

KEVIN MCCARTHY, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY,

Petitioner,

v.

PEDRO HERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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December 18, 2025

APPENDIX

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM, 2024

ARGUED: APRIL 24, 2025
DECIDED: JULY 21, 2025

No. 24-1816

PEDRO HERNANDEZ,

Petitioner-Appellant,

v.

DONITA MCINTOSH,
SUPERINTENDENT OF THE CLINTON CORRECTIONAL FACILITY,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of New York.

Before: CALABRESI, LOHIER, and PÉREZ, *Circuit Judges*.

Petitioner Pedro Hernandez, a New York State ("State") prisoner convicted of murder and kidnapping, appeals from a judgment of the United States District Court for the Southern District of New York (McMahon, *J*.) dismissing his 28 U.S.C. § 2254 petition for a writ of habeas corpus. In his petition, Hernandez contends that an instruction given by the state trial court in response to a jury note improperly ignored clearly established Supreme Court precedent and prejudiced the verdict. The district court adopted the Report and Recommendation of Magistrate Judge Robert W. Lehrburger and denied the writ. The district court first held that the trial court's jury instruction was so deficient as to deprive Hernandez of due process but then concluded—though not without doubt—that the Antiterrorism and Effective Death Penalty Act ("AEDPA") foreclosed habeas relief based on the state appellate court's conclusion that any instructional error was harmless. Hernandez challenges this ruling on appeal. We conclude that 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. We therefore REVERSE and REMAND for the conditional granting of the writ.

EDWARD B. DISKANT, McDermott Will & Emery LLP, New York, NY (Cindy D. Ham, Jennifer E. Levengood, Jacqueline K. Winters, McDermott Will & Emery LLP, New York, NY; Ben A. Schatz, Center for Appellate Litigation, New York, NY, *on the brief*), *for Petitioner-Appellant*.

STEPHEN J. KRESS (Steven C. Wu, *on the brief*), of Counsel, *for* Alvin L. Bragg, Jr., District Attorney for New York County, NY, *for Respondent-Appellee*.

CALABRESI, *Circuit Judge*:

In 2017, a jury sitting in New York State Supreme Court found Hernandez guilty of kidnapping and murdering six-year-old Etan Patz in 1979, nearly forty years prior. Because of the lack of physical evidence, the trial—Hernandez's second, after the first jury hung—hinged entirely on Hernandez's purported confessions to the crime. Central to the trial was whether Hernandez's confessions to law enforcement were made voluntarily, knowingly, and intelligently under *Miranda v. Arizona*, 384 U.S. 426 (1966).

Hernandez, who has a documented history of mental illnesses and a low intelligence quotient ("IQ"), initially confessed after approximately seven hours of unwarned questioning by three police officers. Immediately after Hernandez confessed, the police administered *Miranda* warnings, began a video recording, and had Hernandez repeat his confession

on tape. He did so again, several hours later, to an Assistant District Attorney ("ADA"). At trial, the prosecution discussed and played these videos repeatedly.

When deliberating during his second trial, the jury sent the judge three different notes about Hernandez's confessions. The third note asked the trial court to "explain" whether, if the jury found that Hernandez's un-*Mirandized* confession "was not voluntary," it "must disregard" the later confessions, including the videotaped confessions at the local Camden County Prosecutor's Office ("CCPO") and the Manhattan District Attorney's ("DA's") Office. App'x at 1486. The trial court instructed the jury, without further explanation, that "the answer is, no." *Id*. at 1515. After seven more days of deliberations, the jury acquitted Hernandez of intentional murder but convicted him of felony murder and kidnapping. Hernandez, now sixty-four years old, is currently in state prison, serving a twenty- five years to life sentence for these crimes.

Hernandez appealed to the New York Supreme Court, Appellate Division, arguing among other things that the trial court's jury instruction was inconsistent with the holding of *Missouri v. Seibert*, 542 U.S. 600 (2004), which held unconstitutional the law enforcement interrogation tactic of intentionally obtaining a confession without giving *Miranda* warnings, then administering the warnings, and finally asking the suspect to repeat the confession. The Appellate Division affirmed, holding that the trial court's instruction was "correct" and, alternatively, that any error in the instruction was harmless. *People v. Hernandez*, 122 N.Y.S.3d 11, 15

(1st Dep't 2020). Judge Feinman of the New York Court of Appeals denied Hernandez leave to appeal to that court, *People v. Hernandez*, 35 N.Y.3d 1066 (N.Y. 2020), and the U.S. Supreme Court denied certiorari, *Hernandez v. New York*, 141 S. Ct. 1691, 1692 (2021).

Hernandez then petitioned for habeas relief in federal court. The district court denied the petition. It ruled that the Appellate Division acted unreasonably in concluding that there was no constitutional error in the trial court's response to the jury note. But, under the "unforgiving standards applicable on habeas review," it held—though not without doubt—that it could not reverse the Appellate Division's alternative holding that any error was harmless. *Hernandez v. McIntosh*, No. 22-CV-02266 (CM), 2024 WL 2959688, at *6 (S.D.N.Y. June 11, 2024).

We agree with the district court that the state trial court's instruction was clearly wrong under *Seibert*. But, unlike the district court, we conclude—even under the demanding standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA")—that the error was manifestly prejudicial. Accordingly, we reverse and remand for the district court to grant the writ conditionally.

BACKGROUND

I. Patz's Disappearance in May 1979 and the Initial Investigations

On the morning of May 25, 1979, Patz disappeared while walking the two blocks from his family's apartment to his school bus stop in the SoHo neighborhood of New York City. The mystery of what happened to six-year-old Patz captured the nation's

attention. From missing-person posters to milk cartons, images of the smiling young boy were ubiquitous.

A massive investigation followed Patz's disappearance. The police performed an "in-depth canvas and search of [nearby] buildings, rooftops, basements and elevator[] shafts[,] backyards and alleys." App'x at 1712. The police also searched the bodega next to the bus stop where Patz was last seen, including the basement. In total, "several police units and the [Federal Bureau of Investigation]" ("FBI") spent "thousands" of hours searching the area in just the first week following Patz's disappearance. *Id.* at 1619. In spite of these efforts, no suspects were arrested or charged. Patz was never found.

In 1979, Hernandez, who was eighteen years old at the time, worked at the bodega next to Patz's school bus stop. In July 1979, police interviewed Hernandez, along with other employees of the bodega, about Patz's disappearance. At the time, however, Hernandez was not identified or treated as a suspect.

Approximately three years later, police had focused their attention on Jose Ramos, who had been the boyfriend of Patz's babysitter. In March 1982, Ramos was arrested after trying to lure two boys into a drainpipe. Police discovered several photographs of young boys in Ramos's personal property, including one that resembled Patz. In 1987, Ramos was convicted of indecent assault of a five-year-old boy and sentenced to three-and-a-half to seven years in prison.

The FBI also considered Ramos a suspect in Patz's disappearance. In June 1988, an Assistant

United States Attorney ("AUSA") interviewed Ramos about Patz's disappearance. Later that year, the AUSA interviewed the son of Patz's babysitter (Ramos's girlfriend), who reported that Ramos had molested him when he was five or six years old. This happened repeatedly during the "period of time" when his mother (Patz's babysitter) "was walking [] Patz home from school." Dkt. 1-54 at 8130-8131, *Hernandez v. McIntosh*, No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022). In 1990, Ramos admitted to molesting another eight-year-old boy on more than one occasion. He was convicted of "involuntary deviate sexual intercourse" and sentenced to ten to twenty years' imprisonment.

During a subsequent FBI interview in 1991, Ramos admitted that, on the same day Patz disappeared, he met a young boy in Washington Square Park, took him to his apartment, molested him, and then put him on a subway train. When the agent pressed Ramos for more details about the boy's appearance, Ramos's replies referenced Patz. For example, when asked how tall the boy was, Ramos responded, "well, how tall was Etan Patz?" App'x at 1636. Although Ramos said that the boy "could have been Etan Patz," he insisted that "even if it was Etan Patz, I put him on a subway and sent him to his aunt." *Id.* at 1637. According to the FBI, there were no other reported disappearances or sexual assaults of young boys that day.

The United States Attorney's Office convened a federal grand jury but ultimately declined to prosecute Ramos, concluding that, because there was no indication that Patz had been transported across state lines, there was insufficient evidence to support

federal jurisdiction. The Manhattan DA's Office also declined to prosecute Ramos because of the absence of physical evidence.

II. The Investigation Is Renewed in 2012

Decades later, the investigation into Patz's disappearance was renewed with a focus on a new 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 Patz's apartment and was familiar with Patz. The night before Patz disappeared, Miller spent approximately forty-five minutes alone with him in the basement workshop. Miller later told the FBI that he had been "changing out of his work clothes when he gave a dollar to [Patz]" in exchange for helping him with the carpentry. App'x at 1707. He also admitted to having sexual intercourse with a girl who was approximately ten years old in 1979.

In April 2012, the FBI brought a scent dog to Miller's basement. The dog was trained to detect the odor of human decomposition, even after many years. The scent dog indicated by barking that he detected the scent of human decomposition in two areas of Miller's basement. The next day, Miller was brought to the basement and told that the dog had alerted to the scent, to which he replied, "[w]hat if the body was moved?" App'x at 1708. For several days, authorities stopped traffic in lower Manhattan and Miller's former workshop was excavated. Despite the scent dog's positive identification, the dig proved inconclusive and Miller was never charged in connection with Patz's disappearance.

III. Law Enforcement Focuses on Hernandez

The excavation drew extensive media attention. After seeing the press coverage, Jose Lopez, Hernandez's brother-in-law, called police with a tip about rumors that Hernandez was involved in the disappearance of Patz. Up until that point, and now nearly thirty years since Patz's disappearance, Hernandez's life was quiet and arrest-free.

Hernandez has an extensive history of mental illness and low IQ. Long before Patz's disappearance, doctors documented Hernandez's "'obsessive thoughts,' 'hallucinations,' and 'borderline impaired' intelligence[.]" *Hernandez v. McIntosh*, No. 22-CV-02266 (CM) (RWL), 2023 WL 6566817, at *4 (S.D.N.Y. Oct. 10, 2023). Doctors diagnosed Hernandez with a myriad of disorders, including psychotic disorder, schizophrenia/bipolar disorder, chronic mental illness, and memory impairment. "Between 1992 and 2014, various intelligence tests placed Hernandez's IQ between 67 and 76, putting him in the lower one to five percentile range compared to other people his age." *Id*. This meant that Hernandez was "functioning at the lowest level of intelligence compared to other people." Dkt. 1- 35 at 853, *Hernandez v. McIntosh*, No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022).

In the decades following his 1979 interview with police, Hernandez told multiple people, including various fellow members at a religious retreat, his neighbor (Mark Pike), and his first wife (Daisy Rivera), that he had killed someone in New York City.

The statements varied widely. For example, at a church retreat in 1980, Hernandez told a member of

his church that he "sodomized" a "kid" in the basement of his workplace and then "stabbed" the child "many times" with a "pointy" "stick." App'x at 1628. In the early 1980s, he told his neighbor, Pike, that a "black kid" "threw a ball" at him and he "lost it" and "strangled the kid." *Id.* at 1627. Also in the early 1980s, Hernandez told his eventual first wife, Rivera, that a "muchacho" (which Rivera took to mean "teenager") "violated" Hernandez and that Hernandez "got very angry" and strangled the boy. *Id.* Neither Pike nor Rivera credited Hernandez's statements, and none of the people with whom Hernandez shared his statements reported them to the police.

IV. Hernandez Is Questioned and Confesses to Police on May 23, 2012

Based on the tip from Hernandez's brother-in-law, the police executed a self-described "tactical plan" to interrogate Hernandez on May 23, 2012. At around 7:45 a.m., four or five police cars pulled up outside Hernandez's home in New Jersey, where he lived with his second wife. New York City Police Department ("NYPD") Detectives Jose Morales and David Ramirez identified themselves to Hernandez as "from the [NYPD] Missing Persons Squad" and "told him[] [that] his name [had] c[o]me up in an old case" and that "[they] wanted to speak to him about it." App'x at 129-130. Hernandez agreed and accompanied the officers to the CCPO.

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. App'x at 306-309. Hernandez asked if it would be a long time because he needed to take

medication at noon, and a detective was sent to his house to pick up his medications. Hernandez was escorted into the CCPO through a locked back entrance and led to Room 133, which was a windowless eight-by-ten-foot room. A video camera, disguised as a smoke alarm, was mounted near the ceiling.

The interrogation began at about 8:10 a.m. While Detectives Morales and Ramirez started questioning Hernandez about his upbringing, Hernandez's first wife, Rivera was purposefully walked past the interrogation room so Hernandez could see her. After seeing Rivera, Hernandez became upset and asked if the interview was about "child support." App'x at 151. The detectives said no and told him that he was there because of a missing child case. Shortly after, the police escorted Hernandez's former neighbor, Pike, past the room. When Pike walked by the room, however, Hernandez did not recognize him.

After giving him a bathroom break around 10:00 a.m., the detectives placed a well-known missing-person poster of Patz in front of Hernandez and began asking him pointed questions about the case.

At around 10:30 a.m., Manhattan ADA Armand Durastanti arrived at the CCPO and began observing the interrogation via a closed-circuit TV monitor. ADA Durastanti asked an investigator from the CCPO if the interrogation "was . . . being video recorded." App'x at 845. The investigator replied that it was not and asked ADA Durastanti if he wanted the recording devices in the room turned on. ADA Durastanti responded by saying, "why don't we just wait to see what happens." *Id.*

After about four hours of interrogation, around 12:00 p.m., Detective Morales brought in Hernandez's medication. After Hernandez placed a fentanyl patch on his chest and took some pills, he explained to the detectives why he was taking medication. He discussed that he had been diagnosed with and treated in the past for schizophrenia, bipolar disorder, and other mental illnesses.

At around 1:00 p.m., Hernandez said that he had "told [the detective] everything," that he "want[ed] to go home," and that they had him there "against [his] will." App'x at 571-573. The detectives reminded him that he came with them "voluntarily." *Id*. Shortly thereafter, Detectives Morales and Ramirez left the room and NYPD Detective James Lamendola entered. Detective Lamendola asked Hernandez questions about his father. According to Detective Lamendola, Hernandez said that "his father often drank alcohol in excess and was very abusive to him and his mother and the rest of his family." *Id*. at 494. Detective Lamendola began talking about the "cyclical patterns of abuse," saying that child abuse "can cause that child to abuse other children when they were older." *Id*. at 495.

At that time, Hernandez "got extremely emotional." App'x at 495. Now five hours into the interrogation, Hernandez "began to sob." *Id.* at 496. "[H]e stood up, he started clenching his stomach and complaining of stomach pains. He started pacing around the room and then he la[y] on the floor in the fetal position and started to shake." *Id*. Hernandez told Detective Lamendola that he was "cold" and "just want[ed] to go home." *Id*. at 564.

After leaving briefly to get Hernandez a jacket, Detective Lamendola "continued to talk . . . [about] the cycle of abuse." App'x at 497. At that point Hernandez became angry and "accused [Detective Lamendola] of trying to trick him." *Id*. at 497-498. As Hernandez cried, Detective Lamendola "continued to tell him that everybody needed to know the truth," *id*. at 502, and that "the truth ha[d] to come out now," *id*. at 499.

At around 2:00 p.m., Detectives Morales and Ramirez joined Lamendola in the interrogation room. They continued asking him if he "had any information" or "anything to tell [them] about what happened in 1979." App'x at 184, 503. Hernandez asked if they were "trying to pin what happened to that kid on [him]." *Id*. at 184. He then repeated for the third time that he wanted to go home. The detectives told Hernandez they "had a few more questions to ask him, and then after that, he could leave." *Id*.

Detectives Morales and Ramirez told Hernandez that they had "spoken to many people from his past" and revealed Pike, his former neighbor, as the man who had walked by the room earlier. App'x at 185-186. Hernandez then asked to speak to his wife, to which Detective Ramirez replied that they wanted "to hear what [he] ha[d] to say[] first." *Id*. at 186. At that point, after more than six hours of interrogation, Hernandez told the detectives, for the first time, that he "did it." *Id*. According to Detective Lamendola, Hernandez said that he had seen Patz standing outside the bodega and asked him if he wanted a soda, that Patz said yes and accompanied him into the basement of the bodega, that Hernandez "choked him" and put his body in a "garbage bag," and that he

placed the bag in a box and left it in a trash area around the corner from the bodega. *Id.* at 505. Hernandez could not explain his motive, but he denied it was sexual.

V. After Hernandez Confesses, Police Give *Miranda* Warnings and Question Hernandez Again

Immediately after obtaining Hernandez's confession, the detectives read Hernandez a six-question *Miranda* warning. At that point, ADA Durastanti, observing from a different room, requested that the video feed be recorded. The recording begins at 2:53 p.m. with Detective Ramirez asking Hernandez the final *Miranda* question: "Now that I have advised you of your rights, are you willing to answer questions?" Dkt. 1-10 at 14:53, *Hernandez v. McIntosh*, No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022). After Detective Morales interjected—"Obviously, yeah, is that right?"—Hernandez responded, "Yes." *Id.*

Detective Lamendola then asked Hernandez to repeat the statement he had given before being *Mirandized*, instructing him to "start it from the beginning" and to "tell[] us again exactly what you just told us before about what happened." *Id.* at 1455-14:56. "When Hernandez did not immediately reply, the detectives began to prompt him."[1] *Hernandez*,

[1] At one point, Hernandez paused, and the following conversation ensued:

Det. Morales:	What time do you think it was?
Hernandez:	What time?

(Continued…)

2023 WL 6566817, at *8. Hernandez then provided an account "almost identical" to what he told the detectives before receiving his *Miranda* warnings. *Id*.

The detectives once again presented Hernandez with Patz's missing-person poster and asked, "is this the guy?" Dkt. 1-10 at 15:05, *Hernandez v. McIntosh*, No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022). When Hernandez said that it was, the detectives handed him a pen and asked him to write a confession on the poster. Hernandez asked the detectives how to spell "choke" before writing on the poster, "I am sorry + shoke [sic] him" and signing his name. *Id*.; App'x at 30. Questioning ended at around 4:00 p.m.[2]

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)

Dkt. 1-10 at 14:56, Hernandez v. McIntosh, No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022).

[2] Shortly before 4:00 p.m., Hernandez spoke with his second wife, Rosemary, and his daughter, Becky Hernandez, in the presence of two detectives. He told them that "[a] long time ago . . . he killed a child . . . a boy," that he did not know why he did it, and that he would "be in jail for the rest of [his] life." App'x at 216.

VI. Hernandez Is Interrogated by ADA Durastanti and Confesses Again

The detectives then drove Hernandez from the CCPO to SoHo. At around 10:00 p.m., they arrived at the corner where the bodega was located in 1979. Hernandez pointed out where he had first seen Patz and identified two different street addresses where he might have left the box containing the garbage bag.

At around 11:00 p.m., the detectives drove Hernandez to the Manhattan DA's Office. For the next three hours, Hernandez intermittently slept on a couch and ate in the presence of law enforcement officers. At around 2:00 a.m., Hernandez was taken to an interview room where he was interrogated by ADA Durastanti, off and on, until a little after 7:00 a.m.[3] Hernandez once again stated that he killed Patz, although certain details deviated from his prior confessions at the CCPO.[4] Hernandez made several additional statements during the course of ADA

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[3] At around 2:18 a.m., ADA Durastanti advised Hernandez of his *Miranda* rights and then told Hernandez: "I know that you spoke to detectives yesterday I want you to understand that the statement you're making here to me today has nothing at all to do with that statement. I want you and I to start brand new, okay?" Dkt. 1-20 at part 1, 2:19, *Hernandez v. McIntosh*, No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022).

[4] For example, although Hernandez had told the detectives at the CCPO that he could not remember what Patz was wearing, he told ADA Durastanti that Patz "had a jacket" that was "black or blue." App'x at 1622.

Durastanti's interrogation that were inconsistent with one another.

Near the end of the interrogation, ADA Durastanti asked Hernandez about his mental health. Hernandez explained that his family had a history of mental illness and that he was "bipolar and schizophrenic." App'x at 1624. Hernandez then told ADA Durastanti a detailed account of seeing and talking to a "vision" of his dead mother's ghost. He said, however, that he was unsure if this actually happened or if it was his imagination.

At the very end of the interrogation, at approximately 7:04 a.m., Hernandez asked ADA Durastanti about his right to counsel, leading to the following exchange:

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.

ADA Durastanti:	That if you, you know, if you need, you can have an attorney, if you want an attorney.
Hernandez:	I would like to have an attorney to represent me, you know, when, if I were to go to court.
ADA Durastanti:	Okay, right, if you were to go to court.
Hernandez:	Yeah, I want that.
ADA Durastanti:	Right, no, you will have an attorney to represent you…if you go to court.
Hernandez:	Yeah.
ADA Durastanti:	But the question, the question that I was asking was whether you wanted one now.
Hernandez:	When I was talking to you?
ADA Durastanti:	Yeah.
Hernandez:	No, because I don't have nothing to hide no more.

Dkt. 1-20 at part 4, 7:04-7:05, *Hernandez v. McIntosh,* No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022). At this point, approximately twenty-four hours had elapsed since police officers first arrived at Hernandez's home.

VII. Hernandez Makes Post-Arrest Statements

Following his arrest, Hernandez was taken to Bellevue Hospital for psychiatric treatment. While at Bellevue, Hernandez told a nurse that he "[c]hoked a person 33 years ago," "[t]hat's why [he] [was] in jail," and that he was "sorry." App'x at 461-462. About a month later, in June 2012, Hernandez was transferred to Rikers Island and was evaluated by Dr. Flavia Robotti. Hernandez told Dr. Robotti that he had "hurt a child" and that he had confessed this to his first wife. Suppl. App'x at 1223. Hernandez also told Dr. Robotti that, at the time of Patz's disappearance, "he had command hallucinations[] telling him exactly what to do" and "started hearing other voices talking among themselves." *Id*. at 911-912. Dr. Robotti's assessment was that Hernandez needed "intensive psychiatric treatment," and she referred him to the mental observation ward at Rikers. *Id*. at 956.

In the summer of 2012, Hernandez was evaluated by Dr. Michael First, who diagnosed him with schizotypal personality disorder.[5] Dr. First testified

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[5] As time passed after his arrest, Hernandez began to express doubts about whether the events he had confessed to had actually occurred. Dr. First testified that changes in Hernandez's confessions, along with his varying degrees of doubt, were the result of a weakening in his "delusional conviction." According to Dr. First, Hernandez's "delusional conviction" was particularly strong after his arrest in May 2012, such that he then completely believed his statements were true. However, within a few months, his confidence in those memories had noticeably diminished.

that the disorder was marked by an inability "to differentiate between what is going on in your mind, versus what is occurring in the external world." Suppl. App'x at 1015. During a multi-day evaluation, Hernandez stated several times that he approached a little boy outside of the bodega and choked him. He insisted there were other people in the basement with him, including "[o]lder, gray haired people . . . [w]earing night gowns like in a nursing home." *Id.* at 1121-1122. Hernandez met again with Dr. First in December 2014, when, within the same day, he stated both that the people in the basement were "not there" and that he had "chok[ed] the kid in [his] mind," yet also that there were "a lot of people in the basement," including "some kids" and "some business people, some dressed up in hospital clothing, elephant colors, clowns, Terry-cloth-type people." *Id*. at 1287- 1288.

In 2014, while detained at Rikers, Hernandez provided similar conflicting statements to Dr. Michael Welner. Hernandez stated that he had not seen the face of the child he choked but that he nevertheless recognized his photograph on the news.

VIII. Hernandez Stands Trial Twice

Hernandez was charged in the New York State Supreme Court with two counts of murder in the second degree and one count of kidnapping in the first degree. His first trial began in January 2015. After deliberating for 18 days, the jury announced that it was unable to reach a verdict. The court declared a mistrial.

Hernandez's second trial began in September 2016. Since there was no physical evidence and no

contemporaneous witnesses tying Hernandez to Patz's disappearance, the State's case "heavily depended on Hernandez's confessions to law enforcement, as well as the various statements Hernandez made to Pike, Rivera, and others." *Hernandez*, 2023 WL 6566817, at *11. Hernandez presented "substantial evidence" that it was Ramos (Patz's babysitter's boyfriend) who was responsible for Patz's disappearance and that Hernandez "had a well-documented history of mental illness, poor memory, and low intellectual ability." *Id*. In particular, Hernandez suffered from a psychopathology known to cause delusions, hallucinations, and distortions in a person's perception of reality. According to the defense, this disorder made him especially susceptible to confessionary hallucinations. *See id*.

In February 2017, the jury began its deliberations. On the second day, after having sent two prior notes,[6] the jury sent a third note to the trial court, which read as follows:

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[6] The other two jury notes, prior to the one at issue, asked the following:

> We, the jury, request the testimony of [1] judge's instructions on confessions[, 2] Ramon Rodriguez on 10/25/2016 around noon or so regarding [Hernandez's] confession[, 3] Neftali Gonzalez, also on 10/25/2016 around 3:45 regarding [Hernandez's] confession.
>
> [. . .]
>
> We, the jury, request – would like clarity on["]corroboration consequence.["] Clarity on may not

(Continued…)

> We, the jury, request that the judge explain to us whether <u>if</u> [] we find that the confession at CCPO before the *Miranda* rights was not voluntary, we must disregard the two later videotape confessions at CCPO and the DA's office[,] the confessions to Rosemary and Becky Hernandez and the confessions to the various doctors.

App'x at 1486 (emphasis noted in original).

The trial court solicited each party's position. The State asserted that the appropriate answer was "no." App'x at 1486. The defense considered that answer to be both "misleading"—because it failed to give the jury guidance on the rules governing un-*Mirandized* confessions—and legally incorrect, because there was "no question" that Hernandez's post-warning confession at the CCPO was improperly obtained as it occurred "within moments" of the involuntary, unwarned confession. *Id*. at 1489-1490. Although defense counsel never cited *Missouri v. Seibert*, 542 U.S. 600 (2004), their argument clearly relied on that precedent. *Id*. at 1505-1508.

The defense urged the court to "[a]t the very least . . . instruct [the jury] that it's up to them. They don't have to disregard them but [can] if they choose to." App'x at 1488. Ultimately, the trial court read the

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> convict defendant on his own words solely[?] Inference can only be drawn from proven facts[?]

App'x at 1478.

jury back its question and then said, "[T]he answer is, no." *Id*. at 1515.

Following the court's response, the jury continued to deliberate for another seven days. On February 14, 2017, the jury acquitted Hernandez of intentional murder in the second degree and found him guilty of felony murder and kidnapping in the first degree. The trial court sentenced Hernandez to concurrent terms of twenty-five years to life in prison.

IX. Hernandez Appeals

In 2020, the New York Supreme Court Appellate Division, First Department, affirmed Hernandez's conviction. *People v. Hernandez*, 122 N.Y.S.3d 11, 16 (1st Dep't 2020). The Appellate Division offered the following on whether the court's jury instruction was erroneous: "Given the precise wording of the note, the court's brief response was correct." *Id*. at 15. The court held in the alternative that, even if there were an error, it was harmless because "there [wa]s no reasonable possibility that the verdict would have been different" since Hernandez's confession to ADA Durastanti "was fully attenuated from all of his confessions to the police." *Id*. Judge Feinman of the New York Court of Appeals denied leave to appeal to that court. *People v. Hernandez*, 35 N.Y.3d 1066 (N.Y. 2020). Hernandez then petitioned the Supreme Court of the United States for a writ of certiorari, which was denied on March 22, 2021. *Hernandez v. New York*, 141 S. Ct. 1691, 1692 (2021).

X. The Instant Action

Hernandez timely filed his petition for a writ of habeas corpus in 2022. The petition was referred to

Magistrate Judge Robert W. Lehrburger pursuant to 28 U.S.C. § 636(b). In a comprehensive Report and Recommendation, Judge Lehrburger found that the trial court's response of "no" to the third jury note was "so deficient as to deprive Hernandez of due process." *Hernandez*, 2023 WL 6566817, at *36. But he was "[c]onstrained" to conclude that, under the AEDPA, he had to defer to the state court's harmlessness determination and hence, to recommend that Hernandez's petition be dismissed. *Id*. at *34.

Judge Colleen McMahon adopted the Report and Recommendation. *Hernandez v. McIntosh*, No. 22-CV-02266 (CM), 2024 WL 2959688 (S.D.N.Y. June 11, 2024). Like Judge Lehrburger, Judge McMahon found that the trial court's failure to give the jurors a proper response to their note was an "error of constitutional magnitude." *Id*. at *14. Judge McMahon further found that "[t]here c[ould] be no serious question that the erroneous instruction here had a 'special impact' on the jury given the prominence of the confessions to the case." *Id*. "That the jury continued to deliberate for almost a week after the trial court's response," Judge McMahon continued, "strongly suggest[ed] that the jurors continued to struggle mightily—in the absence of meaningful guidance—with how to consider Hernandez's confessions." *Id*. Nevertheless, Judge McMahon held that Hernandez failed to satisfy the "prevailing standard for evaluating harmless error findings on habeas." *Id*. Noting the result was both "strange" and "counterintuitive," Judge McMahon found that the issue was "sufficiently close that it should be reviewed by the Second Circuit" and granted a Certificate of Appealability pursuant to 28

U.S.C. § 2253(c). *Id.* at *6, 14, 15. This appeal timely followed.

DISCUSSION

Under 28 U.S.C. § 2254, "a person in custody pursuant to the judgment of a State court" may petition a federal district court for a writ of habeas corpus "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2254(a). "We review a district court's grant or denial of habeas corpus de novo." *Jordan v. Lamanna*, 33 F.4th 144, 150 (2d Cir. 2022).

AEDPA's revisions of the federal habeas statute, codified at 28 U.S.C. § 2254, govern the disposition of Hernandez's petition. AEDPA prescribes a highly deferential framework for evaluating issues previously decided in state court. As relevant here, under AEDPA,

> a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Id. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 97-98 (2011).

A state-court decision is "contrary to" clearly established law if the court arrived at a conclusion opposite to the one reached by the Supreme Court on

a question of law, or if the state court confronted facts that are "materially indistinguishable" from a Supreme Court precedent and arrived at a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The "unreasonable application" clause of § 2254(d)(1) requires the federal court to consider whether the state court unreasonably applied Supreme Court precedent to the facts of the petitioner's case. *See Holland v. Jackson*, 542 U.S. 649, 652 (2004) (per curiam). "Under § 2254(d), a habeas court must determine what arguments or theories supported or . . . could have supported[] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington*, 562 U.S. at 102.

If a petitioner satisfies § 2254(d)'s requirements, we then consider whether the state court's error was harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In collateral cases, a federal constitutional error is harmless unless it caused "actual prejudice." *Id.* at 637-38 (citation omitted). The Supreme Court recently held that, to demonstrate prejudice, a petitioner must convince the habeas judge that (1) there is "grave doubt" about the petitioner's verdict, as required under *Brecht v. Abrahamson*; and (2) that every fair-minded jurist would harbor at least a reasonable doubt that the error was harmless, as required by AEDPA. *See Brown v. Davenport*, 596 U.S. 118, 122, 135-36, 144 (2022).

Hernandez argues that his petition should be granted because (I) the trial court's response to the jury's note was contrary to, and an unreasonable

application of, the Supreme Court's opinion in *Missouri v. Seibert*, 542 U.S. at 621 (Kennedy, J., concurring), and thus was an error cognizable under AEDPA; and (II) this error was not harmless under the two-step inquiry set forth in *Brown v. Davenport*, 596 U.S. at 122.

Given the extraordinary facts of this case, we agree that a conditional grant of the writ is merited.

I.

In evaluating Hernandez's petition, we must first determine whether the trial court's response to the third jury note, and the Appellate Division's subsequent approval of that instruction, were contrary to or unreasonable applications of *Seibert*. And under AEDPA, we must do so while giving deference to the state court that evaluated Hernandez's case.

In considering these questions, both Judge Lehrburger and Judge McMahon found that the trial court's response to the third jury note was not only inconsistent with the holding of *Seibert* but so erroneous as to deny Hernandez due process. After a careful review of the record, and with the benefit of oral argument, we agree.

At the outset, we note that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Rather, "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id.* at 68. We may therefore grant relief only if the

state courts' decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

In this case, the jury was entitled to, and indeed instructed to, evaluate the voluntariness of Hernandez's confessions. As the trial court correctly recognized, the jury was empowered to reach its own conclusions about the voluntariness of the confessions even after the trial court declined to suppress them. *See* App'x at 1488 ("There was a [suppression] [h]earing and [I] denied suppression. And if the jury wants to disregard all statements, they can. That's entirely up to them …."); *People v. Parker*, 205 N.Y.S.3d 194, 197-99 (2d Dep't 2024) (observing that even where the trial court had denied suppression, if "the defendant has placed in issue the voluntariness of his statements to law enforcement officials, the court must submit such issue to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made" (internal quotation marks omitted)); *see also Jackson v. Denno*, 378 U.S. 368, 401 (1964) (Black, J., concurring in part) ("Whatever might be a judge's view of the voluntariness of a confession, the jury in passing on a defendant's guilt or innocence is . . . entitled to hear and determine voluntariness of a confession along with other factual issues on which its verdict must rest.").

The trial court did instruct the jury, in general terms, about voluntariness. The court charged the jury that it must disregard any statement of Hernandez's "unless the [State] ha[s] proved beyond a reasonable doubt that the defendant made the

statement voluntarily." App'x at 1435-1436. But the court did not give the jury any instruction concerning how to treat subsequent confessions if it found Hernandez's first confession to be involuntary.

The jury was plainly focused on this question. Indeed, whether Hernandez's post-*Miranda* confessions were voluntarily or involuntarily obtained was "*the central issue in the case*." *Hernandez*, 2024 WL 2959688, at *10 (emphasis in original). The argument that those confessions were involuntarily obtained, as part of a nearly twenty-four-hour-long period of essentially continuous custodial interrogations, was at the core of the defense's case.

As we noted earlier, the day after the trial court delivered its charge, the jury sent three notes focused on the voluntariness of Hernandez's confessions. The third jury note requested the trial judge to "explain" whether, "if" the jury found that the pre-*Miranda* confession at the CCPO was involuntary, it "must disregard" Hernandez's post-*Miranda* confessions.

As to this question, federal law gives a clear answer. In *Seibert*, the Supreme Court held unconstitutional the then-common tactic of intentionally obtaining an inadmissible, un-*Mirandized* confession, administering a *Miranda* warning after the suspect had confessed, and finally asking the suspect to repeat the confession post-warning. 542 U.S. at 620-22 (Kennedy, J., concurring). This tactic renders a suspect's post-warning confessions inadmissible "unless curative measures (designed to ensure that a reasonable person in the defendant's position would understand the import and effect of the *Miranda* warnings and

waiver) were taken before the defendant's post-warning statement." *United States v. Moore*, 670 F.3d 222, 230 (2d Cir. 2012).

The rule laid out in *Seibert* is relevant not only to a court making admissibility determinations, "but also to jurors who are deciding whether to consider such statements or to set them aside as involuntary." *Hernandez*, 2024 WL 2959688, at *10. The thrust of a *Seibert* claim—that law enforcement used an improper "two-step interrogation technique" that undercut the voluntariness of a subsequent confession—is the same whether the claim is raised in the context of a trial court's suppression determination or a jury's assessment of voluntariness. In both instances, Seibert instructs that law enforcement's deliberate elicitation of an un-*Mirandized* confession forecloses the jury from considering a subsequent, *Mirandized* confession unless curative measures were taken.[7]

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[7] Prior to trial, Hernandez moved to suppress his statements to the detectives at the CCPO and his subsequent statement to ADA Durastanti. Among other arguments, he asserted that (1) the pre-*Miranda* statement was inadmissible because he was in custody at the CCPO, and (2) *Seibert* required suppression of the post-*Miranda* statements. The trial court denied Hernandez's motion. The trial court determined that Hernandez "was not in custody at the time his initial statements were made" and, thus, his pre-*Miranda* statements were not subject to suppression. Suppl. App'x at 1502-1503. Because the court found Hernandez's pre-warning statements admissible, it expressly did "not reach the issue of whether the post-*Miranda* statements were sufficiently attenuated" under *Seibert*. *Id*. at 1506. *See United*

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States v. Familetti, 878 F.3d 53, 62 (2d Cir. 2017) ("Because [the defendant] was not subject to a pre-warning custodial interrogation, we do not reach his corollary argument regarding a deliberate two-step interrogation."). The Appellate Division affirmed. It held that Hernandez's pre-*Miranda* statement was not the product of custodial interrogation "because a reasonable innocent person in [Hernandez]'s position would not have thought he was in custody." *People v. Hernandez*, 122 N.Y.S.3d 11, 13 (1st Dep't 2020). On habeas review, Judge Lehrburger denied Hernandez's challenges to the state courts' admissibility determinations. He found that, although "several facts len[t] considerable support to Hernandez's argument that he was in custody for purposes of Miranda," he was "constrained" to agree that the state court did not "*unreasonably*" apply clearly established Supreme Court law in concluding otherwise. *Hernandez v. McIntosh*, No. 22-CV-02266 (CM) (RWL), 2023 WL 6566817, at *17-18 (S.D.N.Y. Oct. 10, 2023) (emphasis in original).

On this basis, however dubious it may have been, the first, pre-*Miranda* confession was admitted. The trial court, however, left the voluntariness of that first confession up to the jury. *See, e.g.,* App'x at 1435-1436 ("[Y]ou [] may not consider [the statement] as evidence in the case unless the [State] ha[s] proved beyond a reasonable doubt that the defendant made the statement voluntarily."); *id*. at 1437 ("[Y]ou must [] decide whether the defendant was in the custody of the police when he made statements to them."). The jury, in its note to the court, assumed the involuntariness of this pre-*Miranda* confession. *See id.* at 1486 ("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 later confessions]." (emphasis noted in original)). It is the trial court's response to that jury note that we address here.

Under *Seibert*, the correct analysis of Hernandez's confessions thus required determining first whether law enforcement deliberately engaged in a two-step interrogation practice and, second, whether intervening "curative measures" "allow[ed] the accused to distinguish" the several rounds of questioning. 542 U.S. at 622 (Kennedy, J., concurring). Such curative measures can include, for example, "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning" or "an additional warning that explains the likely inadmissibility of the prewarning custodial statement." *Id*.

Despite the jury's note seeking an "expla[nation]" as to how it was to assess Hernandez's subsequent statements, the trial court provided none. The jury was not told that it could disregard those statements, or on what basis it might even be obligated to disregard them. Instead, the trial court, over the defense's objections, gave the bare response of "no."

Seibert clearly instructs that the answer is not "no." 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.

We begin with Hernandez's second confession at the CCPO—the first after he was *Mirandized*. This confession fits precisely the mold addressed in *Seibert*. Detectives interrogated Hernandez for approximately seven hours without administering *Miranda* warnings until Hernandez finally offered a confession. Almost immediately after Hernandez's

statement, the detectives administered *Miranda* warnings and law enforcement officials began recording the closed-circuit video feed. Less than two minutes after Hernandez signed the *Miranda* waiver, the detectives asked him to "tell[] us again exactly what you just told us before." Dkt. 1-10 at 14:55, *Hernandez v. McIntosh*, No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022).

Seibert directs that confessions obtained using this two-step interrogation method must not be considered by a jury unless law enforcement used sufficient "curative measures." 542 U.S. at 622 (Kennedy, J., concurring). But here, although the Appellate Division never addressed the issue, every fair-minded jurist would agree that no curative measures were taken between Hernandez's first, un- *Mirandized* confession and his second confession at the CCPO. Indeed, the two-step method law enforcement employed with Hernandez was equally stark—if not more so—than the process discussed in *Seibert*. In *Seibert*, the suspect was arrested and questioned for approximately half an hour without being advised of her *Miranda* rights. *See id.* at 604-05. After the suspect admitted her complicity in the crime, "she was given a 20-minute coffee and cigarette break," after which the interrogator gave *Miranda* warnings. *Id.* at 605. The suspect then repeated what she had said prior to the break and was convicted based on her confessions. *See id.* at 605-06. The Supreme Court concluded that the statement should have been suppressed because it was obtained by a "deliberate, two-step strategy" by law enforcement to get a confession and there were no "additional warning[s]" given or "curative steps" taken between

the pre- and post-warning statements. *Id.* at 621-22 (Kennedy, J., concurring).

The only meaningful differences between the two cases are that Hernandez's pre-warning interrogation was significantly longer and the time between his pre- and post-*Miranda* statements was even shorter. Thus, if the jury concluded that the first, un-*Mirandized* confession was involuntary, *Seibert* compelled the jury to disregard the second CCPO confession.[8] The proper answer to the jury's third note was, therefore: as to the second CCPO confession, yes.

That is sufficient to conclude that the trial court's response to the third jury note was "contrary to . . . clearly established Federal law." 28 U.S.C. § 2254(d)(1). But that response was also flawed with regard to Hernandez's statements after he left the CCPO. As mentioned, *Seibert* instructs that the presence of "curative measures" between an involuntary, un-*Mirandized* confession and subsequent *Mirandized* confessions determines whether a jury may consider those later confessions. Thus, if the jury determined that the first CCPO confession was involuntary—as the third jury note contemplated—then the jury's ability to consider the post-CCPO statements turned on whether law enforcement used sufficient "curative measures." The trial court's response to the third jury note, however,

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[8] Indeed, in their briefs to Judge Lehrburger, the parties agreed that if the judge determined that "Hernandez's pre-*Miranda* statements should have been suppressed, then, under Seibert, so should his post-*Miranda* statements made at the CCPO." *Hernandez*, 2023 WL 6566817, at *30.

explained none of this. By answering "no," the response failed accurately to inform the jury that, if the first CCPO confession was involuntary, the jury might also have been required to disregard his post-CCPO statements. In other words, with respect to the post-CCPO statements, the answer to the third jury note was not "no," but "maybe." And the "maybe" depended on whether the jury found the subsequent statements to be sufficiently attenuated from the involuntary statement.

In sum, *Seibert* instructs that, in situations where law enforcement engages in a question-first, *Mirandize*-later tactic, a factfinder must question whether the subsequent warning was effective. Here, the trial court's answer to the third jury instruction deprived Hernandez of the benefit of that rule. Answering that note with a "no" was "contrary to" and "an unreasonable application of" *Seibert*.[9]

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[9] In order to obtain a writ of habeas corpus in federal court on the ground of error in a state court's jury instruction on matters of *state law*, a petitioner must show not only that the instruction misstated state law but also that the error violated a right guaranteed to him by the federal Constitution. *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001); *accord Cupp v. Naughten*, 414 U.S. 141, 146 (1973); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). But such an analysis is not required where, as here, the error alleged is a misstatement or misapplication of *federal constitutional law* in a jury instruction. *Cf. Jackson v. Edwards*, 404 F.3d 612, 628 (2d Cir. 2005) (concluding that the trial court's failure to properly charge the jury under New York law violated the petitioner's due process rights under *Cupp*). Regardless, here there can be no doubt that the trial court's response to the third

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II.

Our conclusion that the state courts unreasonably applied *Seibert* in responding to the third jury note does not end our inquiry. We must also determine whether the constitutional error was harmless.

A state appellate court may not affirm a conviction in a trial containing a federal constitutional error unless the State demonstrates that the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Here, although the Appellate Division never cited *Chapman* in its review of the trial court's jury instruction, it invoked the correct legal standard, concluding that "there is no reasonable possibility that the verdict would have been different had [additional instructions on attenuation] been given, in light of the strong evidence that [Hernandez]'s confession to [ADA Durastanti] was fully attenuated from all of his confessions to the police." *Hernandez*, 122 N.Y.S.3d at 15 (citations omitted).

"[A] state court's harmless-error determination qualifies as an adjudication on the merits under AEDPA." *Brown*, 596 U.S. at 127. Pursuant to the analysis pronounced by the Supreme Court in *Brown*, a state-court merits determination of harmless error is reviewed under a two-part standard. *See id*. First,

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jury note "so infected the entire trial that the resulting conviction violate[d] due process." *Cupp*, 414 U.S. at 147. Leaving the jury with no direction on how to apply the necessary *Seibert* analysis denied Hernandez the opportunity to present completely, and have the jury fully consider, a "highly credible defense." *Jackson*, 404 F.3d at 625.

relief cannot be granted unless the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. Second, federal courts must apply the AEDPA standard prescribed by § 2254(d)(1), that every fair-minded jurist would harbor at least a reasonable doubt that the error was harmless. *Brown*, 596 U.S. at 122, 135; *Chapman*, 386 U.S. at 24. "In sum, where AEDPA asks whether *every* fairminded jurist would agree that an error was prejudicial, *Brecht* asks only whether a federal habeas court *itself* harbors grave doubt about the petitioner's verdict." *Brown*, 596 U.S. at 136 (emphases in original). Taking each in turn, Hernandez satisfies both standards.

A.

"When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (quoting *Brecht*, 507 U.S. at 627); *see also Brown*, 596 U.S. at 135-36 ("[U]nder *Brecht* a petitioner may prevail by persuading a federal court that it alone should harbor 'grave doubt'—not absolute certainty—about whether the trial error affected the verdict's outcome.").

In applying the *Brecht* standard in the related context of evidentiary errors, this Court has considered (1) "the importance of the . . . wrongly admitted [evidence]" to the trial, and (2) "the overall strength of the prosecution's case," with the latter being "probably the single most critical factor in determining whether error was harmless." *Wray v.*

Johnson, 202 F.3d 515, 526 (2d Cir. 2000); *see Wood v. Ercole*, 644 F.3d 83, 94 (2d Cir. 2011). The importance of the issue to the trial is determined in part by whether the evidence "bore on an issue that [wa]s plainly critical to the jury's decision" and "was material to the establishment of the critical fact." *Wray*, 202 F.3d at 526 (internal quotation marks and citation omitted).

Here, we must determine (1) whether the erroneous instruction bore on an issue central to the trial such that it was critical to the jury's deliberations; and (2) what, absent the erroneous instruction, was the strength of the prosecution's case. These factors manifestly favor Hernandez.

With respect to the first, the voluntariness of Hernandez's confessions was "plainly a crucial [issue]" at trial. *Id.*; see *Hernandez*, 2024 WL 2959688, at *12 (finding the prosecution's "case hinged entirely on Hernandez's confessions, and the [State] heavily and repeatedly relied on them to convict Hernandez" (internal quotation marks omitted)). Nothing aside from the confessions directly linked Hernandez to the crime. During summation alone, the State played clips from the taped confessions at least seven times.[10]

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[10] As we have already said in a habeas case commenting on the importance of an admitted videotaped confession like this one,

> [w]e do not suggest that the prosecutor improperly emphasized [the petitioner's] statement to the jury. Quite the opposite: since the statement was admitted into evidence the prosecutor had every right to rely on it

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Further, as the jury's multiple notes about the confessions made clear, the voluntariness of Hernandez's statements was also a focus of the jury's deliberations and "critical to the jury's decision." *Wray*, 202 F.3d at 526; see App'x at 1478 (first jury note, requesting read-back of judge's instructions on confessions as well as testimony about Hernandez's confessions); *id*. (second jury note, requesting "[c]larity on" whether the jury may "convict defendant on his own words solely"); *id*. at 1486 (third jury 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 second consideration—the strength of the prosecution's case—also weighs strongly in Hernandez's favor. As we have already noted, the prosecution had no support for its case other than Hernandez's own confessions to both law enforcement and non-law enforcement civilians. "As a result, the prosecution's case rested squarely on [the statements'] credibility." *Wood*, 644 F.3d at 94. The jury was entitled to determine independently whether to give the confessions any weight. A properly

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> in summation, and like a skilled advocate he focused the jury's attention on the strengths of his case. In so doing, however, he revealed his belief about the impact [the petitioner's] statement would have on the jury. That the prosecutor found [the petitioner's] statement so significant confirms our belief that it was, in fact, central to the prosecution's case.

Wood v. Ercole, 644 F.3d 83, 98 (2d Cir. 2011).

instructed jury could have decided that they need not have credited—and indeed, might not be permitted to credit—any or all of the confessions to law enforcement if they determined that the first one was involuntary. And the 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 Durastanti, especially because they were so manifestly inconsistent. Those statements did not bear any of the traditional hallmarks of reliability and, indeed, were referenced by the defense as further evidence that Hernandez suffered from serious mental health issues and was prone to confessionary hallucinations. *See Zappulla v. New York*, 391 F.3d 462, 468-71 (2d Cir. 2004) (determining prosecution's case was weak in part because its witnesses lacked credibility).

The first jury hung, and the second deliberated for nine days, clearly grappling with what weight, if any, to give to the confessions. The second jury ultimately returned a mixed verdict—acquitting Hernandez of intentional murder but convicting him of felony murder and kidnapping—"suggest[ing] that a conviction was not assured." *Id*. at 471.

We thus harbor "grave doubt" about whether the trial court's erroneous instruction had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal*, 513 U.S. at 436. That is sufficient to satisfy *Brecht*. *See Wood*, 644 F.3d at 96-99 (reversing district court's denial of habeas relief, finding that a videotaped confession elicited from the defendant after he had already invoked his right to counsel was improperly entered into evidence and

that such an error was not harmless where the confession was a "significant piece of evidence" that the State relied upon heavily throughout trial); *see also Scrimo v. Lee*, 935 F.3d 103, 115 (2d Cir. 2019) ("The creation of reasonable doubt satisfies the 'substantial and injurious' standard.").

B.

Because "a state court's harmless-error determination qualifies as an adjudication on the merits under AEDPA," where a state court makes such a determination, AEDPA's strictures also "must be satisfied" in order for a federal court to grant habeas relief. *Brown*, 596 U.S. at 127; *accord Orlando v. Nassau Cnty. Dist. Att'y's Off.*, 915 F.3d 113, 127 (2d Cir. 2019) ("When a state court makes a harmless error determination on direct appeal, we owe the 'harmlessness determination itself' deference under [AEDPA]." (quoting *Davis v. Ayala*, 576 U.S. 257, 269 (2015))); *Zappulla*, 391 F.3d at 466-67.

Thus, for habeas relief to be appropriate in this case, we must conclude not only that the error was prejudicial under *Brecht*, but also that the state court's adverse harmless-error ruling can be overcome under AEDPA—in other words, that it was contrary to, or an unreasonable application of, the applicable standard as determined by the Supreme Court, namely *Chapman v. California*, 386 U.S. at 24. Unlike *Brecht*, where the burden is on the petitioner to show harm, under *Chapman*, it is the State's burden to show beyond a reasonable doubt that the constitutional error was harmless. *See id.* Accordingly, this Court must conclude that "every fairminded jurist would agree" that the State failed to

meet its burden of showing that the error was harmless beyond a reasonable doubt. *Brown*, 596 U.S. at 136. Or, inversely, we must ask whether *any* "fairminded jurist" applying the *Chapman* standard would find the error harmless beyond a reasonable doubt.

No fair-minded jurist could reach the conclusion that the error was harmless beyond a reasonable doubt. The State manifestly cannot meet its burden of proving that there was "no reasonable possibility" that the verdict would have been different had the trial court properly addressed the third jury note. *Hernandez*, 122 N.Y.S.3d at 15.

In its analysis, the Appellate Division said nothing about the second CCPO confession. Instead, it concluded that the period between the un-*Mirandized* questioning and ADA Durastanti's questioning—approximately eleven hours, during which time Hernandez was taken around SoHo by police, and intermittently ate and slept in the presence of law enforcement officers—meant that Hernandez's confession to ADA Durastanti was "fully attenuated" from the earlier questioning, rendering that later confession voluntary. *Id.*

The confession to ADA Durastanti presents a closer question than the second CCPO confession. But a properly instructed jury could well have found that the confession to ADA Durastanti, too, was involuntary under *Seibert*. Among other things, Hernandez (1) was in the continual presence of law enforcement for approximately twenty-four hours; (2) has a well-documented history of mental illness, low IQ, and hallucinations; (3) was not provided any

explanation by ADA Durastanti, who witnessed his previous interrogation, of the likely inadmissibility of his prior statements; and (4) may not have knowingly waived his *Miranda* rights at the DA's office.[11] Although there was a substantial temporal gap between the pre-*Miranda* confession at the CCPO and the confession to ADA Durastanti, there is no bright line rule on attenuation, which is a highly fact-specific determination. *Compare United States v. Capers*, 627 F.3d 470, 484 (2d Cir. 2010) (finding a ninety- minute gap insufficient because "the two rounds of questioning bracketed one continual process" and detectives "were with [the subject] throughout the [ninety] minutes, engaging in 'small talk' and advising [the subject] to tell the truth"), *with Moore*, 670 F.3d at 232 (finding a ninety-minute gap sufficient where "the second interview was not treated as a continuation of the first, . . . nor did the investigators use the information obtained from [the earlier] questioning to cross- examine [the subject] or compel him to answer due to the weight of an earlier admission"). Notwithstanding the temporal gap, at the time of Hernandez's confession to ADA Durastanti, he had been in the continual presence of law enforcement for nearly twenty-four hours, was mentally and physically exhausted, and had no opportunity to consult counsel. *Cf. Bobby v. Dixon*,

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[11] Indeed, at the end of the interrogation with ADA Durastanti, Hernandez suggested that he did not understand he was entitled to an attorney during the interrogation itself, as opposed to later in court. *See* Dkt. 1-20 at part 4, 7:04-7:05, *Hernandez v. McIntosh*, No. 22-CV-02266-CM-RWL (S.D.N.Y. filed Mar. 18, 2022).

565 U.S. 23, 31-32 (2011) (finding a "significant break in time and dramatic change in circumstances" where the subject of interrogation claimed to have spoken with his lawyer between the unwarned interrogation and his receipt of *Miranda* warnings). Because the jury could have reasonably found that "the unwarned and warned interrogations blended into one continuum," *id*. at 31-32, it could likewise have found that *Seibert's* "assumption that *Miranda* warnings will tend to mean less . . . after inculpatory statements have already been obtained" applied to Hernandez's confession to ADA Durastanti as well. *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring).

Furthermore, because the instructional error was undeniably prejudicial to the jury's consideration of the second CCPO confession, the error could not help but influence the jury's assessment of subsequent statements, regardless of how attenuated they were. For instance, had the jury concluded that the second CCPO confession was involuntary, it would have been precluded from using it to infer the accuracy and consistency of the later confession to ADA Durastanti. In these circumstances, and given the significant weakness of the State's case absent the confessions, no fair-minded jurist could conclude that the instructional error was harmless beyond a reasonable doubt.

The Appellate Division's conclusion that there was evidence of attenuation might be a basis for affirming the trial court's decision to *admit* the subsequent statements. It also might be enough to affirm a verdict by a properly instructed jury. But that determination does not answer whether there is no reasonable doubt that a correctly instructed jury

would have reached the same verdict had it known it *could* (or might in fact be required to) account for the involuntary nature of the initial confessions.

As noted throughout, a proper instruction on the principles of *Seibert* with respect to Hernandez's post-*Miranda* confessions would have unquestionably impacted deliberations. *See Hernandez*, 2024 WL 2959688, at *14 ("[T]here can be no serious question that the erroneous instruction here had a 'special impact' on the jury given the prominence of the confessions to the case."). Under the extraordinary circumstances of this case, we believe that no fair-minded jurist would conclude that the State has proved harmlessness *beyond a reasonable doubt*, as it must where, as here, we have identified a constitutional error in the petitioner's state-court trial.[12] The instant case clearly is one of those rare

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[12] Pre-*Brown*, this Court has granted habeas relief notwithstanding a state court's harmless-error determination on similar facts. *See Wray v. Johnson*, 202 F.3d 515, 521, 528-30 (2d Cir. 2000) (reversing district court's denial of habeas relief after finding that the state trial court's error in admitting "improperly suggestive" identification evidence was not harmless where there was no "physical evidence to connect [petitioner] with the crime;" "the only admissible [identification evidence] came from officers who . . . were poorly situated to see [the petitioner's] face;" "the State believed the . . . evidence was important;" and it was "plain that [the evidence] was considered by the jurors" because they requested a re-reading of the evidence during deliberations). In contrast, this Court has denied habeas relief where there was "significant evidence of [the defendant's] guilt" such that "the erroneously admitted evidence did not result in

(Continued…)

cases where both *Brown* requirements are met and habeas relief is appropriate.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's denial of Hernandez's petition and REMAND with instructions to grant the writ conditionally, ordering Hernandez's release unless the State affords him a new trial within a reasonable period as the district court shall set.

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actual prejudice to [the defendant]." *Perkins v. Herbert*, 596 F.3d 161, 180 (2d Cir. 2010) (internal quotation marks and citation omitted); *see, e.g., id.* (declining to disturb the Appellate Division's harmlessness finding where "the erroneously admitted evidence was cumulative of the properly admitted evidence").

APPENDIX B

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of August, two thousand twenty-five.

Present:

Guido Calabresi,
Raymond J. Lohier, Jr.,
Myrna Pérez,
Circuit Judges

Pedro Hernandez,
Petitioner-Appellant,

v.

Donita McIntosh,
Superintendent of the
Clinton Correctional Facility,
Respondent-Appellee.

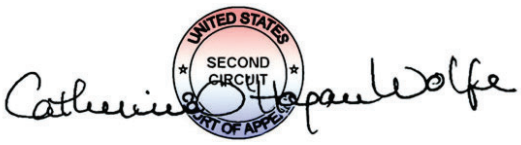
Order

No. 24-1816-pr

On August 8, 2025, Respondent-Appellee filed a motion to stay the mandate pending the possible filing of a petition for a writ of certiorari. Dkt. No. 76. Petitioner-Appellant filed his opposition to the motion

on August 12, 2025. Dkt. No. 78. Upon consideration, it is hereby ORDERED that the motion to stay the mandate is GRANTED for a period of thirty (30) days to permit Respondent-Appellee to decide whether or not to file a petition. The mandate will issue at the end of that period.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court



APPENDIX C

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of October, two thousand twenty-five.

Present:
Guido Calabresi,
Raymond J. Lohier, Jr.,
Myrna Pérez,
Circuit Judges

Pedro Hernandez,
Petitioner-Appellant,

Order

v.

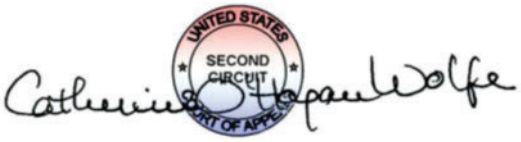
No. 24-1816-pr

Donita McIntosh,
Superintendent of the
Clinton Correctional Facility,
Respondent-Appellee.

On September 14, 2025, Respondent-Appellee filed a motion to extend the stay of the mandate until October 20, 2025. Dkt. No. 80. Petitioner-Appellant filed his opposition to the motion on September 19, 2025. Dkt. No. 81. Upon

consideration, it is hereby ORDERED that the motion to extend the stay of the mandate is DENIED. Nothing in this Order prevents the State from seeking Petitioner-Appellant's retrial in state court or his detention in advance of retrial.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court



APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PEDRO HERNANDEZ,

Petitioner,

22 civ 2266 (CM)

-v-

DONITA MCINTOSH,

Respondent.

CONDITIONAL WRIT OF HABEAS CORPUS

McMahon, J.:

Precipitating this, the latest chapter in the nearly half-century long saga of the disappearance, and presumptive murder, of the child Etan Patz: the United States Court of Appeals for the Second Circuit has reversed this court's decision denying Petitioner Pedro Hernandez' petition for a writ of habeas corpus, and has directed that this court grant the writ, but conditionally. Specifically, the panel has directed this court to order Hernandez released unless The People of the State of New York retry him (which is to say,

commence a retrial[1]) within "a reasonable period as the court shall set." The People twice went to the Second Circuit with motions to stay issuance of the mandate. They received a 30-day extension on their first bite at the apple, but no further extension the second time they tried.

The mandate issued on or about October 2, 2025. I am constrained by the mandate rule to do what the Second Circuit told me to do—which is to set a "reasonable period" by which a retrial of Hernandez must commence. Neither side appears to want me to make that decision today.

The People argue that it would be premature for the court to set a "reasonable period", for retrial now. They plan to file a petition for a writ of certiorari. They are seeking Supreme Court review of the Second Circuit's decision on multiple grounds. That petition is presently due on October 20, 2025—next Monday. The People have applied to the Supreme Court for an extension of the time within which they can file their petition. As of this writing, I have not been advised that any extension was granted.

The People would have this court rule that the "reasonable period" for commencing retrial cannot begin pending final action by the Supreme Court on its request for review—whether that final action be denial of the petition for a writ of certiorari, a grant of certiorari and summary reversal, or a grant of certiorari and the issuance of a decision after full briefing and argument, as the case may be. And while

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[1] Under New York state law, a trial "commences" at the beginning of jury selection. *People v. Crespo,* 32 N.Y.3d 176, 185, 112 N.E.3d 1243, 1250 (2018).

The People represent that they are already hard at work putting together a new trial team (all but one member of the original trial team no longer work at the Manhattan District Attorney's Office), and trying to locate the dozens of long-scattered witnesses who testified at the last trial some seven years ago, they do not believe that they can be ready for trial until one year after the Supreme Court does whatever it is going to do. Transcript of Hearing, held on October 14, 2025 (Tr.) at 12.

In the alternative, The People asks that they have 90 days to apprise the court of the "concrete and additional steps" that they are taking to prepare for any retrial—and that the court refrain from setting the requisite "reasonable period" for retrial until I receive that report.

However, at the October 14, conference, The People advised the court of the concrete steps they have already taken toward that end during the three months since the Second Circuit handed down its decision, as well as the steps they were continuing to take. As a result, this alternative request for relief makes little sense.

Petitioner opposes The People's request that I take into account any activity at the Supreme Court when setting the "reasonable" period for commencing retrial. Indeed, Petitioner argues that, were I to take the possibility of certiorari into account, I would be effectively overruling the Second Circuit's decision to deny a stay of the mandate beyond October 2.

However, Petitioner also does not appear to want me to set the "reasonable period" just yet. Instead, he asks that I require The People to decide by a date certain—30 days, is his suggestion—whether they are

going to retry the case at all. (Tr. 19). He even urges that, before setting a "reasonable period" for retrial, the court might direct The People to reopen the case in the New York State Supreme Court, so that various necessary administrative matters can be carried out and a possible pre-trial trial schedule set. (Tr. 18). And he suggests that he might make a bail application (Tr. 22), although neither party could enlighten me about whether this court is a position to entertain such a request. Were I to release him on bail, Hernandez would of course be willing to give The People as much time as they want to retry the case. (Tr. 22). The People suggest that, if the court were interested in adopting this approach, 90 days would be a more reasonable time for a decision on retrial (Tr. 21).

I thank the parties for appearing before me on short notice on October 14, so we could discuss these matters. After careful consideration, I have reached the view that it is not within the scope of the mandate for me to grant any of the requests that were contained in the letters to the court dated October 3, 2025 (Dkt. #54) and October 6, 2025 (Dkt. #56) or discussed at the conference. The mandate rule constrains this court to do exactly what the Second Circuit directed me to do—order the Petitioner released unless The People start a retrial within such "reasonable period" as I shall set. It is not my job to read the tea leaves and make predictions or estimates about when or how the Supreme Court will act on any petition for certiorari that may be filed. The Second Circuit refused to delay issuance of the mandate to accommodate action by the Supreme Court; I am not at liberty to do what the Court of Appeals refused to do.

Similarly, the mandate says nothing about my setting a date by which The People must decide whether or not to retry Hernandez. The mandate—my marching orders—simply directs that I set an end date by which any retrial must commence, and order Hernandez freed if a retrial does not commence by that date. Federal judges issue such conditional writs all the time without knowing what judge will be trying the case in state court or what schedule that judge will set for pre-trial proceedings. It seems to me that the appropriate court to set the date by which The People must announce whether they intend to retry the case is the court where the case will be tried—the New York State Supreme Court. Similarly, all of the administrative decisions that need to be made—from reopening the case to reappointing defense counsel to setting a pre-trial motion schedule (if there are to be any such motions; the trial court may well choose to adhere to its prior rulings on pre-trial motions) to setting an actual trial date—require the case to be back in the New York State Supreme Court, and sooner rather than later.

So, my task is really quite simple. Relying on my three decades of experience as a trial judge, I have to decide what constitutes a "reasonable period" for The People to be ready to commence a retrial in this twice-tried, very old case, and I have to order Hernandez released if any retrial does not commence by that date.

The Second Circuit's decision issued on July 21, 2025. The People have already had almost three months to review and digest that decision and begin the process of preparing for a retrial. I accept that this is an unusually complicated task. The case needs new prosecutors and new investigators. I am advised that

those individuals have been identified and are already hard at work locating numerous witnesses and familiarizing themselves with a very large case file (there were, after all, not one but two prior trials—the first ended with a hung jury, the second with a conviction—and this was a cold case to begin with).

However, it would not be reasonable to give The People all the time they want, either—which is to say, a full year from the date when the United States Supreme Court takes whatever final action it decides to take in connection with this case, which could and likely would extend well into 2027. Indeed, it makes no sense to exclude from any "reasonable period" the time during which the as-yet-unfiled cert petition is under consideration, because there are other ways of dealing with that (*see infra*). The People represent that they have already commenced preparations for a retrial, by designating new counsel and investigators and locating as many as half of the 57 witnesses who testified at the last trial. (Tr. 21) That The People are already moving forward—notwithstanding their intention to file a cert petition—makes perfect sense. The People cannot possibly make a reasoned decision about whether to retry the case until they have explored things like the availability of witnesses and evidence—not just seven years after the last trial (which took place in 2017), but 47 years after the child mysteriously disappeared.

The question for me, then is how much time beyond the approximately three months they have already had is a "reasonable period" within which to commence a retrial. It seems to me that I should allow The People until December 1, 2025, to finish the unusually complicated preparatory work that began

upon issuance of the Second Circuit's decision, followed by a period of up to 180 days for actual trial preparation. That means the reasonable period by which the People have to commence retrial will end on June 1, 2026.[2] This period—just over ten months from the Second Circuit's decision—is longer than I would ordinarily consider reasonable for the retrial of an already heavily litigated case. But I accept that there are unusual, even extraordinary, difficulties attendant on this particular case, which make it reasonable to give The People more time than I might otherwise.

I will, therefore, issue a conditional writ directing that the Petitioner be released unless the People retry him by June 1, 2026.

I said earlier that there were ways of dealing with action in the United States Supreme Court—and indeed there are. Nothing in this decision prevents any party from asking this court to modify this conditional writ if the Supreme Court should decide to hear an appeal from the Second Circuit's ruling, *Bohan v. Kuhlman*, No. 00 Civ, 4225 (VM), 2003 WL 22769234 (S.D.N.Y, Nov. 19, 2003) (modifying the conditional writ in light of a pending petition for Supreme Court review).[3] Similarly, if the United States Supreme Court should direct that this court

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[2] Exactly 180 days brings us to Saturday, May 30, 2026. The New York State Supreme Court does not sit on Saturdays.

[3] For avoidance of doubt, given the Second Circuit's refusal to stay issuance of the mandate, I am not—unlike Judge Marrero in *Bohan*—prepared to take potential United States Supreme Court action into account unless and until that court decides to hear an appeal in this case.

modify the conditional writ upon a grant of the petition for a writ of certiorari, I would of course do so.

Moreover, when it denied The People's second motion for a stay of the mandate, the Second Circuit specifically said that nothing in its order prevented The People from asking the New York State Supreme Court to order that Hernandez be detained in advance of any retrial. This very clear statement by the Court of Appeals should cover The People in the event that retrial is delayed beyond June 1, 2026, for any reason. Furthermore, it comports with my understanding of the law. *See. e.g.,* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure*, §33.3 and nn. 6, 10 (7th Ed. 2015 & Supp. 2025) (petitioners released from custody if state fails to satisfy conditional writ are, unless ordered otherwise, subject to rearrest and reprosecution).

Similarly, I can see no reason why Hernandez could not ask the New York State Supreme Court to admit him to bail in advance of any retrial. That, too, it seems to me, is within that court's remit.

In short, this court's conditional writ does not tie the hands of the state court judge assigned to preside over any retrial from considering whatever applications are properly made to him or her.

So there are multiple ways to deal with any developments at the United States Supreme Court-none of which requires this court to delay compliance with the mandate.

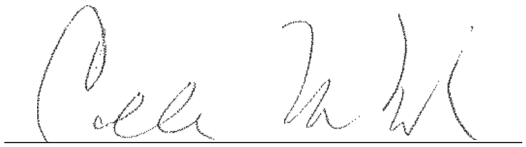
Conclusion

A reasonable period for preparing this case for retrial extends from July 21, 2025 (the date on which

the Second Circuit issued its decision) to and including June 1, 2026. If jury selection does not commence by June 1, 2026, Hernandez must be released pursuant to the writ.

This constitutes the decision and order of this court. As far as I am concerned, there is nothing more to do here; the matter now rests with the New York State Supreme Court.

Dated: October 16, 2025



U.S.D.J.

BY ECF TO ALL COUNSEL

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PEDRO HERNANDEZ,

Petitioner,

22 civ 2266 (CM)

-v-

DONITA MCINTOSH,

Respondent.
----------X

DECISION AND ORDER (1) DENYING OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, (2) ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AS THE DECISION OF THE COURT, AND (3) DENYING PETITION FOR A WRIT OF HABEAS CORPUS

McMahon, J.:

On February 14, 2017, a jury sitting in New York State Supreme Court (New York County), found Petitioner Pedro Hernandez guilty of kidnapping and murdering a six-year-old boy, Etan Patz, back in 1979. Hernandez is currently in state prison serving a 25-years to life sentence for his crimes.

The notorious Etan Patz case captivated New York City and, indeed, the nation at the time of the boy's disappearance in in 1979. Etan disappeared while walking the two blocks from his family's apartment to his school bus stop. An investigation ensued, but, at the time, no suspects were arrested or charged. Etan was never found. Hernandez was convicted primarily based on his multiple confessions to the crime. A central issue before and at trial was whether the confessions given by Hernandez—who has a history of mental illness and a low intelligence quotient—were made voluntarily, knowingly, and intelligently or were instead inadmissible, having been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

In a petition filed pursuant to 28 U.S.C. § 2254(a), Hernandez challenges his conviction for four principal reasons:

First, Hernandez argues that the trial court erred in denying his motion to suppress his confessions by unreasonably finding both that he was not in custody when he initially confessed and that he understood and could properly waive his *Miranda* rights.

Second, Hernandez contends that the state courts erred by ignoring *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004), which found unconstitutional the law enforcement two-step interrogation practice of intentionally obtaining a confession without giving *Miranda* warnings, then issuing the warnings, and then obtaining a second confession.

Third, Hernandez asserts that the trial court made evidentiary rulings that deprived him of the opportunity to present a complete defense. Hernandez says that those rulings denied him the

opportunity to present evidence of the culpability of one of two-third parties, as well as police reports memorializing contemporaneous statements made in the initial 1979 investigation.

Fourth and finally, Hernandez argues that the state courts improperly ignored prejudicial contacts between court officers and jurors, including informing jurors that jurors from Hernandez's first trial were sitting with Patz's family at the second trial.

On April 7, 2022, the Court referred Hernandez's petition to Magistrate Judge Robert W. Lehrburger for the preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b); upon receiving his referral, Judge Lehrburger immediately ordered the Respondent to answer the petition.

On September 2, 2022, the District Attorney for New York County filed responsive papers; and on December 2, 2022, Hernandez filed his reply.

On August 23, 2023, Magistrate Judge Lehrburger heard oral argument on Hernandez's motion.

On October 10, 2023, Magistrate Judge Lehrburger issued his Report and Recommendation.

In one of the most thorough and comprehensive reports this Court has ever received in response to a state habeas referral, Judge Lehrburger ultimately concluded (after 130 pages of discussion and analysis) that—while the circumstances of Hernandez's confessions implicate federal constitutional concerns—the highly deferential standard Congress has afforded to state courts in habeas cases meant that Hernandez's petition should be dismissed. Hernandez filed timely objections.

In reviewing a Report and Recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(l)(C). When specific objections are made, "[t]he district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). To accept those portions of the report to which no timely objection has been made, "a district court need only satisfy itself that there is no clear error on the face of the record." *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009) (citation omitted); *see also Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

1. *Objections relating to the voluntariness of Petitioner's confessions*

Petitioner contends that Judge Lehrburger made two errors in connection with his review of the state court's decision not to suppress Hernandez' confessions.

First, he argues that Judge Lehrburger was wrong to reject his argument that certain of the state court's findings about the voluntariness of the confession—specifically, its findings that: (1) Hernandez was not restrained at the CCPO; (2) he was repeatedly told that he was free to leave and voluntarily opted to continue to speak with detectives; and (3) that the interrogation was never hostile or accusatory—were unreasonable in light of the evidence presented at the suppression hearing. (Petitioner's Objections to the R&R, ECF No. 42: 11).

In support of this argument, petitioner essentially repeats the arguments from his opening and reply memoranda of law (*see* PO: 13-23; Petitioner's Memorandum of Law, ECF No. 1-2: 37-48; Petitioner's Reply Memorandum of Law, ECF No. 25: 3-8). But as petitioner is constrained to acknowledge (PO: 12 n.4), under 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(l), "a federal court will 'presume the correctness of state courts' factual findings unless [petitioners] rebut this presumption with 'clear and convincing evidence.'" *Wilson v. Capra*, 2023 WL 7179268, at *2 (2d Cir. Nov. 1, 2023) (alteration in original) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473-74 [2007]). Applying that standard, Judge Lehrburger correctly rejected petitioner's arguments. (*See* R&R at 34-60).

Petitioner also contends that, despite identifying the correct legal standards and addressing the relevant facts, Judge Lehrburger erroneously "focused on whether any *single* fact, in isolation, might conceivably support the state court's finding," rather than evaluating the totality of the circumstances (PO: 11-12; *see id.* at 14, 16). But, contrary to petitioner's contention, Judge Lehrburger concluded that the state court's custody determination was reasonable based on all the evidence presented to the state court (*see* R&R at 38-40).

Because I find that the Magistrate Judge's conclusion that Hernandez was not in custody when he gave his initial confession to the police (*see* R&R at 40) is not erroneous, I do not need to address Respondent's objection to Judge Lehrburger's conclusion that Hernandez' *Seibert* claim with respect to his confessions was not procedurally defaulted. *See*

R&R at 69. However, I note that this is not a sound objection, and I would overrule it if it were necessary for me to reach the issue, for the reasons set forth in the Report at pages 70-76. I would also conclude, as did the learned Magistrate Judge, that Hernandez failed to establish that his pre-and-post Miranda confessions were part of a single continuous chain of events for which there was no attenuation, and no intervening time or circumstances, *see Missouri v. Seibert*, 542 U.S. 600, 606-617 (2004), given the Appellate Division's finding that questioning of Petitioner by ADA Dursanti was "fully attenuated"—a finding that gets AEDPA deference. In this regard I also defer to Judge Lehrburger's discussion of the issue, which I adopt as my own.

2. *Objection with regard to Petitioner's Ability to Waive his Miranda Rights*

Petitioner objects to the Report on the ground that Judge Lehrburger "overlooked" the alleged "dilutive effect" that the pre-*Miranda* interrogation had on his ability to voluntarily waive his *Miranda* rights (PO: 24-26). But petitioner fails to explain how Judge Lehrburger could have overlooked an argument that was not raised in the written submissions before the state courts or this Court. As petitioner acknowledges (PO: 24), he raised this contention for the first time at oral argument before the Magistrate Judge. Thus, there was no reason for Judge Lehrburger to address it. *See, e.g., United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998) ("Normally, we will not consider arguments raised for the first time in a reply brief, let alone [at or] after oral argument." [quoting *Keefe v.*

Shalala, 71 F.3d 1060, 1066 n.2 (2d Cir. 1995)]). I, thus, overrule this objection.[1]

3. *Objection relating to various evidentiary rulings*

Petitioner objects to Judge Lehrburger's rejection of his argument that the state court's evidentiary rulings—(i) concerning third-party culpability evidence related to Othniel Miller and (ii) hearsay evidence from unavailable witnesses—were contrary to or based upon an unreasonable application of clearly established federal law. Specifically, petitioner alleges that Judge Lehrburger erred when he concluded (1) that the New York rule of evidence pursuant to which the third party culpability evidence was excluded did not contravene *Holmes v. South Carolina*, 547 U.S. 319 (2006); and (2) that the state court's application of the state evidentiary rule in this case did not violate petitioner's constitutional right to put forth a complete defense. (PO: 36-37). Petitioner also argues that Judge Lehrburger, like the state court, misapplied *Chambers v. Mississippi*, 410 U.S. 284 (1973), because the hearsay he offered at trial "bore persuasive assurances of trustworthiness" and was "critical" to his defense (PO: 37).

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[1] Petitioner has consistently argued that his mental state, due to an alleged combination of mental illness, lack of intelligence, and impairment by medication, was such that he could not *knowingly* or *intelligently* waive his *Miranda* rights (*see* Pet. MOL: 48-51; Pet. Reply MOL: 8-10; Petitioner's Appellate Division Opening Brief [ECF No. 1-93]: 94-99; Petitioner's Appellate Division Reply Brief, ECF No. 1-95: 8- 12).

Because these are exactly the same arguments petitioner made in his opening and reply memorandum of law (Pet. MOL: 58-63; Pet. Reply MOL: 19-26), they are subject to clear error analysis. There was no clear error in the Magistrate Judge's reasoning. *See, e.g., Curet v. Graham*, No. 14-cv-4831 (VSB) (DF), 2022 WL 1486492, at *1 (S.D.N.Y. 2022).

Petitioner's *Holmes* argument is baseless. Judge Lehrburger is just the latest in a long list of jurists to conclude that New York's rule for determining the admissibility of third-party culpability evidence does not violate the rule articulated in *Holmes*, joining the state trial judge, four Justices of the Appellate Division, six Judges of the New York Court of Appeals, and several other federal judges based in this Circuit (*see* R&R at 102-03; Resp. MOL: 128-33). Judge Lehrburger relied on the applicable New York and federal precedent, including other habeas decisions, all of which recognize that New York's rule on the admissibility of third-party culpability evidence is fully consistent with *Holmes*. This is because—unlike the South Carolina rule that was found unconstitutional in *Holmes*—the New York rule does not tie the admissibility of third-party culpability evidence to the strength of the prosecution's case. Instead, the admissibility of such evidence is subject to a general balancing test that governs the admissibility of all evidence—the judge must weigh the probative value of the evidence against the prospect of delay, undue prejudice to the opposing party, confusing the issues, or misleading the jury (*see* R&R at 97-103).

Therefore, this aspect of petitioner's objection fails under any standard of review.

4. *Objections relating to the lack of a jury contamination hearing*

Petitioner objects to Judge Lehrburger's conclusion that the state court's summary denial of his jury contamination claim without holding a hearing was not contrary to or an unreasonable application of clearly established Supreme Court precedent. In petitioner's view, the Supreme Court's decisions in *Mattox v. United States*, 146 U.S. 140 (1892), *Remmer v. United States*, 347 U.S. 227 (1954), and *Parker v. Gladden*, 385 U.S. 363 (1966), require trial courts to hold hearings any time there are allegations of improper contacts with sitting jurors, so Judge Lehrburger erred in distinguishing those cases on their facts (PO: 39-42). Because petitioner has simply reiterated his original argument, this objection is subject to clear error review. *See Curet*, 2022 WL 1486492, at *1.

Petitioner is wrong. Judge Lehrburger properly concluded (R&R at 123-29) that, even accepting the allegations in petitioner's post-verdict motion as true, they did not need to be explored at an evidentiary hearing, because they "failed to sufficiently articulate a ground for relief." (R&R at 124).

First and foremost, none of the Supreme Court's cases involving improper juror contacts expressly states, as petitioner seems to believe (PO: 39-41), that a hearing is required *any* time an allegation is made about improper contacts with a sitting jury. *See, e.g., Smith v. Philips*, 455 U.S. 209, 217 (1982) ("Such determinations *may* be made at a hearing like that ordered in Remmer and held in this case."); *Remmer*, 347 U.S. at 229 (noting that a hearing would be required in a criminal case involving "private

communication[s], contact[s], or tampering with a juror ... *about a matter pending before the jury*" because such contacts are "presumptively prejudicial" [emphasis added]).

The Second Circuit has read the Supreme Court's precedent as not requiring a hearing in all cases where there is a suggestion of prejudicial occurrences. *See, e.g., Haxhia v. Lee*, 637 F. App'x 634, 637 (2d Cir. 2016) ("*Smith* does not *require* a court to hold a hearing to investigate prejudicial occurrences, and it does not specify what actions short of a hearing may be appropriate under a different set of circumstances."); *Taus v. Senkowski*, 134 F. App'x 468,470 (2d Cir. 2005) ("A court need not inquire into juror-misconduct allegations unless the defendant provides 'reasonable grounds' for an inquiry; the defendant may not request a hearing to conduct a 'fishing expedition.'"); *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) ("The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality."); *see also Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003) ("*Remmer* and *Smith* do not stand for the proposition that *any time* evidence of juror bias comes to light, due process requires the trial court to question the jurors alleged to have bias.").

Thus, as Judge Lehrburger correctly recognized, the facts presented in *Mattox* (jurors being informed about excluded evidence and external analysis), *Remmer* (attempted bribery of a juror), and *Parker* (jurors being told that the defendant was guilty) all involved improper jury contacts "*about a matter pending before the jury*," and therefore were presumptively prejudicial. (*See* R&R at 123-24). Here,

the allegedly improper contact was alerting the jurors to the fact that some of the people who had served as jurors at Hernandez' first trial were sitting in the gallery—information that has nothing to do with the People's case against Hernandez.

Moreover, the jurors were already aware that there had been a prior trial. (*See* Exs. 22G at 3632:4-5 (Julie Patz referring to testimony provided "during the last trial"); 22H at 4030:8-24 (Trial Judge instructing jury that they "may have heard a witness refer to a first trial" but "that first trial was not concluded, and, therefore, it has no bearing on the evidence in this case.") *See Curet v. Graham*, No. 14-CV-4831, 2019 WL 13184139, at *35 (S.D.N.Y. Jan. 14, 2019), *R & R adopted* 2022 WL 1486492 (S.D.N.Y. May 11, 2022) (finding no prejudice in extra-record evidence that "was largely cumulative of other evidence in the record"). The Trial Judge instructed the jury that the "[first] trial or any reference to it, is not evidence of anything, and you are not to speculate or consider it." (Ex. 22H at 4030:13-18; *see also* Ex. 22U at 10138:20-23.) *See Smith v. Graham*, 2012 WL 2428913, at* 18 (affirming state court's dismissal of petitioner's juror misconduct claim where "jury was already aware that Petitioner was on parole ... and ... would thus have recognized that Petitioner had a prior criminal history" and jury had received specific instructions not to allow Petitioner's parole status to influence their verdict). Therefore, the alleged "prejudice" from the jurors' learning that their predecessors retained enough interest in this famous case to attend the second trial is nonexistent.

Because clearly established federal law does not require a hearing any time an allegation is made

about improper contacts with a sitting jury, petitioner's objection is overruled.

Judge Lehrburger also found that, as Hernandez's jury contamination claim was based on speculation and hearsay, the trial court's summary rejection of the claim was not contrary to or based upon an unreasonable application of clearly established federal law. (R&R at 125-29). Hernandez offered no affidavits from jurors, and none of the jurors spoken to by investigator O'Brien said that they learned about the first panel jurors from a court officer. *See* CPL § 330.40(2)(a) ("The moving papers must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the motion.... Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief"). "A post-verdict hearing on allegations of juror impartiality is only required when 'the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality.'" *Stone v. Griffin*, No. l 7- CV-8741, 2020 WL 7390188, at *8 (S.D.N.Y. Aug. 29, 2020) (quoting *Ianniello*, 866 F.2d at 543). Since there was no evidence in the record that the allegedly prejudicial contact actually occurred, there was no need for a hearing.

5. *Objections Raised to the Trial Court's Response to the Jury Note*

With these objections out of the way, I turn to the issue that troubled both Judge Lehrburger and myself the most—the trial judge's response to a note in which

the jury asked for guidance about what to do if it concluded that Hernandez' initial, un-Mirandized confession was involuntary. The learned Magistrate Judge concluded that the judge's terse one word response to the note, while technically "correct," denied Hernandez due process—especially given the importance of Petitioner's confessions to the People's case—because it failed to explain to the jury what it would have to do if it found that the initial confession was not voluntary. However, Judge Lehrburger also concluded that, under the unforgiving standards applicable on habeas review, this error, while of constitutional dimension, was harmless, because the Appellate Division: First Department—whose decisions are entitled to substantial habeas deference—found that any reasonable jury would have to conclude that Hernandez' final post-*Miranda* confession to law enforcement (his confession to ADA Durasanti) was sufficiently attenuated from the initial confession so that it could not be deemed part of a single continuous course of conduct. The Appellate Division so found because the confession to Durasanti came eleven hours after the non-Mirandized confession, an interval that include a period of time in which Hernandez both ate and slept. R&R at 93-95.

Both Hernandez and the People object to Judge Lehrburger's Report in this regard. Respondent objects to Judge Lehrburger's conclusion that the "the trial court's response to the jury [note] was so deficient as to deprive Hernandez of due process." (R&R at 83, 88). Petitioner objects to his conclusion that, given the Appellate Division's finding, the trial court's erroneous response to the jury note was harmless error under AEDPA and *Brecht v.*

Abrahamson, 507 U.S. 619 (1993) (PO: 26-36; *see* R&R at 88-95).

I am going to overrule both objections and adopt Judge Lehrburger's opinion as my own. However, I believe this issue is sufficiently close that it should be reviewed by the Second Circuit.

At the end of the case, the trial judge instructed the jury on the standards for determining voluntariness, custodial interrogation, and *Miranda* waiver. These instructions are set out in their entirety here in a footnote.[2] The jurors were given no

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[2] I now want to discuss the law as it relates to testimony concerning statements of the defendant made to law enforcement, that is police officers and an Assistant District Attorney.

Our law does not require that a statement by a defendant be in any particular form. It may be oral or written or electronically recorded. And there is no requirement that a statement be made under oath.

Now, you heard testimony that the defendant here was questioned by the police and made certain statements, some of which were recorded on video. There is also testimony that the defendant made a videotaped statement to an Assistant District Attorney. Now, under our law, before you may consider any such statement as evidence in the case, you must first be convinced that the statement attributed to the defendant was, in fact, made by him. In determining whether the defendant made the statement, you may apply the tests of believability and accuracy that I went over just a few minutes ago.

Also, under our law, even if you find that the defendant made a statement, you still may not consider it as evidence in the case

(Continued…)

unless the People have proved beyond a reasonable doubt that the defendant made the statement voluntarily. So how do you determine whether the People have proved beyond a reasonable doubt that the defendant made a statement voluntarily? First, under our law, a statement is not voluntary if it is obtained from the defendant by the use or threatened use of physical force. In addition, the statement is not voluntary if it is obtained by means of any other improper conduct or undue pressure which impairs the defendant's physical or mental condition to the extent of undermining his ability to make a choice of whether or not to make a statement. In considering whether a statement was obtained by means of any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice of whether or not to make a statement, you may consider such factors as the defendant's age, intelligence, physical and mental condition, and the conduct of the police during their contact with the defendant including, for example, the number of officers who questioned the defendant, the manner in which the defendant was questioned, the defendant's treatment during the period of detention and questioning, and the length of time the defendant was questioned. It is for you to evaluate and weigh the various factors to determine whether in the end the statement was obtained by means of any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice of whether or not to make a statement.

Finally, a statement of a defendant is not voluntarily made when it is obtained from the defendant by law enforcement by means of any promise or statement of fact which promise or statement creates a substantial risk that the defendant might falsely incriminate himself. A promise or statement of fact made

(Continued…)

to a defendant does not by itself render the defendant's statement involuntary. A defendant's statement would be involuntary only if the promise or statement made to him created a substantial risk that he might falsely incriminate himself.

All right. So if you have decided that the defendant's statements to law enforcement were made voluntarily, as I have just defined that term, you must then decide whether the defendant was in the custody of the police when he made statements to them. In other words, you must decide whether all or some of the statements were made in response to questioning while the defendant was in custody. This is because under our law before a person in custody may be questioned by the police or an Assistant DA, that person first must be advised of his rights. Second, he must understand those rights. And, third, he must voluntarily waive those rights and agree to speak to the police or the Assistant District Attorney.

On the other hand, a defendant who is not in custody when questioned by the police or Assistant DA, need not be advised of his rights, and any voluntary statement may be considered by you, the jury.

Now, the term in custody has a special legal meaning. Under our law, a person is in custody when he is physically deprived of his freedom of action in any significant way. The fact that the defendant was being questioned by police or that the questioning took place inside a police station does not necessarily mean the defendant was in custody. Whether the defendant was in custody at the time of the questioning is not determined by what the defendant himself believed or by what the police believed. In other words, the test is not whether the defendant believed he was in custody or the police believed he

(Continued…)

was in custody. The test is what a reasonable person, innocent of any crime in the defendant's position, would have believed. If that reasonable person would have believed that he was in custody, then the defendant was in custody. If that reasonable person would have believed that he was not in custody, then the defendant was not in custody. To decide whether a reasonable person innocent of any crime in the defendant's position would have believed that he was in custody, you must examine all of the surroundings circumstances, including, but not limited to the reason the defendant was speaking to the police or being questioned by the police, where the questioning took place, and whether the defendant appeared at the police station voluntarily, how many police officers took part in the questioning, whether the questioning was investigative or accusatory, whether the questioning took place in a coercive atmosphere, whether the defendant was handcuffed or physically restrained, whether the police treated the defendant as if he were in custody, whether the defendant was offered food or drink, and whether the defendant had been allowed to leave after the questioning.

Next, under our law, before a person who is in custody may be questioned by the police or an Assistant District Attorney, that person first must be advised of his rights. Second, must understand those rights and, third, must voluntarily waive those rights and agree to speak to the police or an Assistant District Attorney. If any one of those three conditions is not met, a statement made in response to questioning while the defendant is in custody is not voluntary and, therefore, you must not consider it.

Now, there is no particular point in time that the police or the assistant DA are required to advise a defendant in custody of his rights so long as they do so before questioning begins. A

(Continued…)

defendant in custody need be advised only once of the rights regardless of how many times or to whom the defendant speaks after having been so advised provided the defendant is in continuous custody from the time he was advised of his rights to the time he was questioned, and there was no reason to believe that the defendant had forgotten or no longer understood his rights. Our law does not require that the advisings of the rights or the defendant's waiver of those rights be in any particular form. They may be oral or written or electronically recorded.

While there is no particular words that the police or the prosecutor are required to use in advising a defendant, in sum or substance, the defendant must be advised, first, that he has the right to remain silent. Second, that anything he says may be used against him in a court of law. Third, that he has the right to consult with a lawyer before answering any questions and the right to the presence of a lawyer during any questioning. And, finally, that if he cannot afford a lawyer, one will be provided for him prior to any questions he so desires.

A person may validly waive his rights regardless of whether or not he had a full understanding of the criminal law or procedures or, in particular, what he says on waiving his rights may be used later in the criminal process. What must be shown for a valid waiver is that the individual grasp the plain meaning of the words and that he did not have to speak to the interrogator, that any statement might be used to his disadvantage, and an attorney's assistance would be provided upon request at any time before questioning would be continued.

Before you may consider as evidence a statement made by the defendant in response to questioning while he was in custody,

(Continued…)

instructions about how to treat Hernandez's post-*Miranda* confessions if they concluded that his pre-*Miranda* confession was involuntary, as they were entitled to do. The trial judge had ruled, after a pre-trial *Huntley* hearing, that the post-*Miranda* confessions were voluntary and declined to suppress them. However, the fact that the court admitted the confessions into evidence did not mean that the jury was required to find that they were voluntarily given. *See Jackson v. Denno*, 378 U.S. 368, 401, (1964) (Mr. Justice BLACK, with whom Mr. Justice CLARK joins as to Part I of this opinion, dissenting in part and concurring in part) ("Whatever might be a judge's view of the voluntariness of a confession, the jury in passing on a defendant's guilt or innocence is, in my judgment, entitled to hear and determine voluntariness of a confession along with other factual

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you must find beyond a reasonable doubt that the defendant was advised of his rights, understood those rights, and voluntarily waived those rights and agreed to speak to the police or an Assistant District Attorney. If you do not make those findings, then you must disregard the statement and not consider it.

So to conclude, that means that if the People have not proved beyond a reasonable doubt that a statement of the defendant was voluntarily made to law enforcement, then you must disregard that statement and not consider it.

If the People have proved beyond a reasonable doubt that the statement -- that a statement of the defendant was voluntarily made to law enforcement, then you may consider that statement as evidence and evaluate it as you would any other evidence.

(Ex. 22U at 10151:4-10158:12.)

issues on which its verdict must rest."). Which leads us to the conundrum that faced the trial court when it received three jury notes in quick succession.

The day after the Court delivered its charge (during the first full day of deliberations), the jury sent out a series of three notes. The first note asked the judge to reread his instructions on confession, as well as a reread of portions of the testimony of Ramon Rodriguez and Neftali Gonzalez, regarding "Pedro's confession."[3] In the second note, which was written five minutes after the first note, the jury asked for: "Clarity on corroboration consequence.... Clarity on may not convict defendant on his own words, solely? ... Inference can only be drawn from proven facts?" The second note also asked for "the laptop with the video pleas."

While the court was formulating its response to the jurors first two notes, the jury sent out a third note, which the court read to the parties:

> 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, you must disregard the two videotape confessions at CCPO and the DA's office. The

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[3] Rodriguez and Gonzalez were two of the various non-law enforcement persons to whom Hernandez made statements about the killing or a killing. As the trial judge correctly recognized, there were no admissibility issues with their testimony about what Hernandez had said to them, and the jurors were simply to evaluate their testimony as they would the testimony of any witness on any issue.

> confessions to Rosemary and Becky Hernandez and the confessions to the various doctors.

Ex. 22U at 10202 (Emphasis (underlining of the word "if") in original note from jury.).

The parties immediately weighed in as to what the jury should be told: The People suggested that the answer to the jurors' note was "No;" defense counsel countered that the answer was "yes." The defense answer was obviously wrong, and the Court quickly ruled: "Agree, the answer is no. That's the short answer."

The trial judge was technically correct—No is "the short answer," because the jury was not *required* to disregard the subsequent confessions (whether to law enforcement after *Miranda* or to various non-law enforcement witnesses) if it found the pre-*Miranda* confession to have been involuntary. But the technically correct answer was an incomplete answer to the question, because the jurors were not told that they were free to disregard those confessions, or on what basis they could make that choice (and obviously, the basis would differ if the confessions were made to law enforcement or lay witnesses).

At that point, defense counsel asked to make a record and engaged in the following discussion with the court:

> MS. FONTIER: Your Honor, obviously, it's impossible to go back in time. But what occurred in this situation is that Mr. Hernandez was taken into custody. He was interrogated for hours, and he made a statement as a product of that.

Everything that flows after that is based on that initial confession. He is in continuous custody throughout time that he talks to ADA Durastanti. The police had just gotten this involuntary confession from him and then finally agreed to let his family speak to him. They had denied request by his family and by Mr. Hernandez to speak to his family prior to obtaining this involuntary confession. So, it's a product of exactly what happened there. And, then, obviously as the case proceeds and your Honor chose not to suppress the statements, there are doctors involved and other issues. I mean we were proceeding because the statements were taken from him, but they were taken in an involuntary fashion. Everything is a product of the initial confession. So, without that, it's—I mean, there is—it would be impossible to mount a defense. Now, if, in a confession case, if everything that comes afterwards is going to be admissible even if the initial confession itself were not, I mean you are tying the hands of the defense. It's an impossible situation to put somebody in We either have to say, you know, we are going to rest, and we are going to ride on the hope that the judge suppresses this confession and move forward, or we are going to prepare an actual defense. But everything comes from the initial confession. If the initial confession is flawed, everything else falls.

THE COURT: All right. So, you put your finger on the problem. There was a *Huntley* Hearing and denied suppression. And if the jury wants to disregard all statements, they can. That's entirely up to them, but their question is very carefully worded but is—must they, and the answer is no. The law does not require them to do that. There is—there is no fruit of the poisonous tree law for the jury. It's entirely up to them.

MS. FONTIER: At the very least, I ask that you instruct them that it's up to them. They don't have to disregard them but if they choose to.

THE COURT: I am going to say no. I think their question is very carefully worded, and I am going to say no because that's it.

MS. FONTIER: But, Judge, simply saying no to that question says they are there. Use them. Pay attention to them. It's not telling them that they can disregard them if they want to, which is actually apparent. Your Honor is deciding the ruling, which, again, I think is improper. Everything is a product of the initial confession.

THE COURT: Right. That's your argument. So, I think I am best saying less than more. I mean I can remind them to follow my legal instructions.

MS. ILLUZZI: Judge, there is a really specific question.

THE COURT: I would rather just leave it at that. Give them the short answer, and they are all free to send out more notes if they want to.

MS. FONTIER: But it's misleading, Judge.

THE COURT: I don't think it is. So, you have got your objections. So, let's talk about the transcript. Is there, like, a basic disagreement?

MR. FISHBEIN: Excuse me, Judge. Can I just add one line.

THE COURT: Sure.

MR. FISHBEIN: They are entitled to, in effect, overrule your decision.

THE COURT: Certainly. They certainly are.

MR. FISHBEIN: On the voluntariness?

THE COURT: Yes.

MR. FISHBEIN: Even with—withdrawn. If you had found that the first statement was not admissible?

THE COURT: Right.

MR. FISHBEIN: Then there would be no question that the videotaped second confession at CCPO—the one from 2:50 until 3:20 would also clearly flow from it

> and be suppressed. It's within moments in minutes.
>
> THE COURT: In the context of a *Huntley* Hearing, you might be right. You might not. I don't know. But we are not there.
>
> MR. FISHBEIN: But what you are saying to them because that's what the law says. You have a right to overrule me without telling them what your ruling was. But then you are not allowing them to do exactly what I would argue many courts would do on a statement that comes within ten minutes of the initial involuntary statement. They are saying no. So, you are saying to them, you are saying to them, you must consider it.
>
> MS. ILLUZZI: No.
>
> MR. VINOCUR: That's what is misleading.
>
> THE COURT: I'm not. And I don't want to get into where the fruit of the poisonous tree doctrine meets the jury instructions on voluntary confessions. That's I don't want to go there. I will just answer their questions. I don't think I am misleading them or limiting your defense at all by just saying no. It's not a legal requirement.

(Ex. 22U at 10202-10206). Although defense counsel never cited to *Seibert*, the defense argument was

unmistakably predicated on that Supreme Court precedent.

The trial court then brought the jury into the courtroom and proceeded to answer the questions presented by the three notes, in the order in which the jury asked them.

> So, I am going to start with the instructions on confessions. So, I will begin by reminding you that you heard testimony that the defendant made statements to various people, both members of law enforcement and civilians. As to statements made by the defendant to civilians, that is people not engaged in law enforcement activity, you will evaluate that testimony like any other testimony. You must decide whether the statements were, in fact, made by the defendant, and you must decide whether all or a portion of the statements were truthful and accurate. In making these decisions, you will use the same tests of credibility and reliability that I have discussed in the earlier part of my charge.

Ex. 22U at 10210-10211. The Court then reread its initial jury instructions "on the law as it relates to testimony concerning statements that the defendant made to police officers and an Assistant District Attorney." (*Id.*; *see*, *supra.*, at n. 1). After the judge finished reading those instructions, the court reporter began reading the testimony of Ramon Rodriguez and Neftali Gonzalez to the jury. The reporter finished reading Rodriguez's testimony and got half-way

through Gonzalez's testimony before the judge decided it was too late in the evening to continue and adjourned the proceedings to the next morning.

When the trial continued the next morning, defense counsel asked to be further heard on the "third note":

> MS. FONTIER: One of the key cases is *Chapelle*, and in that case the question is, is the second questioning attenuated enough so that the person is effectively being questioned for a second and new time. And a lot of the factors which are set out in the motion, that go into that, are the timing, whether there was a significant break, whether there was a change in personnel. This jury needs some guidance. "No" is the exact opposite of that. It tells them it is perfectly fine, ignore it, don't worry about that issue, move on from custody. That is what you are saying when you are saying "no."
>
> THE COURT: That is exactly what I don't want to say, so I think the best answer to give to this particular note is a "no". They wrote the note very carefully. It is framed in terms of, if we find the first statement to be non-voluntary, must we disregard all the rest. The very simple answer is "no", I believe. Believe me, I don't see any other way of answering this that doesn't involve then instructing them on attenuation, and "cat out of the bag", and

> basically replaying the *Huntley* hearing, which is not their function here, I don't think.

Ex. 22U at 10221-10225.

The argument concluded, the court brought the jury into the courtroom and finished reading Gonzalez's testimony. The court then reread the instruction it gave the jurors in its original charge regarding "corroboration of statements." With that complete, the court finally addressed the jurors' third note:

> ... I am going to reread your question for you, and then I'll answer the question. In this note you said, "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 documents." And the answer is, no. Thank you very much. So, I will ask you to continue your deliberations.

Id. at 10231.

Judge Lehrburger concluded that the trial judge's response to the question violated *Missouri v. Seibert*, *supra*.: "The jury asked the Trial Judge to "explain" whether they "must" disregard the post-Miranda confessions if they found that the pre-Miranda confession was not voluntary. The Trial Judge answered "no," yet did not provide any guidance to the

jury on how they were to consider the relationship between the pre- and post-Miranda confessions. Judge Lehrburger determined that this less-than-complete response violated Hernandez's due process rights. He further concluded that the Appellate Division had acted unreasonably when it concluded otherwise, because the response to the note "did not provide any guidance to the jury on how they were to consider the relationship between the pre-and post-Miranda confessions." R&R at 83.

Respondent argues that the learned Magistrate Judge's finding in this regard was erroneous because, "Neither Judge Lehrburger nor Hernandez has identified a Supreme Court decision extending *Seibert* beyond the context of a suppression claim." (Respondent's Objections at 6).

Seibert was indeed concerned with the admissibility—determined by a court at a pretrial suppression hearing—of repeated statements following *Miranda* warnings as part of a two-step interrogation procedure. *See Seibert*, 542 U.S. at 604-05. Nothing in *Seibert* discusses how trial courts should respond to jury notes of any sort, let alone one like that the trial court received in petitioner's trial. And to the extent petitioner is arguing that the state courts unreasonably failed to extend *Seibert* in response to the jury note, it is also true that the Supreme Court "has rejected the unreasonable-refusal-to-extend rule." *See White v. Woodall*, 572 U.S. 415, 426 (2014) ("To the extent the unreasonable-refusal-to-extend rule differs from the one embraced in *Williams* and reiterated many times since, we reject it.").

But the People's objection misses the mark.

In *Seibert*, the Supreme Court laid out the process for determining the admissibility of a "*Mirandized*" confession that was preceded by an "un-*Mirandized*" confession. That process is relevant, not only to a court that is making a pre-trial determination of the admissibility of such a statement, but also to jurors who are deciding whether to consider such statements or to set them aside as involuntary during deliberations. As the trial judge correctly recognized, the jury was free to find that subsequent confessions were involuntary—they were, in essence, free to "overrule" the findings of fact that undergirded the trial judge's decision at the *Huntley* hearing, and to conclude that the series of confessions were a single continuous chain of events. Whether the post-Miranda confessions to law enforcement were voluntary or involuntary was, as Judge Lehrburger recognized, *the central issue* in the case; the argument that those confessions were involuntary, as part of a single continuous chain of events, was the centerpiece of the defense. That being so, constitutional due process required the trial court to deliver a response that was more than "technically" correct; it required a "meaningful" answer that was responsive to the jury's request for an "explanation" about what to do if it made a certain finding. Judge Lehrburger found that the trial court's terse one-word answer "deprive[d] [] [Hernandez] of a constitutional right" and was "so deficient as to constitute a federal due process violation." (R&R at 83).

I conclude that Judge Lehrburger was correct to make this finding, and I overrule Respondent's objection.

Trial courts are understandably loath to confuse jurors with nuances of suppression law that they

believe to be outside the jurors' province as the triers of fact. In *People v. Medina*, 146 A.D.2d 344 (1989), the defendant argued that his statement to police should not have been admitted into evidence because his right to counsel had attached before the statement was made. He urged that the right to counsel issue should have been submitted to the jury. The Appellate Division First Department demurred, because the issue was a purely legal one. "To decide this issue ... would require a knowledge of the criminal justice system which not only lay people, but even lawyers who are active in such practice do not possess" (*id.* at 350, 541 N.Y.S.2d 355). The Court mused:

> "If a literal interpretation of the words 'involuntarily made' as used in CPL 60.45 were to require the issue of right of counsel to be submitted to a jury because it is a right derived from the Constitution, then it will be equally argued that the same rule must apply to statements obtained in violation of other constitutional challenges. For example, if a statement was obtained where there was allegedly no probable cause (*Dunaway v. New York*, 442 US 200 [1979]) do we submit the issue of probable cause to the jury? Where a person is arrested in his home without a warrant do we submit that issue and the issue of exigency to the jury? (*Payton v. New York*, 445 US 573 [1980].) *If a statement is first obtained in violation of Miranda, and a subsequent statement is made after proper warnings have been given do we submit to the jury the issue*

> *of attenuation (People v Tanner, 30 NY2d 102 [1972]) or the issue of whether the statements '[were] in reality a single continuous chain of events'? (People v Chapple, 38 NY2d 112, 114 [1975])* ..."

People v. Medina, 146 A.D.2d 344 (1989) (Emphasis added). Reading this dictum, one might well think that the judge was correct not to instruct the jury beyond its terse "No."

But in *People v. Woods*, 290 A.D.2d 346 (2002) the First Department made it clear that the concerns it voiced in *Medina* did not relieve a trial court from responding meaningfully to a jury's inquiry about whether a defendant's statement was obtained lawfully. In *Woods*, the deliberating jury sent out two notes relating to confessions. The first asked whether, "prior to being arrested, can a person be asked to answer any questions before being read his Miranda rights?" and the second asked, "Was [defendant] supposed to be Mirandized prior to his initial verbal statement?" To both questions, the court responded by informing the jury that it could not answer the question. *Woods*, 290 A.D.2d at 347. The Court reversed the defendant's conviction holding that "the court's responses 'I can't answer that question' and 'I cannot give you an answer to that question,' to the jury's appeals for clarification and guidance, do not satisfy the requirement of a meaningful response." *Id*. The First Department specifically rejected the People's reliance on *Medina*, stating: "Notwithstanding the People's position that the jury's questions required a legal ruling beyond its responsibility, *the 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." Id. at 348. (Emphasis added).

While the trial court's wariness to go off script to provide the jurors with additional legal instruction on the admissibility of petitioner's confessions is understandable ("I don't want to get into where the fruit of the poisonous tree doctrine meets the jury instructions on voluntary confessions. That's I don't want to go there…. It's not a legal requirement" . . . "I don't see any other way of answering this that doesn't involve then instructing them on attenuation, and 'cat out of the bag,' and basically replaying the *Huntley* hearing, which is not their function here"), such concerns must give way to the more pressing concern: to protect petitioner's constitutional rights—and that means properly (fully) instructing the jury on the law. In point-of-fact, it *is* the jury's job "to replay the Huntley hearing" if they find a defendant's un-Mirandized statement to have been involuntary. Not, of course, in the *Huntley* sense—only a court can determine admissibility—but a jury is free to disagree with a judge in so far as he made a finding of voluntariness. And in order to make that independent assessment of voluntariness, the jury needs to understand what the rules are. A proper answer to the question asked by this jury would have been, "No, but...."; "No, you are not required to disregard those subsequent statements, but you may do so if you find that they too were involuntary." And because the defense argument was that all the confessions were part of a continuous course of conduct, the jury needed to be told about attenuation if the response was to be meaningful. *Seibert* requires no less.

The People make a series of additional arguments that do not withstand scrutiny.

First, the People contend that the response was "not erroneous under state law." (People's Objections at 10). As an initial matter, state law is substantively identical to *Seibert* on the issue of attenuation where, as here, "an improper, unwarned statement gives rise to a subsequent Mirandized statement as part of a 'single continuous chain of events.'" *People v. Paulman*, 5 N.Y.3d 122, 130 (2005) (internal citation omitted). Nor, for substantially the same reasons set forth in Judge Lehrburger's R&R, is it material to the analysis whether state law compelled the trial court to include an instruction on attenuation in its initial charge. Hernandez does not argue that *Seibert* compelled the trial court to instruct the jury on attenuation in its initial charge. (R&R at 84 ("[T]he Court is not confronted here with the question of whether an instruction on voluntariness or attenuation should have been given in the first place."). He argues that the trial court failed to "respond meaningfully to the inquiry" that the jury sent out. *People v. Almodovar*, 62 N.Y.2d 126, 131 (1984))). And as Judge Lehrburger correctly found, the trial court's terse answer of "No" to the jury's question was "neither meaningful nor responsive to the jury's request for the court to 'explain' what it must do" because it failed to give the jury any meaningful guidance on how to evaluate a central issue in the case. (*See* R&R at 86).

Second, the People argue that Hernandez "was not prejudiced by the absence of an attenuation instruction ... because the court's [original] charge left the jury well-equipped to assess the arguments petitioner actually made in summation—namely,

that petitioner was a 'limited, vulnerable man' whose will was overborne by 'undue pressure' from interviewers and that his initial confession was the product of custodial interrogation before the administration of *Miranda* warnings." (*See* Government's Objections at 12). But as Judge Lehrburger correctly found, the jury was "actively grappling with how to deal with the confessions." The jury sent out three notes on the issue of the voluntariness of the confessions. (*See* R&R at 91 (citing Dkt. No. 1-59 at 10209:20-10210:9)). And the original charge did not explain attenuation at all. So, when "the jury requested an *explanation* about whether finding Hernandez's initial confession to be involuntary would require them to disregard his subsequent confessions," "it was incumbent on the Trial Judge to provide" an accurate "supplemental instruction." (*See* R&R at 85).

Third, Judge Lehrburger correctly concluded that the jury note response satisfied the *Cupp* standard, which asks "whether the ailing instruction [in question] by itself so infected the entire trial that the resulting conviction violates due process," rather than "merely whether the instruction is undesirable, erroneous, or even 'universally condemned.'" *Cupp v. Naughten*, 414 U.S. 141, 146- 47 (1973); *see also* R&R at 83. This case "hinged entirely on Hernandez's confessions," and the People heavily and repeatedly relied on them to convict Hernandez. (R&R at 90; *see also id*. at 90-91 (noting that nothing aside from the confessions "directly link[ed] him to Patz's disappearance.")). Moreover, the jury was obviously focused on the voluntariness of Hernandez's confessions, as evidenced by its multiple notes to the

trial judge on this topic, including the jury note here in question. (*See* R&R at 91).

But rather than give the jury "direction [on] how to apply the analysis required by *Seibert*" to the confessions—the issue posed by the jury note—the trial court declined to give the jury any meaningful guidance and, as a result, "den[ied] [the] defendant the opportunity" to have the jury meaningful consider this "'highly credible defense.'" (R&R at 86-87 (quoting *Jackson*, 404 F.3d at 625)). This error was not merely "undesirable, erroneous, or even universally condemned." *Cupp*, 414 U.S. at 146. It went to the heart of the defense. (*See* R&R at 86-88; *Jackson*, 404 F.3d at 624-27 (affirming grant of habeas because denial of justification jury instruction violated defendant's due process).

Fourth, Respondent fails to persuade that the case law relied on by Judge Lehrburger compels a result different than the one he reached. In *Jackson*, the Second Circuit concluded that the trial court's refusal to give a justification instruction violated the petitioner's due process because "the evidence could have allowed a jury to conclude that Jackson acted justifiably and thus to acquit him of all homicide charges." *Jackson*, 404 F.3d at 624-25. Similarly, in *Rodriguez*, the Second Circuit found a due process violation where the state court failed to give a justification instruction. *Rodriguez*, 648 F. App'x at 139-40. There, mirroring the jury's mixed verdict in this case, the Second Circuit reasoned that the jury's acquittal of petitioner of second-degree murder and first-degree manslaughter ("counts for which the jury was charged on justification") "signal[ed] not only the State's failure to disprove justification beyond a reasonable doubt, but also the jury's openness to

crediting Rodriguez's version of events." *Id*. (jury notes showed that jury "clearly understood that it could not consider justification with respect to second-degree manslaughter," similar to the jury notes in Hernandez's showing it grappled with *Seibert*-related issues).

Respondent attempts to distinguish these cases on the grounds that, "The court's response did not preclude the jury from disregarding all of petitioner's subsequent statements if they found his initial statement at the CCPO involuntary; it simply conveyed that they were not required to do so" and "unlike *Rodriguez* and *Jackson*, the court's response did not create a situation where the jury was unable to acquit petitioner ...."(Respondent's Objections at 10-11). But these arguments both ignore the plain language of what the jury wanted—an *explanation* of how to treat the subsequent confessions if it concluded the original pre-Mirandized confession was involuntary. The instruction that was given had the practical effect of "preclud[ing] the jury from disregarding all of petitioner's subsequent statements if they found the initial statement at the CCPO involuntary" because it failed to inform the jury of its ability to find that the statements were involuntary, or provide the jury with any guidance at all about how to make that assessment.

Finally, Respondent's attempts to distinguish *Arroyo v. Jones*, 685 F.2d 35 (2d Cir. 1982) fail for substantially similar reasons. (People's Objections at 12-13). Specifically, just as the court in *Arroyo* "did not give the jury an[y] assistance in how to apply a presumption [as to intent—], whether they were free to disregard it, whether it was merely something they might infer, or whether the defendant had to

overcome it" (*Arroyo*, 685 F.2d at 40), the trial court here likewise "left the jury with no direction how to apply the analysis required by *Seibert*." (R&R at 86.) The jurors were not told that they could disregard the subsequent confessions; neither were they informed of how to decide whether subsequent confessions should be disregarded because they were not sufficiently attenuated.

There can be no serious question that the erroneous instruction here had a "special impact" on the jury given the prominence of the confessions to the case. That the jury continued to deliberate for almost a week after the trial court's response, strongly suggest that the jurors continued to struggle mightily—in the absence of meaningful guidance—with how to consider Hernandez's confessions.

Therefore, Respondent's objection to Judge Lehrburger's conclusion that Hernandez was deprived of due process by the trial judge's response to the jury's note is overruled.

However—and strange though it may seem—Petitioner's objection to the learned Magistrate Judge's conclusion that this constituted only harmless error fares no better. Even though the state court acted unreasonably in concluding that there was no error of constitutional magnitude in the trial court's response to the jury's request for clarification, Petitioner has not demonstrated that the state court's alternative holding—that any error in this regard was harmless—was either contrary to law or an unreasonable application of law to the facts. That counterintuitive result is compelled by the prevailing standard for evaluating harmless error findings on habeas. (*See* R&R at 88-95.).

A state-court merits determination of harmless error is reviewed "under a two-part standard." *Krivoi v. Chappius*, No. 21-2934-PR, 2022 WL 17481816, at *3 (2d Cir. Dec. 7, 2022).

A petitioner must convince the habeas judge that (1) there is grave doubt about the petitioner's verdict, as required under *Brecht Abrahamson*, 507 U.S. 619 (1993)), and (2) that every fair minded jurist would agree that the error was prejudicial, as required by AEDPA. *See Brown v. Davenport* 142 S. Ct. 1510, 1525 (2022). "A judge is in 'grave doubt' when 'the matter is so evenly balanced that the judge feels himself in virtual equipoise as to the harmlessness of the error.'" *Peck v. United States*, 106 F.3d 450, 454 (2d Cir. 1997) (quoting *O'Neal*, 513 U.S. at 435).

Judge Lehrburger concluded that Petitioner satisfied neither standard. He harbored "reasonable doubt," but not "grave doubt," about the guilty verdict reached by the jury on some counts. R&R at 92. Frankly, I find the discussion of "reasonable doubt" versus "grave doubt" confusing, especially as "reasonable doubt" is the standard applicable to a criminal conviction. But I need not explore this aspect of Judge Lehrburger's decision because he is correct that not every fair-minded jurist would agree that the error here was prejudicial.

As noted above, the Appellate Division concluded that the long period between the un-Mirandized questioning and ADA Dursanti's questioning—a total of eleven hours, including several hours during which Hernandez intermittently ate and slept—meant that his confession to Dursanti was sufficiently attenuated from the earlier questioning so as to render it voluntary. *See* R&R at 93-95. For this reason, the trial

judge's error in failing to give the jurors a meaningful answer to the third note insofar as it addressed statements made to law enforcement personnel was deemed harmless.[4] I cannot say that no reasonable

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[4] The jury's third note also referred to the confessions given to various lay witnesses to whom Hernandez confessed: "Rosemary and Becky Hernandez and the confessions to the various doctors." The trial judge correctly instructed the jury in its initial charge (Document 1-59 at 326-27), and then re-instructed the jury after receiving the notes, that:

> [S]tatements made by the defendant to civilians, that is people not engaged in law enforcement activity, you will evaluate that testimony like you will any other testimony. You must decide whether the statements were, in fact, made by the defendant and you must decide whether all or a portion of those statements were truthful and accurate. In making these decisions you will use the same tests of credibility and reliability that I discussed just a few minutes ago.

Document 1-59 at 386-877.

Of course, the trial courts instruction would control the jury's consideration of the "confessions" Hernandez made to Rosemary and Becky and other folks prior to his confessions to law enforcement, regardless of what the jury decided as to the lawfulness of Hernandez's subsequent confessions to law enforcement. And those early on statements certainly bolstered the People's case and, perhaps even, would have been sufficient enough alone to gain a conviction.

However, if a properly instructed jury were to determine that Hernandez statements to law enforcement (including his statement to the ADA) were indeed obtain in violation of his

(Continued…)

jurist confronted would have failed to reach the same conclusion as the Appellate Division on this point. Therefore, I, like Judge Lehrburger, cannot say that the failure to give the jurors a proper response to their note, while of constitutional magnitude, was anything other than harmless error.

CONCLUSION

For the reasons given in this Decision and Order, Petitioner's and Respondent's objections to the Report are denied following a *de novo* review.

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constitutional rights, it would seemingly follow that the jury would be required to make yet another determination: whether Hernandez's subsequent post- arrest statements to the doctors and other non-law enforcement persons should be excluded from their consideration, under the "fruit of a poisonous tree"' doctrine—yet another concept the trial court would have had to explain to the jurors. One can see why the *Medina* Court was reluctant to go down this rabbit hole.

Judge Lehrburger did not address the issue because "the parties [did] not addressed the extent to which *Seibert* would have any application to those confessions [confessions made to civilians] as they were not made directly to law enforcement personnel, although law enforcement personnel were present for at least some of those statements."

Regardless, the Court need not grapple with this tentacle of the *Seibert* error since the Court adopts the magistrate judge's principle finding that any *Seibert* error was harmless on the ground that the no reasonable jurist confronted with evidence of the attenuation between Hernandez un-Mirandized statement and the statement he later made to ADA Durasanti, would have failed to reach the same conclusion as the Appellate Division.

Careful review of Magistrate Judge Lehrburger's Report reveals that there is no facial error in its conclusions. The Court adopts Judge Lehrburger's Report and his recommendations contained therein, as the decision of the Court.

The petition for a writ of habeas corpus is denied and the petition is dismissed.

Section 2253(c) permits the issuance of a Certificate of Appealability only where a petitioner has made a "substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003). Under the controlling standard, a petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), (quoting *Barefoot v. Estelle*, 463 U.S. 800, 893, n. 4 (1983). The Court finds that a certificate of appealability should issue as to the issue of the "*Seibert*/inadequate response to the jury note question." Accordingly, the Court authorizes a Certificate of Appealability as to that limited issue and declines to issue a certificate as to any other ground presented in the petition.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 11, 2024

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PEDRO HERNANDEZ,

Petitioner,

- against -

DONITA MCINTOSH,

Respondent.
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REPORT AND RECOMMENDATION TO HON. COLLEEN MCMAHON: PETITION FOR HABEAS CORPUS

22-CV-2266 (CM) (RWL)

ROBERT W. LEHRBURGER, United States Magistrate Judge.

On the morning of May 25, 1979, six-year-old Etan Patz ("Patz") disappeared while walking the two blocks from his family's apartment to his school bus stop. An investigation ensued, but, at the time, no suspects were arrested or charged. Patz was never found. In 1983, President Ronald Reagan designated May 25 – the anniversary of Patz's disappearance – as National Missing Children's Day in the United States.

On February 14, 2017, almost 40 years after Patz's disappearance, Pedro Hernandez ("Hernandez"

or "Petitioner") was convicted of kidnapping and felony murder of Patz. Despite the absence of any physical evidence or even Patz's body, Hernandez was convicted primarily based on his multiple confessions to the crime. A central issue before and at trial was whether the confessions given by Hernandez – who has a history of mental illness and a low intelligence quotient ("IQ") – were made voluntarily, knowingly, and intelligently or were instead inadmissible, having been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

By the instant petition for habeas corpus pursuant to 28 U.S.C. § 2554, Hernandez challenges his conviction for four principal reasons. First, Hernandez argues that the trial court erred in denying his motion to suppress his confessions by unreasonably finding both that he was not in custody when he initially confessed and that he understood and could properly waive his *Miranda* rights. Second, Hernandez contends that the state courts erred by ignoring *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004), which found unconstitutional the law enforcement two-step interrogation practice of intentionally obtaining a confession without giving *Miranda* warnings, then issuing the warnings, and then obtaining a second confession.

Third, Hernandez asserts that the trial court made evidentiary rulings that deprived him of the opportunity to present a complete defense. Those rulings denied Hernandez the opportunity to present evidence of the culpability of one of two third-parties, as well as police reports memorializing contemporaneous statements made in the initial 1979 investigation. Finally, Hernandez argues that the state courts improperly ignored prejudicial contacts

between court officers and jurors, including informing jurors that jurors from Hernandez's first trial were sitting with Patz's family at the second trial.

As discussed below, the circumstances of Hernandez's confessions do implicate federal constitutional concerns. Moreover, the record provides evidence by which a reasonable juror or jurist could find reasonable doubt of Hernandez's guilt. However, that is not the standard this Court must apply. Nor is the standard whether this Court would reach a different conclusion than that made by the state courts, or even whether the state courts were incorrect. Instead, the Court must apply the highly deferential standard Congress has afforded to state courts in habeas cases. Accordingly, for the reasons that follow, I recommend that Hernandez's petition be DENIED and the petition dismissed.

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BACKGROUND

A. Initial Suspects

In 1982, law enforcement trained their focus on Jose Ramos ("Ramos"). Ramos, in 1979, had been the boyfriend of Susan Harrington, whom Patz's mother had previously hired to walk Patz home from school during the 1979 school bus strike. (Exs. 2 (Part 1) at 1:00:10-1:01:56; 22G at 3620:1-11; 22Q at 8277:3-5.[1]) In a 1982 interview with authorities, Ramos demonstrated familiarity with Patz's appearance and case but denied ever meeting him. (Exs. 22O at 7679:1-7680:3; 2 (Part 2) at 16:58-18:23, 22:11-24:19.) Several years later, in January 1986, Ramos was convicted of indecent assault for molesting two young boys and sentenced to three and a half to seven years. (Exs. 3-4; 22Q at 8227-30.)

In June 1988, Assistant United States Attorney Stuart Grabois ("Grabois") interviewed Ramos, whom the FBI considered a suspect in Patz's disappearance. (Ex. 22Q at 8230-33.) In November 1988, Barrett Harrington, Susan Harrington's son, divulged to Grabois that Ramos had molested him. (Ex. 22P at 8113-44.) On November 19, 1990, Ramos was sentenced to ten to twenty years in prison for "involuntary deviate sexual intercourse" for molesting another boy. (Exs. 4; 22Q at 8234-38.)

While incarcerated in 1991, Ramos was interviewed by FBI Special Agent Galligan

[1] Citations to "Ex._" refer to exhibits attached to Hernandez's Petition Under 28 U.S.C. § 2554 For Writ Of Habeas Corpus By A Person In State Custody filed on March 18, 2022 at Dkt. 1 ("Habeas Pet.").

("Galligan"), the case agent for the Patz investigation from 1989 to 2000. (Ex. 22Q at 8244:16-21, 8279:8-15.) During questioning, Ramos admitted to being a child molester and that "on the day that Etan Patz went missing, he was in Washington Square Park … [and] saw a little boy playing … [and] went up to the little boy … [whose] name was Jimmy" and said "I am Susan's friend." (Ex. 22Q at 8284:21-8285:2, 8493:18-8494:2.) Ramos stated that he brought Jimmy back to his apartment and "did to the little boy what the old Ramos does or did to little boys" before taking Jimmy to the subway and putting him on a train. (Ex. 22Q at 8285:14-8286:2, 8286:18-8287:1.) When Galligan questioned Ramos on Jimmy's physical description, Ramos' replies referenced Patz. (Ex. 22Q at 8286:3-17.) Although Ramos said that "[Jimmy] could have been Etan Patz," he never confessed and stated that "even if it was Etan Patz, I put him on the subway and sent him to his aunt." (Ex. 22Q at 8288:4-19.) The FBI and the U.S. Attorney's Office convened a federal grand jury, but ultimately declined to prosecute Ramos for lack of federal jurisdiction. (Ex. 22Q at 8290:11-13, 8291:7-25.) The Manhattan District Attorney's ("DA's") Office also declined to prosecute Ramos because of the absence of physical evidence. (Ex. 22Q at 8301:13-8302:6.) Ramos later was convicted in 2014 for failing to comply with sex offender registration. (Ex. 20.)

The investigation into Patz's disappearance was renewed in 2011 with a focus on Othniel Miller ("Miller"), a carpenter with a basement workshop on Prince Street between the Patz family's apartment and Patz's school bus stop. (Exs. 32 at 8; 22G at 3572:9-3573:1.) Miller did work in the Patz family's loft, and Patz would, on occasion, go to Miller's

basement workshop to help with the carpentry in exchange for small change. (Ex. 22G 3576:18-3577:6.) On May 24, 1979 – the night before he disappeared – Patz spent approximately 45 minutes with Miller in his basement shop working in exchange for one dollar. (Ex. 22G at 3576:3-16, 3576-78, 3643-44.) In a 2011 interview with the FBI, Miller told authorities that he had been "changing out of his work clothes" when he gave Patz the one dollar on May 24, 1979, and that he had previously had sexual intercourse with a ten-year old girl. (Ex. 32 at 8-9.)

On April 3, 2012, the FBI brought a scent dog trained to detect the odor of human decomposition to Miller's basement. (Ex. 32 at 8-9.) When the dog alerted to the scent of human decomposition, Miller asked "[w]hat if the body was moved?" (Ex. 32 at 8-9.) Pursuant to a warrant, Miller's basement was excavated on April 19, 2012. (Ex. 22J at 5054-56.) The search proved inconclusive and Miller was never charged in connection with Patz's disappearance.

B. Law Enforcement's Focus on Hernandez

After seeing press coverage of Miller's basement's excavation, Jose Lopez ("Lopez"), Hernandez's brother-in-law, called police with a tip that Hernandez was involved in Patz's disappearance. (Ex. 22I at 4448:7-4451:25.) On May 8, 2012, detectives interviewed Lopez. Through that interview and another with one of Hernandez's sisters, detectives learned that Hernandez had previously made statements to various people about killing a child in New York City. (Exs. 22I at 4633-34, 4657; 22J at 5057-58.)

Hernandez was born in Puerto Rico in 1974 and moved to New Jersey with his family when he was

about 13 years old. (Ex. 21C at 253.) In 1979, Hernandez worked at the bodega at the corner of Prince Street and West Broadway next to Patz's school bus stop. (Exs. 21C at 255; 22J at 4912:6-24, 4916:2-8.) During the initial investigation, police interviewed Hernandez since he was a bodega employee. (Exs. 47-48.)

In the years following his 1979 interview with police, Hernandez told multiple people that he had killed someone in New York City. While attending a religious retreat later in 1979, Hernandez told various group members that he had abused and killed a child in the basement of a New York City grocery store and placed the body in the garbage. (Ex. 22H at 3901:11-3905:18, 3980:1-23.) Also in 1979, Hernandez told Mark Pike ("Pike"), his neighbor at the time, that, while working at the store, he had strangled a black child who had thrown a ball at him and put the body in a dumpster. (Ex. 22H at 4057:23-4059:23.) And, in 1982, prior to their marriage, Hernandez told his now ex-wife Daisy Rivera ("Rivera") that, while he was living in New York and working at the bodega, he had strangled someone he described as a "muchacho" and a "gringo" who had "violated him," and put the body in a dumpster. (Ex. 22I at 4328:9-4330:20.) Neither Pike, Rivera, nor the religious group members, reported Hernandez's statements to the police. (*See* Exs. 22H at 3907:17-19, 3984:4-11, 4060:11-24; 22I at 4331:1-8.)

Hernandez has a history of mental illness and low intellectual ability. Throughout the 1990s and 2000s, various doctors noted Hernandez's "obsessive thoughts," "hallucinations," and "borderline impaired" intelligence, and diagnosed him with "affective disorder," "depressive disorder," "dependent

personality disorder," "personality disorder NOS," and "intermittent explosive disorder." (*See* Exs. 19A at SSA 19, 23, 71; 19D at SSA 272; 22R at 8778:1-20; 44 at 21.) In 2004 and 2005, Hernandez was diagnosed with "psychotic disorder NOS," "schizophrenia/bipolar," "psychotic" disorder, and "chronic mental illness." (Ex. 19A at SSA 19, 23-25, 27-28, 50, 71.) Doctors prescribed Hernandez the anti-psychotic drug Zyprexa. (Ex. 19A at SSA 19, 27-28, 37.) Between 1992 and 2014, various intelligence tests placed Hernandez's IQ between 67 and 76, putting him in the lower one to five percentile range compared to other people his age. (Ex. 21H at 848:1-852:16, Ex. 22P at 7768:4-10.)

C. May 23 To 25, 2012: Hernandez Is Questioned And Confesses To Police[2]

1. Police Arrive at Hernandez's House

At around 7:45 a.m. on May 23, 2012, members of the New York Police Department ("NYPD"), including Detectives Jose Morales ("Morales") and Dave Ramirez ("Ramirez"), accompanied by local police officers in marked cars, drove to Hernandez's home in New Jersey to interview him. (Exs. 21C at 225:13-227:14; 21D at 406:5-16.) Uniformed police officers knocked on the door and, when Hernandez answered, entered his home, and told him that some detectives wanted to speak with him. (Exs. 21C at 230:22-231:25; 21D at 406:17-20; 21E at 474:16-476:5.) Hernandez agreed to do so and came outside. (Ex. 21E at 477:18-19.) Morales and Ramirez then introduced

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[2] The facts in this section are derived from the 2014 *Huntley* Hearing Transcripts (Exs. 21A-21K), as well as the taped interrogations of Hernandez (Exs. 7, 8, 17).

themselves and asked Hernandez to accompany them to the local Camden County Prosecutor's Office ("CCPO") to discuss an old missing person's case in New York City, in connection with which Hernandez's name had "c[o]me up." (Exs. 21C at 233:25-236:25; 21F at 581:23-25.) Hernandez agreed. (Ex. 21C at 236:21-237:6.)

Morales asked Hernandez if he would "mind" if Morales "patted [him] down" for "everyone's safety," to which Hernandez replied "no problem." (Exs. 21C at 237:8-13; 21D at 411:7-25; 21F at 582:8-17.) While the detectives walked Hernandez to their unmarked police car, Morales asked Hernandez about a hard object he had felt while patting Hernandez down. (Exs. 21C at 237:15-20; 21F at 582:19-23.) Hernandez presented a cylindrical pill case. (Ex. 21F at 582:24-583:1.) Before getting into the car, Morales asked Hernandez if he had anything else in his pockets. (Exs. 21C at 238:4-7; 21D at 412:8-12.) In response, Hernandez emptied his pockets, removing his keys, a key chain, his wallet, and a cellphone. (Exs. 21C at 238:8-9, 24-25; 21D at 412:13-15.) Morales asked if Hernandez would "secure" his property in the trunk of the car, which he did. (Exs. 21C at 238:15-22; 21D at 412:13-413:6; 21F at 583:2-6.)

Before the car pulled away, Hernandez asked if this would "take a long time" because he needed to take his medication at noon. (Ex. 21C at 239:15-240:2.) Ramirez sent another detective back to Hernandez's house to get Hernandez's medications from Hernandez's wife Rosemary. (Exs. 21C at 240:5-8; 21F at 577:7-10.) Rosemary had already expressed concern to one of the CCPO officers that Hernandez was "unstable" and that "someone needed to stay with him." (Ex. 21E at 559:13-14.) Rosemary and Becky

Hernandez, Petitioner's daughter, traveled to the CCPO in another detective's car. (Ex. 21F at 577:1-4.)

During the ride, Hernandez asked "what this was about" and if "it had [] to do with child support issues with his ex-wife." (Ex. 21C at 240:17-20.) Ramirez reiterated that it "had to do with a missing child case in New York City." (Ex. 21C at 240:17-23.)

2. Police Question Hernandez For Seven Hours Without Giving *Miranda* Warnings

At around 8:00 a.m., the detectives and Hernandez arrived at the back parking lot of the CCPO. (Exs. 21C at 243:9-20; 21F at 583:18-19.) Hernandez was escorted through the back entrance and down a hallway to Room 133, which was a windowless eight-by-ten feet room with a desk, a few chairs, and a video camera disguised as a smoke alarm near the ceiling. (Exs. 21C at 167:19-23, 168:17-20, 244:11-16; 21F at 583:20-584:24.) Hernandez was not handcuffed. (Exs. 21C at 245:2-4; 21F at 584:13- 15.) While securing their firearms, Ramirez and Morales left Hernandez in the room with the case folder holding his possessions. (Exs. 21C at 250:17-251:14; 21F at 584:25- 585:4.) Upon returning to the room, Morales asked Hernandez if he wanted to take his items; Hernandez replied that he would collect them when he left. (Ex. 21F at 585:15- 18.)

Questioning began at around 8:10 a.m. (Ex. 21F at 619:23-25.) Hernandez was seated at the table in the corner furthest from the door, with Morales and Ramirez seated diagonally and across from him respectively. (Exs. 21C at 249:11-250:6, 251:24-252:12.) The door to Room 133 was left open. (Ex. 21C at 253:2-4.) Initial questioning focused on

Hernandez's upbringing, his time in New York City, and his work at the bodega. (Ex. 21C at 252:16-256:6.)

Meanwhile, other detectives, including Detective James Lamendola ("Lamendola"), brought Rivera and Pike to the CCPO and interviewed them there. (Exs. 21A at 26:1-12; 21B at 127:14-25; 21D at 344:2-345:9; 21G at 696:10-697:25.) Shortly after Hernandez's questioning began, police purposely escorted Rivera past Room 133. (Exs. 21B at 127:14-128:1.) Hernandez asked what she was "doing [t]here" and again inquired whether the interview was about "child support." (Ex. 21C at 257:4-22.) Ramirez repeated that they were investigating a "missing child case." (Ex. 21C at 258:1-4.) Pike was then escorted past, but Hernandez did not recognize him. (Exs. 21A at 26:9-27:6; 21C at 258:5-16.)

At around 10 a.m., Hernandez asked to take a bathroom break. (Exs. 21C at 261:4-6; 21F at 622:10-14.) Morales escorted Hernandez to the bathroom down the hallway and then returned to Room 133, leaving Hernandez alone. (Exs. 21C at 261:8- 262:8; 21F at 586:5-17.) When Hernandez exited the bathroom, he briefly chatted with a detective standing in the hallway whose family Hernandez knew. (Ex. 21D at 346:4- 350:1.)

When Hernandez returned to Room 133, Ramirez showed him Patz's missing persons poster and asked if he recognized it. (Ex. 21C at 266:3-268:7.) Hernandez asked "why are you showing me this poster?" (Ex. 21C at 269:17.) The detectives then asked Hernandez a series of questions about the poster, whether he had seen or interacted with children at the bodega, and if he knew about the location of a bus stop by the bodega. Hernandez

answered each question in the negative and stated that he had never seen the child or the poster before. (Ex. 21C at 268:16-269:8.) The detectives removed the poster but continued to ask Hernandez about his time working at the bodega. (Ex. 21C at 269:18-270:24.) Ramirez showed Hernandez a picture of Patz's parents, whom he did not recognize. (Ex. 21C at 273:14-24.)

At around 10:30 a.m., Manhattan Assistant District Attorneys ("ADA") Armand Durastanti ("Durastanti") and Virginia Nguyen ("Nguyen") arrived at the CCPO and began observing Room 133 via a closed-circuit TV. (Ex. 22K at 5582:23-5585:2.) Durastanti inquired as to whether the interrogation was being videotaped and was told it was not. (Ex. 22K at 5585:20-5586:3.) An investigator from the CCPO asked Durastanti if he wanted the recording devices turned on. Durastanti responded by saying "why don't we just wait to see what happens." (Ex. 22K at 5586:14-17.)

At around 11:40 a.m., the detectives began asking Hernandez about his religious beliefs and if he believed that he would go to heaven. Hernandez replied yes because he had "done nothing wrong and [] repented for [his] sins." (Ex. 21C at 276:19-277:1.) Ramirez asked Hernandez if he had "something to tell." (Ex. 21C at 277:10-11.) Hernandez said no, and then asked, "don't you have the guys that did that kid?" (Ex. 21C at 277:10-14, 280:15-18.) At noon, Morales provided Hernandez with his medication, which he took. (Ex. 21C at 281:3-21.) Hernandez told detectives that he had schizophrenia and bipolar disorder but had not seen a psychiatrist in "a long time." (Ex. 21D at 440:13-442:14.)

Shortly before 1:00 p.m., Morales asked Hernandez why he had not looked at the missing persons poster earlier. (Ex. 21C at 284:10-18.) Hernandez got "upset" and picked up a notebook from the table, held it in front of his face, and asked "what do you want me to do, look at it like this?" (Ex. 21C at 284:19-285:2.) Hernandez then told detectives that he was "tired of answering the same questions over and over again" and wanted to go home. (Exs. 21C at 285:25-286:3; 21G at 780:18-20, 781:15-19.) He also told detectives that they were "trying to pin this missing kid on me" and had him there "against his will." (Ex. 21G at 712:3-5, 780:14-17, 781:10-19.) The detectives replied by confirming with Hernandez that he was there voluntarily, and that "[n]obody's asking you to say anything you don't want to say." (Exs. 21C at 286:6-13; 21F at 628:17-629:5; 21G at 775:22-776:10.) The detectives asked Hernandez if he would answer some more questions, to which he answered "no problem." (Ex. 21F at 636:19-22.)

At 1:00 p.m., Ramirez and Morales left for lunch and asked Hernandez if he wanted anything to eat; he declined. (Ex. 21C at 287:1-9.) Lamendola took over for Ramirez and Morales. (Ex. 21C at 287:10-17.) Lamendola asked Hernandez about his father, whom Hernandez described as an abusive alcoholic. (Ex. 21G at 703:16-704:10.) Lamendola told Hernandez "about the cyclical patterns of abuse" and that child abuse "can cause that child to abuse other children when they [are] older." (Ex. 21G at 704:15-22.) Hernandez began to cry and clench his stomach, complaining of stomach pain. (Ex. 21G at 704:23-705:2.) He then "laid on the floor in the fetal position and started to shake." (Ex. 21G at 705:3-4.) Lamendola asked Hernandez if he needed anything;

Hernandez replied that he was cold and needed a jacket. (Ex. 21G at 705:5-8.) Lamendola left the room with the door open, returned with a jacket, and then told Hernandez to get back into the chair. (Ex. 21G at 705:10-706:16.)

Lamendola continued to talk about the cycle of abuse. Hernandez got "angry" and accused Lamendola of "trying to trick him." (Ex. 21G at 706:17-707:1.) Lamendola said he was trying to help Hernandez and only wanted the truth. (Ex. 21G at 707:3-4.) Lamendola asked Hernandez about his time in New York in the late 1970s, and Hernandez started to cry again. (Ex. 21G at 707:6-708:3.) As Hernandez cried, Lamendola continually told him that "the lies need[ed] to stop" and that "the truth has to come out now." (Ex. 21G at 708:15-18, 751:1-9.) Hernandez said that he "just want[ed] to go home."[3] (Ex. 21G at 773:8-11, 782:24-783:2.)

At around 2:00 p.m., Hernandez went to the bathroom, escorted halfway there by Lamendola. (Ex. 21G at 709:3-710:24.) Hernandez returned to Room 133, followed shortly thereafter by Ramirez and Morales. (Ex. 21G at 710:20-711:24.) The door was closed. (Ex. 21G at 784:9-11.) The detectives asked Hernandez if he had anything to tell them "about what happened in 1979." (Exs. 21C at 290:10-11; 21G at 711:25-712:2.) Hernandez asked again if they were "trying to pin what happened to that kid on [him]" and repeated that he "felt like going home." (Exs. 21C at 290:12-16; 21G at 712:4-5, 784:2-6.) The detectives once more confirmed with Hernandez that he had

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[3] Lamendola testified that he did not remember ever hearing Hernandez say the words "I want to go home." (Ex. 21G at 756:20-757:2.)

come voluntarily, with which Hernandez agreed. (Exs. 21C at 290:17-20; 21F at 640:17-19; 21G at 712:12- 14.) They told Hernandez that they would take him home if he wanted to, but that they "had a few more questions to ask him, and then after that, he could leave." (Exs. 21C at 290:17-20; 21F at 640:20-22.) Hernandez agreed to answer more questions. (Ex. 21F at 640:23.) Morales and Ramirez then left the room for about 15 minutes. (Ex. 21C at 290:21-291:18.) During their absence, Lamendola continued to tell Hernandez that they "needed to find out the truth about this." (Ex. 21G at 712:15-22.)

At around 2:30 p.m., Morales and Ramirez returned. They told Hernandez that they had interviewed people from his past and revealed Pike as the man who had walked by Room 133 earlier. (Exs. 21C at 291:20-292:5; 21F at 596:8-19; 21G at 713:9-11.) Hernandez asked to speak to his wife and said he would then tell the detectives what happened. (Exs. 21C at 292:6-8; 21G at 713:13-14.) The detectives replied that Hernandez could speak to his wife but that they wanted "to hear what [he had] to say, first." (Exs. 21C at 9-12; 21G at 713:18-20.)

Hernandez told detectives that, on May 25, 1979, he had seen Patz standing outside the bodega and asked him if he wanted something to drink. (Ex. 21G at 714:3- 4.) Patz replied yes, and accompanied Hernandez into the basement of the bodega, where Hernandez choked him and put his body in a garbage bag. (Ex. 21G at 714:4-12.) Hernandez put the bag in a box, which he carried out of the basement and left around the corner. (Exs. 21C at 292:21-23; 21G at 714:4-12.) Hernandez gave no motive, although he denied it being sexual. (Ex. 21C at 293:5-7.) The detectives asked if Patz had been carrying anything.

Hernandez said the boy had a "blue or black" book bag that Hernandez tossed behind the freezer in the basement and offered to show the detectives where it had been thrown. (Exs. 21C at 293:10-20; 21F at 598:4-10.) Detectives then embraced Hernandez. (Ex. 21G at 731:22-732:14.)

3. After Hernandez Confesses, Police Give The *Miranda* Warnings And Question Hernandez Again

Immediately after Hernandez's confession, Ramirez began reading Hernandez his *Miranda* rights. (Dkt. 21F at 598:15-17.) Video recording began at 2:53 p.m. with Ramirez asking Hernandez the final question of the *Miranda* warnings – "[n]ow that I have advised you of your rights, are you willing to answer questions?" (Ex. 7 at 14:53.[4]) Before Hernandez replied, Morales interjected, "Obviously, yeah, is that right?" (Ex. 7 at 14:53.) Hernandez said "yes" and signed the advice-of-rights form. (Ex. 7 at 14:53-54.)

Lamendola then asked Hernandez to "start from the beginning" and tell them "again exactly what you told us before." (Ex. 7 at 14:55-56.) When Hernandez did not immediately reply, the detectives began to prompt him. (Ex. 7 at 14:56.) Hernandez then provided an account of how he had strangled Patz almost identical to what he told detectives prior to receiving *Miranda* warnings. (Ex. 7 at 14:56-15:02.) Hernandez insisted that Patz was "still alive" when he left him in the box and that the box was gone when

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[4] At the beginning of this video, Lamendola is sitting opposite Hernandez, while Ramirez is sitting diagonally, and Morales is sitting next to him.

Hernandez checked the next day. (Ex. 7 at 15:02-15:08.) Hernandez again offered to show detectives where he put the box saying "[i]f you take me I will show you" but added "I need to go to the doctor tomorrow … to get my medication." (Ex. 7 at 15:05.)

Morales showed Hernandez the missing persons poster and asked "[i]s this the guy?" (Ex.7 at 15:05.) Hernandez confirmed, and the detectives asked him to write a confession on the poster. Morales directed Hernandez to write "[t]his is the kid I strangled" in the margin. (Ex. 15:05.) Lamendola pointed to the poster and asked Hernandez "who is this? I want you to say it." (Ex. 7 at 15:06.) Hernandez said it was Patz and, in response to another question from Lamendola, said he had choked the boy. Morales again pointed to the poster and told Hernandez to write "I choked him." (Ex. 7 at 15:06.) Hernandez wrote: "I am sorry + shoke [*sic*] him." (Ex. 5.)

Hernandez then told detectives how he had later confessed to Rivera and Pike. (Ex. 7 at 15:07-08, 15:15-16.) He became emotional and said "I'm going to be in jail for the rest of my life," to which Lamendola replied "you are a sick person that needs help." (Ex. 7 at 15:10.) When asked why he did it, Hernandez said he lost his head and "it was something that just happened." (Ex. 7 at 15:10.)

At 3:18 p.m., at Morales' request, Hernandez initialed each page of a statement Morales had written of Hernandez's various statements. (Ex. 7 at 15:18-19.) Shortly before 4:00 p.m., Hernandez spoke with his wife and daughter in the presence of two detectives. (Ex. 21D at 319:11-320:20.) He told them that "a long time ago … he killed a child … a boy" who he put "in a bag [and] then … in a box," he did not

know why he did it, and that he would "be in jail for the rest of [his] life." (Ex. 21D at 321:6-12.)

4. Police Take Hernandez to SoHo

At around 8:00 p.m., after providing Hernandez with his medication, Morales and Ramirez drove Hernandez from the CCPO to SoHo. (Ex. 21D at 322:25-325:4.) At around 10:00 p.m., they arrived at the corner of Prince Street and West Broadway, the where the bodega had been located in 1979. (Ex. 21D at 324:15-325:22.) Hernandez led detectives around the neighborhood, pointing out where he had first seen Patz. (Ex. 21D at 326:1-4.) He then identified both 115 Thompson Street and 113 Thompson Street as possible locations where he could have left the box. (Ex. 8 at 1:45-2:42.)

5. Hernandez Is Interrogated By ADA Durasanti And Confesses Again

At around 11:00 p.m., detectives drove Hernandez to the Manhattan DA's office. (Ex. 21B at 108:13-16.) For the next few hours, Hernandez intermittently slept and ate in the presence of officers. (Ex. 21B at 110:5-112:16.) At around 2:00 a.m. on May 24, 2012, Hernandez was escorted to an interview room. (Ex. 21A at 28:8-29:24.)

At around 2:18 a.m., ADA Durastanti, who had previously observed Hernandez's interrogation at the CCPO, advised Hernandez of his *Miranda* rights. (Ex. 17 at 2:18-19.) Durastanti then told Hernandez "I know that you spoke to detectives yesterday … I want you to understand that the statement you're making here to me today has nothing at all to do with that statement. I want you and I to start brand new, okay?" (Ex. 17 at 2:19.) Durastanti questioned

Hernandez off and on until about 7:00 a.m., during which Hernandez again confessed to strangling Patz in the bodega's basement, although with certain details deviating from his prior confessions at the CCPO. (Ex. 17 at 2:23-38.)

At around 6:40 a.m., Durastanti and Hernandez discussed Hernandez's health. Hernandez told Duratanti of his family history of mental illness and that he was "bipolar and schizophrenic" and currently taking the anti-psychotic drug Zyprexa. (Ex. 17 at 6:43- 44, 6:53-57.) Around 7:00 a.m., Hernandez told Durastanti about seeing and speaking with a "vision" of his dead mother's ghost. (Ex. 17 at 6:58-59.) Hernandez was unsure if his conversation with this "vision" was just his imagination. (Ex. 17 at 6:59.)

At approximately 7:04 a.m., at the end of the interrogation, Hernandez asked Durastanti about his right to counsel in the following exchange:

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 mean when I was talking to you if I did not want to answer you?
Durastanti:	Yes.
Hernandez:	Oh, that's what it meant?
Durastanti:	Yes.
Hernandez:	Oh.
Durastanti:	That if you … need, you can have an attorney, if you want an attorney.

Hernandez:	I would like to have an attorney to represent me … when, if I were to go to court.
Durastanti:	Ok, right, if you were to go to court.
Hernandez:	Yeah I want that.
Durastanti:	Right, no, you will have an attorney represent you … if you go to court. … But the question, the question that I was asking was whether you wanted one now?
Hernandez:	When I was talking to you?
Durastanti:	Yeah.
Hernandez:	No, because I don't have nothing to hide no more … I'm being honest. I said what I did … so I just feel bad what I did.

(Ex. 17 at 7:04-05.)

Between 7:30 a.m. and 8:30 p.m., Hernandez was taken for arrest processing and to Central Booking. (Exs. 21D at 335:6-17; 21E at 565: 24-566:10.) On May 25, 2012 at around 5:00 a.m., Hernandez was taken to Bellevue Hospital ("Bellevue") for psychiatric treatment. (Exs. 21E at 525:1-527:1; 21G at 675:5-19.)

D. Other Confessions

After his arrest, Hernandez made several other admissions and confessions that generally resembled his prior confessions at the CCPO and to ADA Durastanti but did not mention Patz by name. For example, while at Bellevue, Hernandez told a nurse he had "bipolar schizophrenia" and that he had

"choked a person 33 years" prior and was "sorry." (Ex. 21G at 670:23-671:1, 672:9-674:14.) Additionally, on June 27, 2012, Hernandez was transferred to Rikers Island and screened by Dr. Flavia Robotti. Hernandez told Dr. Robotti that he had "hurt a child" and had told his first wife and his "church in a prayer group, years ago, but [he] did not tell them the specifics." (Ex. 22L at 6180:21-6181:18.) Hernandez also reported that he had "confessed what [he] did because [he] carried this weight inside all these years" and that he "ha[d] been thinking of choking [him]self." (Ex. 22L at 6180:21-6181:18.)

In June, July, and August of 2012, Hernandez was evaluated by Dr. Michael First, who diagnosed him with schizotypal personality disorder. Throughout the multi-day evaluation, Hernandez several times admitted to seeing a little boy outside of the bodega, approaching him and asking him if he wanted a drink, choking him, and putting the body in a box. (See Ex. 22M at 6623:6-6628:11.) At trial, Dr. First testified that while certain details of Hernandez's confessions changed from one evaluation to the other, the basic components did not, although Hernandez also expressed doubts of his involvement. (Ex. 22M at 6623:6-6628:11.) Dr. First also testified that Hernandez had again related a confession to him as recently as August 2016.[5] (Ex. 22M at 6635:1-13.)

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[5] A witness for the defense, Dr. First diagnosed Hernandez with "schizotypal personality disorder" (Ex. 22M at 6502:22-6503:5) and testified that changes in Hernandez's confessions, as well as Hernandez's fluctuating expressions of doubt, were the product of the "diminishment of the strength of a delusional conviction" (Ex. 22M at 6629:16- 6631:21.) According to Dr. First, Hernandez's "delusional conviction was very strong" right after

(Continued…)

Hernandez also provided similar admissions to Dr. Michael Welner, who conducted over sixteen hours of videotaped interviews with Hernandez while he was at Rikers in 2014. (Ex. 22S at 9002:13-9006:21.) Hernandez told Dr. Welner that he had not seen the face of the child he choked during the incident, but that "he saw the picture of the child, the next time he saw the child was when he saw his photograph on the news" and that he had told his church group, Rivera, and Pike about what he had done. (Ex. 22S at 9005:17-9006:21.)

E. Pre-Trial and Trial Proceedings

Hernandez was charged with two counts of murder in the Second Degree and one count of kidnapping in the First Degree. (Ex. 22U at 10166:1-10171:4.)

1. Motion to Suppress and *Huntley* Hearing

On September 15, 2014, the court conducted a *Huntley* hearing to determine whether Hernandez's pre-arrest inculpatory statements were voluntarily made and in compliance with Hernandez's right to warnings as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).[6] (See Exs. 21A-21K.) The parties called witnesses to establish the facts of the

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his arrest in May 2012 and he "absolutely believed" what he was saying was real after seven hours with the police, but only a few months later he trusted his recollection less. (Ex. 22N at 7012:5-7014:24.)

[6] A *Huntley* hearing is a suppression hearing conducted pursuant to *Dunaway v. State of New York*, 442 U.S. 200, 99 S. Ct. 2248 (1979), *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961), and *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965).

May 2012 interrogation as detailed above. The parties also each called psychologists to testify to Hernandez's ability to waive his right to silence.

Hernandez's counsel called psychologist Dr. Bruce Frumkin ("Dr. Frumkin"), who testified that Hernandez could not intelligently waive his right to silence. (Ex. 21H at 870:8-20.) In 2013, Dr. Frumkin examined and conducted in-person testing of Hernandez for about ten hours. (Ex. 21H at 834:19-835:23, 842:13-843:20, 865:10-866:17, 871:7-872:5.) Dr. Frumkin also reviewed Hernandez's medical records, reports by other doctors, police reports, and video-recorded interviews. (Ex. 21H at 826-36.) Dr. Frumkin noted that, during testing, Hernandez provided answers indicating that he could not appreciate the significance of his right to silence and did not understand that he could invoke his right to silence and counsel at any time. (Ex. 21H at 824:7-825:12, 857:22-24, 862:15-864:13, 870:8-20, and 966:22-967:6.) Dr. Frumkin opined that these answers, along with Hernandez's "very deficit" IQ (*see* Ex. 21H at 847:6-10, 850:3-4, 904:12-16, 956-957), demonstrated that he would have been incapable of making an intelligent waiver of his *Miranda* rights during the May 2012 interrogation. (Ex. 21H at 966:25-967:6.)

The Government called psychologist Dr. Michael Sweda ("Dr. Sweda") in rebuttal. In 2014, Dr. Sweda evaluated Hernandez for about 21 hours over six days and additionally reviewed video recordings and the reports of other doctors. (Ex. 22I at 1049:20-1067:21.) Dr. Sweda opined that, although Hernandez had "[b]orderline intellectual functioning," he was capable of intelligently waiving his rights. (Exs. 22I at 1069:25-1070:14; 21J at 1157:3-7.) In reaching this

opinion, Dr. Sweda noted that Hernandez had displayed high "adaptive functioning" throughout his life and a "reasonable understanding" of his *Miranda* rights in interviews. (Exs. 22I at 1061:14-1079:14, 1083:4-1086:19; 22J at 1147:7-20.)

On October 20, 2014, Hernandez's counsel moved to reopen the *Huntley* hearing to present additional testimony to support Hernandez's limited cognitive functioning. (*See* Exs. 24-25.) On November 24, 2014, after briefing from the parties, the trial court issued an order denying both Hernandez's motions to reopen and to suppress. (Ex. 31 at 20.) The court found that Hernandez "was not in custody at the time his initial statements were made" and, thus, his pre-*Miranda* statements were not subject to suppression. (Ex. 31 at 18.) "[A]ssessing the totality of the circumstances," the court held that a "reasonable person" in Hernandez's position "would not have thought [they were] in custody." (Ex. 31 at 17.) Because the court found Hernandez's pre-warning statement admissible, it expressly did not "reach the issue of whether the post-*Miranda* statements were sufficiently attenuated." (Ex. 31 at 21.) Second, the court held that, for purposes of admissibility, Hernandez had knowingly, intelligently, and voluntarily waived his *Miranda* rights. (Ex. 31 at 18, 20.) In reaching its decision, the court favored Dr. Sweda's opinion over Dr. Frumkin's, finding that Dr. Sweda's "assessment was based on a more comprehensive assessment of Hernandez's capabilities." The court also cited Hernandez's competency test scores and his "basic ability to make his way in the world." (Ex. 31 at 19-20.)

2. Hernandez's First Trial

Hernandez's first trial began on January 30, 2015. On May 8, 2015, after deliberating for 18 days, the jury announced that it was unable to reach a verdict. The court declared a mistrial. (Ex. 56 at 42.)

3. Evidentiary Motions Prior To The Second Trial

On November 4, 2015, prior to commencement of the second trial, Hernandez filed a motion in limine to admit evidence of third-party culpability specifically as related to Ramos and Miller. (Ex. 32.) Pursuant to *People v. Primo*, 96 N.Y.2d 353, 728 N.Y.S.2d 735 (2001), Hernandez made offers of proof, including providing an affirmation prepared by the Manhattan DA's Office to obtain the search warrant for Miller's basement as part of the 2012 investigation. (Ex. 32 at 8-10.) On December 15, 2015, the trial court heard oral argument on various pretrial motions, including the motion to admit evidence of third-party culpability. (Ex. 39.)

Additionally, on January 4, 2016, Hernandez filed a motion to admit statements of unavailable witnesses and other evidence. (Ex. 40.) In particular, Hernandez sought to admit police reports from 1979 memorializing witness interviews and detectives' investigation notes. In a February 8, 2016 hearing on various pre-trial issues, the trial court denied Hernandez's motion without explanation.[7] (Ex. 41 at 43-44.)

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[7] The Trial Judge stated at the hearing that he would issue a written decision as to why he denied the motion to admit the (Continued…)

On March 7, 2016, the trial court denied Hernandez's motion in limine to admit evidence of third-party culpability with respect to Miller but permitted the introduction of certain evidence about Ramos. (Ex. 42.) In its decision, the court held that Hernandez could neither "introduce evidence about statements Miller made to the FBI in 2012. Nor… elicit testimony about the actions of a 'scent dog' in 2012" in Miller's basement. (Ex. 42 at 3.) The court did permit Hernandez to call Miller to the stand, although it was understood that Miller was certain to assert his Fifth Amendment right against self-incrimination. (Ex. 38 at 5.)

4. Hernandez's Second Trial

Hernandez's second trial began on September 12, 2016 before presiding Justice Maxwell Wiley (the "Trial Judge").[8]

a. The Government's Case

The Government's case focused on the events of Patz's 1979 disappearance, the 2012 investigation into Hernandez, and evidence to establish that Hernandez was not severely mentally impaired. Since there was no physical evidence, the Government's case heavily depended on Hernandez's confessions to law enforcement, as well as the various statements Hernandez made to Pike, Rivera, and others in the years following Patz's disappearance. The

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police reports from 1979 (Ex. 41 at 43:17-44:5), but no such written decision appears in the record.

[8] Justice Wiley also conducted each of the pre-trial and trial hearings discussed herein, and additionally ruled on the motion to set aside the verdict.

Government also argued that, while incarcerated, Hernandez had begun exhibiting signs of malingering and exaggerated psychiatric symptoms.

b. Hernandez's Case

Hernandez presented substantial evidence that Ramos was responsible for Patz's disappearance and that Hernandez had a well-documented history of mental illness, poor memory, and low intellectual ability. Hernandez called various doctors as witnesses who attested that Hernandez suffered from a psychopathology called "Schizotypal Personality Disorder," a disorder that can cause delusions, visions, and persistent distortions in a person's ability to comprehend reality. This disorder, according to Hernandez, made him especially susceptible to providing a false confession.

c. Jury Instructions and The Jury Note

The trial court delivered its jury charge on February 1, 2017. Justice Wiley instructed the jurors that it was the Government's burden to prove beyond a reasonable doubt that Hernandez had made his confessional statements voluntarily. (Ex. 22U at 10151:23-10152:2.) In particular, the Trial Judge instructed the jury that a statement is not voluntary if obtained "by the use or threatened use of physical force" or "any other improper conduct or undue pressure which impairs the defendant's physical or mental condition to the extent of undermining his ability to make a choice of whether or not to make a statement." (Ex. 22U at 10152:6-13.) The Trial Judge told the jury that, in making its determination of voluntariness, it could consider factors like Hernandez's "age, intelligence, physical and mental condition, and the conduct of the police during their

contact with [him]." (Ex. 22U at 10152:14-10153:1.) The jury also received instructions on the criteria by which to determine if a voluntary statement from Hernandez had nonetheless been a product of custodial questioning prior to the administration of *Miranda* warnings (Ex. 22U at 10153:20-10155:22) or was not prefaced by a knowing, intelligent, and voluntary waiver of *Miranda* rights. (Ex. 22U at 10155:23-10158:7.)

The jury began deliberations that same day. (Ex. 22U at 10182:12-15.) On February 2, 2017, the jury sent a note to the court which read:

> 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.

(Ex. 22U at 10202:5-16) (emphasis in original). The trial court solicited each party's position. The Government asserted that the appropriate answer was "no," while Hernandez's counsel said it was "yes." (Ex. 22U at 10202:17-19.) The court agreed with the Government that "the answer is no. That's the short answer." (Ex. 22U at 10202:20- 21.) Hernandez's counsel argued that simply answering "no" was misleading and urged the court to "[a]t the very least … instruct [the jury] that it's up to them. They don't have to disregard them but [can] if they choose to." (Ex. 22U at 10204:16-18, 10205:7-12, *see* 10225:22-10226:3.) Ultimately, when the jury returned, the

trial court judge read them back the question and said "the answer is, no." (Ex. 22U at 10231:10-19.)

On February 14, 2017, the jury acquitted Hernandez of intentional murder and convicted him of felony murder and kidnapping. (Ex. 22U at 10253:22-10258:3.)

F. Motion To Set Aside The Verdict

On March 15, 2017, Hernandez submitted a motion to set aside the verdict under CPL § 330.30(2) on the basis of jury contamination. (*See* Ex. 52 at ECF 1.) Hernandez's attorney also requested a hearing to determine the applicable facts. (*See* Ex. 52 at ECF 1.)

Hernandez's counsel alleged that, immediately after the verdict was announced, second-trial jurors were seen interacting with first-trial jurors who had been watching the trial regularly and sitting with the Patz family. Hernandez's motion was supported with news clippings of articles about the trial and the jury's conduct, an attorney affidavit, and the affidavit of Joe O'Brien ("O'Brien"), a private investigator enlisted by Hernandez's counsel who reached out to jurors. (Ex. 52 at ECF 3-7, 20-46.) On March 31, 2017, Hernandez's counsel supplemented the motion with an additional memorandum of law and affidavit from O'Brien. (Ex. 53.) According to Hernandez's counsel, the investigation into juror behavior and the various affidavits and news articles showed that numerous members of the jury were aware that first-trial jurors were watching the trial and supporting the Patz family. (*See* Ex. 52.) Additionally, Hernandez's counsel contended that court officers improperly informed the jury of the identities of first-trial jurors. (*See* Ex. 53 at 2.)

On April 6, 2017, the trial court denied Hernandez's motion without holding a factual hearing because it found that Hernandez's moving papers neither alleged any ground constituting a legal basis for the motion, nor contained sworn allegations of all facts essential to support the motion. (Ex. 54 at ECF 2 (citing CPL § 330.40(2)(e).) Specifically, the court held that "[t]he lawful presence of former jurors … does not affect any substantial rights of the defendant," and that none of the sworn affidavits supported Hernandez's factual claims. (Ex. 54 at ECF 3-4.)

On April 18, 2017, the trial court sentenced Hernandez to concurrent terms of 25 years to life imprisonment. (Ex. 55 at 19.)

G. Appeals

Hernandez appealed his conviction to the New York Appellate Division, First Department. Hernandez advanced eleven arguments, which, in relevant part, included that: (1) the trial court erred in both failing to suppress his initial confession and in finding that he was capable of knowingly and intelligently waiving his *Miranda* rights; (2) various evidentiary and trial rulings violated Hernandez's right to present a complete defense; (3) the trial court erred in its response to the jury note; and (4) the trial court erred in denying, without a hearing, Hernandez's post-verdict motion alleging jury contamination. (*See* Ex. 56.)

On March 26, 2020, the First Department affirmed the judgment in its entirety. *People v. Hernandez*, 181 A.D.3d 530, 122 N.Y.S.3d 11 (2020). The court held that the trial court properly denied Hernandez's motion to suppress in determining that

Hernandez was not in custody before giving his initial confession "because a reasonable innocent person in defendant's position would not have thought he was in custody." *Id.* at 530, 122 N.Y.S.3d at 13. The court further affirmed the trial court's finding that Hernandez made a knowing and intelligent waiver of his *Miranda* rights, categorizing his exchange with ADA Durastanti at the end of his interrogation on May 24, 2012 as "demonstrat[ing] [Hernandez's] ability, rather than inability, to understand his rights." *Id.*

Additionally, the Appellate Division found that the trial court's exercise of discretion in its various evidentiary rulings did not impair Hernandez's right to present a defense or any other constitutional rights and that the response to the jury note had been "correct." *Id.* at 533, 122 N.Y.S.3d at 15. "Even assuming, without deciding, that the [trial] court should have added instructions on the circumstances whereby a statement may or may not be attenuated from a prior statement found to be involuntary," the Appellate Division stated that "there is no reasonable possibility that the verdict would have been different" since Hernandez's confession to Durastanti "was fully attenuated from all of his confessions to the police." *Id.* Finally, the court held that it was not an abuse of discretion for the trial court to deny the motion to set aside the verdict without holding a factual hearing because Hernandez had failed to provide affidavits from anyone with first-hand knowledge of the material facts of alleged jury contamination. *Id.*

On August 24, 2020, the New York Court of Appeals denied leave to appeal. *People v. Hernandez*, 35 N.Y.3d 1066, 129 N.Y.S.3d 376 (N.Y. 2020). Hernandez then petitioned the Supreme Court of the

United States for a writ of certiorari, which was denied on March 22, 2021. *People v. Hernandez*, _ U.S. _, 141 S. Ct. 1691 (2021).

H. The Instant Action

On March 18, 2022, Hernandez filed his petition for a writ of habeas corpus, arguing that relief is warranted because: (1) the trial court erred in denying his motion to suppress by both unreasonably finding that Hernandez was not in custody when he initially confessed and that Hernandez understood and could properly waive his *Miranda* rights; (2) the state courts erroneously ignored the Supreme Court's decision in *Missouri v. Seibert* governing the police tactic of interrogating a suspect before and after the reading of their *Miranda* rights; (3) the trial court's evidentiary rulings excluding third-party culpability information about Miller and certain police reports deprived Hernandez of the opportunity to present a complete defense; and (4) the state courts improperly ignored prejudicial contacts between court officers and jurors. (Habeas Pet. at ECF 5-10.) On March 22, 2022, this case was assigned to me for a report and recommendation. (Dkt. 5.) The Government answered the petition on September 2, 2022. (Dkts. 17-19.) Hernandez replied on December 2, 2022, at which time the Petition was fully briefed. (Dkt. 25.) The Court heard oral argument on August 23, 2023.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits a federal court's ability to provide habeas corpus relief. 28 U.S.C. § 2254(a). Under AEDPA, a state prisoner's application for a writ of habeas corpus shall not be granted unless the state court's decision:

> (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In making that determination, a federal court must afford deference to the state court:

> Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to 'train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's federal claims' … and to give appropriate deference to that decision.

Wilson v. Sellers, _ U.S. _, 138 S. Ct. 1188, 1191-92 (2018) (internal citations omitted) (quoting *Hittson v. Chatman*, 576 U.S. 1028, 1028, 135 S. Ct 2126, 2126 (2015) (Ginsburg, J., concurring in denial of certiorari)).

A state court decision is "contrary to" clearly established precedent when the state court applies a rule that is "diametrically different, opposite in character, or mutually opposed" to the governing law set forth in Supreme Court cases. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 1519 (2000) (internal quotations marks omitted) (quoting *Contrary*, Webster's Third New International

Dictionary (1976)). Alternatively, a "court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle … but unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850 (2002) (citing *Williams*, 529 U.S. at 407-08, 120 S. Ct. at 1520-21). This inquiry focuses not on whether the state court's application of clearly established federal law was merely incorrect or erroneous but on whether it was objectively unreasonable. *Bell*, 535 U.S. at 694, 122 S. Ct. at 1850 (citing *Williams*, 529 U.S. at 409-10, 120 S. Ct. at 1521). "Under § 2254(d), a habeas court must determine what arguments or theories supported, or … could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011).

AEDPA forecloses "'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'" *Parker v. Matthews*, 567 U.S. 37, 38, 132 S. Ct. 2148, 2149 (2012) (per curiam) (quoting *Renico v. Lett*, 559 U.S. 766, 779, Accordingly, "[a] state court's findings are not unreasonable under § 2254(d)(2) simply because a federal habeas court reviewing the claim in the first instance would have reached a different conclusion." *Pine v. Superintendent, Green Haven Correctional Facility*, 103 F. Supp.3d 263, 275 (N.D.N.Y. 2015) (citing *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 849 (2010)). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that

determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939 (2007).

Even if a trial-court error meets the standards required by AEDPA, habeas relief is not warranted unless the violation "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 1722 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)); *see also Fry v. Pliler*, 551 U.S. 112, 121, 127 S. Ct. 2321, 2327 (2007) (confirming continued applicability of *Brecht* under AEDPA); *Bentley v. Scully*, 41 F.3d 818, 824 (2d Cir. 1994) ("Habeas relief is not appropriate when there is merely a 'reasonable possibility' that trial error contributed to the verdict.") (quoting *Brecht*, 507 U.S. at 637, 113 S. Ct. at 1721)); *Butler v. Graham*, No. 07-CV-6586, 2008 WL 2388740, *6 (S.D.N.Y. June 12, 2008) (recognizing and applying the "substantial and injurious effect" standard and citing *Brecht* and *Fry*).

The petitioner "bears the burden of proving by a preponderance of the evidence that his constitutional rights have been violated." *Jones v. Vacco*, 126 F.3d 408, 415 (2d Cir. 1997). The petitioner also bears "the burden of rebutting the presumption of correctness" of state court fact determinations "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Where a state appellate court summarily affirms a decision by the lower court, the federal habeas court "'look[s] through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "then presume[s] that the unexplained decision adopted the same reasoning."

Wilson, _ U.S. at _, 138 S. Ct. at 1192. That presumption may be rebutted "by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.*, U.S. at _, 138 S. Ct. at 1192.

DISCUSSION

I. Hernandez's Motion to Suppress Claims

Hernandez contends that the state courts were unreasonable in finding both that he was not in custody for his pre-*Miranda* questioning and that he intelligently waived his *Miranda* rights. The Court first summarizes the relevant law and then addresses each argument in turn.

A. Relevant *Miranda* Law

The Fifth Amendment guarantees the right against self-incrimination. U.S. Const. Amend. V. In *Miranda v. Arizona*, the Supreme Court held that criminal defendants are entitled to prophylactic warnings about their right not to incriminate themselves. 384 U.S. at 467-74, 86 S. Ct. at 1624-28. "An interaction between law enforcement officials and an individual generally triggers *Miranda*'s prophylactic warnings" only when it "becomes a 'custodial interrogation.'" *United States v. FNU LNU*, 653 F.3d 144, 148 (2d Cir. 2011); *Parsad v. Greiner*, 337 F.3d 175, 181 (2d Cir. 2003), *cert denied*, 540 U.S. 1091, 124 S. Ct. 962 (2003) ("[a] suspect is entitled to *Miranda* warnings only if he or she is interrogated while 'in custody"). Logically, determining whether an interrogation is custodial involves "two parts: (a)

there must be an interrogation of the defendant, and (b) it must be while [the defendant] is in 'custody.'" *FNU LNU*, 653 F.3d at 148 (citing *Cruz v. Miller*, 255 F.3d 77, 80-81 (2d Cir. 2001)). "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Acosta v. Artuz*, 575 F. 3d 177, 189 (2d Cir. 2009) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689 (1980).

Even if a person is subject to an interrogation, *Miranda* warnings are only required, "where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977). "'[C]ustody' for *Miranda* purposes is not coterminous with … the colloquial understanding of custody." *FNU LNU*, 653 F.3d 144 at 152-53. The test for determining custody is objective and asks "(1) whether a reasonable person would have thought he was free to leave the police encounter at issue and (2) whether a reasonable person would have understood his freedom of action to have been curtailed to a degree associated with formal arrest." *United States v. Faux*, 828 F.3d 130, 135 (2d Cir. 2016) (citations and quotation marks omitted); *see also Stansbury v. California*, 511 U.S. 318, 323 (1994) ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation"). Where a reasonable person would not have felt free to leave, "a court must [then] ask whether, in addition to not feeling free to leave, a reasonable person would have understood his freedom of action to have been

curtailed to a degree associated with a formal arrest." *United States v. Newton*, 369 F.3d 659, 671-72 (2d Cir. 2004) *cert. denied*, 543 U.S. 947, 125 S. Ct. 371 (2004); *accord Tankleff v. Senkowski*, 135 F.3d 235, 243-44 (2d Cir. 1998). "Only if the answer … is yes was the person in custody for practical purposes, and entitled to the full panoply of protections prescribed by *Miranda*." *Newton*, 369 F.3d at 672; *see also Georgison v. Donelli*, 588 F.3d 145, 155 (2d Cir. 2009) (stating that the overarching question is whether "'a reasonable man in the suspect's position would have understood his position'" as "'subjected to restraints comparable … with a formal arrest.'") (quoting *Berkemer v. McCarty*, 468 U.S. 420, 421-22, 104 S. Ct. 3138, 3141 (1984).)

When determining whether a person is in custody for *Miranda* purposes, courts evaluate the totality of "'the circumstances surrounding the interrogation; and … [whether] given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'" *United States v. Romaszko*, 253 F.3d 757, 760 (2d Cir. 2001) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 465 (1995)). Relevant factors include: "whether a suspect is or is not told that she is free to leave; the location and atmosphere of the interrogation; the language and tone used by the police; whether the suspect is searched, frisked, or patted down; and the length of the interrogation." *Tankleff*, 135 F.3d at 244 (internal citations omitted); *see also People v. Centano*, 76 N.Y.2d 837, 838, 559 N.E.2d 1280, 1280 (1990) (identifying similar factors to determine whether an interrogation was custodial).

The first inquiry into the circumstances surrounding the interrogation is distinctly factual,

and the state court's findings are afforded a presumption of correctness. *Thompson*, 516 U.S. at 112, 116 S. Ct. at 465; *Tankleff*, 135 F.3d at 243 (same); *Holland v. Donnelly*, 216 F. Supp.2d 227, 231 (S.D.N.Y. 2002) ("account[s] of the events leading up to [petitioner's] confession" are "findings of historical fact [that] must be presumed to be correct for purposes of [habeas] petition") (internal quotation marks omitted). Whether, based on those facts, a reasonable person would have felt free to leave "is a mixed question of fact and law qualifying for *de novo* review by the habeas court." *Tankleff*, 135 F.3d at 243. "[B]ecause 'the custody test is general,' the state court's application of federal law need only fit[] within the matrix of [the Supreme] Court's prior decisions" for AEDPA purposes. *Ortiz v. N.Y.S. Parole in Bronx, N.Y.*, 586 F.3d 149, 157 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 653, 124 S. Ct. 2140, 2143 (2004)). Where fair-minded jurists could disagree about custody, a state court's finding that an individual was not in custody should not be upset on habeas review. *Yarborough*, 541 U.S. at 664, 124 S. Ct. at 2149.

A defendant subject to custodial interrogation can waive their *Miranda* rights "provided [that] the waiver is made voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. A waiver is voluntary if "it was the product of a free and deliberate choice, rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986). A knowing and intelligent waiver is made when the defendant agrees to speak "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.; see also United States*

v. Plugh, 648 F.3d 118, 127 (2d Cir. 2011) (same); *United States v. Gomez*, 199 F. Supp.3d 728, 748 (S.D.N.Y. 2016) (same). It is the Government's burden to demonstrate that a waiver was knowing and voluntary. *Berghius v. Thompkins*, 560 U.S. 370, 383-84, 130 S. Ct. 2261 (2010). "The question of waiver must be determined on the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Plugh*, 648 F.3d at 127 (quoting *United States v. Spencer*, 995 F.2d 10, 11 (2d Cir. 1983) (per curiam)).

Statements obtained in violation of *Miranda* generally must be suppressed. *Dickerson v. United States*, 530 U.S. 428, 443-44, 120 S. Ct. 2326, 2336 (2000); *United States v. Valerio*, 765 F. App'x 562, 564-65 (2d Cir. 2019) ("Consistent with the Fifth Amendment privilege against self-incrimination, statements made during a custodial interrogation are generally inadmissible unless a suspect has first been advised of his right to remain silent and to have counsel present").

B. The State Courts' Determination That Hernandez's Initial Statement Was Not The Product of Custodial Interrogation Must Be Upheld

In denying Hernandez's motion to suppress his pre-*Miranda* statements, the hearing court determined that Hernandez was not in custody when he made those admissions. In so finding, the court made several factual determinations regarding the circumstances that existed before Hernandez was read his *Miranda* rights. The court found that Hernandez "was never handcuffed or in any way physically restrained;" "accompanied the officers

voluntarily in an unmarked police car;" "was left unattended in the interview room with an open door;" "was permitted to walk unaccompanied around the CCPO – an uncomplicated building with at least one clearly marked exit;" "was repeatedly told he was free to leave;" "was reminded that his presence … was voluntary, even as he was asked if he was willing to remain and answer further questions;" "was openly and correctly informed [by detectives] that he was being questioned about an old New York City missing person's case;" "was offered lunch, and given an opportunity to take his medications;" and was not subject to accusatory or hostile questioning. (Ex. 31 at 17.)

Although recognizing that Hernandez several times expressed a desire to go home, the hearing court found that he never actually protested the officers' questioning, was not threatened with penalty if he decided to leave, and voluntarily agreed to continue the interview. (Ex. 31 at 18.) The court did find that Hernandez was lightly frisked and asked to empty his pockets, but that he was told it was for safety reasons and then offered back his property shortly after arriving at CCPO. (Ex. 31 at 18.) The hearing court concluded that, under these circumstances, a reasonable person in Hernandez's position would not have believed themselves to be in custody. (Ex. 31 at 16-17.) The Appellate Division affirmed for substantially the same reasons. *See Hernandez*, A.D.3d at 530-31, 122 N.Y.S.3d at 13.

Hernandez asserts that the factual record demonstrates by clear and convincing evidence that the state courts' findings that he was not in custody because he was unrestrained, told he was free to leave, and subject to non-accusatory questioning were

unreasonable. The Government disagrees, arguing that the state courts' decisions were not based on an unreasonable determination of the facts and that Hernandez's proposed evidence does not overcome the presumption of correctness afforded to state courts' factual findings.

The Court is constrained to agree with the Government. To be sure, several facts lend considerable support to Hernandez's argument that he was in custody for purposes of *Miranda*. For instance, detectives drove Hernandez to the CCPO in a squad car; Hernandez was patted down; the interview was continuous and lasted almost seven hours; detectives deflected Hernandez's requests to go home; and detectives employed manipulative tactics. "These circumstances, however, were offset by others." *Howes v. Fields*, 565 U.S. 499, 514-15, 132 S. Ct. 1181, 1193 (2012). Hernandez accompanied detectives voluntarily and was never handcuffed. The door to Room 133, the room where detectives questioned Hernandez, was sometimes left open, and Hernandez at points walked to and from the bathroom unescorted. Whether Hernandez was ever squarely told he was free to leave is disputed, but he was never told that he was ***not*** free to leave. Detectives were unarmed, offered Hernandez food and water, and did not tell Hernandez that he was under arrest or a suspect in the case.

Based on the mixed record, the Court cannot conclude that the state court made unreasonable findings of fact or that the state courts "***unreasonably*** applied clearly established Supreme Court law in concluding that [Hernandez] was not in custody for purposes of *Miranda*." *Cruz*, 255 F.3d at 86 (emphasis in original); *Yarborough*, 541 U.S. at

656, 124 S. Ct. at 2150 (listing facts both consistent and inconsistent with a finding of custody and concluding that "these differing indications lead us to hold that the state court's application of our custody standard was reasonable"); *see also Nova v. Bartlett*, 63 F. Supp.2d 449, 457 (S.D.N.Y. 1999), *aff'd* 211 F.3d 705 (2d Cir. 2000) (finding the circumstances surrounding the suspect's questioning were "not, as the Supreme Court and the Second Circuit have construed the reasonable person standard, such that a reasonable person would not have felt free to leave.")

The Court next discusses the facts in more detail within the framework of the three guiding factors considered to determine if a subject was subject to custodial interrogation: whether Hernandez was restrained; whether he was told that he was free to leave; and whether the questioning was accusatory. *See Tankleff*, 135 F.3d at 243-44; *Colon v. Ercole*, No. 09-CV-5168, 2010 WL 9401, *26 (S.D.N.Y. Jan. 4, 2010), *R & R adopted* 2010 WL 3767079 (S.D.N.Y. Sept. 27, 2010).

1. Whether Hernandez Was Restrained

Hernandez argues that he was restrained, and the state courts' finding otherwise was unreasonable. Hernandez cites to many facts, including that: before entering the detectives' car, he was "patted down" and asked to place his cellphone, wallet, pill container, and personal items in the car's trunk; he never regained "actual possession" of his items; he rode in the back of the unmarked police car seated next to a detective; the car parked in a CCPO lot surrounded by a fence topped with barbed wire; he was escorted through the rear "locked" entrance of the CCPO to

Room 133 without passing any other exits; he was escorted to and from the bathroom; and he sat in the furthest corner from the door in Room 133, thus requiring him to force his way passed the detectives if he wanted to leave. (Pet. Mem. at 40-44.[9]) And, if the video of Hernandez's post-*Miranda* confession is any indication of the positioning during the pre-*Miranda* questioning, Hernandez was literally cornered by a table and a police officer just inches away from Hernandez while asking questions.[10] (See Ex. 7 (video of Hernandez's post-*Miranda* confession at the CCPO).)

Hernandez is correct that those facts weigh in favor of finding that he was restrained. They are not dispositive, however, and other facts in the record militate in the opposite direction as the hearing court recited. First, Hernandez accompanied the officers voluntarily. "A person who voluntarily accompanies the police to the station for questioning, without more,

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[9] "Pet. Mem." refers to Hernandez's Memorandum Of Law In Support Of Pedro Hernandez's Petition For A Writ Of Habeas Corpus filed on March 18, 2022, at Dkt. 1-2.

[10] Testimony from the *Huntley* hearing suggests that the seating arrangement during the pre-*Miranda* questioning was the same or similar to that of the post-*Miranda* questioning. Ramirez testified that, at the start of the pre-*Miranda* questioning, Hernandez sat in the chair farthest from the door, Ramirez sat opposite to Hernandez, and Morales sat in between. (Ex. 21C at 249:11-250:6, 252:1-12.) Lamendola testified that, when he was alone in the room with Hernandez, Hernandez remained in the chair farthest from the door, while Lamendola sat in the chair right next to Hernandez. Lamendola said that the chairs had rollers on them and that it was likely that he rolled closer to Hernandez and leaned towards him during the interview. (Ex. 21G at 759:10-760:19).

is not in custody." *Harris v. Woods*, No. 05-CV-5582, 2006 WL 1140888, at *25 (S.D.N.Y. May 1, 2006), *R & R adopted* 2006 WL 1975990 (S.D.N.Y. July 10, 2006) (quoting *California v. Beheler*, 463 U.S. 1121, 1122-25, 103 S. Ct. 3517, 3518-20 (1983)); *see also Mathiason*, 429 U.S. at 495, 97 S. Ct. at 714 ("the requirement of warnings [is not] to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect"); *Perez v. Ercole*, No. 09-CV-2180, 2011 WL 403912, at *2 (S.D.N.Y. Feb. 7, 2011) ("Although [the suspect] rode in the back seat of a police car en route to the station, he did so voluntarily, and he was not interrogated during the ride"); *U.S. ex rel. Mahler v. Perez*, No. 06-CV-5109, 2007 WL 1825403, at *7 (E.D.N.Y. June 21, 2007) (interrogating individual at police station does not "convert the noncustodial situation to one in which *Miranda* applied").

Second, Hernandez was not handcuffed at any point before or during the pre-*Miranda* questioning. *Cf. New York v. Quarles*, 467 U.S. 649, 655, 104 S. Ct. 2626, 2632 (1984) (holding that handcuffed defendant was in custody for purposes of *Miranda*), *and Newton*, 369 F.3d at 676 (2d Cir. 2004) ("Handcuffs are generally recognized as a hallmark of a formal arrest" and "a reasonable person finding himself placed in handcuffs by the police would ordinarily conclude that … he was restrained to a degree normally associated with formal arrest and, therefore, in custody"). While numerous uniformed and plainclothes officers arrived at Hernandez's home on the morning of May 23, 2012, none drew their guns or took out their handcuffs. *See Newton*, 369 F.3d at 675 (finding that "handcuffs are the problematic factor" and "the number of officers on

the scene would not, by itself, have led a reasonable person in [the suspect's] shoes to conclude that he was in custody").

Third, although Hernandez was frisked and asked to place his personal items in the car's trunk before he entered the police vehicle, the police did so for their own safety. (*See* Exs. 21C at 237:8-11 (Ramirez testifying that Morales asked Hernandez if he minded being patted down "for our own safety"); 21F at 582: 8-12 (Morales testimony that he asked Hernandez "for everyone's safety … would he mind if I pat him down.") *See Harris*, 2006 WL 1140888, at *25-26 (finding that the suspect voluntarily agreed to accompany the police to the police station even where the detective "did not go into [the suspect's] pockets, although he did pat [the suspect's] pockets and waist area"); *Gren v. Greiner*, 275 F. Supp.2d 313, 321 (E.D.N.Y. 2003) (finding suspect held at gunpoint and frisked not in custody because "[g]uns were drawn and a frisk was conducted in order to assure the safety of the police" and "[p]etitioner was not handcuffed after he was frisked and he was not placed under arrest").

Fourth, during the questioning, Detectives Morales and Ramirez were unarmed, having secured their firearms outside of Room 133 upon entering the CCPO. (Exs. 21C at 250:17-251:14; 21F at 584:25-585:4.) At no other point did officers display weapons or otherwise threaten or use physical force against Hernandez. *See FNU LNU*, 653 F.3d at 155 (noting that officers never drew their weapons and did not use physical restraints when determining that suspect was not in custody); *Faux*, 828 F.3d at 138-39 (finding suspect not in custody for reasons including the

officers never displayed weapons, threatened, or used physical force).

Fifth, although Hernandez was seated in a corner in a relatively small room with the police officers sitting between him and the door, the door was unlocked and left open at various points. (Exs. 21C at 253:2-4; 21G at 705:10-706:25.) *See Mathiason*, 429 U.S. at 493, 495, 97 S. Ct. at 713-14 (finding suspect who came to police station voluntarily and questioned in a closed room not "in custody"); *Harris*, 2006 WL 1140888, at *26 (finding the "circumstances at the police station … not coercive" including that petitioner was "taken to a fifteen by eight foot interview room, the door to which was open a crack and was never locked"); *United States v. Vado*, 87 F. Supp.3d 472, 480 (S.D.N.Y. 2015) (finding no error in state court's finding that defendant was not in custody despite the presence of several facts favoring defendant's in-custody claim including that, "during the interview, at least one agent was situated between the defendant and the partially closed bedroom door.")

Further, while the police also sat between Hernandez and the case folder containing his possessions, the police offered Hernandez back his items when they first arrived at Room 133 and Hernandez declined the offer. (Ex. 21F at 585:15-18; *see also* Ex. 21F at 642:4-6 (Morales testimony that he had explained to Hernandez that he could have access to his possessions)). Even before questioning began, Hernandez was left alone in the room with the case folder containing his possessions. (Exs. 21C at 250:17-251:14; 21F at 584:25-585:4.) That Hernandez did not regain "actual possession" of his personal items thus

was not the product of the detectives' refusal to return them to him.

The parties frame Hernandez's freedom of movement within the CCPO differently. The Government contends that Hernandez twice went to the bathroom and returned to Room 133 unescorted. In each instance, according to the Government, Hernandez was "just feet from two marked exits" and "could have easily left the building" but chose instead to "voluntarily return[] to Room 133." (Resp. Mem. at 85.[11]) The state courts agreed, stating that Hernandez "was permitted to walk unaccompanied around the CCPO – an uncomplicated building with at least one clearly marked exit." (Ex. 31.) This strikes the Court as overstated. A person in Hernandez's position being in the middle of questioning by detectives, even though uncuffed and not under arrest, likely would not have felt free to simply roam around the station unmonitored.

That said, Hernandez's argument that he was always escorted by various officers to and from the bathroom is also somewhat overstated. (Pet. Mem. at 41-42.) When he first used the bathroom, Hernandez was escorted there by Morales, who then returned to Room 133, leaving Hernandez in the bathroom. (Exs. 21C at 261:8-262:8; 21F at 586:5- 12.) There were other officers in the hallway when Hernandez exited the bathroom, one of whom he knew and chatted with before returning unescorted to Room 133. (Ex. 21D at 346:4-350:1.) For his second bathroom trip, Hernandez was escorted halfway there by Lamendola

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[11] "Resp. Mem." refers to the Government's Memorandum Of Law Opposing Petition For A Writ Of Habeas Corpus filed on September 2, 2022, at Dkt. 18.

and returned the entire way unescorted, although Lamendola was waiting by Room 133's door. (Ex. 21G at 709:3-711:24.) Though limited, Hernandez's freedom of movement at the CCPO could reasonably be considered an indication of his not being restrained.

In short, the factual record reveals competing indicia of the extent to which Hernandez was or was not restrained. While a reasonable fact finder could have found that Hernandez was restrained, another reasonable fact finder could find that he was not. The state courts' finding that Hernandez was not restrained therefore cannot be disturbed.

2. Whether Hernandez Was Free To Leave

Hernandez next argues that the record belies the state courts' conclusion that detectives repeatedly told Hernandez he was free to leave in response to his several requests to return home. (Pet. Mem. at 44.) Hernandez points to detectives' DD5 reports[12], which do not mention that detectives ever told Hernandez that he was free to leave, as well as testimony from the Huntley hearing demonstrating "that each time Hernandez told the detectives he wanted to return home, [they] stalled and deflected rather than honoring his request." (Pet. Mem. at 45.) Again,

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[12] A DD5 is an official report "generated by the detective squad of the NYPD." (Ex. 21C at 214:8-215:3.) Here, the various detectives used their DD5s to prepare for and to refresh their recollection during testimony. Ramirez testified that he began writing his DD5 "the very next morning" after he questioned Hernandez. (Ex. 21D at 376:2-377:24). Lamendola testified that he prepared his DD5 "probably within a couple of weeks of the interview." (Ex. 21G at 727:21-23.)

however, reasonable fact finders could differ on what the evidence showed.

On three separate occasions during his being questioned, Hernandez told detectives that he was there against his will and wanted to go home. (*See* Exs. 21C at 285:25-286:13, 290:10-20; 292:6-14; 21D at 420:15-22, 427:22-428:19; 21F at 592:16-593:17, 596:19-597:4; 21G at 713:13-20, 773:1-16, 775:11-776:23, 781:10-782:5, 782:6-783:6.) The parties dispute whether, in response, detectives ever told Hernandez that he was free to go home, that they would drive him home, or if any such request was conditioned on Hernandez answering more questions. (*Compare* Pet. Mem. at 44-47 *with* Resp. Mem. at 79-85.)

Even if not fully consistent, there is evidence to support a reasonable factfinder's determination that detectives did tell Hernandez that he was free to leave, although the detectives had more questions they wanted to ask. (*See* Exs. 21C at 290:14-20 (Ramirez's testimony that detectives told Hernandez "if you wanted to go home, we would take you home. We will drive you home, and that we had a few more questions to ask him, and then after that, he could leave"); 21F at 593:9-17 (Morales' testimony that, in response to Hernandez's first statement about going home around 1:00 p.m., detectives responded "you can leave any time you want. Your stuff; your cell phone, your keys, wallet is right there. I explained to you, you can grab it any time you feel like it. No one is forcing you to be here … [but] there's a few other questions that we have to ask you. Would you mind if you answered them?"), 636:19-20 (Morales' testimony that he told Hernandez that "he's free to go any time" after Hernandez's request at 1:00 p.m.), 640:17-23

(Morales' testimony that, after Hernandez said he wanted to go home between 2:00-2:30pm, Morales replied "we didn't force you to be here. Correct me if I'm wrong, you're here voluntarily … We only have a few more questions for you, okay? Do you mind answering them? If you want to go home, we can take you home" in response to which Hernandez agreed to answer more questions), 644:6-645:6 (Morales' testimony that he "could have [told Hernandez] more than one time" that he "can grab [his possessions], at any time, and he can leave, at any time" and that he "initially told [Hernandez] that [he was free to leave and could have his property] when we first came into the interview room"); 21G at 712:4-14 (Lamendola's testimony that he told Hernandez "you came here voluntarily, you came here on your own, you are free to leave whenever you want but we just want to ask you questions" in response to Hernandez's statement that detectives were trying to trick him); *but see* Ex. 21D at 422:13-22 (Ramirez's testimony that ***he*** – i.e., Ramirez – never told Hernandez "even though you came here voluntarily you could leave right now"). Additionally, ADA Nguyen confirmed that one of the detectives told Hernandez "when we finish here we can even drive you home but we have a few more questions would you be willing to stay and then we'll give you a ride home."[13] (Ex. 21I at 1025:8-22.)

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[13] ADA Nguyen also testified that Lamendola did not tell Hernandez he was free to leave after Hernandez had curled up on the floor in the fetal position and said that he wanted to go home. In response to the question, "he was never told, go then, you are free to leave, right?", ADA Nguyen replied "No, not in response to that statement. ***Not at that time***, no." (Ex. 21G at 783:3-6 (emphasis added).)

As Hernandez points out, ADA Durastanti provided a sworn stipulation that "[h]e [did] not specifically recall the detectives saying, or using words to the effect, … if you wanted to go home, we would take you home, we would drive you home … or … you can leave any time you want." (Ex. 21I at 1003:7-1004:2.) At oral argument before this Court on August 23, 2023, Hernandez urged the Court to give more credence to the ADA's recounting of what happened than to the detectives' rendition since ADAs have a particular interest in seeing that justice is done and safeguarding the integrity of their investigations. (Dkt. 35 at 9:12-20.) That argument is not persuasive. Hernandez merely raises a comparative credibility determination for which there is not clear and convincing evidence to the contrary. *See Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S. Ct. 843, 851 (federal habeas courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court but not by them"); *see also Miller-El v. Cockrell*, 537 U.S. 322, 339-40, 123 S. Ct. 1029, 1040-41 (2003). Regardless, not recalling, as ADA Durastanti attested, is not the same as denying what the detectives, and ADA Nguyen, testified to having taken place.

Hernandez argues that each time he stated that he wanted to go home, "the detectives stalled and deflected rather than honoring his request." (Pet. Mem. at 45.) To some extent that is accurate. For example, in response to Hernandez's declaring that he wanted to go home, the detectives' reaffirmed with Hernandez that he had accompanied them voluntarily and was not forced to be there or there against his will. Hernandez, however, responded by agreeing with the detectives and continued to answer

questions. (See Exs. 21C at 285:25-286:13 (Hernandez agreed that Ramirez is correct that nobody brought him there against his will and that he is there voluntarily); 21F at 592:16-593:17, 636:13-22 (Morales and Ramirez asked Hernandez if he came voluntarily, which he affirmed, and if he had been threatened or handcuffed, which he denied).) And when, at the end of the interrogation, Hernandez told detectives "I would like to speak to [my wife] … and [then] I will tell you [what happened]," detectives replied that he could speak to his wife "all [he'd] like, but we would like to hear what you have to say, first." (*See* Exs. 21C at 292:6-14; 21D at 437:2-25; 21F at 596:18-597:4.) Hernandez again agreed and then said "I'm sorry, it shouldn't have happened. I did it." (*See* Exs. 21C at 292:6-14; 21D at 437:2-25; 21F at 596:18-597:4.) Ramirez testified that, if Hernandez had insisted, detectives would have let Ramirez speak to Rosemary. (Ex. 21D at 437:2-25.) A reasonable factfinder could find that the detectives' responses effectively denied Hernandez's request to leave. But a reasonable factfinder could also conclude the opposite and that the detectives' responses, and Hernandez's confirmation of them, were further assurances to Hernandez that he was free to leave.

At oral argument, Hernandez asserted that, at most, Hernandez was told he was free to leave around 1:00 p.m., about five to six hours into the interrogation and after Hernandez had first stated he wanted to go home at 12:00 p.m. (Dkt. 35 at 30:6-18.) The Court cannot find support in the record for the notion that Hernandez first asked to go home at 12:00 p.m. on May 23. Even Hernandez's briefing does not support it, stating that he first told detectives he wanted to go home and that they had him there

against his will "[j]ust before 1 p.m." (Pet. Mem. at 18.) Hernandez's argument also overlooks the testimony of Morales that he told Hernandez that he could leave and take his property "initially … when we first came into the interview room." (Ex. 21F at 645:1-2.)

Putting aside the question of the extent to which detectives told Hernandez he was free to leave, the record is devoid of any evidence that detectives told Hernandez that he was ***not*** free to leave. That is a significant distinction. As one court put it, "although the Court has some uncertainty about whether defendant was told he was free to leave, the central question in the custody analysis is ***not*** whether defendant was told he was free to leave, but whether the agents affirmatively conveyed to defendant that he was ***not*** free to leave." *United States v. Hester*, No. 14-CR-420, 2015 WL 861749, at *2 (S.D.N.Y. Feb. 9, 2015), *aff'd* 674 F. App'x 31 (2d Cir. 2016) (emphasis in original); *see also United States v. Valerio*, 765 F. App'x 562, 566 (2d Cir. 2019) (finding suspect not in custody where "he was never told that he was not free to leave or would be arrested after the interview"); *United States v. Belitz*, No. 21-CR-693, 2022 WL 205585, at *5 (S.D.N.Y. Jan. 24, 2022) (suspect not in custody because none of the factors relied upon by the Second Circuit – "the defendant was handcuffed, the defendant was explicitly told he was not free to leave, or the agents showed their firearms or otherwise threatened or use physical force" – were present); *Miller v. Superintendent of Shawangunk Correctional Facility*, No. 18-CV-1762, 2020 WL 4432096, at *11 (S.D.N.Y. July 31, 2020), *aff'd Miller v. Superintendent of Shawangunk Correctional Facility*, 2022 WL 1669195 (2d Cir. May 26, 2022) (suspect not

in custody who "was never told that he was not free to leave or threatened in any way"); *United States v. Casanova*, No. 11-CR-562, 2012 WL 760308, at *2 (S.D.N.Y. March 8, 2012) (defendants not in custody when "agents did not tell [them] that they were free to leave" but also did not "tell [them] that they were ***not*** free to leave") (emphasis in original); *cf. Romaszko*, 253 F.3d at 759-61 (affirming district court's determination that suspect was in custody where "on at least five occasions, [suspect] asked to leave or attempted to stand up and was told that she could not"); *United States v. Codrington*, No. 07-MJ-118, 2008 WL 1927372, at *11 (E.D.N.Y. 2008) (finding suspect in custody where she "asked to leave to pick up her grandchildren and was told she could not").

"In the absence of actual arrest, an interrogation is not 'custodial' unless the authorities affirmatively convey the message that the defendant is not free to leave." *United States v. Mitchell*, 966 F.2d 92, 98 (2d Cir. 1992). At least one court has found that, even in cases where "[t]he words and acts of the officers undoubtedly sent [suspect] mixed messages about whether he was free to leave, … a reasonable person … would not have felt that he had no choice but to … confess." *United States v. Newton*, 181 F. Supp.2d 157, 175 (E.D.N.Y. 2002), *aff'd Newton*, 369 F.3d 659 (2d Cir. 2004). Here, even if the detectives' engaged in some deflection and sent "mixed messages," at no time did they affirmatively tell Hernandez that he was not free to leave, nor did they indicate that fact to him by handcuffing, physically restraining, or threatening him. Absent clear and convincing evidence demonstrating otherwise, the state courts' factual findings cannot be deemed to be unreasonable.

Hernandez is correct that the DD5 reports do not reference any detective at any point having told Hernandez that he was free to leave. But the DD5 reports also do not show that detectives indicated to Hernandez that he was not free to leave. And one DD5 report includes an example of detectives responding to Hernandez by reaffirming his voluntary participation, which comports with what detectives testified to in the *Huntley* hearing. (*See* Ex. 16 at ECF 3-4 (Ramirez's DD5 which states that, in response to Hernandez's 1:00 p.m. request to go home, detectives reminded Hernandez that he came willingly, that they were not accusing him or encouraging him to confess, and that they only wanted the truth, with which Hernandez agreed).)

That the state courts' orders did not mention the DD5s does not, as Hernandez argues, preclude AEDPA deference. (Pet. Mem. at 44-45; Pet. Reply at 6.[14]) *See Cruz*, 255 F.3d at 86 ("deficient reasoning will not preclude AEDPA deference … at least in the absence of an analysis so flawed as to undermine confidence that the constitutional claim has been fairly adjudicated.") The trial court ordered full briefing and conducted a *Huntley* hearing on Hernandez's motion to suppress, in which it heard from various witnesses and reviewed evidence including the DD5 reports. That the final order does not mention the DD5 reports does not mean that the courts did not consider them in coming to a decision. Regardless, the role of the habeas court is to determine "the reasonableness of the state court's

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[14] "Pet. Reply" refers to Hernandez's Reply In Support Of Pedro Hernandez's Petition For A Writ Of Habeas Corpus filed on December 2, 2022, at Dkt. 25.

decision … not [to grade] their papers." *Id*. at 86 (internal quotation marks and citations omitted). In this instance, the state court findings about Hernandez's freedom to leave were not unreasonable.

3. Whether The Questioning Of Hernandez Was Accusatory

The state courts determined that the questioning of Hernandez at the CCPO was not accusatory. Hernandez contends that the "clear and convincing record establishes that [his] seven-hour interrogation … was indeed accusatory, and was carefully crafted to be so." (Pet. Mem. at 48.) In support, Hernandez points to the detectives' use of various manipulative tactics, questioning about Hernandez's faith, and insistence that Hernandez tell the truth, as well as the length of time of the interrogation. (Pet. Mem. at 47-48.) The Government counters that the detectives' strategies were not aggressive or accusatory, that they did no more than ask for the truth, and that, although the interrogation was long, the length of time alone is not controlling. (Resp. Mem. at 92-95.) Again, the record is comprised of evidence that compels that Court to conclude that the state court determination was not unreasonable.

It is undisputed that detectives implemented a "tactical plan" on the day of Hernandez's questioning. (Exs. 21A at 61:4-6; 21B at 67:18-22.) But the mere existence and execution of a plan does not constitute a custodial interrogation especially where, as here, detectives never told Hernandez that he was under arrest or a suspect in the case. (*See* Ex. 21I at 1003:7-13.) *See Berkemer*, 468 U.S. at 421, 104 S. Ct. at 3141 (1984) ("A policeman's unarticulated plan has no bearing on the question of whether a suspect was 'in

custody' at a particular time"). For example, when detectives and officers came to Hernandez's house and asked him to come with them, they told him that his name had come up in connection with an old missing person's case in New York City. (Exs. 21C at 233:25-236:20; 21F at 581:23-25.) During the interrogation, detectives reiterated that they wanted to ask Hernandez questions about a missing child from New York City. (*See* Exs. 21C at 258:3-4.) The detectives no doubt viewed Hernandez as a suspect. But the subjective, uncommunicated view of the detectives about Hernandez's potential guilt does not create custodial conditions. *See Stansbury*, 511 U.S. at 325, 114 S. Ct. at 1530 ("an officer's views concerning the nature of the interrogation, or beliefs concerning the potential culpability of the individual being questioned, may … bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation").

Detectives employed manipulative and even deceptive tactics during Hernandez's questioning, presumably with the goal of eliciting incriminatory statements. The police walked Daisy Rivera and Mark Pike past Hernandez, and detectives told Hernandez falsely that they had "interviewed everyone from his past." (*See* Exs. 21A at 26:9-27:6; 21B at 127:14-128:1; 21C at 258:5-16, 291:20-292:5; 21F at 610:16-19, 596:8-19.) But the fact that the police engaged in such strategies, even deceptive or coercive ones, does not render Hernandez in custody and, thus, does not transform his interrogation into a ***custodial*** interrogation for which *Miranda* rights are required. *See Mathiason*, 429 U.S. at 496, 97 S. Ct. at 714 (finding that detectives' factual

misrepresentations have "nothing to do with whether [a defendant] was in custody for the purposes of the *Miranda* rule"); *Newton*, 369 F.3d at 671 (stating that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it" but "*Miranda* does not reach so broadly" as to attach whenever questioning has some coercive quality, and that "although coercive pressure is *Miranda's* underlying concern, custody remains the touchstone for application of its warning requirement"); *Williams v. Phillips*, 433 F. Supp.2d 303, 314 (W.D.N.Y. 2006) (finding that state courts' legal conclusion that petitioner was not in custody was not unreasonable even though the police engaged in some degree of deception).

The nature of detectives' questioning – much of which focused on Hernandez's personal background – was also not sufficiently hostile for a finding of custody. *See Loucks v. Capra*, No. 16-CV-3115, 2019 WL 4921722, at *11 (S.D.N.Y. March 28, 2019) *R & R adopted*, 2019 WL 4917191 (S.D.N.Y. Oct. 4, 2019) (finding detectives' background questions about petitioner's relationship and recent contact with the victim "not so hostile and coercive to amount to a custodial interrogation"); *see also Andrango v. Chappius*, No. 14-CV-7716, 2015 WL 4039839, at *12 (finding that detectives initial questioning of suspect for "his pedigree information only, and despite [detective's] knowledge of [suspect's] theft" was not coercive); *United States v. Adegbite*, 846 F.2d 834, 838 (2d Cir. 1988) ("the solicitation of information concerning a person's identity and background does not amount to custodial interrogation").

Detectives did attempt to exploit Hernandez's vulnerabilities. For instance, questions about

Hernandez's religious devotion and past familial abuse triggered an emotional response from Hernandez, at one point rendering him so distraught that he curled up on the ground shaking. (Ex. 21G at 703:16-705:4.) However, during that period of questioning, although describing the cycle of abuse, Lamendola never mentioned Patz or pursued an accusatory line of questioning. (*See* Ex. 21G at 703:16-708:18.) *See Harris*, 2006 WL 1140888 at *26 (finding defendant not in custody despite the use of ruses since those ruses were not "used to question Harris about [the] homicide" and "detectives never mentioned the homicide throughout this period").

As another tactic, detectives showed Hernandez the missing persons poster for Patz. But doing so is "neither a compelling influence nor a psychological ploy designed to illicit an incriminating response" against which *Miranda* protects. *Perez*, 2011 WL 403912, at *3 (internal quotation marks omitted) (finding petitioner was not subject to custodial interrogation where detectives showed petitioner photographs of victims); *see also Harris*, 2006 WL 1140888, at *26-27 (finding suspect was not in custody even though detectives showed the suspect photos of the victim's body and said "'this is why you're here, because you did this,'" reasoning that "brief accusations were not enough to transform the interview into a custodial interrogation").

Hernandez's statements that detectives were both trying to "trick him" (Ex. 21G at 706:12-23) and "pin what happened to this kid on me" (Exs. 21C at 290:14-15; 21G at 712:4-5) are subjective impressions outside of the objective standard for analyzing custodial status. *See Belitz*, 2022 WL 205585, at *4 ("although it is clear … that Belitz subjectively

believed he was not free to leave, the custody inquiry for purposes of *Miranda* is an objective analysis"); *Stansbury*, 511 U.S. at 323, 114 S. Ct. at 1529 (only "objective circumstances" are relevant to custody determination). In any event, detectives responded to Hernandez's statements by reaffirming with Hernandez that he was not there against his will; the detectives would drive him home if he wanted; and they were not trying to trick him. (Exs. 21C at 290:17-20; 21G at 707:3-5.)

Importantly, detectives never openly accused Hernandez of Patz's disappearance, but rather implored him repeatedly to tell the truth. *See, e.g. Yarborough*, 541 U.S. at 664, 124 S. Ct. at 2149 (finding suspect not in custody where "[i]nstead of pressuring [the suspect] with the threat of arrest and prosecution," detectives "appealed to his interest in telling the truth and being helpful to a police officer"). Detectives' "express[ing] skepticism" about Hernandez's answers and "telling [him] not to lie is not so coercive that it amounts to custodial interrogation." *Vega*, 2002 WL 252764, at *11; *see also Colon*, 2010 WL 9401, at *39 (finding that "detectives did not use dishonesty or misrepresentation to elicit any statements from [petitioner]" where "they simply asked [him] to tell the truth about what he knew regarding [the victim of the crime]").

The instant case thus is not like those where suspects were determined to have been in custody based on, among other indicia, police questioning that was hostile and accusatory. *See, e.g., Tankleff*, 135 F.3d at 244 (finding suspect was in custody after six-hour intermittent questioning when during the final two hours, suspect was subject to "increasingly hostile questioning at the police station, during which the

detectives accused him of showing insufficient grief," told him his story was ridiculous, that they "could not accept" his explanations, and, falsely, that the victim "had woken up from a coma and accused him"); *United States v. Rogers*, No. 99-CR-710, 2000 WL 101235, at *14-15 (finding suspect was in custody where he was "subjected to over two hours of interrogation, during which he was informed over and over by the officers questioning him that the police believed he was involved in a heinous crime"); *United States v. Guzman*, 11 F. Supp.2d 292, 296-97 (S.D.N.Y. 1998), *aff'd*, 152 F.3d 921 (2d Cir. 1998) (determining suspect in custody where police told him he would "have to come" with them to the station and was then questioned by "a number of different officers throughout the night for more than twelve hours" with police "repeatedly [telling] him that they knew the answers he was giving were contradicted by facts" they knew).

Hernandez argues that the length of time that detectives "executed [their] plan" was per se excessive and hostile. (Pet. Reply at 7.) Seven hours of continuous questioning by two or three detectives is certainly a lengthy interrogation. *See, e.g., Wilson v. Walker*, No. 00-CV-5348, 2001 WL 1388299, at *3 (E.D.N.Y. Nov. 2, 2001) (court did not need to determine whether petitioner was in custody, but given that "petitioner was questioned at the police station for nearly seven continuous hours, the Court is skeptical of the state courts' … conclu[sion] that [petitioner] was not in custody at the time he initially confessed"). The Court agrees that the duration and intensity of the detectives' questioning is suggestive of custody. But that "is not dispositive" as to whether the questioning is accusatory and hostile. *Miller*, 2020

WL 4432096, at *8 (finding no custody despite questioning for eight hours);[15] *see also Howes*, 556 U.S. at 515, 132 S. Ct. at 1192-93 (finding respondent not in custody although several facts lent some support to his argument that the custody requirement was met, including that "[t]he interview lasted for between five and seven hours").

Also of note, detectives did not deprive Hernandez of comfort, food, or other necessities. When Hernandez reacted physically to repeated questioning about his abusive father, Lamendola left the room – leaving Hernandez alone with his items and with the door open – to fulfill Hernandez's request for a jacket. (Ex. 21G at 705:6-706:17.) And detectives periodically asked Hernandez if he needed anything, offered him food, and reminded him to take his medication. (Exs. 21F at 590:8-591:4, 593:23-594:4; 21G at 708:9-11.) *See Howes*, 565 U.S. at 515, 132 S. Ct. at 1193 (finding incarcerated suspect not in custody where "[h]e was offered food and water, and the door to the conference room was sometimes left open"); *Ortiz v. Artuz*, No. 09-CV-5553, 2010 WL 3290962, at *9 (S.D.N.Y. Aug. 9, 2010) (granting deference to trial court finding that suspect who "was unrestrained, questioned in a room with an open door and no officer posted outside, and offered food and a beverage" was not in custody).

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[15] At oral argument, Hernandez's counsel distinguished *Miller* from the facts here. (Dkt. 35 at 7:8-8:23, 18:1-18:12.) There are indeed differences as well as similarities between the two sets of facts. But the Court is not suggesting that *Miller* is determinative. To the contrary, the Court cites *Miller* for the proposition that the duration of questioning is not dispositive. Moreover, as here, the record in *Miller* contained facts suggestive of custody and others that were not.

As with the other custodial elements discussed above (restraint and freedom to leave), the record contains facts that can reasonably support different conclusions about the extent to which the questioning of Hernandez was hostile and accusatory. This Court could well conclude on de novo review that Hernandez was interrogated while in custody in violation of *Miranda*. But that is not the standard Congress and the Supreme Court have established to grant habeas relief. *See Yarborough*, 541 U.S. at 656. 124 S. Ct. at 2150 ("We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter"); *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S. Ct. 357 (2002) (per curiam) ("a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state- court decision applied [the law] incorrectly"); *Maldonado v. Greiner*, No. 01-CIV-0799, 2003 WL 22435713, at *22 (S.D.N.Y. Oct. 28, 2003) ("because of the 'difficulty of determining "custody" for purposes of *Miranda* …, unless the facts clearly establish custody, a state court should be deemed to have made a reasonable application of clearly established Supreme Court law in concluding that custody for *Miranda* purposes was not shown'") (quoting *Cruz*, 255 F.3d at 85-86).

Accordingly, the Court has no alternative but to find that the state courts did not unreasonably determine the facts or unreasonably apply established law to the facts of the case in concluding

that Hernandez was not in custody prior to his receiving Miranda warnings. [16]

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[16] One might well conclude that there is a mismatch between how the reasonable person as conceived by the courts would behave and how actual people reasonably react when encountered by the police. The Court nonetheless is constrained by the reasonable person standard as currently constituted, which, as one court frames it, suggests "that a reasonable person should feel free to leave or to deny police requests for stationhouse questioning in all circumstances except where the police explicitly tell the person that he or she is under arrest or that he or she is not free to leave." *Nova*, 63 F. Supp.2d at 456 ("[Cota's] holding that a reasonable person in Cota's position would feel free to disobey (deny) a police command (request) for stationhouse questioning makes it difficult for this court to apply a practical reasonable person standard in the present case"). This disparity between the real world and the theoretical reasonable person is compounded by the fact that the reasonable person standard, as currently formulated, does not take a person's IQ or mental capacity into account.

The Supreme Court has found that the age of a child may be considered as a relevant circumstance in determining whether they are in custody. *See J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394 (2011). In so holding, the Supreme Court found consideration of a juvenile's age "consistent with the objective nature" of the custody analysis test "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to any reasonable officer." *Id.* at 275, 131 S. Ct. at 2404. The majority did not opine as to whether its holding should be applied to other characteristics, and the Court is not aware of any court extending *J.D.B.* beyond juvenile age to, for example, diminished mental capacity or limited intelligence. At least one court in a civil case has suggested that *J.D.B.* is limited to cases where a child is the person being questioned. *C.S. v. Couch*, No. 10-CV-231, 2011 WL 6888368, at *16 (N.D. Ind. Dec. 28, 2011). And at least one other court has found that testimony regarding a defendant's ability to understand that he was not under arrest

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"is irrelevant in determining whether Defendant was in custody." *United States v. Norrie*, No. 5:11-CR- 94, 2013 WL 1285864, at *16 (D. Vt. March 26, 2013).

Even if the Court were to extend *J.D.B.*'s logic to consideration of Hernandez's diminished mental capacity, "[detectives] would have to have known about [Hernandez's] disabilities or those disabilities would have to have been objectively apparent to a reasonable officer." *U.S v. McFall*, CR No. 7-411, 2012 WL 194078, at *5 (W.D. Penn. Jan. 19, 2012). Here, local police officer Mark O'Brien testified that, while outside of the Hernandez residence, Rosemary Hernandez "alluded to the fact that [Hernandez] was unstable, and someone needed to stay with him." (Ex. 21E at 559:13-14.) Officer O'Brien testified that Rosemary did not tell him that Hernandez had a mental condition and that he neither asked Rosemary to elaborate nor relayed the information she told him to anyone else, which presumably includes the detectives who conducted Hernandez's questioning. (Ex. 21E at 559:6-16, 562:11-24.)

Detectives Ramirez, Morales, and Lamendola were aware that Hernandez required medication as they initially sent Officer O'Brien back to Hernandez's residence to retrieve the medication and reminded Hernandez during questioning to take his medication. At other points during questioning, Hernandez told detectives about various ailments he had such as HIV and back problems, and the medications he took for them. (Ex. 21C at 272:14, 282:18-22.) As for mental health, Hernandez told detectives that he had been diagnosed or treated in the past for schizophrenia, bipolar disease, and assorted other mental conditions, but that he had not been to a psychiatrist in a long time. (Ex. 21D at 439:23-442:20.) Hernandez did not, however, tell detectives that he had hallucinations or that one of his drugs – Olanzapine – was an antipsychotic. (Ex. 21D at 440:20-441:4.) Nor is there any indication that detectives were aware of Hernandez's low IQ. If *J.D.B.* were extended to cover diminished mental capacity, Detectives' knowledge of Hernandez's conditions would be of paramount importance.

As discussed below, in contrast to the objective standard governing the custody determination, an individual's

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C. The State Courts' Determination That Hernandez Waived His *Miranda* Rights Knowingly And Intelligently Was Not Unreasonable

Following his pre-*Miranda* questioning and first confession, Hernandez was read, and twice waived, his *Miranda* rights. The hearing court found that Hernandez was not so cognitively impaired that he was incapable of making a knowing and intelligent waiver. The court summarized the findings of Dr. Frumkin, Hernandez's expert, and Dr. Sweda, the Government's expert, crediting the latter because it was "based on a more comprehensive assessment of defendant's capabilities." (Ex. 31 at 19.) The Appellate Division affirmed, stating that Hernandez

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characteristics, including mental capacity, are considered as part of the totality of the circumstances when determining waiver. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 2047 (1973) (stating that voluntariness inquiry requires examining "both the characteristics of the accused and the details of the interrogation"); *Withrow v. Wilson*, 507 U.S. 680, 693-94, 113 S. Ct. 1754 (1993) (listing potential circumstances for determination of waiver including "the defendant's maturity, … education, … and mental health"); *Green v. Scully*, 850 F.2d 894, 901-02 (2d Cir. 1988) (mentioning "the individual's experience and background, together with the suspect's youth and lack of education or intelligence" as relevant to the court's determination of whether a confession was voluntary). *Compare United States v. Zeng*, 804 F. App'x 18, 20 (2d Cir. 2020) (summary order) (affirming district court's denial of motion to suppress because "Zeng's intellectual limitations did not prevent him from understanding the content of the waiver and consent forms"), *with United States v. Zerbo*, No. 98-CR-1344, 1999 WL 804129, at *12 (S.D.N.Y. Oct. 8, 1999) (concluding that defendants "limited cognitive abilities and mental illness prevented him from understanding both the *Miranda* warning and the significance of his waiver").

"was not so mentally ill, lacking in intelligence, or impaired by medication that he was incapable of intelligently waiving his rights" and that Hernandez's questions to ADA Durastanti about his right to counsel demonstrated that he understood his *Miranda* rights. *Hernandez*, 181 A.D.3d at 531, 122 N.Y.S.3d at 14. Hernandez contends that the state courts improperly discounted Dr. Frumkin's testimony and unreasonably concluded that Hernandez's exchange with ADA Durastanti about his right to counsel was proof of Hernandez's understanding of his rights. (Pet. Mem. at 50.)

Courts' review of a *Miranda* waiver is based on the totality of the circumstances, including the characteristics of the accused. *Favre v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2571-72 (1979). Even if a confession is given voluntarily, it may nonetheless be inadmissible if a person lacks the mental capacity to waive knowingly and intelligently. At the same time, "[a] waiver of the right to remain silent is not invalid merely because a defendant is of limited mental capacity." *Toste v. Lopes*, 861 F.2d 782, 783 (2d Cir. 1988), *cert. denied*, 490 U.S. 1112, 109 S. ct. 3170 (1989) (finding that petitioner waived his *Miranda* rights "[d]espite his low intelligence"); *United States v. Male Juvenile*, 121 F.3d 34, 40 (2d Cir. 1997) ("[t]he evidence of defendant's disabilities does not show that defendant was so incompetent that he was not aware both of the nature of the right being abandoned and the consequences of the decision to abandon it") (internal quotation marks omitted); *United States v. Murgas*, 967 F. Supp. 695, 706-08 (N.D.N.Y. 1997) ("while [defendant] presented evidence he has a below average IQ, limited education, and impaired reading ability, these

limitations do not preclude a finding that he made a knowing and intelligent waiver of his *Miranda* rights").

Mental competence at the time of a confession is gauged primarily by opinion testimony from medical experts. *See Blackburn v. State of Alabama*, 361 U.S. 199, 208, 80 S. Ct. 274, 280-81 (1960). Here, both Dr. Frumkin and Dr. Sweda agreed that Hernandez had a "very low" IQ, but that, "in terms of knowing and intelligent waiver, there is no one absolute [IQ] cutoff," and that a person of Hernandez's IQ ***could*** both knowingly and intelligently waive. (*See* Exs. 21H at 845-46, 852-53, 961-62; 21I at 1078.) As applied to Hernandez, the experts both found that Hernandez was capable of ***knowingly*** waiving his rights but disagreed whether Hernandez, given his IQ and the relevant testing, could ***intelligently*** waive his right. (*Compare* Exs. 21H at 870:13-20, *with* 22I at 1069:25-1070:14; 22J at 1157:3-7.)

Dr. Frumkin's opinion was based on his review of medical records, reports of other doctors (including Dr. Sweda), police reports, and video-recorded interviews, as well as about ten hours of evaluation and testing of Hernandez. (Ex. 21H at 828:14-831:22, 834:19-25.) Dr. Frumkin administered the Function of Rights Interrogation ("FRI"), which is designed to measure an intelligent waiver of rights and involves several vignettes depicting a person undergoing an interrogation with follow-up hypothetical questions. (Ex. 21H at 834:19-838:2, 856:19-857:21). In response to the questions, Hernandez stated that the police "can keep [a suspect] there until he talks … [b]ecause they want to find out what happened;" a suspect who does not talk to the police "can get in trouble … [b]ecause he should talk if he knows anything;" and if

a suspect starts speaking to the police and then decides they do not want to speak anymore it is "[t]oo late, you cannot change your mind, you have to keep going." (Ex. 21H at 858:15-862:19.)

Based on those answers, Dr. Frumkin testified that Hernandez did not understand the right to silence and, thus, could not have intelligently waived his rights. Dr. Frumkin's opinion was unaltered by Hernandez's conversation with Durastanti about the right to counsel. (Ex. 21H at 948:2-24.) When confronted with inconsistencies in Hernandez's testimony, Dr. Frumkin said that Hernandez was not a liar but an unreliable narrator. (Ex. 21H at 930:22-931:24.)

Dr. Sweda based his testimony on 21 hours of interviews and testing with Hernandez, video recordings of prior interviews, and the reports of other doctors. (Ex. 22I at 1049:20-1067:21.) Dr. Sweda also administered the FRI test and found that, Hernandez's scores, although in the low to middle range, were about average for respondents. (Ex. 22I at 1074:22-1077:25.) In response to a *Miranda*-specific comprehension test administered by Dr. Sweda, Hernandez recited the *Miranda* rights from memory. (Ex. 22I at 1079:10-14.). Based on Hernandez's testing results, plus the fact that he passed most of his high school classes and had a long employment history, Dr. Sweda concluded that Hernandez was capable of intelligently waiving his rights. (Ex. 22I at 1078:1-4.) Hernandez's conversation with ADA Durastanti, according to Dr. Sweda, indicated that Hernandez understood and appreciated his rights. (Ex. 22I at 1089:12-1090:3.)

Hernandez does not contend that the trial court acted contrary to clearly established federal law in how it conducted the *Huntley* hearing. "The only question [then] … is whether the trial court's factual determination … was unreasonable." *Rice v. Collins*, 546 U.S. 333, 342, 126 S. Ct. 969, 976 (2006). The hearing court's findings that Hernandez knowingly and intelligently waived his rights and that he understood his rights are "factual in nature and therefore entitled to a presumption of correctness." *Smith v. Sullivan*, 1 F. Supp.2d 206, 213 (W.D.N.Y. 1998) (stating that trial court and Appellate Division's findings that suspect understood and intelligently waived his rights was "entitled to a presumption of correctness"); *see also Whyte v. Brown*, No. 09-CV-5196, 2011 WL 7100558, at *16 (S.D.N.Y. July 18, 2011) ("this Court must give deference to the state court factual findings, and Petitioner bears the burden of rebutting these findings by clear and convincing evidence").

In making its determination, the hearing court gave more weight to Dr. Sweda's testimony than to Dr. Frumkin's. The Court did not act unreasonably in doing so. The hearing court stated that it relied more on Dr. Sweda's testimony because Dr. Sweda gave a 360-degree evaluation of Hernandez's life and adaptive functioning (Ex. 21I at 1061:14-22), unlike Dr. Frumkin, whose conclusions derived from certain tests but not Hernandez's adaptive functioning and background. (Ex. 31 at 14.) The hearing court weighed and considered the evidence and testimony of the experts and gave a reasoned explanation of why it gave more weight to one expert compared to the other. (Ex. 31 at 14-15, 19-20.) Determinations of fact by state courts are presumed correct unless shown

otherwise by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Hernandez has not done so here – at best he has shown that reasonable minds could disagree on what conclusion to draw from the experts' opinions. Under those circumstances, habeas relief is foreclosed. *See Amir v. Hulihan*, No. 10-CV-2293, 2016 WL 6068128, at *9 (E.D.N.Y. Oct. 13, 2016) (denying habeas because "it was within the trial court's discretion to [] rely on [one expert's] conclusions" over those of a "different mental health expert who examined Petitioner at the request of the defense counsel"); *Wright v. Poole*, No. 02-CV- 8669, 2007 WL 7714966, at *7 (S.D.N.Y. Nov. 7, 2007), *R & R adopted* 2012 WL 4478393 (S.D.N.Y. Sept. 28, 2012) ("[t]he admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the trial court, and review beyond the intermediate appellate level is generally unwarranted") (internal quotation marks omitted); *Catlett v. Greiner*, No. 01-CV-2548, 2001 WL 1267194, at *5 (S.D.N.Y. Oct. 23, 2001) ("this court affords a high degree of deference to the trial court's finding of fact" and "[i]t was the trial judge's function to weigh the conflicting medical opinions presented along with her own observations of the defendant").

Hernandez insists that his exchange with ADA Durastanti undermines the reasonableness of the state court's finding because it demonstrates that Hernandez did not understand his right to counsel. (Pet. Mem. at 50-51.) At the end of his interrogation at the Manhattan DA's Office at around 7:00 a.m. on May 24, 2012, Hernandez asked Durastanti whether his right to counsel applied "when I was talking to you if I did not want to answer" and stated that he wanted an attorney to represent him ***in court***. (Ex. 17 at 7:04-

05 (emphasis added).) When Durastanti responded that the *Miranda* rights concerned not whether Hernandez wanted an attorney to represent him in court but rather if Hernandez wanted an attorney at the present time, Hernandez replied "No, because I don't have nothing to hide no more." (Ex. 17 at 7:04-05.)

Both the hearing court and the Appellate Division considered the exchange between Hernandez and Durastanti. In concluding that Hernandez's waiver was intelligent, the hearing court observed the videotaped exchange and relied on Dr. Sweda's finding that "particularly significant [were] the circumstances of the actual interviews in this case, including [Hernandez's] questioning of the ADA about his access to an attorney." (Ex. 31 at 19.) The Appellate Division held that this exchange demonstrated Hernandez's comprehension of, rather than confusion about, his *Miranda* rights. *Hernandez*, 122 N.Y.S.3d at 14. While it may be possible to reasonably interpret the exchange in different ways, the Court cannot conclude either that the hearing court unreasonably determined what the exchange signifies or that the appellate court unreasonably reached a similar conclusion.

Circumstances likely would be different if Hernandez explicitly told Durastanti that he did not understand that he had the right to have an attorney during questioning. *See Cook v. Kernan*, No. C 15-06343, 2017 WL 4516837, at *12 (N.D. Cal. Oct. 10, 2017) ("the most critical fact" was that the suspect "repeatedly told his interrogators that he had not understood he had the right to have an attorney at the interrogation"). But that is not what the record shows. Again, reasonable factfinders could reach different

conclusions about whether Hernandez's exchange with Durastanti demonstrates a level of uncertainty and miscomprehension such that Hernandez did not intelligently waive his *Miranda* rights. But the evidence to support that is not clear and convincing and does not establish a basis for granting habeas relief.

II. Hernandez's *Missouri v. Seibert* Claims

In *Seibert*, the Supreme Court held unconstitutional the law enforcement practice of intentionally obtaining a confession without giving *Miranda* warnings, then issuing the warnings, and then obtaining a second confession. Under *Seibert*, "[l]aw enforcement may not circumvent *Miranda* by engaging in a two-step interrogation process whereby a person is questioned without the proper warnings, made to confess, *Mirandized*, and then questioned again." *United States v. Pritchette*, 219 F. Supp.3d 379, 383 (S.D.N.Y. 2016) (citing *Seibert*, 542 U.S. at 609, 124 S. Ct. at 2608). A suspect's post-warning confession will generally be excluded if the Government "engage[d] in a deliberate two-step process calculated to undermine the defendant's *Miranda* rights … unless curative measures (designed to ensure that a reasonable person in the defendant's position would understand the import and effect of [*Miranda*]) were taken before the defendant's post-warning statement." *United States v. Moore*, 670 F.3d 222, 229-30 (2d Cir. 2012).

Hernandez argues that the state courts ignored *Seibert* in both failing to suppress his post-*Miranda* statements and in responding to the jury's request for instruction concerning those statements. The Government contends that Hernandez's suppression

claim is procedurally defaulted, and, regardless, that *Seibert* does not apply. The Government further argues that Hernandez has failed to establish that the trial court's response to the jury's request was contrary to *Seibert*. The Court addresses each issue in turn.

A. *Seibert* and Suppression of Hernandez's Post-*Miranda* Statements

As a threshold matter, the Court's conclusion in Section I that the state courts did not unreasonably determine that Hernandez was not in custody prior to receiving his *Miranda* rights and, therefore, that his pre-*Miranda* confession was not obtained improperly, "necessarily defeats [his] second argument, which claims that the police conducted an impermissible two-step interrogation." *Miller*, 2022 WL 1669195, at *2 (internal quotation marks omitted); *see also Moore*, 670 F.3d at 229 (asking "was the initial statement, though voluntary, obtained in violation of the defendant's *Miranda* rights? If not, there is no need to go further"); *United States v. Familetti*, 878 F.3d 53, 62 (2d Cir. 2017) ("Because Familetti was not subject to a pre-warning custodial interrogation, we do not reach his corollary argument regarding a deliberate two-step interrogation"); *see generally Seibert*, 542 U.S. at 612, 124 S. Ct. at 2610 (finding post-*Miranda* confessions can be involuntary specifically in circumstances where law enforcement deliberately elicited a "first, unwarned and inadmissible segment" of incriminating evidence).

If, however, the District Judge disagrees with Section I conclusion's and instead finds that the state courts unreasonably determined that Hernandez was not subjected to custodial interrogation before

receiving *Miranda* warnings, the Court will have to determine whether *Seibert* required exclusion of Hernandez's post-*Miranda* statements as well. There are three periods of post-*Miranda* statements at issue: the second round of questioning at the CCPO, the SoHo tour, and questioning by ADA Durastanti at the Manhattan DA's Office. The parties agree that if Hernandez's pre-*Miranda* statements should have been suppressed, then, under *Seibert*, so should his post-*Miranda* statements made at the CCPO. (*See* Pet. Mem. at 52-53; Resp. Mem. at 109; Pet. Reply at 12.) At oral argument, the Government equivocated on whether statements made during the SoHo tour should also be excluded. (Dkt. 35 at 54:10-20.) Those statements, however, would require suppression as well, given that Detectives Ramirez and Morales – the same detectives who interrogated him at the CCPO – also led the SoHo tour, did not administer new *Miranda* warnings, and did not take any other curative steps. (Ex. 31 at 12.) *See United States v. Capers*, 627 F.3d 470, 483-84 (2d Cir. 2010) (excluding statement because the pre- and post-warning interrogations involved the same personnel). That leaves open to dispute whether Hernandez's statements made to ADA Durastanti would also warrant suppression under *Seibert*.

1. Hernandez's *Seibert* Claim Is Not Procedurally Forfeited

The Government first argues that Hernandez's *Seibert* claim is unexhausted and procedurally forfeited because Hernandez "failed to fairly present his *Seibert* claim in state court;" "it is no longer possible for him to present his suppression claims to the Appellate Division;" and neither the cause-and-prejudice nor the miscarriage-of-justice exceptions

apply. (Resp. Mem. at 105-08.) Adjudicating the claim now, according to the Government, would require the Court to undertake factual findings never made by the trial court. (Resp. Mem. at 105-06.) Hernandez counters that the discussion of *Seibert* in his briefing before the Appellate Division, although in a different context, sufficiently alerted the state courts to his *Seibert* claim. (Pet. Reply at 10-12.) The Court agrees with Hernandez.

AEDPA imposes threshold requirements on habeas petitioners, including that petitioners first exhaust their claims in state court. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731 (1999); *Galdamez v. Keane*, 394 F.3d 68, 72 (2d Cir. 2005). The exhaustion requirement is designed to provide state courts with the "'opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *Jackson v. Edwards*, 404 F.3d 612, 619 (2d Cir. 2005) (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 512 (1971)); *see Galdamez*, 394 F.3d at 72 ("Comity concerns lie at the core of the exhaustion requirement").

Substantively, the petitioner must have apprised the state courts of "both the factual and the legal premises of the claim [the petitioner] asserts in federal court." *Jones v. Vacco*, 126 F.3d 408, 413 (2d Cir. 1997) (quoting *Daye v. Attorney General of New York*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc)). Although the petitioner need not "cite chapter and verse of the Constitution in order to satisfy this requirement, he must tender his claim in terms that are likely to alert the state courts to the claim's federal nature." *Jackson v. Conway*, 763 F.3d 115, 133 (2d Cir. 2014) (internal quotation marks omitted)

(quoting *Carvajal v. Artus*, 633 F.3d 95, 104 (2d Cir. 2011)). A petitioner may meet this requirement by presenting his claim in any of the following ways:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Strogov v. Attorney General of New York, 191 F.3d 188, 191 (2d Cir. 1999) (quoting *Daye*, 696 F.2d at 194).

The parties agree that Hernandez raised *Seibert* in both his opening and reply briefs to the Appellate Division. (Resp. Mem. at 105; Pet. Reply at 10.) The Government contends, however, that Hernandez addressed his *Seibert* claim only as a component of his jury note argument, thereby failing to exhaust it in the suppression context. (Resp. Mem. at 105 (citing Exs. 56 at 197-99; 58 at 19-22).) The Court disagrees. Hernandez's *Seibert* claim centers on whether Hernandez's post-*Miranda* confessions are so related to his pre-*Miranda* confession that they required suppression. That same legal argument underlies ***both*** his suppression and his jury note claims. Irrespective of the argument's location in his briefing, Hernandez sufficiently presented the sum and substance of his *Seibert* claim to the state courts.

"Even [though Hernandez] did not fully articulate a claim under *Seibert* on his direct appeal" as grounds

for suppression, "he did, nonetheless, explicitly claim a Fifth Amendment violation (*i.e.*, a federal constitutional violation) based on the way in which his interrogation was conducted – where a portion of the questioning was conducted pre-*Miranda* warnings and another portion was conducted post." *Bracey v. Graham*, No. 16-CV-7919, 2020 WL 12178000, at *28 (S.D.N.Y. Apr. 27, 2020), *R & R adopted*, 2021 WL 4950890 (S.D.N.Y. Oct. 25, 2021). The requirement for Hernandez to place "before the state court essentially the same legal doctrine he asserts in his federal petition" does not mean "that there can be no substantial difference in the legal theory advanced to explain an alleged deviation from constitutional precepts." *Daye*, 696 F.2d at 192,192 n.4. Rather, for arguments about whether a confession was voluntary, "all that is needed to alert the state courts to the constitutional nature of the claim is the exposition of the material facts and the assertion that the confession was not voluntary," a standard Hernandez more than meets. *Id.*

Hernandez's state court briefs expressly discuss *Seibert*'s substantive legal holding as applied to the relevant facts. (Exs. 56 at 197-99; 58 at 19-22.) In his opening brief to the Appellate Division, Hernandez summarized and analogized *Seibert* to the facts of his case, alleging that detectives "employed the 'question-first' technique – struck down in *Seibert*" when they "'played psychologist' with [Hernandez] for hours, without reading him his rights, until he confessed [and] [t]hen … Mirandized him and asked him to 'start telling us again exactly what you just told us before.'" (Ex. 56 at 198.) That presentation is more complete than is required by the Second Circuit to satisfy the habeas exhaustion requirement. *See, e.g.,*

Jackson v. Edwards, 404 F.3d at 619 (finding claim fairly presented when "the substance of the federal habeas corpus claim is clearly raised and ruled on in state court, although the federal principle may initially be attached to a different label than the one ultimately affixed in federal habeas proceedings") (internal citations omitted); *Gonzalez v. Sullivan*, 934 F.2d 419, 423 (2d Cir. 1991) (a "petitioner's citation to [a constitutional provision] in a heading in his brief [is] sufficient[] [to] alert[] the state courts to the federal constitutional nature of the … claim"); *Samuel V. LaValley*, No. 12- CV-2372, 2013 WL 550688, at *2 (E.D.N.Y. Feb. 12, 2013), *aff'd*, 551 F. App'x 614 (2d Cir. 2014) (stating that petitioner's single reference to *Strickland* satisfied the exhaustion requirement even without "mention of either of *Strickland*'s two requirements or any arguments as to how defense counsel's failure to object was objectively unreasonable or prejudicial"); *cf. Howe v. Scully*, 582 F. Supp 277, 279 (S.D.N.Y. 1984) (finding petitioner's claim unexhausted "where his appellate brief failed to cite a single case discussing insufficiency of the evidence in federal constitutional terms").

Although Hernandez did not cite *Seibert* by name either prior to or at trial, he repeatedly invoked *Seibert*'s substance and articulated his claims in a manner that specifically called *Seibert* to mind. In moving to reopen the *Huntley* hearing, Hernandez argued that his questioning and confessions were part of a "single continuous chain of events" for which "[t]here was no attenuation, and no intervening time or circumstances." (Ex. 25 at 37-38.) And at trial when discussing the jury note, Hernandez's counsel described the factual circumstances in ways reminiscent of *Seibert*, arguing that "[i]f the initial

confession is flawed, everything else fails," "[e]verything is a product of the initial confession," (Ex. 22U at 10203:1-10204:6) and that detectives "got a confession out of [Hernandez], first, read him Miranda rights, and then continued to hold him in custody for further questioning" (Ex. 22U at 10222:6-8). Hernandez went on to argue for the suppression of his confession to Durastanti because Hernandez was in continuous police custody and Durastanti was present for the first confession (Ex. 22U at 10223:11-19), both contentions evocative of *Seibert*'s standards for establishing whether a post-*Miranda* confession requires suppression based on an impermissible pre-*Miranda* confession. *See Seibert*, 542 U.S. at 620-22, 124 S. Ct. at 2615-16 (Kennedy. J, concurring).

The Court also agrees with Hernandez that the Government's comparison to *Jones v. Murphy*, 694 F.3d 225 (2d Cir. 2012) is inapt. In *Jones*, the Second Circuit denied petitioner's habeas petition, finding that his *Seibert* claim was unexhausted because Jones' briefs on appeal "did not so much as cite *Seibert*, nor did he in any way articulate the core of a *Seibert* claim." *Id.* at 247. That is wholly different from the instant circumstance. Hernandez cited to *Seibert* extensively in his appellate briefs, recited *Seibert*'s core legal holdings, and linked them to the relevant facts. (*See, e.g.*, Exs. 56 at 197-99; 58 at 19-22.) The state court was properly alerted to the law and facts relevant to the thrust of the *Seibert* claim irrespective of whether it appeared in the suppression or jury note context.

"[T]here are instances" – like the case here – "in which 'the ultimate question for disposition' will be the same despite variations in the legal theory or factual allegations urged in its support." *Picard*, 404

U.S. at 277-78, 92 S. Ct. at 513. Hernandez sufficiently presented the relevant facts and law for his *Seibert* claim to the state courts. His raising those arguments in relation to the jury's note, rather than in support of suppression, is of no moment. Hernandez's state court submissions satisfy the exhaustion requirement and preserved his *Seibert* claim.

2. Hernandez's *Seibert* Suppression Claim Nonetheless Fails

Even though not procedurally defaulted, Hernandez's *Seibert* claim vis-à-vis suppression does not survive habeas scrutiny. Analysis of a *Seibert* claim follows several steps. "First, was the initial statement, though voluntary, obtained in violation of the defendant's *Miranda* rights? If not, there is no need to go further." *Moore*, 670 F.2d at 229. If the initial statement was obtained in violation, then the government must establish by a preponderance of the evidence, and in light of the totality of the objective and subjective evidence, that it did not engage in a deliberate two-step process. *Id*. at 229-30. To make that determination, courts review the totality of the circumstances, including: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Seibert*, 542 U.S. at 615, 124 S. Ct. at 2612; *see also Capers*, 627 F.3d at 483-84 (same). If detectives are deemed not to have engaged in a deliberate two-step process, the suspect's post-warning statement is admissible so long as it was voluntary. *See Oregon v.*

Elstad, 470 U.S. 298, 314, 318, 105 S. Ct. 1285, 1296, 1298 (1985) (finding that the "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement" and that "[t]he relevant inquiry" is whether "the second [post-warning] statement was … voluntarily made").

If the police did engage in a deliberate two-step interrogation process, courts "next consider whether any curative measures intervened to restore the defendant's opportunity to voluntarily exercise his *Miranda* rights." *Capers*, 627 F.3d at 484; *see Seibert*, 542 U.S. at 621, 124 S. Ct. at 2615 (Kennedy, J., concurring) ("When an interrogator uses this deliberate, two-step strategy … postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps"). Such curative measures can include, for example, "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning" or "an additional warning that explains the inadmissibility of the prewarning custodial statement." *Seibert*, 542 U.S. at 622, 124 S. Ct. at 2616 (Kennedy, J., concurring).

Hernandez argues that Durastanti's interrogation of Hernandez was part of "one long interrogation" (Pet. Mem. at 54) in which detectives engaged in questioning that "'was systematic, exhaustive, and managed with psychological skill,'" as was the case in *Seibert* (Pet. Reply at 13 (quoting *Seibert*, 542 U.S. at 616, 124 S. Ct. at 2612)). According to Hernandez, Durastanti's sole curative step – "a twelve-second statement made at 2:19 a.m." in which Durastanti stated that he knew Hernandez

had spoken with detectives the previous day, but that their conversation had "nothing at all to do with that statement" and they were "start[ing] brand new" – was insufficient because "it did not 'explain[ ] the likely inadmissibility of the prewarning custodial statement [ ].'" (Pet. Mem. at 54 (quoting *Seibert*, 542 U.S. at 622, 124 S. Ct. at 2616 (Kennedy, J., concurring).) Hernandez also argues that "the ten-hour gap between Hernandez's statements made while at the CCPO, including the SoHo walk-around, and at the [DA's] office" was not "a break significant enough to 'allow the defendant to appreciate that he retained the right to remain silent or provide ample opportunity to reassess his situation.'" (Pet. Reply at 15 (quoting *Pritchette*, 219 F. Supp.3d at 387).)

The Government counters that, even if Hernandez had been subjected to custodial interrogation at the CCPO, suppression of Hernandez's confession to Durastanti would not be required. The Government points to the "roughly 10 hours … and about six hours" that elapsed between Durastanti's interrogation and Hernandez's questioning at the CCPO and the SoHo tour respectively, during which time Hernandez spoke with his wife and daughter, ate dinner, and slept. (Resp. Mem. at 110.) And the Government underscores that the interviews were dissimilar and non-continuous as Durastanti's "was conducted in a different state by a different interlocutor than the initial questioning." (Resp. Mem. at 110.) The Government also highlights that Durastanti "elicit[ed] another waiver of [Hernandez's] *Miranda* rights" and "stressed that he wanted to start 'brand new' with [Hernandez] and that their conversation

had 'nothing at all to do' with [Hernandez's] [prior] conversations with detectives." (Resp. Mem. at 110.)

As explained above (and further below), the parties' briefing on direct appeal included similar *Seibert* arguments in the context of the Trial Judge's response to the jury note. (*See* Exs. 56 at 197-201; 57 at 204-05; 58 at 19-22.) In its decision based on those submissions, the Appellate Division held, in the context of the court's response to the jury note, that "there is no reasonable probability that the verdict would have been different … in light of the strong evidence that [Hernandez's] confession to [Durastanti] was fully attenuated from all of his confessions to the police, as well as corroborated by defendant's various confessions to civilians." *Hernandez*, 181 A.D.3d at 533, 122 N.Y.S.3d at 15.

The Appellate Division's conclusion undermines Hernandez's argument that the state courts ***ignored*** *Seibert*. Although brief and lacking explicit reference to *Seibert*, the Appellate Division's statement shows that it considered what *Seibert* requires – assessment of the relationship between the pre- and post-*Miranda*-warning questioning – and concluded, based on the record, that the confession obtained during questioning by Durastanti was "fully attenuated from all his confessions to the police." The Appellate Division thus rejected Hernandez's argument that he was subject to one continuous line of questioning. To be sure, the Appellate Division did not address "deliberateness" of the persons engaged in the multi-step questioning. But the court's conclusion that the initial pre-*Miranda*-warning questioning and the questioning by ADA Durastanti was "fully attenuated" reflects a determination that, even if detectives and ADA Durastanti deliberately

implemented a two-step interrogation, "measures intervened to restore the defendant's opportunity voluntarily to exercise his *Miranda* rights." *Capers*, 627 F.3d at 484.

Thus, even if the state courts did ignore *Seibert* in the context of considering suppression of Hernandez's post-*Miranda* statements, the Appellate Division's "fully attenuated" conclusion would render that lapse harmless error. To overcome that finding, as further explained below, Hernandez would have to show that no fair-minded jurist could reach the Appellate Division's conclusion on attenuation. Hernandez cannot clear that high bar; reasonable jurists could arrive at different conclusions as to whether curative measures existed sufficient to break the chain and render Hernandez's subsequent confession to Durastanti fully attenuated. On one hand, for instance, the lengthy time that elapsed between the two confessions supports a finding of attenuation, as does Durastanti's initial statement to Hernandez about starting brand new. On the other hand, for example, Hernandez remained in custody throughout, and Durastanti's *Miranda* warnings omitted any explanation of the likely inadmissibility of Hernandez's prior statements. Given these varied facts, reasonable jurists assessing the record could disagree whether the intervening measures were sufficiently curative.[17]

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[17] At oral argument, Hernandez pointed to *Pritchette*, 219 F. Supp.3d 379, as support for finding an unconstitutional two-step interrogation and insufficient attenuation between pre- and post-*Miranda* statements. (Dkt. 35 at 37:15-38:18.) In *Pritchette*, detectives conducted an unrecorded pre-*Miranda* interrogation in which Pritchette confessed. *Id*. *at* 382. Thirty minutes elapsed

(Continued…)

The determination that Hernandez's post-*Miranda* questioning was fully attenuated from his pre-*Miranda* questioning necessarily means that suppression of his post-*Miranda* statements would not be warranted under *Seibert*. As with the question of whether Hernandez's pre-*Miranda* confession should have been suppressed, this Court could well reach a different conclusion than the state courts did regarding suppression of Hernandez's post-*Miranda* statements to Durastanti. But, once again, as a habeas court, this Court may not simply stand in the shoes of the trial court, reassess the facts, and reach its own conclusion. Constrained by the deference required by AEDPA, the Court cannot conclude that the Appellate Division's attenuation conclusion was unreasonable. Thus, even if the District Judge

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before detectives brought Pritchette back into the same room, turned on the recording devices, *Mirandized* him, and elicited another confession. *Id*. Pritchette was then held in state custody for a month before he was arrested by federal authorities, *Mirandized* again, interviewed by federal agents, and once again confessed. *Id*. at 382-83. The Court found that both of Pritchette's subsequent confessions should be suppressed as the product of an improper two-step interrogation. *Id*. 383-88.

While there are some similarities between *Pritchette* and the instant case, there also are significant differences. As here, the first post-*Miranda* confession in *Pritchette* was subject to suppression as it took place just a short while after the pre-*Miranda* questioning and confession, and was conducted in the same room by the same agents. *Id*. at 383-86. Unlike here, the second post-*Miranda* confession in *Pritchette*, although far more attenuated in time than here, was obtained after the agents conducting the interrogation explicitly communicated that it was a continuation of the prior interrogations and reminded Pritchette that he had already confessed and that the confession had been recorded. *Id*. at 386-88.

disagrees with this Court's recommendation on Section I and proceeds to a full *Seibert* analysis, Hernandez's claim that the confession to Durastanti should be suppressed would not succeed.

B. *Seibert* And The Trial Court's Response to the Jury Note

Hernandez argues that the state courts' jury note rulings improperly ignored *Seibert*, should be reviewed de novo, and were not harmless error. (Pet. Mem. at 55-57, 67-68.) The Government disagrees, asserting that AEDPA's deferential standard applies, the state courts did not act unreasonably, and, regardless, any error was harmless. (Resp. Mem. at 112-13, 122-25.) Although the Court finds that, even under AEDPA's deferential standard, the state court acted unreasonably in ignoring *Seibert* when responding to the jury's request for clarification, the Court ultimately agrees with the Government that the error was harmless under the prevailing standard.

1. The Relevant Jury Note Facts

On February 1, 2017, the Trial Judge delivered final instructions to the jurors. The jury was instructed on "the law as it relates to testimony concerning statements of the defendant made to law enforcement," as well as the standards for determining voluntariness, custodial interrogation, and *Miranda* waiver, but were provided no instructions on how to consider Hernandez's post-*Miranda* confessions depending on what the jury determined with respect to the pre-*Miranda* confession. (Ex. 22U at 10151:4-10158:12.) The following day, the jury sent a note "request[ing] 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 various doctors." (Ex. 22U at 10202:5-16 (emphasis in original).) After discussion with the parties, and over objection of Hernandez's counsel, the Trial Judge concluded that, because the jury's question "is very carefully worded … I am going to say no because that's it." (Ex. 22U at 10204:19-21.)

On direct appeal, the parties fully briefed the issue of whether the Trial Judge's terse "no" response was legally incorrect under *Seibert*. (Ex. 56 at 197-201; *see also* Exs. 57 at 202-09; 58 at 19-22.) The Appellate Division rejected Hernandez's claims, finding that "[t]he court provided a meaningful response to a jury note on the subject of the voluntariness of confessions [and] [g]iven the precise wording of the note, the court's brief response was correct." *Hernandez*, 181 A.D.3d at 532-33, 122 N.Y.S.3d at 15 (internal citations omitted). As recited above, the Appellate Division additionally held that, even if the Trial Judge should have instructed the jury on attenuation, "there is no reasonable possibility that the verdict would have been different had those instructions been given, in light of the strong evidence that defendant's confession to [Durastanti] was fully attenuated from all of his confessions to the police." *Id*. at 533, 122 N.Y.S.3d at 15 (internal citations omitted).

2. AEDPA Deference Applies

Hernandez initially argues that the state courts' failure to "acknowledge … let alone [correctly] apply" *Seibert* with respect to the jury note issue requires the

Court to conduct a de novo review. (Pet. Mem. at 55.) The Government counters that, although neither discussing nor citing *Seibert*, the Appellate Division's decision was a ruling on the merits. (Resp. Mem. at 112-13.) The Government is correct – despite the Appellate Division's not having cited *Seibert*, the Court is still required to apply the deferential AEDPA standard. *Bell v. Cone*, 543 U.S. 447, 455, 125 S. Ct. 847, 853 (2005) ("Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation"); *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 365 (2002) (per curiam) (observing that "the state court['s] fail[ure] to cite … any federal law" was not required).

A state court's adjudication of a state prisoner's federal claim is on the merits when it: "(1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer [under] § 2254(d)(1) to the state court's decision on the federal claim – ***even if*** the state court does not explicitly refer to either the federal claim or to relevant federal case law." *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001) (emphasis added); *see also Richter*, 562 U.S. at 98, 131 S. Ct. at 784 ("a state court need not cite or even be aware of our cases under § 2254(d)" to adjudicate on the merits); *Wade v. Herbert*, 391 F.3d 135, 140 (2d Cir. 2004) ("even absent citation of federal case law, [a state court's determination] is a determination 'on the merits'" requiring deference); *Jiang v. Larkin*, No. 12-CV-3869, 2016 WL 1718260, at *13 (S.D.N.Y. April 28, 2016) ("even where a state court decision does not explicitly reference a

defendant's federal claim or federal case law," AEDPA deferential standard applies).

The Appellate Division's decision disposed of Hernandez's jury note claim on the merits, determining that the court's response was "correct." *Hernandez*, 181 A.D.3d at 532-33, 122 N.Y.S.3d at 15. And, even if the Appellate Division had not addressed Hernandez's *Seibert* claim regarding the jury note, the statement that it had "considered and rejected [Hernandez's] remaining claims," *id.* at 533, 122 N.Y.S.3d at 16, would be sufficient for proper disposition. *See Francolino v. Kuhlman*, 365 F.3d 137, 141 (2d Cir. 2004), *cert denied*, 543 U.S. 872, 125 S. Ct. 110 (2004) (finding that "a claim was adjudicated on the merits where it was one of the remaining contentions that the Appellate Division stated were 'without merit'"). The Court thus reviews Hernandez's claim under AEDPA's deferential standard.

3. The Trial Court's Response To The Jury Ignored *Seibert*

Although meriting deference, the trial court's response to the jury was so deficient as to deprive Hernandez of due process. The jury asked the Trial Judge to "explain" whether they "must" disregard the post-*Miranda* confessions if they found that the pre-*Miranda* confession was not voluntary. The Trial Judge answered "no," yet did not provide any guidance to the jury on how they were to consider the relationship between the pre- and post-*Miranda* confessions. That violated Hernandez's due process rights, and the Appellate Division's conclusion otherwise was unreasonable.

Generally, improper jury instructions in a state trial will not form the basis of federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). But habeas relief is warranted when an instruction is so deficient as to constitute a federal due process violation. *See id.* at 72, 112 S. Ct. at 482; *Cupp v. Naughten*, 414 U.S. 141, 145-46, 94 S. Ct. 396, 400 (1973). Similarly, when responding to a jury question, "[d]etermination of the appropriate answer rests within the discretion of the trial court, so long as the answer given does not deprive a defendant of a constitutional right." *McShall v. Henderson*, 526 F. Supp. 158, 161 (S.D.N.Y. 1981).

The Government is correct that, as a general rule, there is no federal constitutional right to a jury determination regarding voluntariness of a statement. *See Lego v. Twomey*, 404 U.S. 477, 490, 92 S. Ct. 619, 927 (1972) ("the admissibility of evidence is a question for the court rather than the jury" and both judge and jury are not required to pass "upon the admissibility of evidence when constitutional grounds are asserted for excluding it"); *United States v. Anderson*, 394 F.2d 743, 747 (2d Cir. 1968) ("no constitutional requirement" of a jury determination of voluntariness"); *Fernandez v. Lee*, No. 10-CV- 9011, 2012 WL 4473294, at *12 (S.D.N.Y. July 12, 2012), *R & R adopted*, 2012 WL 4478998 (S.D.N.Y. Sept. 28, 2012) ("Because the trial judge considered and ruled on the voluntariness of Mr. Fernandez's statements …, the Constitution does not guarantee him the right to have a jury consider the same issue"); *Colon*, 2010 WL 9401, at *42 ("The United States Constitution

does not give a criminal defendant the right to a jury determination regarding statement voluntariness").

In reaching that conclusion, courts have been compelled by the notion that requiring the inclusion of a jury charge on voluntariness absent a request could interfere with a defendant's trial tactics.[18] *See Anderson*, 394 F.2d at 747-48. Even where a defendant has requested an instruction on voluntariness, "whether … the [voluntariness] issue should also be submitted to the jury" is an open question. *Id*. at 747; *cf. Lake v. Greiner*, No. 98-CV-6289, 2003 WL 21508326, at *11 (E.D.N.Y. 2003), *aff'd* 169 F. App'x 606 (2d Cir. 2006) ("Petitioner cites no Supreme Court case, nor is this court aware of any, that has held that a voluntariness charge is *per se* required even where defendant does not ask for it"). Nor, apparently, does New York state law require the trial court to instruct the jury on attenuation. *See People v. Rabady*, 28 A.D.3d 794, 795, 812 N.Y.S.2d 884, 844 (2d Dep't 2006) (citing cases).

Regardless, the Court is not confronted here with the question of whether an instruction on voluntariness or attenuation should have been given in the first place. That is because the trial was largely about Hernandez's confessions, including the extent to which they were voluntary. The Trial Judge did instruct the jury about voluntariness – in general – but without providing any direction on how to consider voluntariness of post-*Miranda* confessions

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[18] As explained above, that concern for interfering with defendant's trial tactics is moot because Hernandez affirmatively requested that the jury be instructed on voluntariness, and, in response to the jury's note, that they be instructed beyond simply being told "no."

vis-à-vis pre-*Miranda* confessions. The jury's note sought guidance on that very issue, yet the Trial Judge purposefully declined to instruct the jury about attenuation despite defense counsel's objection to the intended answer, request for a specific additional instruction, and, request "[a]t the very least" that the Trial Judge instruct the jury "that it's up to them. They don't have to disregard [the subsequent confessions] but if they choose to [they may]." (Ex. 22U at 10202:25-10204:6; 10204:16-18.)

The Trial Judge's response of "no" to the jury's request for explanation of how to treat the subsequent confessions improperly ignored *Seibert* and, thus, violated Hernandez's Fifth Amendment rights. *Seibert* is not a mandate that subsequent confessions must be suppressed. *Seibert*, 542 U.S. at 618-19, 124 S. Ct. at 2614 (Kennedy J., concurring) ("not every violation of the rule requires suppression of the evidence obtained"). Rather, as explained by the Second Circuit, *Seibert* prescribes a stepwise analysis to determine if subsequent confessions following an initial improper un-*Mirandized* confession are part of a deliberate two-step interrogation and should be suppressed absent curative measures. *See Moore*, 670 F.3d at 229-30.

Here, the jury requested an explanation whether finding Hernandez's initial confession involuntary would require them to disregard his subsequent confessions. Once the jury made this request, it was incumbent on the Trial Judge to provide supplemental instruction that indicated the proper analysis as dictated by federal constitutional law. The Second Circuit has underscored the need for particular care that must be given to responding to juries' questions:

> A supplemental charge must be viewed in a special light. It will enjoy special prominence in the minds of the jurors for several reasons. First, it will have been the most recent, or among the most recent, bit of instruction they will have heard, and will thus be freshest in their minds. Moreover, it will have been isolated from the other instructions they have heard, thus bringing it into the foreground of their thoughts. Because supplemental instructions are generally brief and are given during a break in the jury's deliberations, they will be received by the jurors with heightened alertness rather than with the normal attentiveness which may well flag from time to time during a lengthy initial charge. And most importantly, the supplemental charge will normally be accorded special emphasis by the jury because it will generally have been given in response to a question from the jury.

Arroyo v. Jones, 685 F.2d 35, 39 (2d Cir. 1982). And "[w]hile the trial court has discretion in giving supplemental instructions, it must respond meaningfully to the jury's inquiry." *Ariza v. Lee*, No. 13-CV-359, 2013 WL 6008920, at *7 (S.D.N.Y. Nov. 13, 2013).

The Trial Judge's answer of "no" was technically correct but neither meaningful nor responsive to the jury's request for the court to "explain" what it must do. The proper analysis, as dictated by *Seibert*, requires determining first whether the two-step process implemented by law enforcement was

deliberate, and second, whether intervening, curative measures adequately separated the multiple rounds of questioning. Despite the jury's request for the Trial Judge to explain whether they must disregard Hernandez's post-*Miranda* confessions if they found that his pre-*Miranda* confession was not voluntary, the Trial Judge provided no explanation, mentioning neither deliberateness nor curative measures, let alone factors that go into making those determinations. Having failed to do so was constitutional error as it left the jury with no direction how to apply the analysis required by *Seibert* and, thus, "den[ied] [the] defendant the opportunity to raise a 'highly credible defense.'" *Jackson v. Edwards*, 404 F.3d at 625; *see Rodriguez v. Heath*, 649 F. App'x 136, 139 (finding the judge's "charging error deprived Rodriguez, who had confessed to the fatal shooting, of a 'highly credible defense'" and, thus, violated his due process rights).

Nor was the Trial Judge's improper response to the jury note mitigated by the rest of the charge. *See McTiernan v. Tedford*, No. 21-CV-1543, 2023 WL 3407600, at *7 (S.D.N.Y May 12, 2023) ("If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution") (internal quotation marks omitted); *Rodriguez*, 649 F. App'x at 139-40 (finding deficient jury instruction merited habeas relief where rest of the charge provided no mitigation); *see generally Henderson v. Kibbe*, 431 U.S. 145, 153 n.10, 97 S. Ct. 1730, 1736 n.10 (1977) ("In determining the effect of this instruction … we accept … the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must

be viewed in the context of the overall charge") (internal quotation marks omitted).

In responding to the jury's note, and in addition to answering "no," the Trial Judge read back his prior instruction on voluntariness, custodial interrogation, and *Miranda* waiver. But as was the case when he first read the charge, the Trial Judge did not instruct the jury on how to treat subsequent confessions if they found Hernandez's pre-*Miranda* confession to be involuntary. *Cf. Arroyo*, 685 F.2d at 40 (finding defective supplemental charge not cured by trial court's initial instructions that "did not mention any presumption as to intent [and] did not give the jury an assistance in how to apply a presumption – whether they were free to disregard it, whether it was merely something they might infer, or whether the defendant had to overcome it"); *Morales v. Miller*, 41 F. Supp.2d 364, 377 (E.D.N.Y. 1999) (finding the refusal to provide supplemental instruction was not error where judge "had already instructed the jury on intoxication in his original charge").

Indeed, in concluding that the correct answer to the jury's question was simply "no," the Trial Judge made it clear that he purposefully was ***avoiding*** instructing the jury about attenuation. As he explained, "there is no fruit of the poisonous tree law for the jury;" he did not "want to get into where the fruit of the poisonous tree doctrine meets jury instructions on voluntary confessions;" and he did not "see any other way of answering this that doesn't involve then instructing them on attenuation, and 'cat out of the bag[,]' [ ] and basically replaying the Huntley hearing, which is not their function here, I don't think." (Ex. 22U at 10204:8-15, 10206:19-22, 10225:17-21.) The Trial Judge's error thus was not

ameliorated by the charge as a whole, and the Appellate Division's conclusion that the Trial Court's "brief response" was "reasonable" and "correct" ignored the precepts of *Seibert* and was unreasonable. *Hernandez*, 181 A.D.3d at 532-33, 122 N.Y.S.3d at 15.

4. The Appellate Division's Alternative Harmless Error Conclusion Was Not Unreasonable

"Even assuming … that the court should have added instructions on the circumstances whereby a statement may or may not be attenuated from a prior statement found involuntary," the Appellate Division found that "there is no reasonable possibility that the verdict would have been different had those instructions been given, in light of the strong evidence that [Hernandez's] confession to [Durastanti] was fully attenuated from all his confessions to police." *Hernandez*, 181 A.D. at 533, 122 N.Y.S.3d at 15 (internal citations omitted). Put another way, the Appellate Division held that any error the trial court made in failing to instruct the jury on the law of attenuation was harmless.[19]

State court harmless error determinations "qualif[y] as an adjudication on the merits under AEDPA." *Brown v. Davenport*, _ U.S. _, _, 142 S. Ct. 1510, 1520 (2022). "[A] state-court merits determination of harmless error" is reviewed "under a two-part standard." *Krivoi v. Chappius*, No. 21-

[19] Although not expressly using the term "harmless error," the Appellate Division cited to two cases stating that errors in a trial court's jury charge were harmless. *See People v. Petty*, 7 N.Y.3d 277, 819 N.Y.S.2d 684 (2006); *People v. Jones*, 3 N.Y.3d 491, 788 N.Y.S.2d 651 (2004).

2934-PR, 2022 WL 17481816, at *3 (2d Cir. Dec. 7, 2022). Pursuant to the analysis recently pronounced by the Supreme Court, a petitioner both "must prevail under the *Brecht* 'substantial and injurious' standard, ***and*** he must show that the state court's harmless error determination was an unreasonable application of federal law as determined by the Supreme Court[]." *Id*. (emphasis in original) (discussing *Brown*, _ U.S. _, _, 142 S. Ct. 1510, 1520 (2022), and invoking *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710 (1993)). "[W]here AEDPA asks whether ***every*** fairminded jurist would agree that an error was prejudicial, *Brecht* asks only whether a federal habeas court ***itself*** harbors grave doubt about the petitioner's verdict." *Brown*, _ U.S. at _, 142 S. Ct. at 1525 (emphasis in original). Thus, to overcome AEDPA deference, Hernandez must show that "no fairminded jurist applying Supreme Court precedent could reach the state court's conclusion" that omitting an attenuation instruction in response to the jury's request was harmless. *Diaz v. Miller*, No. 22-CV-1835, 2023 WL 4363245, at *2 (2d Cir. July 6, 2023) (internal quotation marks omitted). Hernandez does not satisfy these standards.

a. "Grave Doubt" Under *Brecht*

A "'reasonable possibility' that the error was harmful" does not satisfy *Brecht*. *Davis v. Ayala*, 576 U.S. 257, 268, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht*, 507 U.S. at 637, 113 S. Ct. at 1721). Rather, a court must hold "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict," in which case, "that error is not harmless. And, the petitioner must win." *O'Neal v. McAnich*, 513 U.S. 432, 436, 115 S. Ct. 992, 994 (1995) (internal

quotation marks omitted); *see also Davis v. Ayala*, 576 U.S. at 267, 135 S. Ct. at 2197 (stating that an error is harmless unless it results in "actual prejudice," meaning that the court has "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict") (internal quotation marks omitted).

"In assessing 'whether the erroneous admission of evidence had a substantial and injurious effect on the jury's decision, we consider the importance of the … wrongly admitted evidence, and the overall strength of the prosecution's case.'" *Wood v. Ercole*, 644 F.3d 83, 94 (2d Cir. 2011) (citing *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000)) (internal brackets omitted). Indeed, "[t]he 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, 1167-68 (2d Cir. 1994). Here, given the total absence of physical evidence, the prosecution's case hinged entirely on Hernandez's confessions.

The Government did put on witnesses who testified that Hernandez had confessed to them in the 1979 and 1982 that he had killed a boy in New York. (Exs. 22H at 3901:11-3905:18, 3980:1-23, 4057:23-4059:23; 22I at 4328:9-4330:20.) However, although Hernandez confessed several times to Rosemary, Becky, and various doctors in the years that followed, Hernandez's confessions to law enforcement on May 23 to May 25, 2012 were his first admissions directly linking him to Patz's disappearance. The 2012 confessions clearly bore "on an issue that is plainly critical to the jury's decision" and was "crucial." *See Wray*, 202 F.3d at 526 (finding wrongly admitted identification evidence "crucial" given its centrality to

prosecution's argument and lack of physical evidence).

The jury's multiple notes demonstrate that it was actively grappling with how to deal with the confessions (see Ex. 22U at 10209:20-10210:1 (first jury note requesting read back of judge's instructions on confessions as well as testimony about Hernandez's confessions); 10210:4-9 (second jury note requesting "[c]larity on may not convict defendant on his own words solely?"), as does the jury's emphasis on "if" in the particular note at issue. Additionally, the jury ultimately returned a mixed verdict – acquitting Hernandez of intentional murder but convicting him of felony murder and kidnapping. (Ex. 22U at 10253:22-10258:3.) This "deliberative conduct by the jury … suggests that a conviction was not assured, at least without a confession." *Zappulla v. New York*, 391 F.3d 462, 471 (2d Cir. 2004). Confession "is like no other evidence" especially when "[a]bsent the confessions, it is unlikely that [the petitioner] would have been prosecuted at all" because of insufficient physical and circumstantial evidence. *Arizona v. Fulminante*, 499 U.S. 279, 297, 111 S. Ct. 1246, 1258 (1991).

Under these circumstances, there is certainly a possibility that the Trial Judge's failure to provide proper guidance to the jury about the relationship between pre- and post-*Miranda* confessions was substantial and injurious. Hernandez's confessions were of utmost importance. As discussed in Section I above, a reasonable juror could have found Hernandez's pre-*Miranda* confession to be involuntary. The jury's note indicated that they were grappling with that very issue. Had the jury come to the conclusion that Hernandez's pre-*Miranda*

confession was the product of custodial interrogation and, thus, not voluntary, they would then have to have considered whether Hernandez's other confessions, including that made to Durastanti, were voluntary. Without proper guidance under *Seibert*, the jury could have been led astray. As noted above, however, a reasonable possibility of prejudice does not suffice under *Brecht*.

Moreover, as explained in Section I, a reasonable jury could have determined that Hernandez's pre-*Miranda* confession was voluntary. In that event, the jury's "if" question would be moot. But this Court can only speculate as to what the jury ultimately concluded about Hernandez's pre-*Miranda* confession. Additionally, having determined that the state courts did not unreasonably find the confession to Durastanti sufficiently attenuated, the Court must acknowledge that a reasonable jury could have reached the same conclusion even with proper instruction.[20] At most, this Court can say that it has reasonable doubt, not grave doubt, about the extent to which the trial court's response to the jury note prejudiced the verdict.

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[20] The Court also cannot overlook the fact that, even if all of Hernandez's confessions to law enforcement were excluded, the jury was presented with evidence of Hernandez's multiple admissions and confessions to assorted other persons – including, but not limited to, his wife and daughter at the CCPO, the nurse at Bellevue, and Drs. Robotti, First, and Welner. The parties have not addressed the extent to which *Seibert* would have any application to those confessions as they were not made directly to law enforcement personnel, although law enforcement personnel were present for at least some of those statements. The Court therefore need not and does not address the issue.

b. Lack Of Prejudice Under AEDPA

The Court also cannot conclude that, as AEDPA requires, "***every*** fairminded jurist would agree that [the] error was prejudicial."[21] *Brown*, _U.S. at _, 142 S. Ct. at 1525. Even if the Trial Judge's answer to the jury question "had a substantial and injurious effect or influence upon the verdict, the Appellate Division's finding otherwise does not constitute an unreasonable determination of law or fact" under AEDPA. *Diaz v. Bell*, No. 18-CV-10121, 2022 WL 3371214, at *6 (S.D.N.Y. Aug. 16, 2022), *aff'd, Diaz v. Miller*, 2021 WL 4363245. Put differently, the Court does not conclude that ***no*** fair-minded jurist could find, as the Appellate Division did, that "there is no reasonable possibility that the verdict would have been different had those instructions been given." *Hernandez*, 181 A.D. at 533, 122 N.Y.S.3d at 15.

For Hernandez to prevail under AEDPA, the Court must conclude that "every fairminded jurist" would find differently than the Appellate Division when applying the same legal principle. *Brown*, _ U.S. at _, 142 S. Ct. at 1530. "The legal principle at issue is the *Chapman* standard [which] requires that

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[21] According to the *Brown* majority, the AEDPA standard and *Brecht* standard are distinct. _ U.S. at _, 142 S. Ct. at 1526, n.3 ("*Brecht* and AEDPA ask analytically distinct questions – and AEDPA's test alone is statutorily mandated"). Reasoning sufficient to permit relief under *Brecht* is not necessarily "enough to warrant relief under AEDPA" under which Congress intentionally made "winning habeas relief more difficult." *Id*. at _, 142 S. Ct. at 1526. As explained by the majority, "satisfying *Brecht* is only a necessary, not a sufficient, condition to relief," and "[p]roof of prejudice under *Brecht* does not equate to a successful showing under AEDPA." *Id*. at _, _, 142 S. Ct. at 1520, 1525.

'before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" *Gumbs v. Stanford*, No. 22-CV-4659, 2023 WL 2908653, at *9 (S.D.N.Y. April 12, 2023) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967)). Although the Appellate Division did not cite *Chapman* directly, it did properly apply the New York Court of Appeals' articulation of the *Chapman* holding, citing to *People v. Petty*, 7 N.Y.3d 277, 819 N.Y.S.2d 684 (2006) and *People v. Jones*, 3 N.Y.3d 491, 788 N.Y.S.2d 651 (2004). Both of those state cases cite *People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213 (1975), a New York state case adopting the harmless constitutional error standard from *Chapman*. *See Gutierrez v. McGinnis*, 389 F.3d 300, 308 (2d Cir. 2004) ("for AEDPA deference to attach … our Circuit does not require state courts to cite federal precedent when disposing of that claim. … Therefore, the question is whether the Appellate Division reasonably applied *Chapman* or New York's equivalent interpretation"); *Lopez v. Lape*, No. 10-CV-397, 2010 WL 3219308, at *7, n.95 (S.D.N.Y. 2010) (stating that the *Chapman* standard applies "even though the First Department did not cite directly to *Chapman* in its decision"); *Gumbs*, 2023 WL 2908653, at *9 (state court's citation to *Crimmins* was sufficient to invoke the *Chapman* standard). In so doing, the Appellate Division found that there was "no reasonable possibility that the verdict would have been different had [attenuation] instructions been given." *Hernandez*, 181 A.D. at 533, 122 N.Y.S.3d at 15.

The Appellate Division cited the "strong evidence that [Hernandez's] confession to [Durastanti] was

fully attenuated from all of his confessions to police, as well as being corroborated by [Hernandez's] various confessions to civilians" as evidence that the jury instruction omission was harmless. *Hernandez*, 181 A.D. at 533, 122 N.Y.S.3d at 15. In reviewing the Appellate Division's rationale, the question is not whether this court would reach the same conclusion, or even if reasonable minds could disagree, but rather whether "***every*** fairminded jurist would agree that [the] error was prejudicial." *Brown*, _U.S. at _, 142 S. Ct. at 1525 (emphasis added). The answer to that question is no.

First, as discussed above, reasonable jurists could disagree as to whether Hernandez was subject to an improper pre-*Miranda* interrogation, which is a prerequisite for a violation under *Seibert*. Second, as described above, even assuming that Hernandez's initial confession was improper, reasonable jurists could then disagree on whether sufficient curative measures distanced the first improper confession from the confessions to Durastanti and various doctors. Even though upon de novo review, this Court may not have found the Trial Judge's erroneous jury instruction to be harmless, the Court recognizes that a reasonable jurist may have concluded otherwise. Hernandez thus cannot succeed on his claim that the trial court's response to the jury's question was contrary to law or an unreasonable application of law to the facts.

III. Hernandez's Evidentiary Claims

Hernandez next argues that two evidentiary rulings made by the state courts deprived him of the opportunity to present a complete defense. Hernandez first contends that the state courts

prevented him from presenting evidence of Miller's third party-guilt under a New York evidentiary rule that is contrary to *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727 (2006). Hernandez then asserts that the state courts unreasonably applied *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973) in rejecting his request to introduce into evidence certain NYPD reports. The Government counters that neither evidentiary ruling was improper and that Hernandez has not satisfied his AEDPA burden. The Court agrees.

A. Evidentiary Rulings In The Habeas Context

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Nevada v. Jackson*, 569 U.S. 505, 509, 133 S. Ct. 1990, 1992 (2013) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146 (1986)). Nevertheless, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from trials." *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264 (1998); *Wade v. Mantello*, 333 F.3d 51, 58 (2d Cir. 2003) ("[a] defendant's right to present relevant evidence is not, however, unlimited; rather it is subject to reasonable restrictions") (internal quotation marks omitted). "Central among these restrictions are state and federal rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. The power of courts to exclude evidence through the application of evidentiary rules that serve the interests of fairness and reliability is well-settled." *Wade*, 333 F.3d at 58 (internal quotation marks and citations omitted). Restrictions on a defendant's evidence are constitutional and "do not

abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308, 118 S. Ct. at 1264 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S. Ct. 2704, 2711 (1987)).

"'[H]abeas corpus relief does not lie for errors of state law,' and that necessarily includes erroneous evidentiary rulings." *Hawkins v. Costello*, 460 F.3d 238, 244 (2d Cir. 2006) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102 (1990)) (internal citations omitted). "However, when a trial court's evidentiary exclusions take on constitutional dimensions … 'we must examine the stated reasons for the exclusion and inquire into possible state evidentiary law errors' that may have deprived the petitioner of a fair trial." *Scrimo v. Lee*, 935 F.3d 103, 114-15 (2d Cir. 2019) (quoting *Washington v. Schriver*, 255 F.3d 45, 57 (2d Cir. 2001)).

B. The State Courts' Exclusion Of Third-Party Culpability Evidence For Miller Was Not Contrary To Supreme Court Precedent

According to Hernandez, the New York rule under which the state courts denied his request to introduce third-party guilt evidence improperly requires defendants to satisfy a heightened evidentiary standard like the South Carolina evidentiary rule held unconstitutional in *Holmes*. (Pet. Mem. at 58-59.) The Government asserts that neither the New York rule, nor the state courts' application, contradict *Holmes*. (Resp. Mem. at 128-34.)

Prior to the second trial, Hernandez moved to admit evidence regarding the FBI's 2012 investigation into Miller, including statements Miller

made to authorities and information about the scent dog's findings in Miller's basement.[22] (Ex. 32 at 8-10.) The Government countered that Miller had given an alibi during the 1979 investigation for the day of Patz's disappearance and, thus, Hernandez could not demonstrate the sufficient connection of time, place, and circumstances required by New York state law. (Ex. 39 at 9:20-10:19, 13:9-19 (citing *Primo*, 96 N.Y.2d 353, 728 N.Y.S.2d 735).) In reply, Hernandez questioned the validity of Miller's alibi and argued that there was clearly enough evidence connecting Miller to the crime because the Manhattan DA had been able to procure and execute a search warrant to excavate Miller's basement in 2012. (Ex. 39 at 11:11-14.)

At the hearing addressing the evidence, the Trial Judge registered concern "that third-party evidence

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[22] Hernandez also moved to admit evidence related to Ramos and "other people in the SoHo neighborhood who were suspected of pedophilia and other acts, who may have had access to Etan Patz in 1979." (Ex. 32 at 2.) The Trial Judge permitted Hernandez to introduce some evidence, including a full video-recording of Ramos' statements to a Bronx ADA, a statement to law enforcement made by Barrett Harrington that Ramos had sexually abused him in 1979, and "any evidence that Ramos was in the company of [Patz] at any time" only "if the defense can produce any witness with direct evidence of that." (Ex. 42 at 2-3.) The Trial Judge denied Hernandez's request to introduce evidence of a wrongful death action brought against Ramos by the Patz family, as well as other evidence of Ramos's criminality in other states. (Ex. 42 at 3.) The Trial Judge additionally denied Hernandez's request to offer evidence regarding NYPD investigations into other known pedophiles in the SoHo area. (Ex. 42 at 3.) Hernandez has not challenged in this proceeding the state court rulings made with respect to the scope of evidence about Ramos.

… at least has to have some possibility, or credible reliability." (Ex. 39 at 11:6-9.) In his order, the Trial Judge held that Hernandez was neither "permitted to introduce evidence about statements Miller made to the FBI in 2012 [] [n]or … permitted to elicit testimony about the actions of a 'scent dog' in 2012" at Miller's basement, although the parties could seek to elicit testimony from Miller if they wished. (Ex. 42 at 3.) Miller did not testify at trial. And while evidence was presented to the jury regarding Miller's relationship with the Patz family and the excavation of his basement, those discussions occurred solely to establish the timeline of events and where Patz had been the night before he disappeared. (*See, e.g.*, Ex. 22G at 3419, 3449, 3576-77, 3644.) The Appellate Division affirmed the trial court's evidentiary rulings, finding that they were "provident exercises of discretion that did not impair [Hernandez's] right to present a defense" and that "evidence offered … relating to [Miller] was so remote as to be irrelevant." *Hernandez*, 181 A.D.3d at 532, 122 N.Y.S.3d at 15 (latter quotation citing *People v. DiPippo*, 27 N.Y.3d 127, 135-36, 31 N.Y.S.3d 421, 425-26 (2016)).

Although "the Supreme Court is traditionally reluctant to impose constitutional constraints on ordinary evidentiary rulings by state trial courts concerning the admissibility of evidence," the latitude afforded to trial courts is not unlimited. *Olivo v. Graham*, No. 15-CV-9938, 2021 WL 3272080, at *17 (S.D.N.Y. March 23, 2021), *R & R adopted*, 2021 WL 3271833 (S.D.N.Y. July 30, 2021) (internal quotation marks and brackets omitted). In *Holmes*, the Supreme Court found unconstitutional a South Carolina evidentiary rule providing that "where there is strong evidence of [a defendant's] guilt, especially

where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence" and "may (or perhaps must) be excluded." 547 U.S. at 324, 329, 126 S. Ct. at 1731, 1734. Unlike Federal Rule of Evidence 403 ("Rule 403") – which permits courts to "exclude relevant evidence if its probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence" – South Carolina's rule directed trial judges to focus on the strength of the prosecution's case rather than on the probative value or potential adverse effects of admitting evidence of third-party guilt. *Id*. at 329, 126 S. Ct. at 1734. In other words, "[if] the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues." *Id*. The Supreme Court concluded that this rule was "arbitrary," did "not rationally serve the end … to focus the trial on central issues by excluding evidence that has only a very weak logical connection to the central issues," and, ultimately, violated the defendant's "right to have a meaningful opportunity to present a complete defense." *Id*. at 330-31, 126 S. Ct. at 1734-35 (internal quotation marks omitted).

Hernandez insists that the New York evidentiary rule applied here is "materially indistinguishable" from the South Carolina rule found unconstitutional by the Supreme Court. (Pet. Mem. at 58-59.) That is not so. Under New York law, "[w]here a defendant seeks to pursue a defense of third-party culpability at

trial, evidence offered in support … is subject to 'the general balancing analysis that governs the admissibility of all evidence.'" *DiPippo*, 27 N.Y.3d at 135, 31 N.Y.S.3d at 893 (quoting *Primo*, 96 N.Y.2d at 356, 728 N.Y.S.2d at 739). The trial judge is to weigh "the countervailing risks of delay, prejudice and confusion … against the probative value of [the] evidence." *Primo*, 96 N.Y.2d at 356- 57, 728 N.Y.S.2d at 739; *see also Alvarez v. Ercole*, 763 F.3d 223, 231 (2d Cir. 2014) (explaining and applying the *Primo* standard); *Gueits v. Kirkpatrick*, 612 F.3d 118, 126 (2d Cir. 2010) (same); *Olivo*, 2021 WL 3272080 at *17 (same); *Marte v. Rivera*, No. 05- CV-2683, 2008 WL 1827425, at *9 (S.D.N.Y. April 24, 2008) (same). Indeed, Hernandez admits as much in a 2015 letter to the Trial Judge prior to the evidentiary hearing, in which he states that "*Primo* did not create any new rules of evidence with respect to third-party culpability" and that it holds "that evidence of third-party culpability is subject to the same rules of evidence as all other types of evidence – it must be relevant to be admissible." (Ex. 38 at ECF 2.)

Under New York law, a court must first determine if the evidence is relevant and, if so, if "its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, confusing the issues or misleading the jury." *DiPippo*, 27 N.Y.3d at 135-36, 31 N.Y.S.3d at 426 (quoting *Primo*, 96 N.Y.2d at 355, 728 N.Y.S.2d at 738.) "'[T]he admission of evidence of third-party culpability [also] may not rest on mere suspicion or surmise'" and "'[r]emote acts, disconnected and outside of the crime itself, cannot be separately proved to show that someone other than the defendant committed the crime.'" *DiPippo*, 27 N.Y.3d at 136, 31 N.Y.S.3d at 426

(former quoting *Primo*, 96 N.Y.3d at 357, 728 N.Y.S.2d at 739 and citing *Holmes*, 547 U.S. at 327, 126 S. Ct. at 1733). This is because "the countervailing risks of delay, prejudice and confusion" are particularly acute in this context. *Primo*, 96 N.Y.2d at 356, 728 N.Y.S.2d at 739.

Hernandez is correct that, unlike Rule 403, which permits evidence to be excluded if the dangers of unfair prejudice, confusion, or undue delay outweigh the evidence's probative value, the New York rule requires defendants instead to establish that the evidence's probative value outweighs the countervailing factors of potential undue prejudice, delay, confusion, and remoteness. But that distinction does not, as Hernandez contends, mean that "New York's rule requires the defendant to overcome the strength of the state's case to be admitted rather than being evaluated for its own probative value." (Pet. Mem. at 60.)

Rather, like Rule 403, the New York standard requires balancing the evidence's probative value against risks of delay, undue prejudice, and confusion. *See Willock v. Martuscello*, No. 17-CV-0454, 2020 WL 2748031, at *10 (E.D.N.Y. May 27, 2020) ("the admission or exclusion of third-party culpability evidence turns on a balancing of the evidence's probative value against countervailing risks of trial delay, undue prejudice to the opposing party, and confusing the issues or misleading the jury") (internal quotation marks omitted). The New York rule makes no mention of considering the strength of the prosecution's case or other evidence at trial as part of the analysis. And unlike the South Carolina rule, the New York rule focuses the judge's critical inquiry "on the probative value or the

potential adverse effects of admitting the defense evidence of third-party guilt." *Holmes*, 548 U.S. at 329, 126 S. Ct. at 1734.

Furthermore, as the Government notes, the New York Court of Appeals in *People v. Powell* explicitly concluded that New York's evidentiary standard was "fully consistent" with *Holmes*, finding that "[u]nlike the rule at issue in *Holmes*, the standard clarified by this Court in *Primo* focuses exclusively on the probative value of the third-party culpability evidence as weighed against its potential countervailing adverse effects." 27 N.Y.3d 523, 530, 35 N.Y.S.3d 675, 679 (2016). And, since that holding, habeas courts have applied New York's rules in exactly that way, evaluating the state court's balance of the probative value of the evidence against the possibility of causing prejudice, delay, or undue confusion. *See Olivo*, 2021 WL 3272080 at *17 (finding trial judge's application of New York evidentiary rule was proper where testimony related to third-party guilt was "remote and disconnected from the crime itself"); *Francis v. Capra*, No. 18-CV-0628, 2019 WL 12026839, at *8-9 (S.D.N.Y. Aug. 6, 2019), *R & R adopted*, 2021 WL 1298481 (S.D.N.Y. Apr. 7, 2021) (finding that, despite using incorrect nomenclature, trial court applied general balancing test to determine admissibility of third-party culpability); *Willock, 2020* WL 2748031, at *10 (finding defendant's proffered third-party culpability evidence properly excluded under New York law where the testimony was insufficiently related to the crime and "could have confused the issues, misled the jury, and resulted in trial delays").

Another district court in this Circuit evaluated the potential arbitrariness of New York's evidentiary rule and determined that it was exactly "the type of

evidentiary rule where the Constitution affords trial judges broad discretion to determine admissibility, and not the kind of blanket exclusion rule that traditionally risks running afoul of the Constitution." *DeVaughn v. Graham*, No. 14-CV-2322, 2017 WL 244837, at *14 (E.D.N.Y. Jan. 19, 2017) (holding that ability of trial court to exclude third-party culpability evidence under New York rule was not arbitrary and disproportionate). This Court has no basis to conclude otherwise or that no fair-minded jurist could find New York's evidentiary rule constitutional and consistent with *Holmes*.

The state court's application of New York's rule was not unreasonable and did not run afoul of *Holmes*. Hernandez offered proof that: Miller's workshop was close to where Patz was last seen; Patz would have passed Miller's workshop on his way to the bus stop; Patz spent time with Miller in his basement the night before his disappearance; and Miller stated to an FBI Special Agent that he changed out of his work clothes in front of Patz. (Ex. 32 at 8-9.) Hernandez also offered proof that, in a 2012 interview with the FBI, Miller had admitted to having sexual intercourse with a ten-year old girl in 1979. (Ex. 32 at 9.) Finally, Hernandez offered proof that, in 2012, a scent dog alerted FBI agents to the scent of human decomposition in Miller's basement and that Miller's response to the dog's detection was to ask "What if the body was moved?," although Hernandez also acknowledged that "Miller has denied any involvement in the disappearance of [ ] Patz." (Ex. 32 at 9-10.)

After briefing and oral argument, the trial court, excluded evidence about statements Miller made to the FBI in 2012. (Ex. 42 at 3.) The court considered

whether the proffered evidence concerning Miller was sufficiently connected to the alleged crime and concluded that it was not. The Appellate Division affirmed, stating that the evidence concerning Miller was too remote, *Hernandez*, 181 A.D.3d at 532, 122 N.Y.S.3d at 15, a ground for exclusion appropriate under both New York state law and *Holmes*. *See Holmes*, 547 U.S. at 327, 126 S. Ct. at 1733 (stating that evidence may be excluded "where it does not sufficiently connect the other person to the crime" and "where the evidence is speculative or remote"); *United States v. Hendricks*, 921 F.3d 320, 331 (2d Cir. 2019) (excluding evidence that may have suggested that the third party "knew about the robbery[,] [but] none of the evidence places [the third party] anywhere near the [crime] scene"); *United States v. White*, 692 F.3d 235, 246 (2d Cir. 2012) (holding that evidence of third-party culpability must "sufficiently connect the other person to the crime"); *Bradley v. Burge*, No. 06-CV-0040, 2007 WL 1225550, at *6 (S.D.N.Y. April 19, 2007) (finding third-party guilt evidence too speculative where "[u]nlike in *Holmes*, there was no other person who confessed to the offenses in this case"); *Smith v. New York*, No. 20-CV-9708, 2023 WL 359568, at *20 (S.D.N.Y. Jan. 20, 2023) (affirming state court's exclusion of third-party culpability evidence that was merely speculative); *cf. Scrimo*, 935 F.3d at 116- 19 (finding that, although "evidence of third-party guilt is routinely excluded," relevant evidence of third-party guilt was neither remote nor speculative because third-party was "on the scene and connected to the crime").

As the Trial Judge noted, exclusion was permissible "if there is some credible alibi for [Miller]." (Ex. 39 at 11:9-10.) In its pre-hearing

briefing, the Government put forth support for exactly that. The Government argued that Hernandez had overlooked "an NYPD investigation corroborat[ing] Miller's statement to police that he was not in So[H]o on the morning of May 25, 1979, but was working [elsewhere]" and failed to proffer any evidence contradicting that alibi. (Ex. 36 at 3.) At the hearing, the Government expanded, stating that Miller gave his alibi to police in early June of 1979, telling them that, on the morning of Patz's disappearance, he was at 126 East 13th Street and did not arrive on Prince Street until 10:45 a.m. (Ex. 39 at 10:2-7.) Additionally, the Government stated that police interviewed several unnamed people at 126 East 13th Street who corroborated Miller's alibi, and that those unnamed people and Miller were given lie detector tests which showed a lack of consciousness of guilt. (Ex. 39 at 10:8-13.) The Government further commented that, from Hernandez's papers, it "d[id] not know how [Hernandez] intend[ed] on" placing Miller on the street at the time of Patz's disappearance and that, regardless, Miller is "going to assert the Fifth." (Ex. 39 at 10:20-11:3.)

At the hearing, Hernandez's counsel disputed the veracity of Miller's alibi, asserting that Miller told police he was home with his wife while his wife told the FBI said she was not home during that period. (Ex. 39 at 11:24-12:2.) Yet, counsel's representations were not substantiated by anything in Hernandez's pre-hearing briefing and did not include any citations to the record. Given the lack of evidence connecting Miller to the day and circumstances of the crime, despite his interactions with Patz the night before or otherwise, the state courts were not unreasonable in finding the evidence concerning Miller too remote for

admission. *See Hernandez*, 181 A.D.3d at 532, 122 N.Y.S.3d at 15; *see also Wade v. Mantello*, 333 F.3d at 62 ("In light of the latitude afforded such rulings by the Constitution, the Appellate Division's conclusion that the exclusion did not offend [petitioner's] constitutional right to present a complete defense is not an unreasonable application of clearly established federal law").

Hernandez nonetheless argues that the state courts' findings of remoteness are unreasonable given that the Government had enough evidence on Miller's potential involvement to support a state-issued search warrant in 2012. The Government counters that: (1) the fruitlessness of the search of Miller's basement undermines any basis to conclude Miller was involved in Patz's disappearance; (2) the evidentiary standard for a search warrant is distinct from that of a judge's ruling for trial; and (3) Hernandez's confessions were either unknown or had not yet taken place when the warrant was issued. (Resp. Mem. at 134.)

The Government's first and second counterpoints have merit.[23] As to the first, the search of Miller's basement pointed away from Miller's involvement rather than further supporting the probable cause that supported the search warrant to begin with. As to the second, a determination of probable cause for a warrant is not the same as an evidentiary determination that takes into account the dangers of

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[23] The Government's third counterpoint is unavailing because it uses Hernandez's confessions to discount the strength of its 2012 search warrant evidence and thereby factors in the strength of the prosecution's case, which, as explained above, is improper under *Holmes*.

admission compared to probative value. Nor are the two determinations necessarily based on the same evidence; here, they were not – by trial the probative value of evidence about Miller had been diminished by both the results of the search and Miller's alibi. *Compare People v. Davis*, 43 N.Y.2d 17, 27, 400 N.Y.S.2d 735, 740 (1977) (detailing that relevant evidence can be rejected at trial "if its probative value is outweighed by the danger that its admission would" result in delay, confusion, mislead the jury, unfair surprise, or undue prejudice) (internal quotation marks omitted), *with People v. Cooper*, 120 A.D.3d 710, 711, 990 N.Y.S.2d 862, 863 (2d Dep't 2014) (stating that search warrant applications "must provide the court with sufficient information to support a reasonable belief that evidence of illegal activity will be present at the specific time and place of the search").

Moreover, under habeas review, state courts' evidentiary decisions are presumed correct unless the petitioner can satisfy the heavy burden of demonstrating that an evidentiary error "remove[d] a reasonable doubt that would have existed on the record without it [and was] crucial, critical, highly significant." *Collings v. Scully*, 755 F.2d 16, 19 (2d Cir. 1985) (internal quotation marks omitted). Hernandez has not done so here. The absence of evidence placing Miller at the scene, combined with evidence supporting his alibi, would have diminished much of the persuasiveness Hernandez ascribes to Miller's potential culpability. The jury was presented with extensive evidence of Hernandez's mental state, the reliability of his confessions, the police's investigation, and, critically, the third-party culpability of Ramos, yet still reached a guilty verdict.

Hernandez's introduction of evidence of Ramos's potential guilt in particular undermines his argument that exclusion of the Miller evidence removed a reasonable doubt that would have otherwise existed. That is because the probative value of evidence of third-party guilt "is also informed by the availability of alternative means to present similar evidence." *United States v. Johnson*, 529 F.3d 493, 500 (2d Cir. 2008); *cf. Alvarez*, 763 F.3d at 232 (finding trial court's exclusion of third-party evidence improper because it left petitioner "without any support for his theory of the case"). As noted by the Appellate Division, Hernandez "had an ample opportunity to introduce evidence about [Ramos]." *Hernandez*, 181 A.D.2d at 532, 122 N.Y.S.3d at 15. At trial, Hernandez "remained able to present equally useful evidence supporting his theory" of third-party culpability, *United States v. Wade*, 512 F. App'x 11, 14 (2d Cir. 2013), arguing that Ramos was the true perpetrator and presenting extensive evidence to the jury about Ramos and the Government's focus on him as a potential suspect.[24] (Ex. 22U at 9833:20-9834:3, 9838:6-9855:6, 9883:23-24.)

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[24] Among other information about Ramos, Hernandez introduced evidence of Ramos's history of sexually abusing and abducting young boys, including Susan Harrington's son during 1979, and of Ramos's statements to FBI Agent Galligan in which Ramos recounted molesting a boy named Jimmy on the day Patz went missing who had all the physical descriptors of Patz and whom Ramos said "could have been Etan [Patz]." (Ex. 32 at 3- 7; *see also* Ex. 22Q at 8286:3-25.) Hernandez was also allowed to introduce evidence that Ramos was in the company of Patz at any time, so long as he could produce a witness with direct evidence, but he apparently did not do so. (Ex. 42 at 2-3.)

(Continued…)

The Court need not speculate on the potential impact of evidence of a second potential perpetrator, though common sense suggests that presenting both

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In briefing and at oral argument, Hernandez emphasized that, after closure of the defense's case, the trial court retroactively struck large portions of Galligan's testimony about Ramos as inadmissible hearsay. (Pet. Mem. at 31; *see also* Ex. 51.) Indeed, all of the excluded testimony consisted of Galligan's testifying about out-of-court statements made to her by AUSA Grabois, as well as two informants who had been incarcerated with Ramos and to whom Ramos allegedly confessed. (*See* Ex. 51, listing struck testimony at Ex. 22Q at 8255:10-8257:25, 8258:3-7, 8263:2-8264:19, 8266:11-21, 8270:24-8276:6, 8277:6-24, 8305:19-8306:15; 8350:20-8352:11, 8423:22-8424:25, 8426:9-8427:7, 8483:25-8490:1, 8491:3-25, 8493:18-3, 8495:16-8496:12, 8521:9-23, 8524:8-8525:3, 8525:12-8526:23, 8530:5-25, 8532:1-8533:20, 8538:1-4.) Both at oral argument and in its papers before the trial court, the Government argued that this testimony was permitted subject to connection and was properly struck as hearsay once it became clear that none of the declarants were going to testify. (*See* Ex. 50.) Hernandez does not challenge the propriety of the trial court's decision to strike that testimony. Instead, he argues that the harm from excluding third-party culpability evidence for Miller was compounded by the striking of evidence related to Ramos. Against this backdrop, Hernandez says that admission of the Miller evidence was even more crucial.

The struck testimony related to Ramos presumably would have strengthened Hernandez's case that Ramos was the perpetrator. But that does not make the excluded evidence about Miller more significant. To the contrary, the evidence placed Ramos with Patz at the time of his disappearance and included Ramos's implicit admission to abducting Patz, including an hour-and-a-half video of an interview between ADA Frank Carroll and Ramos in which Ramos discussed his predatory behavior and was asked about Patz. (*See* Exs. 22G at 3472; *see generally* ADA Carroll testimony at Ex. 22Os at 7676-7748.) The evidence about Miller, however, neither placed him at the scene of the crime nor included any admission about abducting a boy.

Ramos and Miller as alternative suspects could have actually diluted Hernandez's defense. Regardless, the state courts concluded that the third-party culpability evidence for Miller was too remote and thus "insufficiently probative to outweigh [the] countervailing risks" that are particularly acute for third-party culpability evidence. *Primo*, 96 N.Y.2d at 355, 753 N.E.2d at 168. The New York rule applied did not mandate an unconstitutional, heightened evidentiary standard; nor was the ultimate decision to exclude unreasonable.

C. The State Courts' Exclusion Of Hearsay Evidence Was Not An Unreasonable Application Of Supreme Court Law

Prior to trial, Hernandez moved in limine to admit hearsay statements made by deceased witnesses that were memorialized in contemporaneous police reports. Those reports include: (1) a 1979 police report memorializing a statement from Robert Buxbaum ("Buxbaum") that he did not see Patz at the school bus stop at 8:00 a.m. on May 25, 1979 ("Buxbaum Statement"), and (2) two DD5 reports by Detective William Butler ("Butler") summarizing the searches performed by police on the day of and day after Patz's disappearance ("Butler DD5s"). (*See* Ex. 40 at ECF 13, 22-23.[25]) After briefing by the parties, the trial court denied Hernandez's motion without explanation. (Ex. 41 at 43:17- 44:5.) The Appellate Division affirmed, finding that the trial court "properly concluded that … the [hearsay] evidence offered by defendant was not admissible [for

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[25] The Buxbaum Statement is attached to Exhibit 40 as Exhibit A at ECF 13, and the Butler DD5s are attached as Exhibit E at ECF 22-23.

legitimate non-hearsay purposes], or any other basis." *Hernandez*, 181 A.D.3d at 532, 122 N.Y.S.3d at 15.

Hernandez argues that the state courts' exclusion of the Buxbaum Statement and the Butler DD5s was an unreasonable application of *Chambers v. Mississippi* and denied him a fair trial. (Pet. Mem. at 61-63.) The Government counters that exclusion was proper because Hernandez neither identified an appropriate hearsay exception nor provided persuasive assurances of the statements' truth. (Resp. Mem. at 135.) Additionally, the Government argues, neither statement was critical to Hernandez's defense, and Hernandez's comparison to *Chambers* is inapposite. (Resp. Mem. at 135-39.) The Court agrees with the Government.

1. *Chambers v. Mississippi*

In *Chambers*, the Supreme Court held that certain hearsay statements, although inadmissible under state evidentiary law, should have been admitted because they "bore persuasive assurances of trustworthiness" and were "critical to [the defendant's] defense." 410 U.S. at 302, 93 S. Ct. at 1049; *see Evans v. Fischer*, 712 F.3d 125, 134 (2d Cir. 2013) ("in some cases the ***exclusion*** of hearsay proffered by a ***defendant*** in a ***correct*** application of state rules of evidence can violate the guarantee of due process by denying a defendant his right to present witnesses in his own defense") (emphasis in original).

Chambers concerned the admissibility of "a third-party's multiple out-of-court admissions to committing the murder charged to defendant." *Bowman v. Racette*, 661 F. App'x 56, 59 (2d Cir. 2016) (citing *Chambers*, 410 U.S. at 292-94, 93 S. Ct. at

1044-45). The state refused to call the third-party who had confessed to the crime. Although Chambers was able to call that third-party, a Mississippi evidentiary rule against impeaching a party's own witness prevented him from being able to cross-examine that third-party as an adverse witness, and his motion to circumvent that rule and do so was denied. *Chambers*, 410 U.S. at 291-92, 295-96, 93 S. Ct. at 1043-44, 1045-46. Chambers therefore sought to introduce other evidence of the third-party's confessions through three witnesses to whom the third-party confessed, but he was prevented from doing so by a Mississippi evidentiary rule against hearsay. *Id*. at 292-96, 298, 93 S. Ct. at 1044-46, 1047. The Supreme Court found that the "the conjunction of two state evidentiary rules – one prohibiting the impeachment by a party of its 'own' witness, and one prohibiting the admission of any hearsay admissions against penal interest – prevented a criminal defendant from introducing strong evidence that another individual had confessed to the crime" and, thus, denied Chambers a fair trial. *Grochulski v. Henderson*, 637 F.2d 50, 55 (2d Cir. 1980), *cert. denied*, 450 U.S. 927, 101 S. Ct. 1383 (discussing *Chambers*, 410 U.S. 284, 93 S. Ct. 1038).

In concluding that the hearsay confessions should have been permitted even though the Mississippi hearsay rule required their exclusion, the Court emphasized that any reliability concerns were readily satisfied. The Court cited several factors providing assurances of reliability, including that the confessions were: (1) "made spontaneously to a close acquaintance shortly after the murder occurred"; (2) corroborated by other evidence in the record, including an independent sworn confession by the

third-party to the authorities and testimony that the third-party had been seen with a gun immediately after the shooting; and (3) self-incriminatory and against penal interest. *Chambers*, 410 U.S. at 300-01, 93 S. Ct. at 1048-49. The Court additionally stressed that the "sheer number of independent confessions provided additional corroboration for each"; the declarant was under oath and available in court "if there was any question about the truthfulness of the extrajudicial statements"; and the confessions were critical to the defendant's case. *Id*. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id*. at 300-02, 93 S. Ct. at 1048-49.

Eschewing establishment of a broad principle, the Supreme Court confined its opinion to the facts. *See id*. at 303, 93 S. Ct. at 1049 ("we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial"). The Court underscored that, "[i]n reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id*. at 301-02, 93 S. Ct. at 1049.

2. Application

In *Chambers*, the Supreme Court found that operation of Mississippi's evidentiary rules together foreclosed defendant's introduction of critical evidence of third-party confessions. Noting the narrow confines of *Chambers*, the Second Circuit has

stated that "[t]o rely on *Chambers* for more than this is to ignore the Supreme Court's interpretation of AEDPA's 'as determined by the Supreme Court' language to include only the holdings of … its cases." *Evans*, 712 F.3d at 135 (quoting *Williams v. Taylor*, 529 U.S. at 412, 120 S. Ct. at 1523). Thus, *Chambers'* holding "must be … limited to the sorts of extreme facts presented by that case." *Soto v. Lefevre*, 651 F. Supp. 588, 597 (S.D.N.Y. 1986); *see also Grochulski*, 637 F.2d 50, 55, 56 (2d Cir. 1980) (stating that *Chambers* is "an opinion confined to its facts" and required the "setting aside of a state evidentiary rule … under limited circumstances"). Those extreme facts are not present here, and Hernandez's reliance on *Chambers* is therefore misplaced. Regardless, neither the Buxbaum Statement nor the Butler DD5s are comparably reliable or critical as the hearsay evidence was in *Chambers*.

The Government argues that, as an initial matter, Hernandez fails to identify an applicable hearsay exception. (Resp. Mem. at 135, 138.) Hernandez responds that *Chambers* does not require identification of a hearsay exception and that the Supreme Court's conclusion in *Chambers* was based on an inquiry into whether the evidence was sufficiently trustworthy and critical to the defense, not whether a particular hearsay exception applied. (Pet. Reply at 23-24, citing *Chambers* 410 U.S. at 302, 93 S. Ct. at 1049.) Even if Hernandez is correct, he still fails to satisfy *Chambers'* requirements for reliability and criticality. *See Brooks v. Artuz*, No. 97-CV-3300, 2000 WL 1532918, at *6 (S.D.N.Y. Oct. 17, 2000) (finding *Chambers* factors unsatisfied where petitioner argued "that although the excluded statement was outside any hearsay exception it

should have been admitted as a matter of due process").

First, the assurances of reliability of the statements are not as strong as they were in *Chambers*. On one hand, both temporality of the statements and the independence of their sources are indicia of reliability. The Butler DD5s were recorded on May 26, 1979, the day after Patz's disappearance; the Buxbaum Statement was taken a few weeks later on June 11, 1979 (Ex. 40 at ECF 13, 22-23); and both statements were made by individuals who had no reason to lie and had either personal knowledge of Patz or the police investigation. But, unlike the statements in *Chambers*, neither was made spontaneously, and neither was self-incriminatory or against penal interest. *See Quartararo v. Hanslmaier*, 28 F. Supp.2d 749, 775 (E.D.N.Y. 1998), *rev'd on other grounds*, 188 F.3d 91 (2d Cir. 1999) (finding "no valid comparison at all" with *Chambers* where statements at issue were not confessions and "hardly were spontaneous because they were neither unprompted, nor impulsive or instinctive"). Further, neither Buxbaum nor Butler was available to testify at trial. *See Nicholson v. Walker*, 100 F. App'x 848, 850 (2d Cir. 2004) ("unlike in *Chambers*, it appears that in this case the reliability of [declarant's] confession could not be tested by cross-examination at a retrial"). "In sum, the indicia of reliability here are not comparable to those in *Chambers* so as to compel a conclusion that *Chambers* clearly established a constitutional imperative to admit the hearsay statement[s] at issue in this case." *Bowman v. Racette*, 661 F. App'x at 59.

Second, neither statement was critical to Hernandez's defense. Hernandez argues that

Buxbaum's statement that he did not see Patz at the school bus stop at 8:00 a.m. on May 25, 1979 was vital because, if Patz never made it to the bus stop, then he would have never reached the bodega and could not have encountered Hernandez. (Pet. Mem. at 62.) Yet, despite exclusion of the Buxbaum Statement, Hernandez argued exactly this point at trial based on other testimony: Hernandez called and elicited testimony from Harry Nudel and Henry Gruen, both of whom were identified in Hernandez's motion in limine memorandum alongside Buxbaum as individuals interviewed by police within days of Patz's disappearance, and who told police that they knew Patz and had not seen him at the bus stop on the morning of May 25, 1979. (Exs. 22N at 7081:24-7084:6, 7107:4-7111:12; 40 at ECF 4.) Karen Jansons – with whom Buxbaum spoke for an additional twenty minutes after the bus's arrival at the bus stop – also testified at trial and stated, on both direct and cross-examination, that she knew Patz and had not seen him at the bus stop that morning. (Ex. 22H at 3823:4-3824:4, 3831:12-3834:20.) And Chelsea Altman, one of Patz's childhood friends, similarly testified that she did not see Patz at the bus stop that day. (Ex. 22H at 3725:22-3726:7, 3735:6- 3738:1.) Drawing on this testimony, Hernandez argued in summation that nobody saw Patz at the bus stop because he never made it there. (Ex. 22U at 9919:21-9920:6.) Far from being critical, the Buxbaum statement was purely cumulative – the type of evidence that the trial court has broad discretion to exclude. *See Rucigay v. Wyckoff Heights Medical Center*, 194 A.D.3d 865, 867, 149 N.Y.S.3d 148, 152 (2d Dep't, 2021) ("As a general rule, the issue of whether evidence should be excluded as cumulative rests within the sound discretion of the trial court") (internal quotation marks omitted).

Hernandez contends that the cumulative nature of the Buxbaum statement is irrelevant because hearsay evidence can be improperly excluded under *Chambers* "even where the state courts already admitted testimony from other sources on related subjects." (Pet. Reply at 25.) Even so, the Buxbaum Statement was still not material to his case given the testimony of multiple witnesses establishing the exact same, not merely "related," fact. Because "[t]he precluded evidence here neither hampered the defendant's ability to present a defense, nor would it have created any reasonable doubt that did not otherwise exist," the trial court was not unreasonable in deciding to exclude it. *Bostic v. Superintendent, Woodbourne Correctional Facility*, No. 09-CV-3540, 2012 WL 7783407, at *8 (E.D.N.Y. Sept. 13, 2012), *R & R adopted*, 2013 WL 1168850 (E.D.N.Y. March 20, 2013); *see Taylor v. Curry*, 708 F.2d 886, 894 (2d Cir. 1983) (affirming district court's dismissal of habeas petition despite evidentiary errors because "[t]he unsigned draft agreement, while probative, was cumulative in nature and its admission into evidence would not have created 'a reasonable doubt that did not otherwise exist' concerning petitioner's guilt"). The Butler Statement's exclusion did not materially diminish Hernandez's argument that Patz never arrived at the bus stop and, thus, did not rob him of a complete defense.

Whether the Butler DD5s were critical is a closer call. Those reports document the police's May 25 and May 26, 1979 searches of the area where Patz disappeared. They state that police engaged in "[a]n in-depth canvas and search of buildings, rooftops, basements and elevator shafts[,] backyards and alleys" located "in the vicinity of Broadway to Hudson

St. and Canal St. to Bleecker Sts" – encompassing both the bodega and the location where Hernandez allegedly left Patz's body – with the assistance of two bloodhounds, but found nothing. (Ex. 40 at ECF 22-23.) Hernandez asserts that this information is crucial because it undermines the prosecution's argument "that the initial investigation was shoddy" and shows that "police ***had*** extended their search up to and past the bodega, but did not find anything." (Pet. Mem. at 63 (emphasis in original).) The Government counters that the prosecution did not argue that the initial investigation was "shoddy," but rather presented evidence that the police spent hours searching the area and that Butler was a competent detective. (Resp. Mem. at 136-37.)

The trial testimony supports the Government. At trial, the Government presented evidence of the initial investigation's scope and Butler's dedication as lead detective. For example, the Government underscored Butler's commitment to the case in its opening statement, saying "Butler will spend the next six years looking for Etan Patz. Nights, weekends, holidays. Bill Butler walked the streets looking for any clue about what happened to Etan Patz." (Ex. 22G at 3430:6-10.) The Government later called Julie Patz, Patz's mother, to the stand, who testified that Butler continued to work on Patz's case for years and was a very dedicated detective. (Ex. 22G at 3590:5-13.) The Government also elicited evidence from Detective Pasquale Eanniello ("Eanniello"), who accompanied Butler and described the initial investigation. (*See* Ex. 22H at 3849:18-3884:18.) On cross-examination, Eanniello stated that, although he could not remember the bodega being searched, he assumed that Butler would have searched the bodega

because "he was not the type of personality to leave anything undone." (Ex. 22H at 3860:10-17.)

Hernandez points to the Government's summation, in which it argued that the initial search rested on a faulty assumption that Patz disappeared between his house and the bodega and that "[n]obody was scrutinizing the Bodega" because they assumed it was a safe place and "[t]he Bodega guys were helping them." (Ex. 22U at 9992:16-9993:17.) In his own summation, Hernandez replied, insisting that given Butler's dedication and the seriousness of Patz's disappearance, police must have searched the bodega's basement. (Ex. 22U at 9925.) Hernandez argued that the police looked in the basement and did not find Patz's bookbag – which Hernandez had confessed to throwing behind the refrigerator – "[b]ecause it never happened this way." (Ex. 22U at 9925:10-12.)

Although the Butler DD5s could have bolstered Hernandez's claim that his confessions were false given that the bodega's basement was searched during the initial 1979 police investigation and no evidence, including Patz's bookbag, was found, they were not critical. It is within the trial court's purview to make evidentiary decisions and "'*Chambers* … does not … countenance the setting aside of a state evidentiary rule … simply because it seems fairer to defendant to abrogate the rule.'" *Brooks*, 2000 WL 1532918, at *6 (quoting *Grochulski*, 637 F.2d at 56) (internal brackets omitted). Unlike in *Chambers*, the excluded DD5s were clearly not "the only means by which the defendant could have put before the jury the particular defense theory" that Patz was never in the basement's bodega and that Hernandez's confession was therefore false. *Bowman v. Racette*,

No. 12-CV-4153, 2015 WL 1780159, at *8 (S.D.N.Y. Apr. 20, 2015), *aff'd*, 661 F. App'x 56 (2d Cir. 2016). While the trial court's evidentiary ruling may have prevented Hernandez from advancing his argument that Patz never made it to the bodega through the presentation of the Butler DD5s, Hernandez was still free and able to advance the argument using other evidence. *See Davidson v. Capra*, No. 15-CV-9840, 2018 WL 1637967, at *13 (S.D.N.Y. Apr. 4, 2018), *R & R adopted* 2019 WL 2342980 (S.D.N.Y. May 31, 2019) (finding *Chambers* did not apply where defendant could have sought to provide non-hearsay evidence). Given the dissimilarity between the circumstances here and those in *Chambers*, and especially in light of *Chambers'* limitation to the facts, the state courts' exclusion of the Buxbaum Statement and the Butler DD5s was not unreasonable and did not deprive Hernandez of a fair trial.

IV. Hernandez's Jury Contamination Claim

Hernandez contends that the state courts misapplied Supreme Court precedent when rejecting his motion to set aside the verdict under CPL § 330.30(2) because of prejudicial contacts between court officers and members of the jury. Hernandez claims that the courts thereby violated his right to have his case heard by an impartial jury and to be confronted with the evidence against him. The Government counters that Hernandez has failed to show that the state courts improperly applied Supreme Court precedent and, regardless, Hernandez has not alleged sufficient grounds for relief. The Government is correct.

A. Relevant Legal Principles

Under the Sixth Amendment, a criminal defendant is entitled to an impartial jury and to be confronted with the evidence against him. *See* U.S. Const. amend VI; *see also Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S. Ct. 1507, 1522 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences"). The Sixth Amendment requires a jury's verdict to be based on the evidence and testimony developed at trial. *See Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 549 (1965). Both the right "to a trial by an impartial jury and right to confront his accusers 'are implicated when a jury considers incriminating evidence that was not admitted at trial.'" *Van Stuyvesant v. Conway*, No. 03-CV-3856, 2007 WL 2584775, at *33 (S.D.N.Y. Sept. 7, 2007) (quoting *Loliscio v. Goord*, 263 F.3d 178, 185 (2d Cir. 2001)).

"[D]etermination of whether a petitioner's Sixth Amendment rights have been violated by the jury's consideration of extra-record information requires a determination of whether the extra-record information had a prejudicial effect on the verdict." *Loliscio*, 263 F.3d at 185. "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is … presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 451 (1954.) But, "[a]ny prejudice that is presumed by the consideration of extra-judicial information can be overcome by a showing that the exposure to the information was harmless." *Smith v. Graham*, No. 10-CV-3450, 2012 WL 2428913, at *18 (S.D.N.Y. May 7, 2012), *R & R adopted*, 2012 WL 2435732 (S.D.N.Y. June 27, 2012).

"Where an extraneous influence is shown, the court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror." *Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir.) (per curiam) (internal quotation marks omitted), *cert. denied*, 513 U.S. 901, 115 S. Ct. 261 (1994). A new trial would be necessary "[i]f the 'hypothetical average jury' would have been coerced or led astray". *United States v. Ianniello*, 866 F.2d 540, 544 (2d Cir. 1989). However, "[a] court need not inquire into juror-misconduct allegations unless the defendant provides 'reasonable grounds' for an inquiry; the defendant may not request a hearing to conduct a 'fishing expedition.'" *Taus v. Senkowski*, 134 F. App'x 468, 470 (2d Cir. 2005) (quoting *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978)); *see also Matos v. Ercole*, No. 08-CV-8814, 2010 WL 2720001, at *10 (S.D.N.Y. June 28, 2010) ("Because courts should avoid 'hauling jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences,' an evidentiary hearing should be held 'only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality'") (quoting *Ianniello*, 866 F.2d at 543) (internal brackets omitted).

B. The Relevant Jury Contamination Facts

In his motion to set aside the verdict, Hernandez alleged that court officers had told sitting jurors that jurors from the first trial were sitting in court with the Patz family. (Ex. 52.) The basis for Hernandez's motion was two news clippings from Newsday and DNAInfo and five sworn affidavits from: (1) a custodian of records at Newsday; (2) a research analyst hired by the defense; (3) Joseph F. O'Brien

("O'Brien"), a private investigator hired by the defense to look into juror misconduct; (4) defendant's counsel Alice L. Fontier; and (5) a supplemental affidavit from O'Brien concerning his conversation with a juror. (*See* Ex. 52.) Hernandez did not submit any sworn affidavits from any jurors.

The newspaper articles reported that, following the verdict, juror Michael Castellon ("Castellon") had hugged a first-trial juror outside the courtroom. (Ex. 52 at ECF 21-27.) When asked by reporters, Castellon said he recognized the first-trial juror because "court officers had told the jury that members of the earlier panel – who frequently sat with Etan's father – were attending the retrial." (Ex. 52 at ECF 21.) In her affirmation, the research analyst described her unsuccessful attempts to speak with three court officers about the media reports of contacts between the jury and court officers. (Ex. 52 at ECF 43.) The Newsday custodian's affidavit authenticated the article and stated that "Newsday has not received a request for a correction." (Ex. 52 at ECF 33.)

The O'Brien affidavits detailed the investigator's unsuccessful attempts to interview jurors "regarding their deliberations and potential communications with court officers." (Ex. 52 at ECF 45.) O'Brien reports speaking with two sitting jurors – #6 and #2 – and one alternate juror. (Ex. 52 at ECF 42, 46.) The alternate juror told O'Brien that he had learned prior to deliberations that first-trial jurors were in the courtroom but that "he could not remember who informed him … but it was definitely another juror, not any of the three court officers." (Ex. 52 at ECF 46.) Juror #6 told O'Brien that "he did not know that there had been a previous trial and that some of the jurors from that trial had attended the most recent one"

until he read it in the paper a few days after the verdict. (Ex. 52 at ECF 46.) Juror #2 stated that she had "suspected there was a prior trial based on references made during the trial to a prior proceeding" and learned late in the trial that people sitting with the Patz family were jurors from the first trial. (Ex. 53 at ECF 14.) Although Juror #2 is "not sure from whom she learned" this information, she guesses that "it could have been the court officers" or "from friends or something like that" but that she was "shocked" and "baffled" by the information. (Ex. 53 at ECF 14.) The affidavits, Hernandez argues, provide sufficient support to establish the requirements under CPL § 330.30(2) of "improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to" the verdict. (Ex. 52 at ECF 11-13, quoting CPL § 330.30(2).)

Viewing Hernandez's allegations in the light most favorable to him, the Trial Judge determined that Hernandez had at most alleged that "a juror claimed a court officer advised him that jurors from the prior trial were present in court during the trial; and that at least one other juror was aware during the trial that jurors from the first trial were present in court and at times seated near the [Patz] family, though this juror could not recall the source of this information." (Ex. 54 at ECF 2-3.) Those allegations were insufficient to set aside the verdict, and the affidavits were insufficient support for the facts alleged. (Ex. 54 at ECF 3-4.) The trial court reasoned that because the jurors were aware of a prior trial, "the most they might have learned from a court officer, or some other source, was that former jurors

were present in the audience during the trial, at times sitting with or near the [Patz] family." (Ex. 54 at ECF 3.) The court further explained that none of the five affidavits contained any "allegations whatsoever that any juror was influenced by the knowledge of prior jurors in the courtroom" or a "sworn allegation ... – on personal knowledge or information and belief – of a court officer advising any juror as to where those prior jurors were sitting, or who they were." (Ex. 54 at ECF 7.)

Finding that Hernandez's moving papers neither alleged any legal basis nor provided sworn allegations of all facts essential for the motion, the Trial Court denied the motion without a hearing Pursuant to CPL § 330.40(2). (Ex. 54 at ECF 2.) The Appellate Division affirmed, noting that Hernandez "did not provide affidavits from anyone with first-hand knowledge of the material facts" and that "[n]one of [the] information [provided] was sufficient to require a hearing." *Hernandez*, 181 A.D.3d at 533, 122 N.Y.S.3d at 15-16.

C. The State Courts' Finding That Hernandez's Jury Contamination Claim Had No Merit Was Not Unreasonable Or Contrary To Supreme Court Law

Hernandez now argues that both rulings were in error because "[n]either the trial court nor the Appellate Division addressed the clear line of Supreme Court authority addressing improper contacts with jurors," citing *Mattox v. United States*, 146 U.S. 140, 13 S. Ct. 50 (1892), *Remmer*, 347 U.S. 227, 74 S. Ct. 450, and *Parker v. Gladden*, 385 U.S. 363, 87 S. Ct. 468 (1966). (Pl. Mem. at 66.) The relevant facts in each of those cases and the proof

offered by those defendants, however, are materially different than those here.

In *Mattox*, a bailiff told sitting jurors prior to deliberation that the defendant was a repeat-offender. 146 U.S. at 142, 13 S. Ct. at 51. Jurors also read a newspaper article while deliberating that discussed the case, the defendant's prior arrests, and the weight of the evidence. *Id*. at 142-44, 13 S. Ct. at 51-52. In support of his motion, the *Mattox* petitioner provided affidavits of two jurors about the bailiff's statements, and the affidavits of eight other jurors attesting to the newspaper article having been read aloud. *Id*. at 142, 13 S. Ct. at 51. In *Parker*, the bailiff assigned to shepherd the sequestered jury told a juror, in the presence of another juror, that the defendant was guilty; additionally, "one of the jurors testified that she was prejudiced by the statements." 385 U.S. at 363-65, 87 S. Ct. 470-71. And in *Remmer*, an unnamed person attempted to bribe the jury foreperson. An investigation was conducted with the knowledge of the judge and prosecutor.

Defendant's counsel only learned of the attempted bribery and investigation after the verdict by reading about it in a newspaper. 347 U.S. at 228, 74 S. Ct. at 450-51. In each of the three cases, the court found that the improper conduct violated the defendants' constitutional rights and granted post-conviction relief.

Accepting the entirety of Hernandez's allegations as true, the state courts did not unreasonably deny Hernandez relief without a hearing because his allegations failed to sufficiently articulate a ground for relief. As a threshold matter, to the extent that Hernandez's allegations relate to procedural errors in

the state court's denial of his post- verdict motion without a hearing, they do not set forth a constitutional claim cognizable on habeas review. "[A]lleged errors in a postconviction proceeding are not grounds for § 2254 review" and petitioner's "claim of a procedural right to a state post-conviction proceeding does not implicate federal law." *Word v. Lord*, 648 F.3d 129, 132 (2d Cir. 2011) (per curiam); *see also Jones v. Duncan*, 162 F. Supp.2d 204, 217-19 (S.D.N.Y. 2001) (noting that "[a]ll the circuits that have considered the issue, except one, have held that federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings," and, therefore, petitioner's claim that the trial court violated his due process rights by denying his CPL §§ 330.30 and 440.10 motions without holding a hearing is "not cognizable on federal habeas review") (internal quotation marks omitted); *Green v. Haggett*, No. 13-CV-0016, 2014 WL 3778587, at *8 (W.D.N.Y. July 31, 2014) (holding that state courts denial of petitioner's CPL § 330.30 motion is not cognizable on federal habeas review because "[t]he United States Constitution does not compel states to provide post-conviction proceedings for relief").

In any event, Hernandez's claim that the state court's denial of his CPL § 330.30 motion violated his Sixth Amendment rights fails on the merits. The Appellate Division's determination that Hernandez did not provide sufficient information for his juror contamination claim was not an unreasonable application of law or determination of fact.

First, the trial court correctly noted that the jury was already aware of the existence of a first trial so any further confirmation of that fact was harmless.

(*See* Exs. 22G at 3632:4-5 (Julie Patz referring to testimony provided "during the last trial"); 22H at 4030:8-24 (Trial Judge instructing jury that they "may have heard a witness refer to a first trial" but "that first trial was not concluded, and, therefore, it has no bearing on the evidence in this case.") *See Curet v. Graham*, No. 14-CV-4831, 2019 WL 13184139, at *35 (S.D.N.Y. Jan. 14, 2019), *R & R adopted* 2022 WL 1486492 (S.D.N.Y. May 11, 2022) (finding no prejudice in extra-record evidence that "was largely cumulative of other evidence in the record"). Moreover, the Trial Judge instructed the jury that the "[first] trial or any reference to it, is not evidence of anything, and you are not to speculate or consider it." (Ex. 22H at 4030:13-18; *see also* Ex. 22U at 10138:20-23.) *See Smith v. Graham*, 2012 WL 2428913, at *18 (affirming state court's dismissal of petitioner's juror misconduct claim where "jury was already aware that Petitioner was on parole … and … would thus have recognized that Petitioner had a prior criminal history" and jury had received specific instructions not to allow Petitioner's parole status to influence their verdict).

Second, Hernandez's claim is speculative and based on hearsay. Hernandez offered no affidavits from jurors, and none of the jurors spoken to by investigator O'Brien confirmed that they learned about the first panel jurors from a court officer. *See* CPL § 330.40(2)(a) ("The moving papers must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the motion. … Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant

must state the sources of such information and the grounds of such belief"); *see generally Agosto v. Senkowski*, No. 99-CV-9013, 2004 WL 1814020, at *10 (S.D.N.Y. Aug. 16, 2004) ("Under New York Law, a defendant's motion made pursuant to CPL § 330.30 is deemed to contain sworn allegations of all facts essential to support the motion where the affiant swears as to the juror misconduct he or she allegedly has observed or heard") (internal quotation marks omitted). Although Hernandez need only meet an "upon information and belief" standard, hearsay allegations are not sufficient. *See Dexter v. Artus*, No. 01-CV-237, 2007 WL 963204, at *10 (N.D.N.Y. March 27, 2007) (stating that trial court's refusal to conduct an evidentiary hearing was in compliance with state statutory law where allegations on which the motion was brought were hearsay). Further, "[a] post-verdict hearing on allegations of juror impartiality is only required when 'the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality.'" *Stone v. Griffin*, No. 17-CV-8741, 2020 WL 7390188, at *8 (S.D.N.Y. Aug. 29, 2020) (quoting *Ianniello*, 866 F.2d at 543.)

O'Brien's affidavits attesting to conversations with one alternate and two sitting jurors, as well as newspaper clippings memorializing the statement of another juror are all hearsay and "d[o] not serve to elevate [Hernandez's] claim of juror prejudice beyond the realm of speculation." *Black v. Graham*, No. 11-CV-1495, 2014 WL 496878, at *7 (S.D.N.Y. Feb. 4, 2014); *see also Covington v. Warden, Five Points Correctional Facility*, No. 11-CV-8761, 2014 WL 7234820, at *7, *15 (S.D.N.Y. Dec. 8, 2014) (affirming state court's denial of motion to set aside verdict

where petitioner presented only inadmissible hearsay and failed to provide a sworn statement by anyone observing the alleged misconduct); *You v. Bennett*, No. 00-CV-7514, 2003 WL 21847008, at *4 (E.D.N.Y. July 29, 2003) (affirming trial court's denial of motion to set aside the verdict where supporting letter "[was] hearsay … not written by the holdout [juror] but by another juror [who] speculates as to why the holdout changed her mind"). Hernandez's counsel's recitation of the various newspaper articles similarly does not constitute personal knowledge or facts provided on information and belief.

Hernandez attempts to distinguish this case from *People v. Samandarov*, 13 N.Y.3d 433 (2009), cited by both the Appellate Division and the Government. In *Samandarov*, the New York Court of Appeals affirmed a lower court's denial of defendant's CPL § 330.30 motion that was based on "an affirmation of his counsel, which in turn relied on a newspaper article and on information given to a counsel by an unnamed 'neighbor' said to be a 'co-worker' of the foreperson of the jury." 13 N.Y.3d at 436. "Even putting aside the hearsay nature of this evidence" the court stated that Defendant had submitted nothing to show any outside influence. *Id.* at 13 N.Y.3d at 437. Hernandez is correct that his submissions are distinct from those offered in *Samandarov* in that they contain allegations that the jury actually received information from outside the courtroom. But allegations of a court officer telling sitting jurors that first trial jurors were sitting with Patz's family does not by itself convey an attempt to influence. Regardless, as the Court understands it, the Government cites to *Samandarov* for its determination on the hearsay nature of the proffered

evidence. And, as was the case in *Samandarov*, the affidavits presented here offer only hearsay, and speculation, as to what a juror may have been told by a court officer.

Third, while Hernandez is correct that a "wide variety of information" can prejudice a jury (Pet. Mem. at 66), the information at issue here is unlike prior instances of juror misconduct. At most, Hernandez argues that sitting jurors were made aware, maybe by a court officer, of the presence of first-trial jurors in the courtroom and their association with the Patz family. Hernandez makes no allegations of jurors being told that he was guilty as in *Parker*, or jurors being informed about excluded evidence and external analysis as in *Mattox*, or of attempted bribery of a juror as in *Remmer*.[26] And, unlike those cases, Hernandez provided no supporting testimony from any juror or other person with first-hand knowledge attesting to attempted or actual improper influence.[27] *See Taus v. Senkowski*,

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[26] Hernandez's allegations are also dissimilar from additional cases in which courts have found juror misconduct. *Cf. Turner*, 379 U.S. at 473-74, 85 S. Ct. at 550 (finding petitioner's basic rights were undermined by comingling of jury and key witnesses for the prosecution during sequestration); *Irwin v. Dowd*, 366 U.S. 717, 725-27, 81 S. Ct. 1639, 1644-46 (1961) (reversing conviction where jury was exposed to media coverage detailing petitioner's criminal history and suggesting his guilt); *United States v. Morrison*, 984 F. Supp.2d 125, 134-38 (E.D.N.Y. 2013) (applying *Remmer* to vacate verdict where juror was offered a bribe to sway verdict).

[27] The Government argues that Hernandez's allegation is "more akin to one in which trial spectators have been alleged to have influenced the jury," citing to *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649 (2006), where the Supreme Court found that

(Continued…)

293 F. Supp.2d 238, 250 (E.D.N.Y. 2003), *aff'd Taus*, 134 F. App'x 468 ("The failure of petitioner either in the state court or in this federal court to support his claims with a sworn statement from [the relevant juror] provides only an attenuated foundation for relief"); *Jones v. Duncan*, 162 F. Supp.2d 204, 219 (S.D.N.Y. 2001) (referring to trial court's denial of CPL § 330.30 motion "in part because the motion[] [was] not supported by affidavits and [was] based on hearsay," was "based on and in compliance with state statutory law," and was "not constitutionally deficient"). "To disturb a trial court's decision based on statements of speculation and conjecture would be untenable given the considerable deference the trial judge is afforded in ruling on such motions." *Stone*, 2020 WL 7390188, at *9 (citing *Wheel v. Robinson*, 34 F.3d 60, 65 (2d Cir. 1994)).

In sum, Hernandez provided neither the form nor substance of proof required to support his claim of juror misconduct. The state courts thus did not fail to adhere to controlling Supreme Court law or unreasonably exercise their discretion according to state rules to determine that the requisite threshold for a hearing had not been met.

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petitioner was not inherently prejudiced by members of the victim's family wearing buttons displaying the victim's image in court. (Resp. Mem. at 146.) Hernandez retorts that this case is nothing like *Carey* because "the jury was made aware that this was Hernandez's second trial and that the jurors from the first trial were sitting with Etan's father." (Pet. Reply at 29.) Because Hernandez's claim fails as presented, the Court does not assess the Government's "spectator" analysis.

CONCLUSION

As noted elsewhere in this Report and Recommendation, Hernandez has raised troubling issues with respect to the manner in which his confessions were obtained, the extent to which his post-confession waiver of *Miranda* rights was made voluntarily and intelligently, and the Trial Court's response to the jury request for an explanation about the relationship between Hernandez's pre- and post-*Miranda* confessions. The Court, however, is constrained by the strictures imposed under AEDPA and Congress's decision to put habeas relief beyond the reach of a petitioner whose conviction raises reasonable doubt in the mind of at least one fair-minded jurist. For the reasons stated above, Hernandez's petition does not survive review under AEDPA. The petition should be DENIED and the case dismissed.

PROCEDURES FOR FILING OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days to file written objections to this Report and Recommendation. Any party shall have fourteen (14) days to file a written response to the other party's objections. Any such objections and responses shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Colleen McMahon, United States Courthouse, 500 Pearl Street, New York, New York 10007, and to the Chambers of the undersigned, at United States Courthouse, 500 Pearl Street, New York, New York 10007. Any request for an extension of time for filing objections must be addressed to Judge McMahon.

Failure to file timely objections will result in a waiver of the right to object and will preclude appellate review.

Respectfully submitted,

ROBERT W. LEHRBURGER
UNITED STATES
MAGISTRATE JUDGE

Dated: October 10, 2023
New York, New York

Copies transmitted on this date to all counsel of record.

APPENDIX G

Friedman, J.P., Kern, Oing, González, JJ.

11259 & M-430	The People of the State of New York, Respondent,	Ind. 4863/12
	-against-	
	Pedro Hernandez, Defendant-Appellant.	

	Chief Defenders Association of New York and The Innocence Project Inc., Amici Curiae.	

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese of counsel), for respondent.

The Legal Aid Bureau of Buffalo, Inc., Buffalo (Eric A. Kulesus of counsel), for Chief Defenders Association of New York amicus curiae.

Simpson Thatcher & Bartlett LLP, New York (Mark Stein of counsel), for The Innocence Project Inc., amicus curiae.

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered April 18, 2017, convicting defendant, after a jury trial, of murder in the second degree and kidnapping in the first degree,

and sentencing him to concurrent terms of 25 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the hearing court's factual determinations. The hearing record establishes that, under the totality of circumstances, defendant's statements made before he received *Miranda* warnings were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought he was in custody (*see People v. Yukl*, 25 NY2d 585 [1969], *cert denied* 400 U.S. 851 [1970]). Defendant voluntarily accompanied the detectives to a New Jersey police station, where he was not locked into the facility, handcuffed or restrained, and he was permitted to move around in a manner that was inconsistent with a custodial setting. The detectives repeatedly told defendant he was free to leave. In the context of all the surrounding circumstances, those explicit assurances were not undermined when, on several occasions, the detectives expressed their preference that defendant complete the interview before he left or spoke to his wife, and defendant voluntarily opted to continue. Furthermore, the interview was never hostile or accusatory.

The court also correctly determined that defendant made a knowing and intelligent waiver of his *Miranda* rights. The evidence, including the videotape of defendant's ultimate interview by an Assistant District Attorney as well as expert testimony presented by both sides, supports the conclusion that defendant was not so mentally ill, lacking in intelligence, or impaired by medication that he was incapable of intelligently waiving his rights (*see People v. Williams*, 62 NY2d 285 [1984]).

An interchange between defendant and the interviewing Assistant, in which defendant asked intelligent questions about his right to counsel and received appropriate answers, demonstrates defendant's ability, rather than inability, to understand his rights.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v. Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find that defendant's confession was corroborated to the limited extent required by CPL 60.50. That statute is satisfied by the production of "some proof, of whatever weight, that a crime was committed by someone" (*People v. Chico*, 90 NY2d 585, 589 [1997]). Here, the unexplained disappearance in 1979 of six-year-old Etan Patz, who has not been located or heard from since, presented strong circumstantial evidence that he was kidnaped and murdered (*see People v. Lipsky*, 57 NY2d 560, 571-572 [1982]).

Next, we find that defendant's confession to law enforcement was reliable and truthful. Defendant offered certain details without any prompting, such as offering Etan a soda, that were consistent with other evidence. Defendant also led detectives to the place where he thought he had left the body, but expressed uncertainty because of the presence of a door; detectives later learned that the owner had installed the door after 1979. Defendant made generally similar admissions to civilians over a period ranging from shortly after Etan's disappearance to immediately after he confessed to the authorities. Defendant's account was consistent with his admissions at a religious retreat, where he told fellow participants that he had strangled a boy while

working at a store, and placed his body in a bag, which he put with the trash. After his confession to law enforcement, defendant also admitted to his wife and daughter that he had killed a boy, and told a nurse that he had choked a person 33 years earlier. Any inconsistencies within defendant's confession, or between that confession and his admissions to civilians, or between his various statements and other evidence in the case, were sufficiently explained. The evidence does not support defendant's claim that he gave a false confession due to a susceptibility resulting from mental impairment. Aside from the fact that defendant volunteered essentially the same admission to civilians, the evidence showed that defendant lived as a well-functioning, employed family man for many years, and the jury could have reasonably rejected the expert testimony introduced by defendant regarding his mental condition. Furthermore, there is no evidence that the facts stated in defendant's confession were contaminated by police suggestion or otherwise.

We also find that evidence regarding the possible culpability of an alternative suspect was too weak to affect the weight of the evidence establishing defendant's guilt. Although the other suspect was a convicted child molester, his admission that on the day Etan disappeared, he had sexually molested a boy named "Jimmy," whom he brought to his apartment and then put on a subway to his aunt's home, had little connection with the facts of this case.

The evidentiary rulings challenged on appeal were provident exercises of discretion that did not impair defendant's right to present a defense or any other constitutional right (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]). Defendant had an ample

opportunity to introduce evidence about the above-discussed alternative suspect, and the evidence offered by defendant relating to yet another possible suspect was so remote as to be irrelevant (*see People v. DiPippo*, 27 NY3d 127, 135-136 [2016]). With regard to hearsay evidence offered by both sides, the court properly concluded that the evidence offered by the People was admissible, not for its truth, but for legitimate nonhearsay explanatory purposes (*see People v. Tosca*, 98 NY2d 660 [2002]), while the evidence offered by defendant was not admissible on that, or any other basis (*see People v. Burns*, 6 NY3d 793, 795 [2006]). The court also providently exercised its discretion in precluding expert testimony on the effect on memory of a lengthy passage of time, because the proposed testimony was within the jurors' ordinary experience and knowledge. We reach similar conclusions as to the other evidentiary issues raised on appeal, including defendant's constitutional claims.

The court provided a meaningful response to a jury note on the subject of the voluntariness of confessions (*see generally People v. Almodovar*, 62 NY2d 126, 131 [1984]; *People v. Malloy*, 55 NY2d 296, 302 [1982], *cert. denied* 459 US 847 [1982]). Given the precise wording of the note, the court's brief response was correct. Even assuming, without deciding, that the court should have added instructions on the circumstances whereby a statement may or may not be attenuated from a prior statement found to be involuntary, there is no reasonable possibility that the verdict would have been different had those instructions been given (*see People v. Petty*, 7 NY3d 277, 286 [2006]; *People v. Jones*, 3 NY3d 491, 497 [2004]), in light of the strong evidence that

defendant's confession to the Assistant District Attorney was fully attenuated from all of his confessions to the police, as well as being corroborated by defendant's various confessions to civilians.

The court providently exercised its discretion in denying, without an evidentiary hearing, defendant's CPL 330.30(2) motion to set aside the verdict on the ground that the jury had been improperly influenced by extraneous information (*see People v. Samandarov*, 13 NY3d 433, 436-438 [2009]). Defendant did not provide affidavits from anyone with first-hand knowledge of the material facts. While affidavits in support of such a motion may be based on information and belief, here the "information" in a defense investigator's affidavits was limited to news media accounts, along with statements by a juror and an alternate that failed to support, or contradicted, defendant's theory of improper influence. None of this information was sufficient to require a hearing (*see id.*). Defendant acknowledged his inability to provide more information, and he was not "entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts" (*People v. Brooks*, 134 AD3d 574, 576 [1st Dept 2015], *aff'd* 31 NY3d 939 [2018]). Furthermore, defendant did not demonstrate that the extraneous information allegedly made known to the jury had any effect on its deliberations, or that it was inherently prejudicial.

We perceive no basis for reducing the sentence.

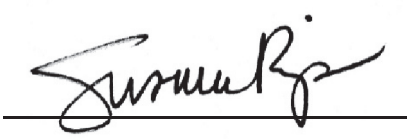
We have considered and rejected defendant's remaining claims.

M-430 – *People v. Hernandez*

Motion to file amicus curiae brief granted, and the brief deemed filed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: MARCH 26, 2020



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APPENDIX H

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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THE PEOPLE OF
THE STATE OF NEW YORK,

-against-

PEDRO HERNANDEZ,

DEFENDANT.

DECISION AND ORDER
INDICTMENT NO. 4863/12

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MAXWELL WILEY, J.:

This cases arises from the disappearance thirty-five years ago of six-year old Etan Patz, who, on May 25, 1979, was reported missing by his family. He was last seen walking toward his school bus stop in the Soho neighborhood in Manhattan that morning. The NYPD began an investigation into the boy's whereabouts that would last for more than thirty years. Over the years the investigation involved not only the NYPD, but the FBI and other agencies as well, and would periodically be reported in the press whenever it appeared that a suspect had been identified.

The case made headlines again in April 2012, when law enforcement excavated a basement that in 1979 had been the location of a workshop owned by a local handyman who had contact with Etan Patz.

Shortly thereafter, the NYPD Missing Persons Squad received a phone call that would lead them to suspect the defendant of the crime. The defendant was subsequently indicted by a New York County Grand Jury for murder and kidnapping.

The defendant has now moved for suppression of statements made by him to law enforcement during the course of their interviews with him on May 23 and 24, 2012. In support of this motion the defendant alleges that he was arrested without probable cause, and that he was subjected to questioning by the police and the District Attorney without first executing a knowing and intelligent waiver of his constitutional rights to remain silent and to the assistance of counsel. After the People filed papers in opposition, the court granted the defendant's motion to the extent of ordering a combined *Dunaway*/*Huntley* hearing. This hearing was conducted during ten days from September 15 to October 7, 2014. The parties have filed briefs based on the evidence adduced at the hearing. The defendant, in a subsequent affirmation, has also moved to re-open the hearing, based on new evidence.

After review of the evidence and the arguments advanced by the parties, the following now constitutes the court's findings of fact and conclusions of law.

Findings of Fact

On May 8, 2012, shortly after the above-noted excavation of the site of the handyman's workshop, the NYPD Missing Persons Squad received a phone call from Jose Lopez, who identified himself as a brother-in-law of the defendant's. In subsequent interviews with Detective David Ramirez and other Missing Persons detectives, Mr. Lopez stated that the

leader of the defendant's church group in the early 1980s informed him that the defendant had confessed to killing a young boy years earlier. The defendant told the church he had taken the child to the basement of the bodega at which he'd worked and there cut him up. The detectives learned that the defendant had indeed worked in May 1979 at a bodega that was on the route that Etan Patz walked from his home to his bus stop. Further investigation by Detective Ramirez and others both confirmed Lopez's statements and established that the defendant had made similar admissions over the years to other people, including the defendant's ex-wife, Daisy Hernandez, and a friend named Mark Pike.

The police developed a plan to contact and interview the defendant, and to simultaneously attempt to contact and interview the people to whom the defendant was known to have made admissions. On May 23, 2012, in the early morning hours, New York City detectives, with the assistance of detectives from the Camden County Prosecutor's Office (CCPO), split up into teams to interview the various witnesses. Detective Ramirez and Detective Jose Morales from the NYPD's Major Case Squad were assigned to interview the defendant. The two detectives, along with CCPO Detective Lance Saunders, obtained the assistance of two uniformed police officers from the Maple Shade Police Department. The officers, P.O. Mark O'Brien, and Sergeant Brian Weiss, were told that NYPD detectives wished to interview the defendant but were not told whether the defendant was a witness or a suspect. The team that was assembled to contact the defendant consisted of the two local uniformed police officers, CCPO Detective

Saunders, NYPD Detectives Ramirez and Morales, along with Detectives Eddie Maldonado and Anthony Ricevuto, and two NYPD supervisors.

The group arrived at the defendant's home on Linwood Avenue in Maple Shade at about 7:30 that morning. The Maple Shade officers had traveled in a marked patrol car, the NYPD personnel in unmarked cars. Sergeant Weiss, accompanied by Officer O'Brien and Detective Saunders, knocked on the defendant's door. The defendant, dressed in jeans and a tee shirt, answered the door, and identified himself at the request of Sergeant Weiss. Weiss and O'Brien identified themselves and asked if they could come in and speak with the defendant. The defendant said yes, and allowed the two uniformed officers into his home, inside the front doorway. The officers waited while the defendant secured his dog in another room. After a few moments the defendant returned and the Sergeant told the defendant that there were detectives outside who would like to speak with the defendant. Weiss asked the defendant if he'd be willing to speak with the detectives. The defendant said he would. The defendant agreed and walked out of his home. The defendant was neither handcuffed nor physically led by the police to the detectives. Detective Ramirez met the defendant and showed him his shield and identification. Ramirez introduced himself and Detective Morales and told the defendant that his name had come up in an old missing person case in New York City. Ramirez and Morales were dressed in suits. Ramirez asked the defendant if he would agree to accompany the detectives to the CCPO to speak with them. The defendant agreed to do so.

Detective Morales asked the defendant if he would mind if the detective patted him down for

safety purposes. The defendant again agreed, and Morales patted the pockets of the defendant's jeans. Morales felt a hard object in one of the pockets and asked the defendant if he could see what it was. The defendant produced a key ring and a metal pill case, along with his wallet and cell phone. At the detective's request the defendant placed his property in a box in the trunk of one of the unmarked NYPD cars parked outside his home. Detectives Ramirez and Morales and the defendant then got into the car, Ramirez in the driver's seat, Morales and the defendant in the back. Once he was seated, the defendant asked the detectives if this was going to take a long time. He explained that if it were going to take more than a few hours he would need his medication. Detective Maldonado was informed of this, and went back to the defendant's home. There the defendant's wife, Rosemary Hernandez, packed a number of pill bottles containing pain medications and psychotropic drugs, along with narcotic pain patches, into two boxes and gave the boxes to Detective Maldonado. Maldonado brought the medication to CCPO in a separate car. While the detective was inside the home retrieving the defendant's pills, Rosemary Hernandez advised Officer O'Brien that her husband was unstable and needed someone to stay with him.

Ramirez drove the defendant to the CCPO, a trip that took about fifteen minutes. During the ride the defendant asked the detectives what this was about and whether it had anything to do with child support issues. Ramirez told the defendant that it was not about support payments, but about a missing child case in New York City. When they arrived at CCPO, Detective Saunders, who had driven ahead of Ramirez's car, met them. While Ramirez retrieved the

case file and the defendant's personal property from the car trunk, Saunders, Morales, and the defendant entered the CCPO through a back door which was unlocked by Saunders. The defendant, who remained un-cuffed, followed Saunders and Morales into the building.

Once inside the building, Morales brought the defendant to an interview room—room number 133. Morales left the defendant alone in the room for several minutes while Morales secured his weapon in a different room and while Ramirez gained entrance to the building with the case files and the defendant's property. Room 133 was an interior room with no windows, approximately eight by ten feet in size. It was well lighted, and the door was left open while the defendant waited alone, sitting in a chair at one end of a conference table. In a few minutes Ramirez entered the room with the boxes of files and property. Ramirez then left the room to secure his weapon, leaving the defendant alone again. Morales returned shortly and, seeing the boxes, told the defendant that his property was inside one of the boxes and that he could take it back at any time. The defendant stated that he would take it when it was time to leave. Ramirez then returned and the two detectives took seats at the table with the defendant. Ramirez sat with his back to the open door. The defendant remained in his seat, against a wall, facing the door, while Morales sat to the defendant's left.

The interview began at about 8:00 a.m. The defendant, in response to the detectives' questions, spoke about his early life in Puerto Rico, Camden, and New York City. He told the detectives that he left high school in 12th grade without graduating. He also spoke about his work history, including his job with

his brother-in-law at a bodega in New York City in 1979. At some point early in the interview, Detective Jose Rosado, as part of the detectives' pre-interview plan, walked the defendant's ex-wife, Daisy, past the open door to room 133. The defendant reacted emotionally and asked the detectives what his ex-wife was doing there, and again whether he was there because of child support. After being assured that child support was not the reason for his being there, the defendant spoke about his relationship with Daisy. During this part of the interview, Detective Anthony Curtin walked Mark Pike past the interview room's open door, again as part of a plan. In response to Detective Ramirez's question, the defendant stated he did not recognize the man who had walked by.

The interview continued with Detectives Ramirez and Morales until about 1:00 p.m., with only one interruption. At about 10:00 a.m. the defendant said he needed to use the bathroom. Detective Morales walked with the defendant to a bathroom down the hall near a building exit. This exit, which was visibly marked, was the same door the defendant had used to enter the building. Morales left the defendant in the bathroom unattended and walked back to room 133. When the defendant returned to the interview room from the bathroom he stopped in the hallway to speak with a person he recognized from his old neighborhood. That person was CCPO Detective Miguel Rubert, who happened to be walking in the hallway at the same time as the defendant. The defendant knew Rubert's mother. Rubert, in turn, knew the defendant's family, and went to school with the defendant's younger brother. The defendant and the detective spoke to each other in Spanish. The conversation ended when the defendant learned from

the detective that the detective's father had passed away, and the defendant expressed his condolences. Detective Morales could hear the defendant exchanging pleasantries in Spanish from inside the interview room, and so went out into the hallway. Morales saw the end of the defendant's conversation with Detective Rubert, and then walked back into the room with the defendant to continue that interview.

After the interview resumed the detectives showed the defendant an old poster containing a picture of Etan Patz. The defendant turned his body away from the poster and stated that he'd never seen the poster before, nor had he ever seen the boy depicted in it. The detectives removed the poster from view. The interview continued, with the defendant answering questions about his prior contacts with the police, his work at the bodega in New York, his marriages, his medical history, and then his religion. After the defendant told the detectives that he was a religious person, Ramirez asked if the defendant thought he would go to Heaven if he died that day. The said he would, that he had done nothing wrong and that he'd repented for his sins. Ramirez asked him if he had anything to tell the detectives; the defendant said, no, he had nothing to tell. The defendant went further and asked: don't you have the guys who did that kid, the guy that's in jail, and that black man?

The detectives told the defendant that the men he referred to were not charged with the crime. Detective Morales then pointed out that the time was almost noon, and asked the defendant if it was time for him to take his medication. The defendant selected several pills from the supply that had been brought from his home, and continued the interview.

After the defendant spoke about the nature of his back injury and his work history, Morales asked the defendant why he hadn't taken a good look at the poster they had shown him earlier. The defendant, displaying some anger, picked up a steno pad, thrust it to his own face, and asked rhetorically: what, did you want me to look at it like this? The defendant stated that he was tired of answering the same questions and that he felt like going home, and that if the detectives had any more questions they knew where to find him. Detective Ramirez responded: Listen nobody brought you here against your will. Nobody's asking you to confess to anything. Nobody's asking you to say anything you don't want to say. The defendant in turn responded, yeah, you're right, you're right. Ramirez continued: We didn't drag you out of your house, you voluntarily came with us; is that right? The defendant responded, yeah. Morales added: Your keys, wallet is right there ... you can grab it any time you feel like it. No one is forcing you to be here. Morales asked the defendant if he'd mind answering "a few other" questions. The defendant stated, no problem.

At that point Ramirez and Morales left the interview room for lunch, asking the defendant if he wanted anything. The defendant said, no. Except for the instances in which the defendant's mood changed when he saw his ex-wife, and when he was asked questions about the missing boy in New York, the defendant remained calm, cooperative, and receptive to questions from Ramirez and Morales.

A few minutes later Detective James Lamendola entered the room and sat at the table next to the defendant. He asked the defendant again about his family history. At one point the defendant described

his father as physically abusive toward the defendant, and toward the defendant's mother and siblings. The defendant continued to appear calm, even as he spoke about some particulars regarding his father's use of a horsewhip when the family was living in Puerto Rico. At about 1:30 p.m., the detective pointed out that people who are abused as children often become adults who are in turn abusive to children. At this, the defendant's demeanor changed. He became upset, grabbed his stomach in pain, said he wanted to go home, and lay down on the floor, curled up in a fetal position. Lamendola asked if there were anything he could do for the defendant. The defendant replied that he was cold and wanted a jacket. Lamendola left the room in search of a jacket. After several minutes he returned with a jacket, gave it to the defendant and asked him to sit back up on the chair and talk some more. The defendant agreed, and the detective continued to talk about the cycle of abuse.

The defendant's demeanor changed once more when Lamendola changed the subject and asked the defendant about his time in New York. As the defendant described working at the bodega in 1979, he became "sad" and was "crying." Lamendola—though he did not explicitly refer to the disappearance of Etan Patz—emphasized that the truth needed to come out. He told the defendant that "it" was not his fault and that he'd feel better if he told the truth. The defendant did not respond other than to look at his shoes and nod his head. At about 2:00 p.m., Lamendola asked the defendant if he needed anything. The defendant, in response, asked to use the bathroom. The defendant walked, unescorted, down the hall to the bathroom. Lamendola waited for the defendant in the interview room.

The defendant returned after some amount of time, followed a few minutes later by Detectives Ramirez and Morales. One of them asked the defendant whether there was anything else he could tell them about what happened in 1979. In response the defendant accused the detectives of trying to trick him and trying to "pin what happened to that kid" on him. He went on to say that he felt like going home. In response, Ramirez once again reminded him that he was there voluntarily, and stated that if we wished to go home the detectives would give him a ride, but that they would like to ask him a few more questions. The defendant agreed to this, and Ramirez and Morales left the room to speak privately.

Ramirez and Morales were gone approximately fifteen minutes. When they returned, at about 2:30 p.m., Ramirez revealed that detectives had been speaking to people from the defendant's past. The detective asked the defendant specifically about Mark Pike, whom the defendant acknowledged was a former neighbor. Ramirez asked the defendant if Pike wasn't in fact also the godson of the defendant's parents, and the defendant acknowledged it. Ramirez asked the defendant if he remembered the man in the green shirt who had walked by the door earlier in the day, and told the defendant that that had been Mark Pike.

Upon being told this, the defendant said that he'd like to speak to his wife, Rosemary. Detective Ramirez said he could speak to Rosemary, but asked the defendant if he could please first tell the detectives what it was he wanted to say. The defendant took a breath and said he was sorry. And then, "It shouldn't have happened. I did it." One or more of the detectives asked, did what? The defendant responded, Etan

Patz, and said that he had choked him. Ramirez asked him to elaborate, and the defendant stated that he offered the boy a soda, took him to the basement of the bodega, stood behind him, and choked him with his hands around the boy's throat. The defendant said he didn't know what came over him, but he choked the boy until his own legs began to shake and the boy's body went limp. He said he placed the boy's body into a bag, which he then put into a box, which he disposed of in an alleyway about a block and half away from the bodega. Ramirez asked the defendant if the boy was carrying anything, and the defendant said, yes, a book bag. The defendant said he disposed of the book bag by throwing it either on top or behind the walk in freezer in the basement. Ramirez asked if the defendant would be able to show police the area he was talking about, and the defendant said he would.

The defendant wept as he spoke. After he agreed to show the detectives the area in and around the bodega, the detectives consoled the defendant. First Morales, then the defendant, then Lamendola, and, finally, Ramirez, stood up and embraced. Morales and Lamendola in turn told the defendant it was going to be all right.

Detective Ramirez then told the defendant that he needed to inform him of his *Miranda* warnings. Ramirez read each of the warnings from a form, asking the defendant after each warning whether he understood, to each of which the defendant replied "yes." Ramirez recorded each response on the form and the defendant wrote his initials next to each "yes" written by Ramirez. Finally, Ramirez asked the defendant the last question on the form, "Now that I have advised you of your rights, are you willing to answer questions?" Before the defendant could

respond, Detective Morales interjected, "obviously." Ramirez asked the defendant, "That right?" The defendant responded, yes. The defendant initialed this final response and signed the *Miranda* form. The time was 2:56 p.m.

The room in which the defendant's interview was conducted was equipped by the CCPO with a video camera and microphone, and these were connected to computers in another room capable of recording the activities in the interview room. Other members of law enforcement, including New York County Assistant District Attorneys, viewed the interview on a video screen in a "monitor room." During the administration of the *Miranda* warnings, however, a CCPO detective discovered that the recording equipment had not been activated. Apparently, an assistant district attorney believed that he had given an instruction to start video recording before administration of the *Miranda* warnings. Due to some error this instruction had not been immediately communicated to anyone responsible for operating the recording equipment. As a result, recording of the defendant's interview did not begin until Detective Ramirez asked the defendant the ultimate *Miranda* question: whether, having been advised of his rights, he wished to answer questions.

After he executed the written Miranda waiver the defendant reiterated in more detail his description of the murder of Etan Patz. The defendant remained at the CCPO until about 8:30 p.m. During that time the defendant's wife and daughter visited with him. He also spoke about an unrelated shooting that involved his ex-wife's family. He smoked a cigarette, and took another round of his medication at 8:00 p.m. At 8:30 Ramirez and Morales drove the defendant to Soho in

lower Manhattan. There the defendant showed detectives the locations of the bodega, the area where he disposed of the body, and where Etan Patz was standing when the defendant first encountered him.

Detectives Rosado and Maldonado, who had not participated in questioning the defendant, drove the defendant from Soho to the New York County District Attorney's Office on Centre Street. The defendant napped on an office couch for about forty-five minutes while detectives bought food for him. After eating a meal, the defendant slept on the couch for another two hours. Then, at about 2:00 a.m., Detective Rosado and Sergeant Frank Galasso took the defendant across the street to an interview room in the District Attorney's Office. The room was large and well lighted; the defendant was supplied with a can of soda. As the defendant waited for the assistant district attorney to arrive, he spoke to Detective Anthony Curtin about his uncertainty about the location in which he'd disposed of Etan Patz's body. The detective told him to mention that to the ADA when he arrived. This exchange was recorded on video.

The assistant district attorney arrived, introduced himself, and again administered the *Miranda* warnings. The warnings began at about 2:16 a.m. The three-hour interview took place over a five-hour period. The defendant took two breaks. At the end of the first hour he used the bathroom, and the interview was suspended for about twenty minutes. The defendant took another break about a half hour later. He was given a candy bar and slept on a bench for about two hours. Just before the interview resumed at 6:30 a.m. the defendant took his medication again. After about forty minutes, just

before the conclusion of the interview, the defendant asked the ADA if he could have a lawyer if he went to court. The ADA said he would be represented, and said that the question for him was, did the defendant want a lawyer now? The defendant said no, he didn't need one now; he said that everything he was saying was the truth, that he felt bad for what he did, and that he may not remember every detail, but that he was being honest.

After the interview ended the defendant was brought to One Police Plaza and central booking, and then to Bellevue Hospital so that his medication could be administered in a medical setting. An intake nurse saw him there, and the defendant told her, among other things, that he had choked someone thirty three years ago, and that he was sorry he did it.

In preparation for this suppression hearing, the defendant was examined by Dr. Bruce Frumkin, who testified for the defendant as an expert in forensic psychology and *Miranda* comprehension. The defendant was also examined by Dr. Michael Sweda, who testified for the People as an expert in clinical and forensic psychology. Each expert gave the defendant a series of tests of the defendant's overall intelligence. Each also tested the defendant on his ability to comprehend *Miranda* warnings and to comprehend the consequences of invoking or waiving the rights that are the subjects of the warnings. The experts agreed that the defendant has a very low IQ. They also agreed that a low IQ does not by itself prevent a person from understanding *Miranda* warnings and making a knowing and intelligent waiver of his rights.

The experts differed, however, on the degree to which the defendant understood the *Miranda* warnings in May 2012. Dr. Frumkin, after reviewing the defendant's performance on a series of so-called "Grisso" tests (named after a researcher who helped develop the tests), concluded that he did indeed have a present understanding of the *Miranda* warnings. Specifically, Dr. Frumkin found that the defendant did "fairly well" on the Comprehension of Miranda Rights (CMR) exam. Dr. Frumkin concluded from this that the defendant was capable of knowingly waiving his rights. The defendant was likely not capable, however, of intelligently waiving his rights, according to Dr. Frumkin. The defense expert arrived at this conclusion primarily from the defendant's performance on another component of the Grisso tests, the Function of Rights Interrogation (FRI). There, based on the defendant's answers to a series of vignettes, Dr. Frumkin concluded that the defendant seemed to believe that a person's invocation of his right to remain silent could be held against him in court. The defendant also appeared to not understand that a person could invoke his right to remain silent at any time, even after initially waiving it.

Dr. Sweda, like Dr. Frumkin, found that the defendant performed well on his Grisso tests. Dr. Sweda, however, concluded that the defendant was not only capable of knowingly waiving his rights, but was capable of intelligently waiving them as well. Dr. Sweda purported to be using a "360" view of the defendant's capabilities in arriving at this conclusion. This meant, first, that the prosecution expert based his opinion on the defendant's overall score on the Grisso tests, rather than a particular answer to one or two vignettes. In addition, Dr. Sweda took into

consideration information about the defendant's educational background, work and medical histories, as well the video recordings of the defendant's interactions with police. Dr. Sweda found particularly significant the defendant's questioning of the ADA about his access to an attorney.

Finally, in rebuttal the prosecution presented evidence about the defendant's school and work history, religious beliefs, and attention to household finances. Witnesses testified about the particular tasks the defendant performed at a manufacturing job in the early 1990s, and about some discussions the defendant, as a young person in the early 1980s, engaged in regarding his preference for Pentecostal views. Evidence was presented about the defendant's record as a high school student. Testimony was also introduced about the defendant's conversations, while incarcerated pending trial in this case, with family members about the status of his government benefits while under indictment, and other household matters.

Conclusions of Law

As an initial matter, although defendant in his reply papers claims that the NYPD lacked probable cause to arrest defendant prior to his making inculpatory statements, this claim is utterly without merit. The statements of Jose Lopez, Thomas Rivera, Daisy Hernandez, Mark Pike and the Patz historical file more than meet the burden of probable cause to arrest the defendant.

The gravamen of defendant's motion is addressed to the statements he made to the detectives and the ADA on April 23 and 24. These statements fall into two categories:

1) Statements made to the detectives during their interview of defendant on May 23, prior to his receiving *Miranda* warnings;

2) Statements made to detectives on May 23 and the ADA on May 24, subsequent to his receiving his *Miranda* warnings.

Defendant seeks suppression of all of these statements.

Defendant's Pre-Miranda Statements

The *Miranda* warnings are procedural safeguards designed to secure an individual's Fifth Amendment privilege against self-incrimination. The safeguards required by the *Miranda* rule are only triggered when a suspect is subject to custodial interrogation. *People v. Berg*, 92 NY2d 701 (1999). The issue of whether a suspect is in custody is generally a question of fact. *People v. Morales*, 65 NY2d 997, 998 (1995). The test of whether an interrogation is custodial is what a reasonable person in the defendant's position, innocent of any crime, would have thought. *People v. Paulman*, 5 NY3d 122, 129 (2005); *People v. Diaz*, 84NY2d 839 (1994); *People v. Centano*, 76 NY2d 837 (1990); *People v. Yuki*, 25, NY2d 585, 589 (1969), *cert denied* 400 US 851.

As there is no dispute that defendant was not advised of his constitutional rights during this initial period of questioning, the admissibility of his first category of statements thus turns on whether defendant was in custody at the time the statements were made.

In *People v. Centano*, the Court of Appeals listed a non-exclusive list of factors relevant to determining whether an individual was in custody for purposes of

Miranda. These factors include: the length of time the suspect spent with the police; the location of the interview; whether the subject was handcuffed or otherwise physically restrained; the tone and climate of the encounter; what, if anything, the police told the subject about his freedom to leave; whether the questioning was continuous or interrupted; whether the questioning was investigatory or accusatory; whether the police expressly informed defendant that he was not a suspect; whether defendant ever protested the questioning; whether defendant was given an opportunity to relax; and whether the subject appeared at the police headquarters voluntarily. In making a determination as to whether a subject is in custody at the time of the police questioning, the court must consider the totality of the circumstances; no one factor is conclusive, nor is the list of factors exhaustive.

In assessing the totality of circumstances here, the court finds that a reasonable person in the defendant's position, innocent of any crime, would not have thought he was in custody.

The defendant was never handcuffed or in any way physically restrained. On the contrary, he accompanied the officers voluntarily in an unmarked police car, entered the CCPO behind the officers, he was left unattended in the interview room with an open door, and was permitted to walk unaccompanied around the CCPO—an uncomplicated building with at least one clearly marked exit. He was repeatedly told that he was free to leave, and reminded that his presence at the CCPO was voluntary, even as he was asked if he was willing to remain and answer further questions. The detectives openly and correctly informed defendant that he was being questioned

about an old New York City missing person's case. Defendant was offered lunch, and given an opportunity to take his medications. Although defendant was urged to tell the truth, at no time was the questioning accusatory or hostile in tone.

To be sure, the interview continued over several hours, beginning at approximately 8:00 a.m. and continuing until after 2:00 p.m. However, this length of time is not per se excessive, and does not in and of itself render the interview custodial. See, e.g., *People v. Hall*, 142 AD2d 735 (2nd Dept. 1988), *lv. denied* 73 NY2d 855 (1988) (six and one half hours investigative room questioning non-custodial); *People v. Bailey*, 140 AD2d 356 (2nd Dept. 1988). Moreover, here, defendant knew in advance that the interview would take some time, and knowingly and voluntarily consented. While still in front of his own home, he asked the officers whether this would take long, explaining that if it would he would need his medications at noon. Knowing that the officers did in fact retrieve his medications from defendant's wife, defendant had every expectation that he would be at the CCPO for some time, and proceeded voluntarily regardless.

Nor can it be said that defendant ever actually protested the officers' questioning. Defendant did state that he was tired of answering questions and expressed his desire to go home on two or three occasions. Each time the officers reminded defendant that he was there voluntarily, and requested of him that he continue. No threats were made, nor was there even a suggestion that if defendant declined he would be detained or otherwise penalized. In each instance, the defendant voluntarily agreed to continue the interview.

Finally, although defendant was lightly frisked and asked to reveal the contents of his pockets before entering the police car, defendant was told this was for safety reasons, and was offered his property back shortly after arriving at the CCPO. Nothing in that situation would cause a reasonable person innocent of a crime to believe he was not free to leave.

Accordingly, because this court finds that the defendant was not in custody at the time his initial statements were made, defendant's motion to suppress them is hereby denied.

Defendant's Post-Miranda Statements

There is no question that defendant actually received and acknowledged receiving *Miranda* warnings on two occasions – once by the detectives, and once by the ADA – and that he waived his rights. The only question is whether defendant is cognitively impaired such that he was unable to make a knowing and intelligent waiver.

As noted above, in preparation for the suppression hearing, the defendant was examined by two experts: Dr. Bruce Frumkin, who testified for the defendant as an expert in forensic psychology and *Miranda* comprehension, and Dr. Michael Sweda, who testified for the People as an expert in clinical and forensic psychology. The experts agreed that although the defendant has a very low IQ, that alone does not necessarily prevent a person from understanding Miranda warnings and making a knowing and intelligent waiver of his rights. Indeed, both experts found that defendant was in fact capable of knowingly waiving his rights. They disagreed only as to whether defendant was capable of intelligently waiving his rights, with the defense expert testifying

that he likely could not and the people's expert testifying that he could.

This court credits the testimony of Dr. Sweda, whose assessment was based on a more comprehensive assessment of defendant's capabilities, as opposed to Dr. Frumkin who seemed to rely almost entirely on the FRI component of the Grisso tests for this aspect of his testimony. Dr. Sweda relied, first, on the defendant's overall scores on the Grisso tests, scores which ranked defendant in the low to middle range of respondents, and therefore, at the very least, capable of appreciating the meaning of the *Miranda* warnings. Further, Dr. Sweda also found defendant's life history to be relevant to his ultimate determination. Finally, Dr. Sweda found particularly significant the circumstances of the actual interviews in this case, including defendant's questioning of the ADA about his access to an attorney, which the Court also finds to be indicative of an intelligent waiver.

In contrast, Dr. Frumkin seemed to discount—unfairly, in the court's view—factors in the defendant's personal history that pointed toward the defendant's ability to comprehend and appreciate the type of information presented by *Miranda* warnings. The evidence showed that the defendant attended high school and, though not a high performing or even average student, passed most academic courses. Defendant was also a fully functioning adult: a husband and a father, with a history of full employment before his back injury. Even if the court were to accept the information offered by the defendant in his motion to re-open the hearing—that, according to one supervisor who joined ICC a decade after the defendant worked there, that the

defendant's job with ICC for several months in 1990 was the equivalent of working for McDonald's—the court would still conclude that the defendant was capable of understanding and appreciating the nature of the rights he was giving up when he spoke to the police and the assistant district attorney.[1] The defendant's overall performances on the Grisso tests conducted by both experts, along with evidence of his actual waiver of his rights, and of his basic ability to make his way in the world over a period of almost forty years, compel this conclusion.

Therefore, this court finds that defendant's waiver of his *Miranda* rights was knowing and intelligent, and defendant's motion to suppress his post-*Miranda* statements is hereby denied.

Defendant's remaining claim—that his statements to the ADA were in violation of his sixth amendment rights due to delay in arraignment—is simply without merit. Finally, because this court finds that defendant was not in custody at the time of the pre-*Miranda* statements, it need not reach the

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[1] The defendant's supplemental motion to re-open the hearing is denied. The defendant's affirmation presents no grounds that would justify the court's ordering a hearing into what information the People possessed about the skill required for the defendant's job at ICC. Regardless, as noted, above, the testimony proffered by the defendant about the limited nature of his work skills would not change the court's conclusion. The court is also of the view that defense counsel's cross-examination of the People's witness on this issue was quite effective in clarifying the significance of this particular testimony to the question of the defendant's intellectual capacity.

issue of whether the post-*Miranda* statements were sufficiently attenuated.

This shall constitute the decision and order of the court.

DATED: New York, New York
November 2014

MAXWELL WILEY, J.S.C.

APPENDIX I

SUPREME COURT OF THE STATE OF NEW YORK

PART 42 DATE 2/2/2017
JUSTICE WILEY TIME 3 PM

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 video-taped confessions at CCPO and the DA's office, the confession to Rosemary and Becky Hernandez, and the confessions to the various doctors.

JURY FOREPERSON

APPENDIX J

THE COURT: Give it to the People. See if they agree. Off the record.

(Conference held at the bench off the record.)

Back on the record. My understanding is that there is a disagreement on the scope of the read back. Before we address that, let me just place on the record the latest note we got while the jury was waiting. This note is timed three -- about ten minutes ago. The parties have seen the note. The note states:

We, the jury, request that the judge explain to us whether if, underlined, we find that the confession at CCPO before the Miranda rights was not voluntary, we must disregard the two later videotape confessions at CCPO and the DA's office -- the confessions to Rosemary and Becky Hernandez and the confessions to the various doctors.

So what's the party's position on that?

MS. ILLUZZI: The answer is no.

MS. FONTIER: The answer is yes.

THE COURT: Agree, the answer is no. That's the short answer.

MS. FONTIER: I need to make a record on that, Judge.

THE COURT: Yes.

MS. FONTIER: Your Honor, obviously, it's impossible to go back in time. But what occurred in this situation is that Mr. Hernandez was taken into custody. He was interrogated for hours, and he made a statement as a product of that. Everything that flows after that is based on that initial confession.

He is in continuous custody throughout time that he talks to ADA Durastanti. The police had just gotten this involuntary confession from him and then finally agreed to let his family speak to him. They had denied request by his family and by Mr. Hernandez to speak to his family prior to obtaining this involuntary confession. So it's a product of exactly what happened there.

And, then, obviously as the case proceeds and your Honor chose not to suppress the statements, there are doctors involved and other issues. I mean we were proceeding because the statements were taken from him, but they were taken in an involuntary fashion. Everything is a product of the initial confession. So without that, it's -- I mean, there is -- it would be impossible to mount a defense.

Now, if, in a confession case, if everything that comes afterwards is going to be admissible even if the initial confession itself were not, I mean you are tying the hands of the defense. It's an impossible situation to put somebody in.

We either have to say, you know, we are going to rest, and we are going to ride on the hope that the judge suppresses this confession and move forward, or we are going to prepare an actual defense. But everything comes from the initial confession. If the initial confession is flawed, everything else falls.

THE COURT: All right. So you put your finger on the problem. There was a Huntley Hearing and denied suppression. And if the jury wants to disregard all statements, they can. That's entirely up to them, but their question is very carefully worded but is -- must they, and the answer is no. The law does not require them to do that. There is -- there is no fruit of

the poisonous tree law for the jury. It's entirely up to them.

MS. FONTIER: At the very least, I ask that you instruct them that it's up to them. They don't have to disregard them but if they chose to.

THE COURT: I am going to say no. I think their question is very carefully worded, and I am going to say no because that's it.

MS. FONTIER: But, Judge, simply saying no to that question says they are there. Use them. Pay attention to them. It's not telling them that they can disregard them if they want to, which is actually apparent. Your Honor is deciding the ruling, which, again, I think is improper. Everything is a product of the initial confession.

THE COURT: Right. That's your argument. So I think I am best saying less than more. I mean I can remind them to follow my legal instructions.

MS. ILLUZZI: Judge, there is a really specific question.

THE COURT: I would rather just leave it at that. Give them the short answer, and they are all free to send out more notes if they want to.

MS. FONTIER: But it's misleading, Judge.

THE COURT: I don't think it is. So you have got your objections. So let's talk about the transcript. Is there, like, a basic disagreement?

MR. FISHBEIN: Excuse me, Judge. Can I just add one line.

THE COURT: Sure.

MR. FISHBEIN: They are entitled to, in effect, overrule your decision.

THE COURT: Certainly. They certainly are.

MR. FISHBEIN: On the voluntariness?

THE COURT: Yes.

MR. FISHBEIN: Even with -- withdrawn. If you had found that the first statement was not admissible?

THE COURT: Right.

MR. FISHBEIN: Then there would be no question that the videotaped second confession at CCPO -- the one from 2:50 until 3:20 would also clearly flow from it and be suppressed. It's within moments -- in minutes.

THE COURT: In the context of a Huntley Hearing, you might be right. You might not. I don't know. But we are not there.

MR. FISHBEIN: But what you are saying to them -- because that's what the law says. You have a right to overrule me without telling them what your ruling was. But then you are not allowing them to do exactly what I would argue many courts would do on a statement that comes within ten minutes of the initial involuntary statement. They are saying no. So you are saying to them, you are saying to them, you must consider it.

MS. ILLUZZI: No.

MR. VINOCUR: That's what is misleading.

THE COURT: I'm not. And I don't want to get into where the fruit of the poisonous tree doctrine meets the jury instructions on voluntary confessions. That's

-- I don't want to go there. I will just answer their questions. I don't think I am misleading them or limiting your defense at all by just saying no. It's not a legal requirement.

So, yes. Go ahead, Mr. Vinocur.

MR. VINOCUR: Your Honor, I think the basic disagreement comes down to one major point essentially. We have culled out the testimony of the two witnesses regarding what they say happened and whether that be on direct, cross, or redirect, the problem that I saw is that there is a lot of inclusion about, well, questions about when the police came to Puerto Rico in 2012 and interviewed them about issues related to them in general but not to the confession that happened in 1979 or 1980.

So there are certainly parts in there where he goes, well, isn't it true that you told the police that you did not tell the police that he never stabbed you with a broom. I concede that's kind of about the confession so I left it in. But isn't it true that you also had a dream about this and that you communicate in tongues seems to me completely separate from the actual confession.

THE COURT: So let's do this. Let's just reread everything starting with confessions. We will read the whole thing.

MS. ILLUZZI: That's what I said.

MS. FONTIER: You are a genius. Thank you.

THE COURT: Let's just make sure the reporter has it straight. Do we at least agree where the testimony about the confessions begins.

MR. VINOCUR: I do -- I think for Mr. Rodriguez.

THE COURT: You can just tell it to the Court Reporter off the record.

MR. VINOCUR: Absolutely.

THE COURT: Back on the record.

MS. FONTIER: We would just like to point out that your Honor is simply going to say no to a detailed legal question, but we are going to read entireties of testimony minus the beginning sort of like how old are you questions for witnesses.

So the idea that we are responding to their actual question seems to be out the window; so I am asking you to give more of an answer than no.

THE COURT: Okay. So I am just going to stick to no.

(Conference held at the bench off the record.)

Back on the record. I think we are ready to go. The read back is going to take basically the rest of the day. We can bring the jury back out. They are going to miss their cigarette break, but I will try to make it up to them.

MS. FONTIER: Assuming the read back is going take to the end of the day, the note that they just sent out regarding the question about the statements, I would prefer that your Honor not answer today. I would like to do later a little bit of research.

THE COURT: Let's see how long it takes. I would like to answer all of the questions today if possible. So let's see how long it takes.

COURT OFFICER: Jury entering.

THE CLERK: Case on trial continues. All parties are present. All jurors are now present.

THE COURT: Welcome back to the courtroom. We got your notes, and you have been very very patient in waiting on us while we came up with the right things to read back and the answers to your notes. I don't want to delay any further, and I do apologize.

Being a bit authoritarian, I sort of canceled your mid-afternoon break. I apologize, but I think maybe the satisfaction you will derive from getting answers to your questions will make you feel better.

So let me remind you of what you asked. Your first note that you written just before two o'clock states:

We, the jury, request the testimony of number one, judge's instructions on confessions. Then Ramon Rodriguez read back. You gave us the date and time he testified. Thank you very much. You wanted to hear about regarding Pedro's confession. Third, Neftali Gonzalez. Again, you gave us the date and time he testified regarding the PH's confession. We are ready to do that.

And then your second note, which was written five minutes later, states:

We, the jury, request -- would like clarity on corroboration consequence, quote, unquote. Clarity on may not convict defendant on his own words solely question mark. Inference can only be drawn from proven facts, question mark. Laptop with video pleas, and you got the laptop.

Then about a half hour ago, you wrote a note. It states:

We, the jury, request that the judge explain to us whether if, underlined, we find that the confession at CCPO before the Miranda rights was not voluntary,

you must disregard the two videotape confessions at CCPO and the DA's office. The confessions to Rosemary and Becky Hernandez and the confessions to the various doctors.

I am going to answer all of these in the order in which you asked them. So I am going to start with the instructions on confessions. So I will begin by reminding you that you heard testimony that the defendant made statements to various people, both members of law enforcement and civilians.

As to statements made by the defendant to civilians, that is people not engaged in law enforcement activity, you will evaluate that testimony like any other testimony. You must decide whether the statements were, in fact, made by the defendant, and you must decide whether all or a portion of the statements were truthful and accurate.

In making these decisions, you will use the same tests of credibility and reliability that I have discussed in the earlier parts of my charge.

I will now discuss the law as it relates to testimony concerning statements that the defendant made to police officers and an Assistant District Attorney. In other words, to law enforcement.

Our law does not require that a statement by defendant be in any particular form. It may be oral or written or electronically recorded. There is no requirement that a statement be made under oath. Now you heard testimony that the defendant here was questioned by the police and made certain statements, some of which were recorded on video.

There is also testimony that the defendant made a videotaped statement to an Assistant District

Attorney. Under our law, before you can consider any such statement as evidence in the case, you must first be convinced that the statement attributed to the defendant was, in fact, made by him. In determining whether the defendant made the statement, you may apply the tests of believability and accuracy that we have already discussed.

Also, under our law, even if you find that the defendant made a statement, you still may not consider it as evidence in the case unless the People have proved beyond a reasonable doubt that the defendant made the statement voluntarily.

Now, how do you determine whether the People have proved beyond a reasonable doubt that the defendant made a statement voluntarily? Under our law, a statement is not voluntary if it is obtained from the defendant by the use or threatened use of physical force.

In addition, a statement is not voluntary if it is obtained by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice of whether or not to make a statement.

In considering whether a statement was obtained by means of any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining him ability to make a choice of whether or not to make a statement, you may consider such factors as the defendant's age, intelligence, physical and mental condition, and the conduct of the police during their contact with the defendant including, for example, the number of officers who questioned the defendant, the manner in

which the defendant was questioned, the defendant's treatment during the period of detention in questioning, and the length of time the defendant was questioned.

It is for you to evaluate and weigh the various factors to determine whether in the end, the statement was obtained by means of any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice of whether or not to make a statement.

Finally, a statement of a defendant is not voluntarily made when it is obtained from the defendant by law enforcement by means of any promise or statement of fact which promise or statement creates a substantial risk that the defendant might falsely incriminate himself.

A promise or statement of fact made to a defendant does not by itself render the defendant's statement involuntary. A defendant's statement would be involuntary only if the promise or statement made to him created a substantial risk that he might falsely incriminate himself.

Now, if you have decided that the defendant's statements to law enforcement remain voluntarily, as I have just defined that term, you must then decide whether the defendant was in custody of the police when he made statements to them. In other words, you must decide whether all or some of the statements were made in response to questioning while the defendant was in custody.

This is because under our law, before a person in custody may be questioned by police or an Assistant

District Attorney, that person first must be advised of his rights. Second, he must understand those rights and, third, he must voluntarily waive those rights and agree to speak to the police or the Assistant District Attorney.

On the other hand, a defendant who is not in custody when questioned by the police or an Assistant District Attorney need not be advised of his rights and any voluntary statement may be considered by you, the jury.

The term in custody has a special legal meaning and I will give that to you. Under our law, a person is in custody when he is physically deprived of his freedom or action in any significant way.

The fact that the defendant was being questioned by police or that the questioning took place inside a police station does not necessarily mean the defendant was in custody.

Whether the defendant was in custody at the time of the questioning is not determined by what the defendant himself believed or by what the police believed. In other words, the test is not whether the defendant believed he was in custody or the police believed he was in custody. The test is what a reasonable person innocent of any crime in the defendant's position would have believed. If that reasonable person would have believed that he was in custody, then the defendant was in custody.

If that reasonable person would have believed that he was not in custody, then the defendant was not in custody.

To decide whether a reasonable person innocent of any crime was in the defendant's position would

have believed that he was in custody, you must examine all of the surroundings circumstances including but not limited to, for instance, the reason the defendant was speaking to the police or being questioned by the police.

Where the questioning took place and whether the defendant appeared at the police station voluntarily, how many police officers took part in the questioning, whether the questioning was investigative or accusatory, whether the questioning took place in a coercive atmosphere, whether the defendant was handcuffed or physically restrained, whether the police treated the defendant as if he were in custody, whether the defendant was offered food or drink, whether the defendant had been allowed to leave after the questioning.

Next, under our law, before a person who is in custody may be questioned by the police or an Assistant District Attorney, that person first must be advised of his rights. Second, he must understand those rights and, third, he must voluntarily waive those rights and agree to speak to the police or an Assistant District Attorney.

If any one of those three conditions is not met, a statement made in response to questioning while the defendant was in custody is not voluntary and, therefore, you must not consider it.

Now, there is no particular point in time that the police or the Assistant District Attorney are required to advise a defendant in custody of his rights so long as they do so before questioning begins.

A defendant in custody need be advised only once of their rights regardless of how many times or to

whom the defendant speaks after having been so advised provided the defendant is in continuous custody from the time he was advised of his rights to the time he was questioned, and there was no reason to believe that the defendant had forgotten or no longer understood his rights.

Our law does not require that the advising of the rights of the defendant's waiver of those rights be in any particular form. They may be oral or written or electronically recorded.

While there are no particular words that the police or prosecutor are required to use in advising a defendant, in sum and substance, the defendant must be advised first that he has the right to remain silent.

Next, that anything he says may be used against him in a court of law. Next, that he has the right to consult with a lawyer before answering any questions, and he has the right to the presence of a lawyer during any questioning.

And, finally, that if he cannot afford a lawyer, one will be provided for him prior to any questioning if he so desires.

A person may validly waive his rights regardless of whether or not he had a full understanding of the criminal law or procedures or in particular how what he says on waiving his rights may be used later in the criminal process.

What must be shown for a valid waiver is that the individual grasp, the plain meaning of the warnings, that he did not have to speak to the interrogator, that any statement might be used to his disadvantage, and that an attorney's assistance would be provided upon

request at the present time and before questioning would be continued.

Before you may consider as evidence a statement made by the defendant in response to questioning while he was in custody, you must find beyond a reasonable doubt that the defendant was advised of his rights, understood those rights, and voluntarily waived those rights, and agreed to speak to the police or an Assistant District Attorney.

If you do not make those findings, then you must disregard the statement and not consider it.

In conclusion, if the People have not proved beyond a reasonable doubt that a statement of the defendant was voluntarily made to law enforcement, then you must disregard that statement and not consider it.

If the People have proved beyond a reasonable doubt that a statement of the defendant was voluntarily made to law enforcement, then you may consider that statement as evidence, and evaluate it as you will any other evidence.

Now, I am going to ask the capable court reporter to take the witness stand and start the read back. This is of Mr. Rodriguez and Mr. Gonzalez. And before she begins, I will tell you that in response to your note, we decided it would be more inclusive rather than less inclusive. So bear with us.

(The requested portion of the transcript was read back at this time.)

All right. Back on the record.

Ladies and gentlemen, thank you very much for staying late. I had really wanted to get part of that

question and answer. I can assure you we are more than halfway finished, and I am hopeful you are grateful that we got this far.

Have a great night. Don't talk about the case with each other or anyone else. Leave your notebooks behind, and be back here at 10:00 o'clock. We will be in this courtroom together, and we will finish your questions tomorrow morning. Have a great night.

(Sworn jurors exit the courtroom at this time.)

So back on the record.

Everybody have a good night. See you tomorrow morning.

(Whereupon, the trial is adjourned to February 3, 2017.)

SUPREME COURT NEW YORK COUNTY
CRIMINAL TERM PART 42

THE PEOPLE OF THE STATE OF NEW YORK

-against

PEDRO HERNANDEZ,

Defendant.

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111 Centre Street
New York, N.Y. 10013
February 3, 2017,

INDICTMENT #
4863/2012
CHARGE: Murder 2
JURY TRIAL (Continued)

BEFORE:

HONORABLE MAXWELL WILEY
JUSTICE OF THE SUPREME COURT

APPEARANCES:

FOR THE PEOPLE:
CYRUS R. VANCE, JR., ESQ.
New York County District Attorney
BY: JOAN ILLUZZI, ESQ.,
JOEL J . SEIDEMAN, ESQ.,
JAMES VINOCUR, ESQ.,
Assistant District Attorneys
ALSO PRESENT: Sarah Doelger, Paralegal

FOR THE DEFENDANT:
HARVEY FISHBEIN, ESQ.
111 Broadway, Suite 701
New York, New York 10006
ALICE L. FONTIER, ESQ.
ALSO PRESENT: Alexandra Katz, Paralegal

THE COURT: Let's call the case into the record. I'll substitute for the court clerk.

The jurors are not present, everybody else is.

So Ms. Fontier, you wanted to be heard on the issue from yesterday?

MS. FONTIER: I do.

Sorry, just give me 2 seconds.

THE COURT: Sure, sure.

MS. FONTIER: I accidentally closed out of what I was looking at so I have to go back in. There is a cite that I just wanted to quote.

MS. FONTIER: Your Honor, I wanted to address the third note that was received from the jurors, and the Court's proposed answer.

And just so the record is clear, that's regarding the jurors' questioning of what they should do with the subsequent statements, if they determine that the first statement by Mr. Hernandez was involuntary, if they had to ignore them. And the Court's proposal is simply to say "no".

I think that is not a correct answer, and that it is also misleading. It really -- because to simply just say "no" to that question, basically tells them, move on from the custody, it doesn't matter. Because there are so many additional subsequent statements, you can consider all of them, so go forward. And that is just not the law, No. 1.

And No. 2, it really just deletes an issue that is really a very central issue to this case. What happened here is that Mr. Hernandez was arrested in his home at 7:30 in the morning, and interrogated for

7 hours before they read him his Miranda rights. They got a confession out of him, first, read him Miranda rights, and then continued to hold him in custody for further questioning.

I understand that your Honor did not find that it was custody at the hearing, but the province of the jury is to determine the fact anew. And if they do, in fact, find that he was in custody, or that there was undue pressure, or whatever their determination is as to why the first statement was involuntary, I think that they should have accurate instructions as to what happens next.

And your Honor, there are a series of issues. The first, of course, is if they find that the first statement was unlawful, they absolutely, and I don't think there's any question that they have to not consider -- they cannot consider the statement that was made to the police at Camden County. So that is statement No. 1 that they absolutely should not consider, and the second is to ADA Durastanti. And your Honor, this was fully briefed following the hearing, so there's case cites, and everything else is actually on the record, and so I would rely on the post-hearing motion that I filed for the purposes of the record in reserving the rights.

But I think what is set out there, your Honor, is important. One of the key cases is Chapelle, and in that case the question is, is the second questioning attenuated enough so that the person is effectively being questioned for a second and new time. And a lot of factors which are set out in the motion, that go into that, are the timing, whether there was a significant break, whether there was a change in personnel.

And yes, Armand Durastanti was not questioning him in the first go round, but he was present, and Mr. Hernandez was never outside police custody. He was with them when they brought him to New York and paraded him around the streets, and then brought to the DA's office. So this is a continuous event. There's no real break, and nothing that would make Mr. Hernandez think that he was separated from that initial questioning, or not still under their control and under their questioning.

So the answer regarding the statements to the DA, I think, has to address that issue. I think we have to instruct this jury that if they find that it was involuntary, then with respect to the questioning by the District Attorney, if they feel that he is still in custody, at that point, they should also disregard that statement.

Your Honor, the other subsequent statements, you know, this is the difficulty of this kind of case. I mean, Mr. Hernandez did make a confession, obviously. The defense, in part, is that it is a false confession. We have to be able to prepare that defense.

If your Honor just simply says, no, that doesn't matter, you can consider everything that he said to every doctor, subsequent to his arrest, then ultimately Mr. Hernandez has a Sophie's choice. He can either say nothing, prepare no defense and hope that the Court suppresses his initial statements, and preserve his Fifth Amendment rights, or he can waive his Fifth Amendment rights and exercise his Sixth by presenting a defense.

But he can't be in a position that is to choose between your Fifth and Sixth Amendment rights. He gets both.

Everything comes from the initial illegality of being arrested and questioned, involuntarily, and if they find that the statement is involuntary, they need to have some direction as to what that actually means. It doesn't just simply mean, okay cool, ignore the first statement, there's 10 more, as if there was no connection to that first statement. It's just not correct.

If that was an accurate rendition of the law, we never would have bothered to spend a half an hour discussing the charges and custody, and the People didn't need to bother to approve it, and we all could have gotten up and said, it doesn't matter if he is in custody, just ignore it because there's all the other statements coming after it.

There is that effect when that initial statement is involuntary. This jury needs some guidance. "No" is the exact opposite of that. It tells them it is perfectly fine, ignore it, don't worry about that issue, move on from custody. That is what you are saying when you are saying "no".

THE COURT: That is exactly what I don't want to say, so I think the best answer is to give to this particular note is a "no". They wrote the note very carefully. It is framed in terms of, if we find the first statement to be non-voluntary, must we disregard all the rest. The very simple answer is "no", I believe.

Believe me, I don't see any other way of answering this that doesn't involve then instructing them on attenuation, and "cat out of the bag", and basically

replaying the Huntley hearing, which is not their function here, I don't think.

MS. FONTIER: Judge, as a bare minimum, I think you have to say, your note says, you must consider. No, you don't have to disregard these -- sorry, must disregard.

No, you don't have to disregard them, but you can, if you so choose.

There has to be something that tells them that the custody issue actually does matter.

THE COURT: Sure, and I think they understand that by their note and by their request to replay the confession instructions. I really believe that if I were to say, no, you do not have to, or it is not required legally, then I have to give them an "on the other hand", and then I'd have to give them another "on the other hand", and we would just go down a road that I think is going to do the opposite of answering their note.

MS. FONTIER: Judge, I feel like you are putting way too much emphasis on this word "must", and you are not giving them any information.

THE COURT: That is my ruling.

MR. FISHBEIN: Just one sentence?

THE COURT: One sentence.

MR. FISHBEIN: If you're going to give the reliance to the word "must".

THE COURT: Right.

MR. FISHBEIN: Then when you read the question back to them, let them know that you are focusing on the word "must".

THE COURT: Yes.

MR. FISHBEIN: They've focused on the word "if" to show that they still haven't made a decision yet.

THE COURT: Sure.

MR. FISHBEIN: But for your emphasis on "must", I ask you to say "must" we disregard? The answer is, no.

THE COURT: I will absolutely emphasize the proper words.

So I'll reread the note back and give them the "no" answer.

So how are we doing on the jurors?

THE SERGEANT: They should be coming down in a few minutes, Judge.

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THE COURT: Back on the record.

I'm informed by the court officer that one of the jurors, apparently through a request of the other jurors, brought in a portable speaker to attach to the laptop because they are having trouble hearing, apparently, the recordings on the laptop.

The court officer has it here, in her hands, if the parties don't object?

MS. FONTIER: I have no objection, but those speakers do not have particularly good sound.

MS. ILLUZZI: Why don't we call our video unit, in the interim.

MS. FONTIER: If they want better speakers, I can provide them.

THE COURT: Why don't I tell them we are exploring the possibility of getting a better one than that.

MS. FONTIER: Those are perfectly fine, but it is not going to do a whole lot for them.

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(Members of the jury entered the courtroom. Time noted: 10:41 a.m.)

THE COURT: All right ladies and gentlemen, welcome back. Thank you again for yesterday. I appreciate your being so patient about being late. I aim not to pull that on you again, but I really wanted to get something done.

So thank you very much for bringing in a speaker for the laptop. Go ahead and use it. Hopefully, that will work, but we are going to explore getting you a better one from the State of New York, so we will be working on that today.

As you recall, when we broke yesterday we finished the read back of Ramon Rodriguez. We will now start with the read back of Neftali Gonzalez, and then I will respond to the remaining questions you had. And I'll remind you of what they were, when we get there.

So I am going to stop talking now so the court reporter can take the witness stand.

(At this time the requested testimony was read back in open court by the court reporter.)

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THE COURT: So ladies and gentlemen, let's move on then. That was the contents of your first request yesterday. I'm moving on to your second note.

If you recall, it states, "we, the jury, request and would like clarity on corroboration consequences, clarity on may not convict defendant on his own word "solely"? (Question mark), inference can only be drawn from proven facts? (Question mark).

And then that's also the note where you asked for the laptop, which you've gotten.

You asked for clarity, but I'm going to at least, in response to these questions, I'm going to reread two brief instructions: one, corroboration of statements, which I think answers at least a couple of your questions, and then the instruction which I gave you immediately following that, which was evidentiary inferences.

So let me repeat those for you. If you need further clarification, send out a note to that effect. I don't have to reread it, I can explain it, but I think I can answer those questions by re-reading that. So this is corroboration statements.

So, under our law, a person may not be convicted of an offense solely upon evidence of confessions or admissions made by that person without additional proof that the offense charged has been committed by someone. This rule applies to any confessions or admissions, whether they were made to law enforcement personnel or to other persons.

This law is designed to make sure that a person is not convicted by his own words of a crime that did not take place. Thus, you may not convict the defendant solely on his own statements. There must be some

additional proof, apart from the admissions or confessions that the crimes charged were committed by someone.

All right, now I am going to give you, again, the instruction on evidentiary inferences, and this instruction applies to all evidence in the case, not just the evidence in the statements.

Now in evaluating the evidence you may consider any fact that is proved, and any inference which may be drawn naturally, reasonably, and logically from such fact.

To draw an inference means to infer or to conclude that a fact exists or does not exist based upon the proof of some other fact. So for example, if you wake up in the morning and you look out your window and you see that the streets or sidewalks are wet, and that people are carrying umbrellas, you may infer that it rained during the night.

In other words, the fact of rain during the night is an inference that might be drawn from the proven facts of water on the streets and sidewalks, and people carrying umbrellas.

The decision to draw and inference is yours, alone, but remember that an inference may be drawn only by the proven facts, and then only if the inference flows naturally, reasonably, and logically from the proven facts.

Therefore, in deciding whether to draw an inference you must look at and consider all the facts in light of reason, common sense, and experience.

All right, so I'm going to move on to your third note, and this is the one that I am going to reread your question for you, and then I'll answer the question.

In this note you said, "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 documents." The answer is, no.

Thank you very much. So I will ask you to continue your deliberations.

(Members of the jury excused from the courtroom. Time noted: 11:33 a.m.)