No. _____

IN THE

Supreme Court of the United States

JAMES CONWAY, Superintendent of
Attica Correctional Facility,

Petitioner,

—v.—

KEVIN LANGSTON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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April 7, 2011

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QUESTIONS PRESENTED

1. Whether the judgment of the Second Circuit should be reversed, where the Second Circuit, in holding that the evidence of the respondent's guilt of the New York Penal Law offense of assault in the first degree was constitutionally insufficient, fundamentally misapplied the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), by: (a) judging the sufficiency of the evidence by reference to the arguments made in the prosecutor's summation, rather than judging the sufficiency of the evidence solely in light of the evidence presented at trial; and (b) adopting its own, narrow construction of the statute defining the offense of which the respondent was convicted, instead of accepting the New York state courts' construction of that statute.

2. Whether the judgment of the Second Circuit should be reversed, where the Second Circuit, in holding that the evidence of the respondent's guilt of the New York Penal Law offense of assault in the first degree was constitutionally insufficient, utterly failed to accord the decision of the state appellate court, which held that the evidence was sufficient, the deference mandated by 28 U.S.C. § 2254(d)(1), as demonstrated by the circumstance that another federal court, considering exactly the same evidence that was before the Second Circuit, concluded that that same evidence was sufficient to sustain the conviction of the respondent's co-defendant at trial.

PARTIES TO THE PROCEEDING

The petitioner in this Court is James Conway, the Superintendent of the Attica Correctional Facility, which is the state prison where Kevin Langston was most recently incarcerated. Mr. Conway is represented in this habeas corpus proceeding by Kings County District Attorney Charles J. Hynes, by agreement with the Attorney General of the State of New York.

The respondent in this Court is Kevin Langston, who was convicted of assault and weapon possession offenses in New York state court and who filed the federal habeas corpus petition that is the subject of this litigation.

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

James Conway, Superintendent of Attica Correctional Facility in New York ("the State"), requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that affirmed a judgment of the United States District Court for the Eastern District of New York (Korman, J.). The district court had granted, in part, Kevin Langston's petition for a writ of habeas corpus, holding that his conviction of assault in the first degree (N.Y. Penal Law § 120.10[4]) was not supported by legally sufficient evidence, and ordering that he be released from custody on that conviction.

Opinions Below

The citation of the opinion of the United States Court of Appeals for the Second Circuit is *Langston v. Smith*, 630 F.3d 310 (2d Cir. 2011). The opinion of the United States District Court for the Eastern District of New York, *Langston v. Smith*, No. 07-CV-2630 (ERK) (E.D.N.Y. July 20, 2010), is not officially reported, but is available on LEXIS at 2010 U.S. Dist. LEXIS 81191 and on Westlaw at 2010 WL 3119284. The citation of the opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is *People v. Langston*, 25 A.D.3d 623, 806 N.Y.S.2d 886 (App. Div. 2006).

Each of the above decisions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 7, 2011. This petition for certiorari was filed within ninety days of January 7, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

28 United States Code § 2254:

> **State custody; remedies in Federal courts**
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> . . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court

proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

New York Penal Law § 120.10:

Assault in the first degree.

A person is guilty of assault in the first degree when:

. . . .

4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

STATEMENT OF THE CASE

Introduction

This case arose out of an investigation in which a New York City police detective, posing as a civilian gun purchaser, was attempting to purchase handguns from some men believed to be involved in the illegal sale of those weapons. The detective arranged to meet one Edward Moultrie at a Brooklyn restaurant, where, in exchange for $3,000, Moultrie was to provide the detective with four handguns. When the detective, accompanied by another undercover officer, arrived at the restaurant, Moultrie was there with the

respondent, Kevin Langston ("the defendant"). From the restaurant, the four men went to an apartment building, and ultimately, to the sixth-floor hallway of that building.

The defendant and Moultrie, and eventually, a third confederate, Gamel Cherry, had a series of conversations with the detectives, in which the purported sellers demanded the money prior to delivering the weapons, and the detectives demanded to see the weapons prior to handing over any money. The conversations became increasingly heated as each side maintained its position. Ultimately, Cherry said that the detectives would get what they had come for, left the hallway, and entered a stairwell. Cherry and two other men then re-entered the hallway and opened fire on the detectives, one of whom sustained a gunshot wound that caused a serious injury to his hand.

The defendant was tried before a Brooklyn jury and convicted of two crimes: assault in the first degree (N.Y. Penal Law § 120.10[4]) (felony assault) and criminal possession of a weapon in the second degree (N.Y. Penal Law former § 265.03[2]). A person is guilty of the former crime when, "[i]n the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants." In this case, the jury was charged that, in order to find the defendant guilty of the assault, the jury had to find beyond a reasonable doubt that the assault was committed in the course of and in furtherance of the crime of

weapon possession. On the defendant's state appeal, the conviction of both counts was affirmed on the merits.[1]

Thereafter, the defendant filed a petition for a writ of habeas corpus in federal court. The district court granted the petition in part, holding that, although the evidence would have been legally sufficient to establish that the assault was committed in furtherance of an attempted robbery of the detectives, the evidence was not legally sufficient to establish that the assault was committed in furtherance of the crime of weapon possession.

The State appealed, and the Second Circuit, like the district court, had "no difficulty" concluding that the evidence would have supported a conviction for assault committed in furtherance of an attempted robbery. However, the Second Circuit affirmed the judgment of the district court, holding that the state appellate court, in determining that the evidence of the defendant's guilt of the assault was legally sufficient, had unreasonably applied this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). In reaching that conclusion, the Second Circuit itself misapplied *Jackson* in two significant respects. First, instead of determining whether the evidence presented at the trial and the reasonable inferences to be drawn therefrom established all of the elements of the crime, as those elements were charged to the jury, the Second Circuit focused on the *prosecutor's summation*, and seemed to conclude that, because the summation did not furnish the

[1] The defendant's weapon possession conviction is not at issue in this petition.

jury with sufficient guidance as to how the shooting that caused the injury to the officer was committed in furtherance of the underlying felony of weapon possession, the evidence was legally insufficient. Second, instead of accepting the New York state courts' construction of the "in furtherance of" element of the New York felony assault statute, the Second Circuit adopted its own, narrow construction of that statute for situations in which the underlying felony is weapon possession, and held that, under that construction, the evidence was insufficient to prove that the shooting was in furtherance of the weapon possession.

In addition, the Second Circuit, while acknowledging that this case was governed by the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1), simply failed to apply that standard. Indeed, as the State noted in the Second Circuit, the federal habeas petition of Gamel Cherry—who had been tried together with the defendant and who also had been convicted of felony assault—had been denied, and the district court judge who had ruled on Cherry's petition (Judge John Gleeson) had rejected Cherry's claim regarding the sufficiency of the evidence and had concluded that the "in furtherance of" element was satisfied.

In holding that the state appellate court unreasonably applied *Jackson*, the Second Circuit inexplicably dismissed the reasonable and commonsense inference that, while the possession and the firing of the gun furthered the attempted commission of a robbery, the firing of the gun also furthered the continued possession of the gun (by minimizing the risk that the intended victims of the robbery would disarm the gunman), and the continued possession of the gun in turn furthered

the ultimate goal of committing a robbery. By refusing to acknowledge that inference as one that a rational jury could have drawn—or even as one that a state court could reasonably have concluded that a rational jury could have drawn—the Second Circuit utterly disregarded the deferential standards, under *Jackson* and 28 U.S.C. § 2254, that apply to review of a state court's determination that the evidence was sufficient to support a criminal conviction.

Therefore, the petition for certiorari should be granted and the judgment below should be reversed summarily.

The Trial

At trial, the State presented evidence that on May 8, 2002, a confidential informant introduced an undercover police officer, Detective John Robert, to Edward Moultrie. After several conversations, the two men agreed to meet on May 22, 2002, in front of Junior's Restaurant in Brooklyn. There, Detective Robert would purchase four nine-millimeter firearms from Moultrie for $3,000 (Tr. 546-48, 681-86, 732; App. 4a, 26a, 46a).[2]

On May 22, 2002, at approximately 9:00 p.m., Detective Robert, accompanied by another undercover officer, Detective Arthur Marquez, drove to Junior's. Detective Robert had $3,000 on his person. Both detectives were armed (Tr. 542-43, 547-48, 552-53, 685-88, 724; App. 4a, 26a, 46a).

[2] Numbers in parentheses preceded by "Tr." and "App." refer, respectively, to pages of the trial transcript and pages of the Appendix.

Upon arriving at the restaurant, Detective Robert saw Moultrie standing with the defendant (Tr. 547-49, 686-87; App. 4a). When Moultrie approached the detectives' vehicle, Detective Robert asked where the guns were. Moultrie responded that they were nearby (Tr. 548, 687-88; App. 47a).

Moultrie then brought the defendant over to the vehicle and introduced him (Tr. 549, 688, 733; App. 4a, 26a). Detective Robert again asked where the guns were, and the defendant replied that the guns had to be retrieved from another location. The defendant and Moultrie got into the vehicle, and the defendant then directed Detective Robert to 301 Sutter Avenue, an apartment building in Brooklyn (Tr. 550-52, 688-92, 733; App. 4a, 26a, 47a).

Once Detective Robert had parked his car, he again asked about the guns and the defendant stated that he needed the money first. Detective Robert stated that he would not give the defendant any money until the guns were brought to him. The defendant replied, "That's not how we do things here." When Detective Robert repeated that he would not give the defendant any money without getting the guns in exchange, the defendant left the car, walked towards 301 Sutter Avenue, and entered the building. The detectives and Moultrie waited outside (Tr. 552-55, 691-92, 708-10, 734-36; App. 4a, 26a-27a, 47a).

After about five minutes, the defendant came out of the building. When Detective Robert asked the defendant about the guns, the defendant, yelling, responded, "They don't want to do it like that. They need the money." Detective Robert told

the defendant that he would not give the defendant any money without receiving the guns. Detective Robert and the defendant continued to argue, with the defendant continuing to demand the money and the detective telling the defendant to "[g]o get the f***ing guns" (Tr. 556-57, 709-10, 736; App. 27a, 48a).

The defendant re-entered the building. When he came back out, he and Detective Robert agreed to make the exchange in the lobby. However, the defendant ultimately would not agree to make the exchange in the lobby, which was full of people, and he suggested going up in the elevator (Tr. 558-61, 710-11, 736-37; App. 5a, 27a, 48a).

In the elevator, the defendant told Detective Robert to push the sixth-floor button. The elevator stopped on the fifth floor, the doors opened, and a man wearing a leather jacket, Skyler Brownlee, looked in. Brownlee and the defendant greeted each other. Brownlee did not get on the elevator (Tr. 560-62, 597, 606, 711-13, 738-39; App. 5a, 27a).

When the elevator arrived at the sixth floor, the defendant, Moultrie, and the two detectives got out. Detective Robert again asked the defendant for the guns and the defendant again demanded the money. When the detective refused to give the defendant any money without receiving the guns in return, the defendant walked to the stairwell, opened the door, and entered the stairwell (Tr. 562-64, 568, 714-15, 738-40; App. 27a, 48a). A few minutes later, the defendant re-entered the hallway, and when Detective Robert asked about the guns, the defendant responded, "They don't want to do it like that." The detective reiterated

that he would not give the defendant any money until the defendant brought the guns (Tr. 564-66, 714-16, 740-41; App. 27a-28a, 48a).

About a minute later, Gamel Cherry appeared from the same stairwell and approached Detective Robert. Cherry told Detective Robert, "I don't do business like that. Just give me the money up front and I'll get the guns" (Tr. 565-66, 600, 603-04, 716-17, 741-42; App. 5a, 28a, 48a). The detective and Cherry argued for a few minutes. Cherry then left the hallway and re-entered the stairwell. The defendant and Detective Robert resumed their argument, with the defendant again demanding money and Detective Robert refusing to give it to him. Moultrie then warned the detective, "I ain't f***ing with you no more." Detective Robert replied, "I'm here to do a deal; you haven't even sold me one gun yet. This is bull****" (Tr. 567-68, 718-19; App. 28a).

A few minutes later, Cherry re-entered the hallway, told Detective Robert that he was the main negotiator, and, standing close to the detective, again demanded money for the handguns. The detective refused and stated that he wanted the guns and would not give any money until he got them. After further discussion, Cherry asked the detective for identification (Tr. 569-70, 604, 719-20, 741-42; App. 5a, 28a, 48a).

Detective Robert did not show Cherry any identification, but Detective Marquez volunteered to do so and showed Cherry an identification card. After studying Detective Marquez's identification, Cherry said, "Okay, we're going to do this, you're going to get what you came here for." Cherry then left the hallway once again. Detective Robert

resumed arguing with the defendant and Moultrie, and the discussion became heated (Tr. 570-74, 604, 720, 742; App. 5a, 28a, 48a).

About five minutes later, Cherry returned to the hallway. He held the stairwell door open with his left hand. In his right hand, Cherry was holding a handgun, and Detective Marquez thought that the gun sale finally was "going down" (Tr. 572-74, 605, 720-22, 744; App. 6a, 28a, 48a). As Cherry held the stairwell door open, two other men, Ralph Wyman and Skyler Brownlee, entered the hallway. Both Wyman and Brownlee were also carrying guns (Tr. 574-75, 605-06, 722-23, 744; App. 28a, 48a).

Cherry, Wyman, and Brownlee raised their guns, aimed them at the detectives, and fired. Detective Marquez was struck in the hand by the gunfire. Detective Marquez looked at his hand to make sure he still had all his fingers. Detectives Robert and Marquez returned fire (Tr. 574-76, 605-06, 610-11, 723-25; App. 6a, 28a, 48-49a).

When the shooting stopped, Detectives Robert and Marquez ran down the stairs. An ambulance took Detective Marquez to a hospital, where he underwent emergency surgery for a gunshot wound to his left wrist and hand (Tr. 577-83, 702-05, 725-26; App. 6a, 28a, 49a).

A few minutes after Detective Marquez was taken to the hospital, other police officers received a radio transmission regarding a wounded man at a specified location on the street. Upon arriving there, the officers learned that the wounded man had walked in the direction of a subway station located several blocks away. The officers went to

that station, where they found the defendant, who was bleeding from his left arm, out of breath, and sweating (Tr. 663-67; App. 28a). The defendant said that he had been robbed (Tr. 669-71; App. 28a).

That same day, on the sixth floor of 301 Sutter Avenue, a detective recovered ballistics evidence, including one .22 caliber discharged shell, one .22 caliber cartridge, and one nine-millimeter semi-automatic handgun containing a magazine with nine bullets (Tr. 771-74, 778-79, 785-89, 796-97, 863; App. 6a, 29a).

Police investigation revealed that at the time of the shooting of Detective Marquez, the defendant, Gamel Cherry, Ralph Wyman, and Skyler Brownlee had all resided at 301 Sutter Avenue. Edward Moultrie was then living in Manhattan, but had previously lived at 301 Sutter Avenue (Tr. 881).

As of the time of trial, more than a year after the shooting, Detective Marquez's left hand had only one-quarter of the strength of his right hand, and he had to retire from the police department. He was not expected to ever regain the full use of his hand or wrist (Tr. 580-84, 704-06; App. 6a, 49a).

The defendant, testifying on his own behalf, admitted that he had participated with Moultrie and Cherry in arranging a sale of guns on May 22, 2002, and admitted that he had lied when he told the police that he had been robbed; but he claimed that he did not know Wyman or Brownlee prior to the incident, that he did not intend to rob the detectives, and that he had no prior knowledge

that the shooting was going to happen (Tr. 964-1001; App. 4a-6a).

The Jury Charge, the Verdict, and the Sentence

The court submitted five counts to the jury: first-degree assault (felony assault); one count each of second-degree and third-degree weapon possession, relating to the .22 caliber handgun fired at 301 Sutter Avenue; and one count each of second-degree and third-degree weapon possession, relating to the nine-millimeter handgun recovered there (Tr. 1123-32; App. 7a). The court charged the jury that the defendant was alleged to have acted in concert with others in the commission of these crimes, and that, for an accused to be found guilty for acting in concert, he must have had the mental culpability required for the crime at issue and have solicited, requested, commanded, importuned, or intentionally aided another person in the commission of the crime (Tr. 1120-22).

Concerning the felony assault count, the court instructed the jury that the State was required to prove beyond a reasonable doubt that the defendant or another participant in the crime caused serious physical injury to Arthur Marquez and that the defendant or another participant caused such injury "while in the course of and in furtherance of" the commission of criminal possession of a weapon (Tr. 1124-27; App. 7a, 11a-12a).

On June 9, 2003, the jury found the defendant guilty of assault in the first degree and criminal possession of a weapon in the second degree for

the possession of the .22 caliber pistol (Tr. 1154). On July 15, 2003, the defendant was sentenced to concurrent prison terms of twenty-five years on the assault count and fifteen years on the weapon possession count (App. 7a).[3]

The State Appeal

On appeal from his judgment of conviction to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, the defendant asserted, among other claims, that the evidence was legally insufficient to sustain his first-degree assault conviction because, according to the defendant, the assault had not been committed "in furtherance of" the possession of the weapon that he was convicted of possessing. On January 17, 2006, the Appellate Division affirmed the defendant's conviction, holding that the State had "established by legally sufficient evidence that the defendant was guilty of assault in the first degree" (App. 43); *People v. Langston*,

[3] The decision of the Second Circuit states that the sentence on the weapon possession count was five years (App. 7a), which is the sentence indicated in the transcript of the sentencing proceeding. Following the judgment of the Second Circuit, the State, in light of evidence that the transcript was incorrect and that the actual prison sentence imposed on the weapon possession count was fifteen years, moved to settle the record. On March 29, 2011, following an evidentiary hearing before the judge who had sentenced the defendant, the Supreme Court, Kings County, determined that the sentence that had actually been imposed was fifteen years. The defendant, who had been released following the judgment of the Second Circuit, because he had already served more than five years in prison (App. 8a), has since been returned to custody pursuant to the sentence of fifteen years on his weapon possession conviction.

25 A.D.3d 623, 623-24, 806 N.Y.S.2d 886, 886-87 (App. Div. 2006). On April 27, 2006, the defendant's application for leave to appeal to the New York Court of Appeals was denied. *People v. Langston*, 6 N.Y.3d 849, 816 N.Y.S.2d 755 (2006) (Rosenblatt, J.).

Co-Defendant Cherry's Federal Habeas Corpus Petition

Gamel Cherry, who was tried jointly with the defendant, was convicted of first-degree assault by a separate jury. Like the defendant, Cherry claimed on his state appeal that the evidence was legally insufficient to prove that the assault was "in furtherance of" the underlying felony of weapon possession. The Appellate Division held that Cherry's claim (his "remaining contention") was "unpreserved for appellate review and, in any event, without merit." *People v. Cherry*, 46 A.D.3d 834, 848 N.Y.S.2d 283, 284 (App. Div. 2007), *leave to appeal denied*, 10 N.Y.3d 839, 859 N.Y.S.2d 398 (2008) (Ciparick, J.).

Thereafter, Cherry filed in federal court a petition for a writ of habeas corpus, in which he again raised the legal sufficiency claim. On August 25, 2009, United States District Judge John Gleeson denied the petition (App. 45a-57a). *Cherry v. Walsh*, No. 09-CV-1452 (JG), 2009 U.S. Dist. LEXIS 75373, 2009 WL 2611225 (E.D.N.Y. Aug. 25, 2009). Judge Gleeson held that Cherry's claim was procedurally barred from habeas review (App. 49a-53a). Judge Gleeson also addressed the claim on the merits and held that the claim failed even under a *de novo* standard of review (App. 53a-56a & n.6).

Judge Gleeson explained:

> As an initial matter, it is worth pointing out that the evidence would have established that the assault took place in furtherance of a robbery. But Cherry was not charged with robbery, and the underlying felonies the prosecution relied on were criminal possession of a weapon in the second and third degrees. . . .
>
> . . . .
>
> Cherry . . . contends that there was no evidence that any assault was in furtherance of his criminal possession of a weapon or of his flight from committing the offense. He notes that, if guilty, he was committing the offense before any assault occurred, that the assault was unprovoked, and that the shooters left with the same guns they had possessed before the shooting began.
>
> At first glance, it may seem artificial to describe the assault as "in furtherance of" the group's weapons possession. It is more natural to say that the act was in furtherance of their main aim, which was to rob Robert and Marquez of the money that, as gun buyers, the undercover detectives were assumed to be carrying. Nevertheless, it is plain that there was sufficient evidence to find the requisite nexus between the underlying felony and the serious injury inflicted on Marquez. The evidence at trial established that Cherry, Brownlee and Wyman stepped into the sixth floor hallway carrying firearms with the intention to open fire on the undercover detectives. In so doing, Cherry and his accomplices were committing the crimes of criminal possession of a weapon

> in the second and third degrees. In opening fire on the detectives, Cherry and his accomplices, while also furthering their primary aim of committing a robbery, simultaneously sought to further their criminal possession of the weapons. The assault was intended to prevent the detectives—who might have been and in fact were armed—from taking possession of the weapons during the robbery.

(App. 54a-56a).[4]

The Defendant's Federal Court Proceedings

In 2007, the defendant filed in federal court a petition for a writ of habeas corpus, asserting the same legal sufficiency claims that he had raised on his state appeal. By decision and order dated July 20, 2010, United States District Judge Edward R. Korman granted the petition as to the assault conviction (App. 25a-41a). *Langston v. Smith*, No. 07-CV-2630 (ERK), 2010 U.S. Dist. LEXIS 81191, 2010 WL 3119284 (E.D.N.Y. July 20, 2010). Judge Korman held that the evidence was legally insufficient to make out the "in furtherance of" element of first-degree assault (App. 34a-40a). Judge Korman noted in his decision that Judge Gleeson, whom he characterized as a "brilliant and thoughtful judge," had reached the opposite conclusion on the same evidence, but that he, Judge Korman, was "unable to join" Judge Gleeson's interpretation of the evidence (App. 40a). Judge Korman did not state in his decision whether, in adjudicating the legal sufficiency claim, he had applied the deferential stan-

[4] On January 6, 2010, the Second Circuit denied Cherry's motion for a certificate of appealability.

dard of review of 28 U.S.C. § 2254(d)(1) or had reviewed the claim *de novo*.[5]

The State appealed from the judgment of the district court to the United States Court of Appeals for the Second Circuit. In its brief to the Second Circuit, the State expanded on the line of reasoning set forth in Judge Gleeson's opinion as to how the assault was in furtherance of the weapon possession. The State argued, in part, that a rational jury could have reasoned as follows:

1. Given the insistence of the defendant and his accomplices that Detective Robert hand over the $3,000 before even getting a glimpse of the weapons, and given the decision of the defendant and Moultrie to bring the purported buyers to their "home turf" (301 Sutter Avenue), it could be inferred that the defendant and his accomplices did not actually want to sell the detectives any weapons. It could be inferred that, instead, the defendant and his accomplices simply wanted to obtain the detectives' $3,000.

2. The negotiations on May 22, 2002 between the purported sellers and the purported purchasers were contentious from the first and became increasingly antagonistic. Just as the defendant and his accomplices continually insisted that Detective Robert had to give them the money before they would show him the weapons, the detective continually insisted on seeing the

[5] Upon the application of the defendant, the district court issued a corrected memorandum and order on August 6, 2010 and a corrected judgment on August 9, 2010. The correction is not relevant to the issue presented in this petition for certiorari. The Appendix to this petition contains the corrected memorandum and order.

weapons before giving over the money. The detective was every bit as assertive in his demands as were the purported sellers, and he was palpably unafraid to curse and insult the purported sellers. Given Detective Robert's assertiveness, and given, too, the type of merchandise involved in the transaction between the parties, it would have been perfectly reasonable for the defendant and his accomplices to have feared that the purported buyers were themselves armed (*see* App. 56a [decision of Judge Gleeson]).

3. Once the defendant and his accomplices realized that their attempt to steal the purported buyers' money through trickery or persuasion was not going to succeed, the defendant and his accomplices must also have realized that, if they were to achieve their objective of obtaining the detectives' money, they would need either to threaten the use of force or actually to use force. In either event, they would need to retain possession of their weapons, because otherwise, they would not be able to overcome the purported buyers' resistance to surrendering their money. However, the defendant and his accomplices could also have realized that if, as they feared, the buyers were armed, it would not be sufficient merely to point their weapons at the buyers, because the buyers might open fire on the defendant and his accomplices and take *their* weapons. Therefore, the defendant and his accomplices could have concluded that in order for them to retain their weapons and to thereby maximize their likelihood of completing the robbery, it was necessary for them to open fire on the detectives.

Accordingly, the State argued, the assault was "in furtherance of" the weapon possession, in that the assault enhanced the ability of the defendant and his accomplices to retain their weapons for the ultimate purpose of effectuating a robbery. The State also argued that it was entitled to the deferential standard of review of 28 U.S.C. § 2254(d)(1).

On January 7, 2011, the Second Circuit affirmed the judgment of the district court, concluding that the state appellate court, in holding that the evidence was legally sufficient to prove the "in furtherance of" element of the felony assault statute, had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979) (App. 2a, 22a-23a). *Langston v. Smith*, 630 F.3d 310 (2d Cir. 2011). The Second Circuit based that conclusion in large part on the prosecutor's summation (App. 14a-16a), which the Second Circuit viewed as "confused" (App. 16a), and which, that court apparently believed, needed to set forth a legally sufficient theory of the case in order for the evidence to be deemed legally sufficient. Additionally, the Second Circuit, apparently unsatisfied with the state courts' construction of the felony assault statute, fashioned its own, narrow construction of that statute and concluded that the evidence was lacking under that construction (App. 17a-18a). Finally, the Second Circuit, although purporting to follow the mandate of 28 U.S.C. § 2254(d)(1), simply dismissed Judge Gleeson's conclusion that the evidence was legally sufficient as "unpersuasive" (App. 8a n.5).

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari should be granted because the Second Circuit fundamentally misapplied the sufficiency-of-the-evidence test of *Jackson v. Virginia*, 443 U.S. 307 (1979), and utterly failed to accord the decision of the state appellate court the deference to merits adjudications mandated by 28 U.S.C. § 2254(d)(1). This case presents this Court with the opportunity to caution the lower federal courts that they must not fashion their own tests of legal sufficiency and that they must not disregard the deferential standard of review of 28 U.S.C. § 2254(d).

In *Jackson*, this Court announced the standard for appellate review of the claim that the evidence of a defendant's guilt was legally insufficient to sustain his or her conviction. The standard is, of course, a highly deferential one: the reviewing court must ask itself not "whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt," but "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original; citations and internal quotation marks omitted). Additionally, the reviewing court must consider all of the evidence in the light most favorable to the prosecution, and must consider all of the possible inferences that may be drawn from the evidence in the light most favorable to the prosecution. *Id.*; *see also Wright v. West*, 505 U.S. 277, 296-97 (1992) (plurality opinion). Moreover, because the reviewing court must sustain the conviction if a rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt, the reviewing court need not concern itself with "how rationally the verdict was actually reached": that is, the reasoning process of the actual factfinder is irrelevant to the question of whether the evidence was legally sufficient (*Jackson*, 443 U.S. at 319 n.13). Finally, because "[s]tate judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims" (*Wright*, 505 U.S. at 290 [quoting *Jackson*, 443 U.S. at 336 n.9 (Stevens, J., concurring in the judgment)]), a federal habeas court should be particularly reluctant to vacate a state conviction on legal sufficiency grounds where the state appellate court's decision upholding the conviction explicitly or implicitly rests on that court's construction of the statute that defines the crime of which the defendant was convicted.

Where a federal habeas court is reviewing the sufficiency of the evidence to support a state conviction, the determination of the state appellate court is "accord[ed] a double layer of deference" (*White v. Steele*, 602 F.3d 707, 710 [6th Cir. 2009], *cert. denied*, 131 S. Ct. 130 [2010]): the layer of deference governing legal sufficiency claims generally, plus the layer of deference mandated by 28 U.S.C. § 2254(d)(1), which requires that a state court's adjudication of a claim on the merits be upheld unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. *See McDaniel v. Brown*, 130 S. Ct. 665, 673 (2010) (per curiam) (noting "the deferential review that *Jackson* and

§ 2254(d)(1) demand"); *see also White*, 602 F.3d at 710; *Foxworth v. St. Amand*, 570 F.3d 414, 428-29 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1710 (2010) (both rejecting legal sufficiency claims on basis of *Jackson* and 28 U.S.C. § 2254[d][1]). Indeed, when the clearly established federal law involves a general standard, such as the *Jackson* standard (*see Wright*, 505 U.S. at 308 [Kennedy, J., concurring in the judgment] [describing rule of *Jackson* as a "general standard"]), the state courts have particular "leeway . . . in reaching outcomes in case-by-case determinations." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 [2004]). As this Court recently explained:

> 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 this Court.

Harrington, 131 S. Ct at 786 (emphasis added).

In this case, the Second Circuit refashioned the *Jackson* standard and "all but ignored" (see *id.*) 28 U.S.C. § 2254(d)(1). Accordingly, the petition for certiorari should be granted.

I. The Second Circuit Misapplied in Two Significant Respects the Legal Sufficiency Test of *Jackson v. Virginia*.

A. The Second Circuit relied heavily on the prosecutor's summation in ruling that the evidence was legally insufficient. The Second Circuit characterized the summation as "confused"; stated that the prosecutor had tried this case as a "botched robbery"; and quoted those parts of the summation in which the prosecutor had argued that the plan of the defendant and his confederates was to "outnumber[ ]" and "outarm[ ]" the undercover officers and "then take what they have got," and in which the prosecutor had argued that the "specific reason why these guns were pulled and used" was to "wrest . . . money" from the officers (App. 14a-16a). Still focusing on the summation, the Second Circuit noted that although the prosecutor mentioned the "*temporal* relationship between the assault and the weapon possession[,] he altogether ignored the 'in furtherance of' requirement" (App. 16a) (emphasis in original). Finally, the Second Circuit quoted the prosecutor's argument that the defendant had not expected the officers to be able to defend themselves with guns of their own (App. 19a-20a).

The decision of the Second Circuit seemingly rests on the premise that if the prosecutor's summation failed to present a cogent argument on how the assault was "in furtherance of" the weapon possession, then the actual jury could not have found—and, apparently, no rational jury could have found—that this element of the crime had been proved beyond a reasonable doubt. However, the Second Circuit's reliance on the sum-

mation as a basis for overturning the verdict is completely contrary to *Jackson*.

The *Jackson* test requires the reviewing court to consider the evidence and the legitimate inferences that may be drawn from the evidence. 443 U.S. at 319. As is well understood, and as the trial court instructed the jury in this case (Tr. 1109), the arguments of counsel in summation are not evidence. *See United States v. Arboleda*, 20 F.3d 58, 61 (2d Cir. 1994). Moreover, given the principle, articulated in *Jackson*, that the reviewing court need not concern itself with the reasoning processes of the jury that actually rendered the verdict (443 U.S. at 319 n.13), it necessarily follows that the prosecutor's summation to the jury, no matter how "confused" that summation allegedly was, is irrelevant to the reviewing court's determination of whether *the evidence* was legally sufficient. Just as a trier of fact is always free to reject arguments made in summation and to formulate its own lines of reasoning in support of a finding of guilt of the accused, so, too, may an appellate court reviewing the sufficiency of the evidence.

Under *Jackson*, the reviewing court does not review the sufficiency of the prosecutor's summation, but the sufficiency of "the record evidence adduced at the trial" (443 U.S. at 324), and where, as here, the State has marshaled for the reviewing court a set of facts and inferences that a rational jury could have found beyond a reasonable doubt, and according to which all of the elements of the crime have been made out, then the reviewing court must uphold the verdict.

B. The Second Circuit also misapplied *Jackson* by adopting its own, narrow construction of the New York felony assault statute, instead of applying the statute as construed by the New York courts.

In determining whether the evidence supporting a state conviction was legally sufficient, a federal habeas court must apply the *Jackson* standard "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16. The habeas court must respect the state courts' construction of a state criminal statute, and is not free to diverge from that construction in adjudicating a claim for relief. *See Hebert v. Louisiana*, 272 U.S. 312, 316 (1926) ("[w]hether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State"); *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

Under the New York courts' construction of the "in furtherance of" language of the felony assault statute and the identical language of the felony murder statute (N.Y. Penal Law § 125.25[3]), the State must show a logical nexus between the underlying felony and the serious injury or death of the victim; a mere temporal or spatial coincidence between the felony and the injury or death will not suffice. *See People v. Lewis*, 111 Misc. 2d 682, 686-87, 444 N.Y.S.2d 1003, 1006-07 (Sup. Ct. 1981). The State must prove that the defendant caused the serious injury or death of the victim "in the attempted execution of the unlawful end." *People v. Joyner*, 26 N.Y.2d 106, 109, 308 N.Y.S.2d

840, 842 (1970); *People v. Wood*, 8 N.Y.2d 48, 51, 201 N.Y.S.2d 328, 331-32 (1960). In other words, the State must show: (1) that the defendant committed acts that furthered the commission of the underlying felony or the defendant's immediate flight therefrom; and (2) that those same acts set in motion a chain of events that ultimately resulted in a person's physical injury or death. *See People v. Hernandez*, 82 N.Y.2d 309, 317, 604 N.Y.S.2d 524, 528 (1993) (defendant must have been "acting in furtherance of the underlying crime at the time of the homicide"); *Wood*, 8 N.Y.2d at 51, 201 N.Y.S.2d at 332 ("the *act* which results in death must be in furtherance of the unlawful purpose" [emphasis in original]).

The New York state courts' construction of the "in furtherance of" element, while requiring a nexus between the underlying felony and the injury or death, does not otherwise limit the circumstances under which a defendant may be found guilty of felony assault or felony murder. For example, the New York state courts have never held that, where the underlying felony is weapon possession, the defendant may be found guilty of felony assault or felony murder only when the victim was injured or killed while attempting to disarm the defendant. Nor have the New York state courts ever held that where the act that results in injury or death is in furtherance of one crime (such as attempted robbery), it may not also simultaneously be in furtherance of a second crime (such as weapon possession).

In this case, however, the Second Circuit took it upon itself to narrow the reach of the New York felony assault statute for situations in which the underlying felony is weapon possession, and,

applying its own new construction, held that the evidence was legally insufficient. The Second Circuit stated:

> We do not hold that criminal possession of a weapon may *never* support a felony assault conviction. In circumstances where, unlike here, the continued possession of the weapon underlying the felony assault charge is threatened *before* an assault takes place, a jury might reasonably infer that the assault was committed to prevent the victim from disarming his assailant (i.e., that the victim was assaulted in furtherance of the assailant's continued possession). For example, had Marquez responded to a threatened robbery by reaching for Cherry's gun in an attempt to disarm him, then a jury might reasonably conclude that Cherry caused Marquez's injuries in furtherance of his continued possession of that weapon.

(App. 17a-18a) (emphasis added). The Second Circuit went on to conclude that because the facts of this case did not fit the single scenario that, according to that court, would support a felony assault conviction, the evidence was legally insufficient (App. 18a).

By narrowing the reach of New York's felony assault statute, the Second Circuit disregarded clear precedent of this Court that a habeas court must accept a state criminal statute as it has been construed by the state courts, and decide whether, under that construction, a rational jury could have found the elements of the statute to have been established beyond a reasonable doubt. Indeed, to the extent that, in this case, the state appellate

court's determination that the evidence was legally sufficient implicitly rested on an expansive reading of the "in furtherance of" element of the felony assault statute, that determination is largely beyond the scope of habeas review, because the determination rests in part on a state court's construction of a state statute.[6]

Moreover, the ultimate explanation given by the Second Circuit for its conclusion that the evidence was insufficient—namely, that "it makes no sense to infer that the gunmen acted in furtherance of the possession of the weapons used to shoot Marquez when those weapons were taken from a place of complete safety" before they were displayed and fired (App. 20a n.11)—wholly

[6] In many cases, unlike this one, the question of the constitutional sufficiency of the evidence does not depend on the definition of the elements of a crime under state law, and instead depends entirely on an issue that is not one of state law, such as whether the evidence adequately established the defendant's identity as the perpetrator of the crime. *See, e.g., Wright v. West*, 505 U.S. 277 (1992). In such cases, a state court's determination that the evidence was constitutionally sufficient would not involve a question of state law and therefore would not constrain a federal court's independent review—subject to the deferential standard of 28 U.S.C. § 2254(d)—of the question whether the evidence was sufficient.

But in this case, by contrast, to the extent that the question of the sufficiency of the evidence depends on whether the "in furtherance of" element of first-degree assault is given an expansive reading, the Second Circuit should have accepted the expansive reading of that element that was implicit in the state appellate court's decision that the evidence was sufficient, rather than make its own determination of the definition of the "in furtherance of" element under New York law. *See Jackson*, 443 U.S. at 324 n.16; *Hebert*, 272 U.S. at 316.

misconstrues the inference that the jury rationally could have drawn. Of course it is not a rational inference that the gunmen would have retrieved, displayed, and fired the guns merely for the purpose of retaining possession of those guns, when the gunmen could have retained possession of the guns by not retrieving and displaying them in the first place. But the inference that rationally could have been drawn is that the gunmen, after having retrieved the guns "from a place of complete safety" and after having displayed the guns for the purpose of committing a robbery, chose to fire the guns for the purpose, at least in part, of continuing their possession of the guns by minimizing the chance that the intended robbery victims would disarm them. The Second Circuit erred by disallowing, or disregarding, that rational inference from the evidence.

Accordingly, the petition for certiorari should be granted to correct the errors made by the Second Circuit in its application of the *Jackson* standard.

II. The Second Circuit Failed to Accord to the State Appellate Court the Deference Mandated by 28 U.S.C. § 2254(d)(1).

The petition should also be granted because the Second Circuit, while acknowledging that its review of the legal sufficiency of the evidence was governed by the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1) (*see* App. 9a, 22a), did not accord the state appellate court anything approaching the degree of deference contemplated by that statute.

"AEDPA prevents defendants—and federal courts—from using federal habeas corpus review

as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010). "On federal habeas review, AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" *Felkner v. Jackson*, No. 10-797, slip op. at 4 (U.S. Mar. 21, 2011) (per curiam) (quoting *Renico*, 130 S. Ct. at 1862). Under 28 U.S.C. § 2254(d)(1), where it is "possible [for] fairminded jurists [to] disagree" about whether arguments that "could have supported" a state court's decision are inconsistent with the holding of a prior decision of this Court, then the decision of the state court must be upheld by the habeas court. *Harrington*, 131 S. Ct. at 786.

District Judge Gleeson, reviewing the very same evidence that the Second Circuit held was legally insufficient to establish guilt of felony assault on the basis of the underlying felony of weapon possession, reached the opposite conclusion, even without according the State the benefit of the 28 U.S.C. § 2254(d)(1) standard of review, in the habeas petition filed by co-defendant Gamel Cherry (App. 53a-56a). *See supra* at 15-17. The Second Circuit summarily dismissed Judge Gleeson's conclusion as "unpersuasive" (App. 8a n.5).[7] But certainly the fact that another federal

[7] The Second Circuit also stated that Judge Gleeson had "cited no caselaw" in support of his interpretation of the "in furtherance of" element (App. 8a n.5). But, as shown *supra* at 26-28, the Second Circuit, failing to find state case law narrowing the definition of that element, impermissibly fashioned its own narrowing construction of the element and then proceeded to find that the element was not satisfied.

judge held, on *de novo* review, that the evidence was legally sufficient—not merely that it was *reasonable* for the state appellate court to have so held—strongly supports the conclusion that the state appellate court's determination was not an unreasonable application of the *Jackson* standard. *Cf. Butler v. McKellar*, 494 U.S. 407, 415 (1990) (differing positions taken by judges of two different federal courts of appeals regarding proper application of Supreme Court decision constituted evidence that scope of Supreme Court decision "was susceptible to debate among reasonable minds"); *see also Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3d Cir.), *cert. denied*, 528 U.S. 824 (1999); *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998).

As argued earlier (*see supra* at 24-29), the Second Circuit erred in reviewing the sufficiency of the prosecutor's summation, rather than the sufficiency of the evidence, and in engaging in its own construction of the felony assault statute. But in addition to making those mistakes, the Second Circuit seems to have concluded that the evidence was legally insufficient because, in its view, the inferences that the State argued a rational trier of fact could have drawn from the evidence (*see supra* at 18-20, 29-30)—the same inferences that Judge Gleeson concluded a rational trier of fact could have drawn from the evidence—were too speculative, and thus, were unreasonable inferences (App. 10a, 19a, 21a). But those inferences were not unreasonable, and, in any event, the question before the Second Circuit was not whether, if that court had been reviewing the sufficiency of the evidence *de novo*, that court would

have found those inferences unreasonable, but rather, whether it would have been an unreasonable application of *Jackson* for the state appellate court to have found that those inferences were reasonable.

Accordingly, certiorari should be granted to correct the Second Circuit's decision and to clarify the proper standard of deference to which a state court's sufficiency-of-the-evidence ruling is entitled on federal habeas corpus review. Indeed, in view of the obvious conflict of the decision of the Second Circuit with *Jackson* and with the decisions of this Court interpreting 28 U.S.C. § 2254(d)(1), summary reversal of the judgment of the Second Circuit would be appropriate. *See, e.g.*, *Felkner*, No. 10-797; *Swarthout v. Cooke*, 131 S. Ct. 859 (2011) (per curiam); *Wilson v. Corcoran*, 131 S. Ct. 13 (2010) (per curiam); *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (per curiam); *Bradshaw v. Richey*, 546 U.S. 74 (2005) (per curiam) (all summarily reversing judgments of courts of appeals that had granted habeas relief).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT OF THE SECOND CIRCUIT SHOULD BE REVERSED.

Respectfully submitted,

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