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**In the Supreme Court of the United States**

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**TIMOTHY RUSSELL,**

Petitioner,

**v.**

**STATE OF CALIFORNIA,**

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF CALIFORNIA

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**OPPOSITION TO PETITION FOR WRIT OF CERTIORARI –  
DEATH PENALTY CASE**

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CAPITAL CASE  
QUESTION PRESENTED

1. Whether exclusion from a sentencing trial of defense evidence of the defendant's hearsay statements, found to be unreliable by the trial court, violated the defendant's constitutional rights where the prosecutor had produced such evidence in the guilt phase of the trial.

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## STATEMENT OF THE CASE

On January 5, 1996, a few days after Petitioner Timothy Russell's wife, Elaine, asked him to leave their residence, he returned in the early morning hours. He woke up his sister-in-law, Beverly Brown, who was staying at the home. They spoke for about ten minutes, and Russell became agitated and made inappropriate remarks about his wife. Elaine woke up and asked Russell to leave. Russell became more agitated, and kicked Elaine and threw her to the floor. Elaine begged Russell to leave; he finally did, tearing the telephone wire out of the wall on his way out, and yelled, "not to f—k with his job, his life, and not to call the cops." (Pet. App. A at 15.)

Elaine went to her neighbor's house and called the police. Russell returned with an unloaded M-1 rifle. He asked Brown where the bullets were. She initially told him she did not know. Russell threatened to kill Brown, and she eventually told him where the bullets were located. Russell was very proficient with his guns. (Pet. App. A at 15.)

Russell threatened to hold Brown hostage because he knew Elaine was calling the police. He also threatened to kill Brown. Russell walked outside and fired his gun four or five times. Russell then went inside and told Brown to go outside because the police were on their way and he was going to kill the police.<sup>1</sup> Brown left with the Russell's two children and went to the

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<sup>1</sup> During a prior domestic violence incident, Russell told Elaine that if she called the  
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neighbor's house. As she ran to the neighbor's house, Brown noticed a police car arriving. Shortly thereafter, she heard about six shots being fired. The two sheriff's deputies, Michael Haugen and James Lehmann, who had been dispatched to respond to the domestic violence call, were lying in the street. Lehmann had been shot in the head. Haugen had been shot in the chest and toe. (Pet. App. A at 15.) Both officers were dead by the time the next responding officer arrived. (Pet. App. A at 16.)

After the shooting, Russell ran into the desert for a few hours. Between 7:00 and 7:30 a.m., he emerged and was arrested. He admitted firing shots in the air in front of the deputies, but claimed he only did so to scare them. Russell took a detective into the desert and showed him where he had placed the gun and ammunition. Russell initially declined to be interviewed, but then later waived his *Miranda* rights and consented to a videotaped interview. Russell discussed his deteriorating relationship with Elaine, her cheating, and his drinking. He claimed he was intoxicated on the night of the shooting, and confirmed certain details leading up to the shooting. When he saw the police approaching, he thought he was a "dead man," and it was "all over." He wanted to sneak past the officers, and planned to shoot in front of them to scare them off and so they would run the other way. He fired several shots, claiming he did so without sighting the rifle scope, then ran into the

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police, he would kill both her and the police.

desert. He claimed he did not know he killed the officers until told so by the interrogating officer. (Pet. App. A at 16.)

During the guilt phase of trial, the prosecutor produced the videotaped statements of Russell pursuant to California Evidence Code section 1220 as admissions of a party. (Pet. App. A at 29.) A jury found Russell guilty of two counts of first degree murder (Cal. Penal Code, § 187, subd. (a)) and found “special circumstances” true beyond a reasonable doubt, making him eligible for the death penalty. The special circumstances were that Russell intentionally killed Deputies Haugen and Lehmann during the performance of their duties as peace officers (Cal. Penal Code, § 190.2, subd. (a)(7)) and multiple murder (Cal. Penal Code, § 190.2, subd. (a)(3).) (Pet. App. A at 14.)

The jury heard victim impact evidence from friends and family of the police officers. The defense presented several witnesses including Russell’s pastor, his employer, and his mother. In addition, a police detective testified about Russell’s demeanor when he told Russell he had killed the officers. (Pet. App. A at 17.) The jury was unable to reach a verdict as to penalty and the court declared a mistrial. (Pet. App. A at 14.)

In the penalty retrial, most of the evidence regarding the circumstances of the crime was the same evidence presented in the original guilt phase trial. At the retrial, however, Russell’s videotaped statements were not admitted. Instead, a police detective testified about Russell’s statements and demeanor



following the shootings. The prosecution again presented victim impact evidence. (Pet. App. A at 18.)

In addition to the evidence presented to the first jury, the defense presented some forensic evidence regarding how the weapon was fired, Russell's drug and alcohol dependence, and his demeanor in the days leading up to the murders. (Pet. App. A at 18-19.) The jury returned a verdict of death. (Pet. App. A at 14.)

In his automatic appeal to the California Supreme Court, see Cal. Penal Code, § 1239, subd. (b), Russell argued, among other things, that his constitutional rights to due process and a fair and reliable penalty determination were violated because his videotaped statements to police were excluded from the penalty retrial. He conceded that the statements were hearsay, but argued that they were admissible under *Green v. Georgia*, 442 U.S. 95 (1979), because the statements were reliable and highly relevant. The California Supreme Court held that Russell's constitutional rights were not violated by exclusion of the statements because, unlike in *Green*, there was no indicia of reliability. Russell's self-serving statements concerning the crime were uncorroborated and the physical evidence suggested Russell's version of the shootings was false. (Pet. App. A at 29.) The California Supreme Court affirmed Russell's judgment and death sentence. (Pet. App. A at 14.)

## REASONS TO DENY THE PETITION

### I. THE TRIAL COURT'S EXCLUSION IN THE PENALTY PHASE RETRIAL OF UNRELIABLE EVIDENCE THAT WAS ADMITTED IN THE PREVIOUS GUILT PHASE DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION OR A NOVEL LEGAL ISSUE

Russell does not deny his videotaped statements were hearsay, inadmissible under the state's evidentiary rules. Instead, he claims exclusion of the videotapes violated his constitutional rights under the Due Process Clause of the Fourteenth Amendment, his right to heightened reliability in capital sentencing and his right to present relevant mitigating evidence under the Eighth Amendment. (Pet. at 12-26.) This case involves only a ruling that applies settled law to the particular facts at hand or a misapplication of a properly stated rule of law. Thus, Russell has not presented any reason to grant certiorari.

Russell's petition does not present a substantial federal question or novel legal issue. Russell argues that the trial court's exclusion of the videotape was arbitrary (Pet. at 13), and that it "mechanistically applied" the state evidence rules to exclude the evidence (Pet. at 23). But the trial court analyzed the evidence and determined it to be unreliable. Thus, its basis for exclusion was not "arbitrary" or "mechanistic."

Under this Court's settled law, and as the California Supreme Court recognized, "due process requires that highly relevant mitigating evidence

may be introduced, though hearsay, where ‘substantial reasons existed to assume its reliability.’” (Pet. App. A at 29, quoting *Green v. Georgia*, 442 U.S. at 95, 97.) The trial court held that Russell’s self-serving statements were inadmissible because they were unreliable. The California Supreme Court affirmed, noting that, unlike *Green*, “[h]ere, no indicia of reliability are present.” It explained,

Defendant’s self-serving statements concerning the circumstances of the crime were uncorroborated; indeed, the physical evidence suggests that defendant’s account of the shootings was false. For example, defendant claimed that he aimed several yards in front of the officers, but the physical evidence suggested that the bullet wounds could not have been the result of ricochet. The statement in *Green*, in contrast, was a corroborated confession of the codefendant sufficient to produce a conviction and capital sentence for that codefendant. [citation]

(Pet. App. A at 29.)

Russell also focuses on the Eighth Amendment’s requirement of reliability to urge this Court to grant certiorari. (Pet. at 16-18.) As the trial court held the excluded statements were unreliable, Russell’s argument amounts to a request to revisit the trial court’s analysis of the facts. That the videotape was admitted in the previous guilt phase trial does not alter the trial court’s determination that the videotape was self-serving and unreliable.<sup>2</sup>

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<sup>2</sup> Russell also focuses heavily on the facts of the case, in that the prosecutor relied on the videotape in securing a guilt phase conviction. (Pet. at 18-19.) The prosecutor made it clear to the guilt phase jury that the self-serving statements were unreliable, and asked it to  
(continued...)

Russell cites *Riggins v Nevada*, 504 U.S. 127, 143 (1992), for the proposition that “the defendant’s behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial.” (Pet. at 20-21.) In *Riggins*, the issue was whether the state of Nevada unconstitutionally forced an antipsychotic medication on a defendant during trial. (*Id.* at 129.) The quote relied on by Russell, in the concurring opinion, addressed the notion that the trier of fact observes a defendant while seated throughout the trial. (*Id.* at 143.) Thus, it has no bearing on the issue Russell raises. All the arguments Russell makes show this case involves only a ruling that applies settled law to the particular facts at hand or, at most, a misapplication of a properly stated rule of law.

To the extent Russell is arguing that the evidence was reliable, and that the California Supreme Court applied the facts incorrectly, certiorari should be denied because this Court does not sit to review such questions. (See, e.g., *United States v. Johnston*, 268 U.S. 220, 227 (1925) [“We do not grant certiorari to review evidence and discuss specific facts.”].) To the extent

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(...continued)

reject the self-serving statements. (11 RT 1305-1310, 1347-1349, 1351-1353, 1357-1358.) That the prosecutor admitted the videotaped statements in the initial guilt phase has no bearing on the admissibility and/or reliability of the statements in a subsequent penalty phase retrial. Moreover, the trial court did not preclude Russell from testifying to the same statements. (21 RT 1866.) Such testimony, of course, would have been subject to cross-examination.

Russell is arguing that this Court should consider a new rule of law on “the limits a state evidentiary rule may place on a defendant’s right to present relevant mitigating evidence at a capital penalty retrial,” (Pet. at 12) he does not present a substantial federal question or a novel legal issue. This Court has already determined when state evidentiary rules violate a defendant’s due process rights in a capital penalty trial in *Green v. Georgia*. Consequently, this case does not present a legal issue warranting a grant of certiorari.

**II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REAFFIRM THE RULE OF *GREEN V. GEORGIA* AS THE CALIFORNIA SUPREME COURT’S ANALYSIS THAT RUSSELL’S SELF SERVING STATEMENT WAS NOT RELIABLE DOES NOT CONFLICT WITH THIS COURT’S JURISPRUDENCE OR REFLECT A CONFLICT IN THE LAW**

In a fact-based argument, Russell contends that both state and federal lower courts have taken different approaches in applying *Green*, “particularly with regard to its reliability prong.” (Pet. at 26-37.) He requests this Court “grant certiorari to reaffirm the vitality of *Green*, particularly where, as here, the hearsay evidence defendant sought to introduce at the penalty phase was already admitted at the guilt phase.” (Pet. at 27.) There is no need for this Court to reaffirm the longstanding principal in *Green*. Furthermore, there is no conflict with this Court’s jurisprudence; nor is there a conflict in the lower courts. Finally, even if there is any conflict, it would not be resolved by granting certiorari in this case.

In *Green v. Georgia*, this Court established a narrow exception for admission of hearsay at the penalty phase of a capital trial. There the petitioner and Carzell Moore were jointly indicted for the rape and murder of Teresa Allen. Moore was tried separately, convicted of both crimes and sentenced to death. The evidence showed that Moore and the petitioner abducted Allen and, acting either in concert or separately, raped and murdered her. At the penalty phase of the petitioner's trial, he attempted to introduce the testimony of an individual who had testified at Moore's trial that Moore had confided in him that he (Moore) had shot Allen after ordering petitioner to run an errand. The evidence was excluded as hearsay because Georgia did not recognize a hearsay exception for declarations against penal interest. (*Green v. Georgia*, 442 U.S. at 95-96.)

This Court held that, regardless of Georgia's hearsay rule, exclusion of the evidence violated the Due Process Clause of the Fourteenth Amendment. "The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial," and

substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it. In

these unique circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

(*Green v. Georgia*, 442 U.S. at 97, footnotes omitted).

Here, the trial court carefully analyzed the reliability of the videotape. The prosecutor argued the self serving statements were unreliable because they were made nearly 12 hours following the shootings and four hours after Russell's arrest. They were not spontaneous statements made right after Russell learned of the officers' deaths. Russell did not initially want to speak to law enforcement officers, and his statements were inconsistent with the physical evidence and lacked corroboration. (Pet. App. A at 29.) The trial court found the statements unreliable for several reasons. Although the court did not rely on it, the court noted that the first jury found the special circumstances true regarding the intentional killing of a police officer, and such finding was implicitly inconsistent with Russell's version of the evidence. (21 RT 1862-1863.) The court based its finding of unreliability on the following facts: (1) Russell did not initially speak to the officers, he invoked his *Miranda* rights; thus there was no spontaneous "outpouring of emotion" when Russell later provided his version of the events; (2) a substantial period of time elapsed between the time Russell was arrested and when he spoke to the detective; (3) Russell spoke to the detective only after he led the deputies to where he hid the gun; and (4) Russell spoke only after being told the deputies had been killed. (21 RT 1863-1864.) The trial court

found no physical evidence to corroborate Russell's version of the shootings; in fact the physical evidence was to the contrary. Rather, Russell attempted to mitigate or negate the element of intent that he planned and premeditated the killing and that he intended to kill the officers. (21 RT 1864-1865.) Russell's statement was very self-serving, and it was reasonable to assume it was made after the police officers knew Russell was the shooter, Russell knew there were witnesses to his presence in the house, shooting the weapon in the driveway, and his statements that he was going to shoot officers when they arrived. (21 RT 1864-1865.) The court noted that Russell was not precluded from presenting evidence of his remorse. He could testify and/or present testimony from the detective concerning his statements of remorse. (21 RT 1865.)

The California Supreme Court affirmed, holding as previously noted, that no indicia of reliability was present, as the self-serving statements of the defendant were uncorroborated and contradicted by the physical evidence. The court distinguished defendant's statements from the statement in *Green* on the basis that Green sought to admit the corroborated confession of a codefendant that was sufficient to produce a conviction and death sentence for Green's co-defendant. The California Supreme Court concluded that although Russell's statements were relevant, they were not as highly reliable as the statement improperly excluded in *Green*. (Pet. App. A. at 29.)



In an apparent attempt to show a need for clarification, Russell contends that some Justices of this Court have construed *Green* as limited to third-party statements of culpability. (Pet. at 28-29, citing *Sears v. Upton*, 130 S.Ct. 3259, 3269 & fn. 3 (2010) (Scalia, J., dissenting).) However, this Court has not suggested that *Green* is limited to third-party statements of culpability, rather, it reaffirmed that the evidence must be reliable, not “uncorroborated second-hand reporting from self-interested witnesses that is unreliable and therefore likely inadmissible.” (*Ibid.*)

Russell claims that some courts have conflated the requirement of reliability with the particular facts of *Green*, and cites to one federal case and a case from Missouri. (Pet. at 29.) He then cites to other courts that have held the factors to consider set out by *Chambers* are not exhaustive or absolute. (Pet. at 30.) While different courts will look to the facts in *Chambers* or *Green* to distinguish or rely on in assessing the admissibility of evidence in particular cases, that does not create a conflict with other decisions. Nor is there anything about the decision in Russell’s case that “illustrates the confusion and inconsistency surrounding application of *Green*’s reliability prong.” (Pet. at 30.) Specifically, Russell argues that the California Supreme Court did not consider or discuss the prosecution’s use of the videotaped statement in the guilt trial, despite this Court in *Green* calling the prosecution’s prior use of the hearsay evidence in *Green* “[p]erhaps most important.” (Pet. at 30-31.) However, this Court in *Green* did not hold

that if a prosecutor uses evidence in a previous proceeding it necessarily must be considered reliable and admissible as evidence in mitigation. The California Supreme Court thoroughly analyzed the reliability of the evidence, and found it to be unreliable, relying on *Green*. It was required to do no more. Consequently, even if there was a conflict in the law, as Russell contends, certiorari should not be granted in this particular case as no conflict would be resolved by granting certiorari in this case. The California Supreme Court properly applied *Green*. Further, even assuming, however, the trial court misapplied a properly stated rule of law, this Court rarely grants certiorari for that reason. (Sup. Ct. Rule 10.)

Russell also criticizes the California Supreme Court on grounds that its analysis that Russell's self-serving statement was unreliable was based only on one factor, i.e., that Russell's statements were uncorroborated. (Pet. at 32-33.) Russell argues that such analysis "underscores the inconsistent approaches among courts to applying *Green's* reliability prong," and raised the question of "the degree of corroboration required under *Green* and *Chambers*," then argues that different courts require different degrees of corroboration. (Pet. at 33.) Russell cites *Turpin v. Kassulke*, 26 F.3d 1392, 1397-98 & fn. 11 (1994), to support his argument, claiming the court in *Turpin* suggested that "every material detail" of a co-defendant's hearsay confession must be corroborated to be reliable. (Pet. at 33.) The reference in *Turpin* to "every material detail" was not made in the course of analyzing the

reliability of evidence under *Green* or *Chambers*, rather, the court was discussing the requirement of corroboration contained in the Federal Rules of Evidence under Rule 804(b)(3) for statements against interest. Likewise, Russell's reliance on *People v. Barrera*, 547 N.W. 2d 280, 291 (1996), is misplaced in that the corroboration discussed in that case was also for purposes of the requirement of corroboration contained in the Federal Rules of Evidence under Rule 804(b)(3). (Pet. at 33.)

Russell also relies on *People v. Tenney*, 793 N.E.2d 571, 587 (2002), to show a different approach to corroboration, in that the court in *Tenney* required a hearsay statement be corroborated by "some other evidence in the case." (Pet. at 33.) While the court in *Tenney* said that a factor bearing on reliability was whether there was some corroboration, it fully analyzed the reliability of the excluded statement, including evaluating the nature of the statement (a statement against penal interests), whether there was corroboration of the statement, to whom the statement was made (statements to friends being more reliable than statements to law enforcement officers), whether the statement was spontaneous, how soon after the crime the statement was made, and whether the declarant was available for cross-examination. (*People v. Tenney*, 793 N.E. 2d at 587-588.)

Nor did the California Supreme Court require "complete corroboration," or rely on a "single inconsistency" as Russell claims. (Pet. at 33.) The court pointed out that Russell's statement was self-serving. In doing so, it was

aware and wrote in its opinion that the prosecutor urged the statements were unreliable because the statements were made to law enforcement officers nearly 12 hours after the shootings, and four hours after Russell's arrest. It noted that the statements concerning the circumstances of the crime were uncorroborated, and pointed out that the evidence suggested Russell's account of how the murders occurred was false. (Pet. App. A at 29.) The California Supreme Court did not say it needed "complete corroboration," nor is that implied in its decision. Although it pointed out an inconsistency in Russell's statements, it did not say it was solely relying on that inconsistency. Rather, the court stated the evidence showed Russell's account of the shooting was false, and then gave an example, preceded by the words "for example." That it gave only one illustration of Russell's account being false is not consistent with Russell's claim it relied on a "single inconsistency." Moreover, the example it gave pertained to a crucial part of the interview—i.e., how the shootings occurred.

Russell has not demonstrated a conflict between the California Supreme Court and another court. The cases he has cited either are discussing a different legal issue, or are merely applying the *Green* factors by using different language—which does not constitute a conflict.

Next Russell claims the California Supreme Court overlooked facts that *Green* considered to be indicia of reliability, including the use of the statement against Russell in the guilt phase trial, and that the statements

were videotaped, not oral statements. (Pet. at 35-37.) While the videotape would alleviate any problem in determining the authenticity of the statements, it does nothing to assure the statements contained within the videotape were themselves reliable. The California Supreme Court found the statements unreliable because they were self-serving, not based on their authenticity. Additionally, the California Supreme Court did not overlook the fact the videotaped statement was used in the guilt phase. However, it found this fact did not negate the statement's lack of trustworthiness. (Pet. App. A at 30.)

Moreover, the prosecutor's use of the defendant's statements to incriminate him in the guilt phase of trial is completely different than the defendant using self-serving statements as evidence in mitigation during the penalty phase. Unlike the defendant in *Green* who was seeking to admit an extrajudicial confession by a third party, Russell did not need to rely on hearsay in order to present evidence of his purported remorse over his crimes in the penalty phase. That evidence could readily have been presented through testimony reliably subjected to cross-examination.

There is not a conflict with this Court's jurisprudence. The California Supreme Court carefully analyzed the issue, and rejected Russell's argument based on this Court's holding in *Green*. Russell's disagreement with the court over the value of his self-serving statements, and its conclusions, does not establish a reason for granting certiorari.

**CONCLUSION**

The petition for writ of certiorari should be denied.

Dated: May 13, 2011

Respectfully submitted

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