

No. 10-10201

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY RUSSELL, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

**PETITIONER'S REPLY TO RESPONDENT'S
OPPOSITION TO PETITION FOR CERTIORARI**

DEATH PENALTY CASE

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Respondent, the State of California (hereafter “the State”), tries to sidestep the important constitutional questions this case presents regarding the scope of mitigating evidence heard at a penalty retrial in a capital case after the first jury deadlocks on the appropriate sentence. As set forth in the Petition, petitioner Timothy Russell (hereafter “Russell”) was sentenced to death at a penalty retrial which the prosecutor pursued after the first penalty jury, by a vote of eight to four, was unable to reach a verdict. The first jury not only saw and heard petitioner’s videotaped interrogation, which

contained relevant mitigating evidence, during the guilt phase after the prosecutor elected to introduce them in their entirety, but that same jury at the penalty phase was *required* under California law to consider that evidence – and all evidence presented at the guilt phase – in reaching its penalty determination. Petition (hereafter “Pet.”) 19; Cal. Pen. Code § 190.4(d). The first penalty jury was unable to reach a penalty verdict. The penalty retrial jury did not see or hear the videotape and was not otherwise aware of its contents because the trial court excluded the videotape after the prosecutor objected to its admission under the hearsay rule in California Evidence Code § 1220. That jury sentenced Russell to death. In short, the prosecution was permitted to use the videotaped interrogation against Russell to obtain capital murder convictions, but Russell was precluded from using that very same evidence to try to save his own life. Russell was thus placed in a worse position at the penalty retrial than he was at the first trial, simply because of the combination of state evidentiary rules and procedures that applied after the first jury deadlocked on the penalty. The question arising from this arbitrary exclusion of relevant mitigating evidence involves the right to a fair trial in all criminal cases guaranteed by the Due Process Clause of the Fourteenth Amendment as well as the right to present relevant mitigating evidence and the requirement of heightened reliability in capital cases under the Eighth Amendment. Pet. 12-25.

In opposing certiorari, the State does not dispute that the videotape watched and considered by the first jury contained relevant mitigating evidence that bore on well-established state statutory mitigating factors of lingering doubt and remorse. *See* Pet. 11, 13, 19-20. Nor does the State dispute that withholding this mitigating evidence, if constitutional error, prejudiced the retrial jury's death verdict under *Chapman v. California*, 386 U.S.18, 24 (1967). *See*, Pet. 23. Indeed, the State acknowledges that except for the videotapes, the evidence of the circumstances of the crime at the penalty retrial was essentially the same as the evidence that was before the first penalty jury. Opposition to Petition for Writ of Certiorari (hereafter "Opp.").

Rather, ignoring crucial aspects of the claim, the State asserts that this case does not present "a substantial federal question or a novel legal issue," but involves only the application of "settled law to the particular facts at hand or a misapplication of a properly stated rule of law." Opp. 5; *see* Opp. 8. Dislodging the legal issue presented from its unique factual context, the State treats the petition as simply complaining about a routine exclusion of Russell's purportedly self-serving, and therefore unreliable, hearsay statements from the penalty phase of a capital case. *See* Opp. 5-6. But that is not the question presented here.

In attempting to recast the claim, the State disregards the fact that the

exclusion of Russell's videotaped interrogation occurred at a retrial following a deadlock on the penalty by a jury that watched the videotape at the guilt phase and was instructed to consider that evidence in fixing Russell's punishment. The State simply avoids the stark reality at the heart of this case – the first penalty jury saw and heard Russell on the videotape and deadlocked eight to four on whether his life should be spared, while the second jury did not see or hear the videotape and returned a verdict of death. The State also overlooks that the trial court fully understood that the outcome of the penalty retrial would depend in large part on whether the new jury found Russell sympathetic based “on his remorsefulness during the interrogation.” R.T 1787; *see* Pet. 21. And the State further ignores that it was the prosecutor who made a deliberate decision to use the entire videotaped interrogation at the guilt phase of the first trial, knowing full well it contained relevant mitigating evidence that the jury would be required to consider at the penalty phase, and then took advantage of the fortuity of the deadlocked jury and the retrial provisions in California Penal Code § 190.4 to withhold this important evidence from the penalty retrial and oppose Russell's attempt to use it in urging the jury to spare his life. *See* Pet. at 18. Notwithstanding the State's attempt to minimize its significance, the question posed by this case is weighty: was the decision to execute Russell was fairly and reliably rendered under the Eighth and

Fourteenth Amendments by the penalty retrial jury that did not see and hear his videotaped interrogation after the original jury that saw and heard his videotaped interrogation containing relevant mitigating evidence was unable to agree whether death or life without parole was the appropriate sentence?

This Court long ago held that “the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Only by distorting the claim presented can the State evade the argument that such unconstitutional risk occurred at Russell’s penalty retrial.

Downplaying the significance of the issue in this case, the State attempts to characterize Russell’s argument as simply “a request to revisit the trial court’s analysis of the facts,” Opp. 6, and misreads the Petition as presenting only a question under *Green v. Georgia*, 442 U.S. 95 (1979), see Opp. 5-17. As the Petition makes clear in its two distinct reasons for granting certiorari, the question presented here both relies on and goes beyond *Green*. See, Pet. 12-26 and 26-37. The first reason, which is not based on *Green*, arises from the unique facts involved in this case – in which state evidentiary and procedural rules were used to prevent the penalty retrial jury from hearing all the mitigating evidence heard by the

original jury that deadlocked as to the appropriate penalty – and the post-*Green* development of the Eighth Amendment law on both the right of a defendant in a capital case to present relevant mitigating evidence and the requirement of heightened reliability in capital sentencing. Pet. 12-26.

Rather than answer that argument, the State suggests that the trial court’s determination that Russell’s videotaped statements were self-serving and unreliable hearsay avoids the need to assess whether the death sentence itself was reliable under the Eighth Amendment. *See* Opp. 6. But the fact that the trial court found Russell’s videotaped statements unreliable under *Green* does not answer whether their exclusion from the penalty retrial under the unique facts here, which include the prosecutor’s use of that evidence to convict Russell of capital murders and the first jury’s consideration of that evidence in trying to fix the penalty, violated the Fourteenth Amendment due process guarantee of a fair trial, the Eighth Amendment right to present relevant mitigating evidence, or the Eighth Amendment requirement of heightened reliability in capital sentencing.¹

¹ Trying to minimize the significance of the prosecutor’s reliance on the videotaped interrogation in securing capital murder convictions, the State contends that the prosecutor at the guilt phase asked the jury to reject Russell’s “self-serving” statements. Opp. 6, n. 2. This is, at best, misleading because, as explained in the Petition, the prosecutor told the jurors that they could convict Russell of first degree lying-in-wait murder even if they entirely credited his videotaped statements. R.T. 1305-07; *see* Pet. 18-19

With regard to the second reason for granting certiorari, the State asserts that the petition essentially seeks error correction which is not the function of this Court. Opp. 7, 13. To be sure, Supreme Court Rule 10 states that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.” In death penalty cases, however, the Court repeatedly has granted certiorari to correct erroneous constitutional law rulings by the state courts. *See, e.g., Porter v. McCollum*, __U.S.__, 130 S.Ct 447 (2009); *Smith v. Texas*, 543 U.S. 37 (2004); *Kyles v. Whitley*, 514 U.S. 419 (1995). Thus, even if the second reason only sought certiorari so this Court could review the California Supreme Court’s misapplication of *Green* in this case, certiorari would be appropriate. But Russell does simply seek error correction; he asks the Court to reaffirm and clarify *Green* in the wake of questions about its scope by members of this Court and inconsistent applications of the decision in the lower courts. *See* Pet. 26-27.

Answering Russell’s argument that in rejecting his *Green* claim, the California Supreme Court ignored the fact that the prosecution introduced the videotaped interrogation against him at the guilt phase, see Pet. 35-37, the State contends that the court “did not overlook the fact the videotaped statement was used in the guilt phase.” Opp. at 16. This misses Russell’s point. The salient fact is that *the prosecution* introduced the videotape, not

simply that the videotape was introduced. The distinction is significant because *Green* characterized the prosecution's reliance on hearsay evidence in a previous trial against another defendant as "[p]erhaps the most important" factor in determining that it was sufficiently reliable to use by the defense in *Green*'s trial. *Green v. Georgia*, 442 U.S. at 97. The California Supreme Court failed even to acknowledge this significant point, *see* Pet. at 31-32, which illustrates the need for clarification of how *Green* should be applied, and undermines the State's contention that there no conflict between the California Supreme Court and other courts in applying *Green*.

The State also contests Russell's argument that in applying *Green*, the California Supreme Court required complete corroboration of the self-serving statements Russell made during the videotaped interrogation. *See* Opp. at 14-15 citing Pet. App. A 29 (the same portion of the state court decision that Russell quoted as showing that state court required complete corroboration); *see* Pet. 32 . Not all of the statements Russell made during the two and a half hours of the videotaped interrogation were self-serving. Many of them were incriminating, corroborated by the prosecutor's own evidence and used by the prosecutor in arguing for first degree murder convictions under the lying-in-wait theory. *See* Pet. 18-19. Others were relevant to the mitigating factor of remorse, and unlike statements going to

lingering doubt about the circumstances of the shooting, corroboration of feelings by physical or other evidence is unlikely to exist. Nevertheless, the California Supreme Court affirmed the exclusion of the entire videotape and every statement Russell made during the recorded interrogation because some of his statements were inconsistent with the physical evidence and thus were uncorroborated. In this way, the state court required complete corroboration – corroboration of all self-serving statements – before any of the hearsay evidence could be admitted. This approach is inconsistent with that of other courts applying *Green* and the related standard in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and tends to usurp the jury’s role – a point the State ignores. See Pet. 34-35.

CONCLUSION

This Court should grant certiorari to decide whether the Eighth and Fourteenth Amendments permit a state evidentiary rule to be applied to keep from a penalty retrial jury in a capital case relevant mitigating evidence that was introduced by the prosecution and heard by the jury at the original trial and to reaffirm and clarify the ruling of *Green v. Georgia*, 422 U.S. 95, and to reverse the death judgment entered against Russell.

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Respectfully submitted,

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