No. 23-5038

IN THE SUPREME COURT OF THE UNITED STATES

KURT MICHAELS,

Petitioner,

v.

RON DAVIS, Acting Warden of San Quentin State Prison;
ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner Kurt Michaels submits this reply to the Brief in Opposition ("BIO"). This Court should intervene in this capital case because the Ninth Circuit's divided decision to affirm petitioner's death sentence despite the erroneous admission of his confession and other improper aggravating evidence is grossly inconsistent with this Court's harmless-error precedent, including *Kotteakos v. United States*, 328 U.S. 750 (1946) and *Arizona v. Fulminante*, 499 U.S. 279 (1991). Indeed, the significantly different approaches taken by the majority and dissent below reflect longstanding disagreement and confusion in the lower courts regarding how to conduct harmless-error and cumulative-error review. This case is a strong vehicle to resolve this confusion and to achieve *Kotteakos*' goal of a consistent line of harmless-error jurisprudence.

ARGUMENT

I. The majority opinion below conflicts with this Court's precedent in numerous respects, meriting review in this capital case.

Respondent does not dispute that, under *Kotteakos* and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Ninth Circuit majority was supposed to assess what effect the errors had on *this* jury, a fundamental principle of harmless-error review that the majority never acknowledged. BIO 15. Respondent glosses over the fact that the majority never considered the notes from *this* jury focusing on the erroneously admitted confession, *see Buck v. Davis*, 580 U.S. 100, 120 (2017)

(note from jury showed prejudice), nor did it recognize the lengthy jury deliberations at the penalty phase. *See Parker v. Gladden*, 385 U.S. 363, 365 (1966). And, like the majority below, respondent simply ignores that the prosecutor argued during penalty summations that the confession was one of the most aggravated parts of the case, App. 135, and that petitioner's attorney (who had to testify against his former client about the unconstitutionally admitted Popik note) was his "favorite witness" in the entire case. App. 136.

Instead, all respondent can muster is that the notes from the jury about the corpus delicti rule and requesting to listen to the confession came at the guilt phase of the trial. BIO 15-16. Respondent ignores that the jury determined the special circumstances required for death-penalty eligibility at the guilt phase, and the prosecutor almost exclusively relied upon the erroneously admitted confession to establish the special circumstances. App. 24. Despite respondent's assertion, BIO 15-16, petitioner has consistently maintained up to and including the instant petition that the erroneous admission of the confession was harmful as to the special-circumstances findings that were needed to impose the death penalty.[1]

Furthermore, the fact that the notes were sent during the guilt/special-

[1] Petitioner has also maintained throughout the habeas corpus proceedings that his convictions should be vacated due to the erroneous admission of the confession and that the confession was at least harmful as to the *degree* of murder found by the jury, which also affects the applicable penalty.

circumstances phase does not mean that the jury's focus on the confession magically disappeared at the penalty phase, particularly when the prosecutor emphasized the confession throughout the penalty proceedings and argued it as one of the most aggravated parts of the case. App. 135. Certainly, jurors who had questions about the adequacy of the prosecution's proof without the confession to establish liability at the guilt/special-circumstances phase would also have had serious questions about whether to impose the death penalty without the confession. It is not surprising that the jurors did not ask to review the confession yet again during their penalty deliberations, as they had already heard it at least five times at that point.

While the Ninth Circuit majority erroneously ignored the jury's lengthy deliberations at the penalty phase, respondent cites *Rushen v. Spain*, 464 U.S. 114 (1983) to argue that even longer deliberations have not precluded a finding of harmless error. BIO 16 n.4. The trial in *Rushen* lasted 17 *months* and involved six defendants. *See Rushen*, 464 U.S. at 115. Thus, the length of the deliberations, which were only a tiny fraction of the entire trial, were not as indicative as to whether the defendant's individual case was close. The penalty proceedings in this single-defendant case, however, took days, not months, and the jury deliberations lasted nearly as long as the entire penalty phase itself. Respondent simply ignores the authority establishing this factor as an important one refuting harmlessness.

See Parker, 385 U.S. at 365; *Johnson v. Superintendent Fayette SCI*, 949 F.3d 791, 805 and n.8 (3d Cir. 2020); *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005).

Respondent contends that the majority's opinion below does not conflict with *Fulminante* because *Fulminante* applied *Chapman v. California*, 386 U.S. 18 (1967) review whereas this case involves the *Kotteakos* standard adopted in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) for federal habeas corpus cases. BIO 14. Respondent ignores Justice Stevens' critical fifth vote in *Brecht*, which explained that the competing standards should not make a significant difference in the context of an erroneously admitted confession. *See Brecht*, 507 U.S. at 643 (Stevens, J., concurring) (citing *Fulminante*, 499 U.S. at 313-14 (Kennedy, J., concurring)).

Meanwhile, respondent essentially ignores all of the other ways in which the Ninth Circuit majority's analysis was inconsistent with *Fulminante*. Respondent says nothing about the fact that the prosecutor acknowledged the importance of the improper confession in his opening and closing statements at both the guilt and penalty phases, recognizing the lack of strong proof without the confession and characterizing it as one of the most aggravated parts of the case, App. 135, something that this Court emphasized in *Fulminante*. *See Fulminante*, 499 U.S. at 297-98 (pointing to prosecutor's evaluation of the importance of the confession in opening and closing statements in finding harmful error).

Likewise, respondent repeats the majority's mistaken reliance on other evidence to conclude that the confession was cumulative, BIO 12-13, even though it is likely that this other evidence would not have been introduced had the confession been properly excluded, a factor emphasized in *Fulminante*. *See Fulminante*, 499 U.S. at 300; *see also Kotteakos*, 328 U.S. at 767-70. Meanwhile, respondent does not even bother to defend the majority's claim that the erroneous admission of a confession is less likely to have an impact than missing mitigating evidence, App. 84, which defies *Fulminante*'s admonition that the erroneous admission of a confession is perhaps *the* most damaging form of trial error. *See Fulminante*, 499 U.S. at 296. Respondent also asserts that the erroneous admission of petitioner's confession was not comparable to the improper evidence in *Buck*, BIO 15, but *Fulminante* makes clear that a confession is a deadly "toxin" for harmless-error purposes, and petitioner received a much heavier dosage when compared to *Buck* given the repeated and heavy emphasis on the confession (and the erroneously admitted Popik note) by the prosecutor.

In sum, the majority's decision conflicts with this Court's precedent in multiple respects. The errors in this case were significant, and the objective factors in the record reflect that the jury focused on the improper evidence and found the penalty question to be close. As the dissent concluded, these circumstances "more than" met the test for harmful error, even under the *Brecht* standard. App. 145.

B. This case is also an ideal vehicle to clarify how to conduct harmless-error and cumulative-error review

While this Court should grant review because the Ninth Circuit majority's opinion is flatly inconsistent with this Court's precedent, this case also presents a strong vehicle for clarifying how to *conduct* harmless-error and cumulative-error review, an issue that arises on a daily basis in lower courts and yet is the subject of widespread confusion. Respondent asserts that the standards for harmless-error review are "clear" and recites that the *Chapman* standard governs constitutional errors on direct appeal while the *Brecht/Kotteakos* standard applies for federal habeas corpus review. BIO 11. But even if the *standards* are purportedly "clear," that does not speak to how to *conduct* harmless-error review under those standards.[2] Respondent's cursory analysis suffers from the same missteps in application that have plagued numerous lower-court opinions, such as the Ninth Circuit majority's analysis below, demonstrating that review is warranted.

For example, respondent contends that the erroneous admission of the confession was harmless because there was other evidence that petitioner was dangerous and lacked remorse, pointing to the testimony of a defense expert. BIO

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[2] The applicable standard in the death-penalty context is not entirely clear. Shortly after *Brecht*, this Court assumed that its standard applied to habeas review in capital cases, although the petitioner in that case did not argue otherwise despite strong reasons for requiring *Chapman* in the capital context. *See Calderon v. Coleman*, 525 U.S. 141 (1998).

12. But that brief explanation is akin to sufficiency of the evidence review, which is not the appropriate analysis, and fails to recognize that the decisions about whether and how to introduce other evidence, like expert testimony, was affected by the erroneous admission of the confession. *See Kotteakos*, 328 U.S. at 767-69; *see also Fulminante*, 499 U.S. at 300. Respondent's analysis simply reinforces the confusion regarding how to *conduct* harmless-error review.

Respondent acknowledges the multiple divided and conflicting lower-court opinions cited by petitioner but essentially contends that the application of the harmless-error test is "highly fact-specific." BIO 17-18. The opinions cited by petitioner were all divided, however, reflecting that judges had significant disputes about how to conduct harmless-error review under the same facts. The conflict and confusion demonstrates that further "direction" is needed to satisfy the goal of consistent, harmless-error results set in *Kotteakos*, 328 U.S. at 762, particularly in the capital context where reliable and consistent results are paramount.

This case is also a strong vehicle for review because it involves *multiple*, significant errors, thereby presenting questions concerning application of the cumulative-error doctrine. Like the flawed majority opinion below, respondent does not meaningfully address the *cumulative* effect of the confession and Popik-note errors, essentially addressing them separately and in isolation. BIO 12-13. Also like the majority below, respondent does not evaluate the misconduct

committed by the prosecutor during closing arguments in the cumulative-error analysis.[3]

Respondent maintains that this case presents a poor vehicle to review questions concerning the cumulative-error doctrine because the Ninth Circuit engaged in a lengthy analysis before finding that the Sixth Amendment claim concerning the Popik note was not procedurally defaulted. BIO 19. Respondent does not provide any argument to show that the Ninth Circuit's analysis was wrong on the procedural-default issue, demonstrating the flimsiness of this vehicle complaint, and, even without the Popik-note error, there were still multiple errors given the prosecutorial misconduct in summation. Respondent also raises a question about deference to the state court's prejudice finding regarding the Popik note, BIO 19-20, but the state court did not consider the *cumulative* effect of the errors related to the Popik note, the confession, and the misconduct in summation, likewise eliminating the force of this additional procedural complaint.[4]

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[3] Respondent simply notes in passing that there was only one instance of prosecutorial misconduct. BIO 19. Even the majority below found at least two forms of improper argument, one of which was repeated throughout summations, App. 101-03, and, in any event, one form of misconduct is enough.

[4] Despite respondent's assertion, BIO 19, petitioner raised footnote nine of *Brecht* in the Ninth Circuit, Rhg. Pet. 6-11, and this case also presents a good vehicle for considering the questions left open in that footnote, questions that have not been addressed in the intervening thirty years. This *capital* case involving a confession error, egregious ineffective assistance of counsel, and prosecutorial misconduct fits the description set forth in the footnote. *See Brecht*, 507 U.S. at 638 n.9.

In sum, while review in this capital case is warranted given the significantly flawed approach taken by the majority below, this case is also a strong vehicle to resolve the conflict and confusion in the lower courts regarding how to conduct harmless-error review and cumulative-error review. Indeed, the fact that the Ninth Circuit opinion was so sharply divided demonstrates that this case is a good vehicle for review.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Dated: October 16, 2023

Respectfully submitted,

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