

No. 23-5711

SUPREME COURT OF THE UNITED STATES

MITCHELL D. GREEN,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Wisconsin

REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Mr. Green petitions this Court to grant certiorari to determine “whether, and under what circumstances, a defendant may be retried after a mistrial was declared due to the jury hearing admissible evidence.” Petition 2. In response, the State of Wisconsin disagrees with this characterization of the issue and asserts that in Mr. Green’s case, “a mistrial was declared due to the jury’s hearing evidence the court deemed inadmissible in that trial, and that was declared admissible only for the subsequent trial.” State’s brief in opposition 10.

The State’s assertion is incorrect in two crucial respects.

First, the record in this case shows that the evidence at issue, Mr. Cousin’s testimony, was never “deemed inadmissible.” The trial judge determined that this testimony “needs to be vetted in advance” and thus requires a mistrial. Petition apx. D 158. However, the trial judge cited no legal basis to require advanced vetting, and no legal basis to require advanced vetting came to light in the subsequent appellate decisions.

The Court of Appeals of Wisconsin could find no basis to support

the claim that advanced notice or vetting was required absent a discovery demand or pretrial order. Petition apx. B 147-148 (§§ 20-22).

The Supreme Court of Wisconsin acknowledged that “nothing in the record indicates the court ruled on the State’s motion in limine” before trial. Petition apx. A 104 (§5). However, the Court found this “irrelevant” because “it was not unreasonable for [the trial judge] to presume that [his predecessor judge] had granted the motion.” Petition apx. A 122 (§38). The record fails to show the trial judge indulging in any such presumption. In the absence of any identifiable procedural violation by Mr. Green’s trial counsel, the Supreme Court of Wisconsin cites only some unspecified limits to introducing third-party defense evidence which Counsel must have known:

Although in retrospect it is clear the State never made a discovery demand for Cousin's statement and the pretrial court never ruled on the State's pretrial motions in limine, the record shows defense counsel understood there were some constraints on the introduction of *Denny* [i.e. third-party defense] evidence.

Petition apx. 123 (§39). Thus, the trial judge’s notion of an “understanding” which is “commonly shared among attorneys

practicing in the criminal court system of Milwaukee” serves as a substitute for any law or rule guiding practice; the only authority cited by the trial judge as to legal requirements is the movie *My Cousin Vinny*. Petition apx. 123 (¶39).

The record does not support the State’s assertion that Mr. Cousin’s testimony was deemed inadmissible based on any law, rule or pretrial order.

Second, even if introduction of Mr. Cousin’s testimony were to have violated some procedural requirement, it would still not warrant a mistrial. The evidence was substantively admissible: the State concedes that the evidence would be admissible at any future trial. Thus, Mr. Green’s jury was not tainted by hearing anything inadmissible or improper. The existence of jury taint was the starting point for this Court in determining whether a trial court exercised sound discretion in declaring a mistrial based on evidence or argument heard by the jury. *Arizona v. Washington*, 434 U.S. 497, 511, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The State’s concession that Mr. Cousin’s testimony would

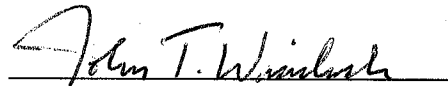
be admissible at any future trial is a concession that this testimony did not taint Mr. Green's jury. This Court in *Washington* found crucial, if not determinative, that the challenged evidence may have affected the impartiality of the jury. The State attempts to parse admissibility at the first trial from admissibility at a second future trial. Since Mr. Cousin's testimony would not affect the impartiality of any jury, this distinction must fail.

Thus, in his petition, Mr. Green asks this Court to address whether, and under what circumstances, a trial court may declare a mistrial based upon evidence or argument which the jury heard, but which did not affect the impartiality of the jury. As argued in the petition, the decision below allowing retrial in such circumstances conflicts with decisions of at least five other appellate courts.

CONCLUSION

Petitioner Mitchell D. Green asks this Court to issue a writ of certiorari to review the decision of the Supreme Court of Wisconsin.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "John T. Wasielewski", is written over a horizontal line.

John T. Wasielewski
Attorney for Petitioner