

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

ROBERT JURADO, Petitioner,

vs.

RONALD DAVIS, Warden, Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

**PETITION FOR A WRIT OF CERTIORARI
(Capital Case)**

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Ninth Circuit err in concluding that the California Supreme Court did not unreasonably apply federal law or unreasonably determine facts in denying petitioner's claim that the exclusion during the penalty phase of his videotaped confession during police interrogation hours after the homicide – as evidence in mitigation showing acceptance of responsibility and petitioner's youthful humanity – was contrary to and an unreasonable application of *Skipper v. South Carolina*, 476 U.S. 1 (1986) and *Green v. Georgia*, 442 U.S. 95 (1979) (U.S. Const., 8th & 14th Amends.)?

2. Did the Ninth Circuit err in concluding that the California Supreme Court did not unreasonably apply federal law or unreasonably determine facts in denying petitioner's claim that his plea of guilty to all charges after dismissal of the special circumstance allegation barred subsequent prosecution for capital murder as a violation of the Double Jeopardy Clause and *Ohio v. Johnson*, 467 U.S. 493 (1984) (U.S. Const., 5th & 14th Amends.)?

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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Jurado v. Davis, 12 F.4th 1084 (9th Cir. 2021), No. 18-99009, judgment entered September 10, 2021, petition for rehearing and rehearing en banc denied October 25, 2021.

United States District Court for the Southern District of California:

Jurado v. Davis, Case No. 08cv1400 JLS (JMA) (United States District Court, Southern District of California), judgment entered September 17, 2018.

United States Supreme Court:

Order, *Robert Jurado, Jr. v. California*, No. 06-5162, October 10, 2006, denying Petition for a Writ of Certiorari to the California Supreme Court.

California Supreme Court:

In re Jurado, No. S181061, January 16, 2013 (state collateral review, first petition for writ of habeas corpus)

In re Jurado, No. S136327, July 23, 2008 (state collateral review, first petition for writ of habeas corpus).

People v. Jurado, 38 Cal.4th 72 (2006), No. S042698, April 6, 2006 (appeal).

California Court of Appeal, Fourth District, Division One:

People v. Superior Court (Jurado) (1992) 4 Cal.App.4th 1217, No. D015875, March 24, 1992.

Superior Court of California, County of San Diego:

People v. Jurado, No. CR124438, judgment of death entered October 7, 1994.

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PETITION FOR A WRIT OF CERTIORARI

ROBERT JURADO petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix A to this Petition and is reported at *Jurado v. Davis*, 12 F.4th 1084 (9th Cir. 2021). The order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Rehearing En Banc appears in Appendix B and is unpublished. The opinion of the United States District Court for the Southern District of California appears in Appendix C and is unpublished. The Order of this Court denying a petition for writ of certiorari to the Supreme Court of California appears in Appendix E. The opinion of the Supreme Court of California on direct appeal appears in Appendix F and is reported at *People v. Jurado*, 38 Cal.4th 72 (2006). The opinion of the California Court of Appeal appears in Appendix G and is reported at *People v. Jurado*, 4 Cal.App.4th 1217 (1992).

JURISDICTION

The district court had jurisdiction of Petitioner's habeas corpus petition under 28 U.S.C. § 2254. The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 2253(c)(1). The judgment of the Ninth Circuit Court of Appeals was entered on

September 10, 2021. App. A. Petitioner’s timely petition for rehearing and rehearing en banc was denied on October 25, 2021. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury ... ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law”

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Section 1 of the Fourteenth Amendment to the United States Constitution states: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law”

28 U.S.C. § 2254(d) states: “An application for a writ of habeas corpus on behalf of a person in custody pursuant to a 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; or (2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented in the State court proceedings.”

STATEMENT OF THE CASE

A. Introduction.

This is a single homicide case involving the murder of Teresa Holloway. Robert Jurado (age 20), accompanied by Denise Shigemura and Anna Humiston, killed Holloway on Highway 163 in San Diego, California. App. F, pp. 74, 76-77.

B. Procedural History.

By amended information filed in October 1991, Jurado and codefendants Denise Shigemura and Anna Humiston were charged with conspiracy to commit murder and first-degree murder of Teresa Holloway (counts 1 and 2, respectively), the special circumstance allegation of murder committed while lying in wait, and as to Jurado, an enhancement that he personally used a deadly and dangerous weapon. App. A, p. 3; App. F., pp. 73-74.

In November 1991, the superior court dismissed the lying-in-wait special circumstance, and Jurado unconditionally pled guilty to all pending charges. In March 1992, the California Court of Appeal reinstated the special circumstance allegation over defense objection that trial thereon was barred by the Double Jeopardy Clause

(U.S. Const., 5th & 14th Amendments.). App. G, pp. 133-146. Jurado withdrew his pleas and pled not guilty. App. F, p. 84.

Jurado was subsequently convicted by jury verdict of one count of murder in the first-degree with the special circumstance of intentionally killing while lying in wait, and one count of conspiracy to commit murder. The jury found that Jurado personally used a deadly and dangerous weapon to commit the murder. The same jury returned a penalty of death for the murder. App. F, pp. 73-74.

During the penalty phase of trial the defense sought admission of Jurado's custodial videotaped confession to the murder as non-hearsay evidence in mitigation for a life sentence, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986) and *Green v. Georgia*, 442 U.S. 95 (1979). App. J, pp. 184-219 (reporter's transcript); App. I, pp. 151-183 (transcript of interrogation May 18, 1991). The trial court held it was inadmissible hearsay and excluded it. App. J, pp. 218-219; App. F, pp. 114-116.

The judgment was affirmed on appeal by the California Supreme Court. App. F. Constitutional claims relating to double jeopardy and exclusion of mitigating evidence (the videotaped confession) were raised on direct appeal. App. F, pp. 84-87, 114-116.

While his direct appeal was pending, Jurado filed a state habeas petition in the California Supreme Court, which was denied without an evidentiary hearing. App. A, p. 3. Jurado's first federal habeas petition was stayed in order to allow him to exhaust

his claims in state court. The California Supreme Court subsequently denied his second state petition. App. A, p. 3.

The district court denied habeas relief on Jurado's second amended federal habeas petition, and also denied his motions for investigation, evidentiary development, and an evidentiary hearing. The district court subsequently issued a certificate of appealability, and stayed execution pending appeal. Apps. C & D; App. A, p. 3. Constitutional claims relating to double jeopardy and exclusion of mitigating evidence (the videotaped confession) were raised in the district court. App. D, pp. 36-53 (double jeopardy), 53-67 (the videotaped confession).

The Ninth Circuit Court of Appeals affirmed the judgment of the district court. App. A, p. 3. 3. Constitutional claims relating to double jeopardy and exclusion of mitigating evidence (the videotaped confession) were raised in the Ninth Circuit. (App. A, pp. 4-6 (double jeopardy), 8-9 (the videotaped confession). A timely petition for rehearing was denied. App. B, p. 17.

C. The exclusion of Jurado's videotaped confession during the defense penalty-phase case in mitigation.

The day after Holloway's body was found Jurado was arrested and during custodial interrogation gave a videotaped confession to the killing. Jurado accepted full and complete responsibility for the killing. He sobbed and grasped at the detective's hand. His contrition and youthful appearance were readily apparent. App. F, pp. 114-116; *post*, pt. I.

The videotaped confession – i.e., state’s evidence – was not used by the prosecution at trial. During the penalty phase, Jurado sought to play the videotaped confession to the jury in mitigation for a life sentence. The trial court held it was inadmissible hearsay and excluded it. App. F, pp. 114-116.

As explained below, the videotaped confession was not hearsay because it was not offered for the truth of the matter stated, and the jury would have been so instructed. The jury never saw the videotaped confession, which was powerful mitigating evidence of acceptance of responsibility and Jurado’s youthful humanity. The jury thus was deprived of material defense evidence in their assessment of moral culpability. *Post*, pt. I.

D. Jurado’s unconditional plea of guilty to all pending charges after dismissal of the lying-in-wait special circumstance allegation.

In October 1991, an amended information was filed charging Jurado with conspiracy to commit murder (count 1), first-degree murder (count 2), the special circumstance of murder committed while lying-in-wait, and a weapon-use enhancement. The lying-in-wait special circumstance allegation was the sole basis for possible imposition of the death penalty. App. D, p. 21; App. G, p. 134.

Jurado then moved to dismiss the lying-in-wait special circumstance allegation for insufficient evidence. The trial court granted the motion and dismissed the lying-in-wait special circumstance allegation. App. G, p. 134. At the conclusion of the hearing, Jurado entered an open, unconditional plea to all pending charges in the first

amended information—i.e., first-degree murder and conspiracy to commit murder, and the deadly-weapon-use enhancement. App. K, pp. 230-259. The pleas of guilty were accepted and entered and the case set for a probation interview (which Jurado completed) and sentencing. App. K, pp. 265-268; App. L, p. 275 (probation officer's report: Jurado interviewed by probation officer on 12/12/1991, admitted to crime and expressed remorse).

In a writ proceeding *initiated the day after Jurado interviewed with probation in anticipation of sentencing* (App. G, p. 135 (“The district attorney filed a petition in this court on December 13, 1991, seeking ... to reinstate the alleged special circumstance”), the lying-in-wait special circumstance was reinstated by the California Court of Appeal. App. G, pp. 133-146. Jurado withdrew the plea and a jury subsequently found him guilty as charged and returned a death verdict. App. A, p. 4. The California Supreme Court rejected Jurado's double jeopardy claim. App. A, p. 4. The district court denied habeas relief on the issue (App. D, pp. 36-53) and the Ninth Circuit affirmed. App. A, pp. 4-6.

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REASONS FOR GRANTING THE WRIT

- I. **Certiorari should be granted because in published opinions the Ninth Circuit and California Supreme Court have drastically limited the scope of admissible evidence in a capital defendant's case in mitigation by excluding from the defense penalty phase a videotaped confession by Jurado taken by the police hours after the homicide (i.e., state's evidence), which evidence was critical to the jury's assessment of moral culpability because it demonstrated acceptance of responsibility and showed Jurado's youthful humanity – in contravention to *Skipper v. South Carolina*, 476 U.S. 1 (1986) (*Skipper*) and *Green v. Georgia*, 442 U.S. 95 (1979) (*Green*).**

- A. **Introduction – the straightforward question presented.**

The issue presents the following straightforward question of the scope of a capital defendant's constitutional right to present mitigating evidence:

Petitioner Jurado confessed to the murder during a videotaped custodial interrogation and then accompanied detectives to the scene and showed them the location of the murder weapon. The confession showed remorse, acceptance of responsibility, and revealed Jurado's youthful humanity – i.e., an immature 20-year-old first denying responsibility and then admitting to the murder while sobbing and grasping at the detective. The trial court excluded the evidence from the defense penalty phase even though it was offered for non-hearsay purposes and notwithstanding that the defense requested a limiting instruction that it not be considered for the truth of the matter asserted. California and the Ninth Circuit affirmed the ruling, holding that the evidence was untrustworthy and hearsay. This Court has clearly established that (1) the jury cannot be precluded from considering any relevant mitigating evidence (*Skipper*, 476 U.S. at p. 4) and (2) even hearsay evidence is admissible where it is highly reliable to a critical issue in the penalty phase and there are substantial reasons to assume the reliability of the evidence (*Green*, 442 U.S. at p. 97). Does the scope of a capital defendant's constitutional right to present mitigating evidence include the right to present evidence of his post-arrest videotaped custodial confession to the murder where it is admitted for non-hearsay purposes?

That is the overarching question.

The Ninth Circuit affirmed the California Supreme Court’s opinion affirming the trial court’s exclusion order, noting that the trial court concluded that the confession was inadmissible hearsay and that the California Supreme Court held that exclusion did not violate constitutional rights because a capital defendant has no constitutional right to admission of evidence lacking trustworthiness. App. A, pp. 8-9.

But the California Supreme Court’s opinion affirming the trial court’s exclusion order did *not* rest on the truthfulness and/or accuracy of Jurado’s confession, but instead on the *categorical exclusion of post-arrest custodial confessions*. See *Jurado*, 38 Cal.4th at p. 130; App. F, pp. 115-116 (“In past decisions, we have upheld the exclusion of self-serving postcrime statements made under similar circumstances.”).

This Court has clearly established that (1) the jury cannot be precluded from considering any relevant mitigating evidence (*Skipper*, 476 U.S. at 4) and (2) even hearsay evidence is admissible where it is highly reliable to a critical issue in the penalty phase and there are substantial reasons to assume the reliability of the evidence (*Green*, 442 U.S. at 97).

Young Jurado’s highly emotional videotaped custodial confession to the murder – elicited by the state only 48 hours after the crime – was relevant mitigating evidence critical to an issue in the penalty phase. There were substantial reasons to assume the reliability of this evidence, which was not to be admitted for the truth of the matters asserted. California’s conclusion that it excluded postcrime statements in similar

circumstances operates as a categorical exclusion of custodial confessions as mitigating evidence and was objectively unreasonable.

B. The holding that the videotaped confession was hearsay is objectively unreasonable because the confession was not sought to be admitted for the truth of the matters stated.

The Ninth Circuit affirmed California's conclusion that the videotaped confession was hearsay. App. A, pp. 8-9; App. F, pp. 114-116; *Jurado*, 38 Cal.4th at 130. California's holding is objectively unreasonable because the defense sought admission of the confession not only for the non-hearsay purposes of remorse and acceptance of responsibility but for the display of the 20-year-old Jurado's humanity just 48 hours after the murder. Defense counsel requested that the confession not be admitted for the truth of the matter asserted because the mitigating value of the confession was tied to Jurado's acceptance of responsibility and demeanor shortly after the crime, including his display of emotion and youthful humanity. App. J, p. 185 (Defense counsel: "In other words, we're not seeking to introduce this for the truth of the matter."); App. J, p. 189 (Defense counsel: "[T]he court would certainly instruct the jury that this is not sought to be introduced for the truth of the matter of the statements that are made there."). The confession showed Jurado's highly wrought emotional state close in time to the murder, and the jury would be instructed not to consider the statements for their truth, but for non-hearsay purposes.

Hearsay is “evidence of a statement that was made other than by a witness while testifying at the hearing and *that is offered to prove the truth of the matter stated.*” Cal. Evid. Code, § 1200, subd. (a), italics added. The videotaped confession was not hearsay because it was *not* offered to prove the truth of the matter stated. Instead, it was offered for non-hearsay purposes, showing acceptance of responsibility for the murder and displaying Jurado’s youthful humanity close in time to the murder.

C. The holding that the videotaped confession was untrustworthy is objectively unreasonable because the confession was inculpatory, it did not shift blame, and it was corroborated.

The Ninth Circuit affirmed California’s conclusion that since the confession was made during a “postarrest police interrogation” it “indicated a lack of trustworthiness.” App. A, pp. 8-9; App. F, pp. 114-116; *Jurado*, 38 Cal.4th at 130. California’s holding is objectively unreasonable because this Court has held that

the “against penal interest” hearsay exception to the hearsay rule ... is founded on the broad assumption “that a person is unlikely to fabricate a statement against his own interest at the time it is made.”

Lilly v. Virginia, 527 U.S. 116, 126-27 (1999) (plurality opinion), quoting *Chambers v. Mississippi*, 410 U.S. 284, 299 (1973).

The confession was trustworthy because it was based on personal knowledge, it was fully inculpatory, it did not shift blame, it was consistent with the prosecution’s evidence, and it reliably identified the murder weapon and its location. App. I, pp. 151-183 (transcript of confession); App. H, p. 149 (San Diego Police Department

Investigator's Report: "The interview with Robert JURADO was concluded." [¶]
"Robert JURADO was taken through the homicide processing procedures. After the physical examination at Harbor View Hospital, Robert JURADO agreed to show us the location where he had thrown the car's jack. Detective ZAVALA and I drove to the Quince Street Bridge which over Highway 163. Robert JURADO showed us the spot where he had tossed the jack into some bushes just past the bridge. Robert JURADO said that it might have got hung up in the branches of the tree. Sergeant MANIS and Evidence Technician DORSETT were made aware of this location. Evidence Technician DORSETT proceeded to look for the tire jack."). The confession shared characteristics typical to custodial confessions routinely relied upon by prosecutors to secure convictions: initial denials followed by a confession of guilt. It was trustworthy.

D. California's decision affirming the trial court's exclusion of the videotaped confession on the ground that there was "no compelling need" for admission is objectively unreasonable because the videotaped confession was uniquely mitigating.

The Ninth Circuit affirmed California's conclusion that the trial court correctly found that there was "no compelling need" for admission of the videotaped confession because Jurado could testify in his defense. App. A, p. 9; App. F, p. 114; *Jurado*, 38 Cal.4th at 128. The holding is objectively unreasonable because this Court has clearly established that the jury cannot "be precluded from considering '*any relevant mitigating evidence*.'" *Skipper*, 476 U.S. at 4, italics added, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

The videotaped confession was uniquely mitigating because it was given only 48 hours after the murder and showed Jurado's highly distraught emotional state close in time to the murder, evidencing his youthful and immature humanity. *See e.g., Green*, 442 U.S. at 97 ("excluded testimony was highly relevant to a critical issue," resulting in the denial of a fair trial); *United States v. O'Brien*, 560 U.S. 218, 227 (2010) ("Sentencing factors traditionally involve characteristics of the offender—such as recidivism, cooperation with law enforcement, or acceptance of responsibility.").

Moreover, there can be no suggestion that Jurado could have testified at trial and thereby lessened the need for admission of the videotaped confession. Such testimony given years later could not replace evidence showing Jurado's acceptance of responsibility and youthful humanity hours after the murder. A defendant also has a constitutional right to remain silent at trial. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976). Any suggestion that Jurado could have testified at trial – and thus obviated the need for admission of the videotaped confession – would unconstitutionally condition the exercise of one constitutional right (i.e, the right to admit "any relevant mitigating evidence" in a capital trial: *Skipper*, 476 U.S. at 4) on the relinquishment of another constitutional right. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

E. The denial of Jurado’s constitutional right to present mitigating evidence of his post-arrest videotaped custodial confession to the murder was manifestly prejudicial.

The fundamental duty of a capital penalty jury to assess moral culpability is undermined when the jury is not able to view and consider the defendant’s humanity.

Riggins v. Nevada, 504 U.S. 127, 143-144 (1992) (conc. opn. of Kennedy, J.);

Woodson v. North Carolina, 428 U.S. 280, 303-305 (1976).

The videotaped confession was critical to the jury’s assessment of moral culpability because it was powerfully mitigating evidence of acceptance of responsibility for the murder and it displayed the youthful humanity of an immature 20-year-old. App. App. F, p. 114 (Cal. Supreme Court: “During this part of the interrogation, defendant displayed considerable emotion, sobbing and at one point grasping an interrogating officer’s hand”); App. I, pp. 168-183 (transcript).

A confession is uniquely powerful evidence. *See e.g., Sivak v. Hardison*, 658 F.3d 898, 917 (9th Cir. 2011) (“Such a conclusion derives from common sense: a confession is typically ‘powerful evidence,’”); *Hernandez v. Chappell*, 923 F.3d 544, 552 (9th Cir. 2019). The state implicitly recognized the powerful mitigating nature of this evidence – a visual display of the young Jurado’s humanity – by seeking its exclusion.

The penalty determination was close. Jurado was 20 years old at the time and had only suffered a single, non-violent prior drug conviction. App. F, p. 81. The jury

deliberated for five days before returning the death verdict. App. F, p. 119. If the jury had viewed the videotaped interrogation, then it would have seen Jurado's immature and broken humanity shortly after the murder and it would have seen that Jurado accepted responsibility for the murder. This powerfully mitigating evidence may well have persuaded one or more jurors to vote for life and reject death, leaving "grave doubt" about the likely effect of the error on the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

II. Certiorari should be granted because in published opinions the Ninth Circuit and California have permitted a death judgment to stand in the face of governmental overreaching in soliciting unconditional, enforceable pleas of guilty to all pending charges after dismissal of the special circumstance allegation (i.e., the greater charge of capital murder), in contravention to historic double jeopardy principles and *Ohio v. Johnson*, 467 U.S. 493 (1984) and *Grady v. Corbin*, 495 U.S. 508 (1990).

A. Introduction.

After the trial court dismissed the special circumstance allegation, Jurado entered a plea of guilty to the only charges pending – first-degree murder and conspiracy to commit murder. App. G, p. 134; App. K, pp. 230-259. The prosecutors did not object to Jurado's pleas. *Post*, pt. II.B.; App. K, pp. 265-268. The State's prosecutors made sure that there was a factual basis for the pleas. App. K, pp. 245-247, 252-259 (factual basis). They made sure that Jurado entered the pleas with a full understanding of the penal consequences of the conviction. App. K, pp. 230-232, 243-245 (penal consequences). The State actively participated in securing enforceable,

valid and final convictions to the first-degree murder and conspiracy to commit murder charges pending against Jurado. App. K, pp. 230-259. After securing the convictions and conducting a probation interview of Jurado (App. K, pp. 265-268; App. L, p. 275), the State filed a successful writ challenging the dismissal of the special circumstances allegation and tried him for capital murder. App. A, p. 4; App. G, pp. 133-146.

Double Jeopardy “protects against a second prosecution for the same offense after conviction.” *Ohio v. Johnson*, 467 U.S. 493 (1984) (*Johnson*). The State obtained valid convictions resolving the pending charges against Jurado, but wanted to keep open the option of later obtaining a capital conviction if it succeeded with a writ. Double Jeopardy does not allow the State to hedge its bets. The State cannot take the opportunity to secure a valid and enforceable first-degree murder conviction against Jurado, and then later obtain a capital conviction for the same murder.

The prosecution’s position is fundamentally unfair. The State would assuredly rely on the validity and finality of Jurado’s plea to first-degree murder if it had not succeeded on its writ. Yet the State maintains that Jurado was not entitled to the same consideration if the writ was successful. Jurado was entitled to rely on the finality of the conviction and obtain repose; Double Jeopardy bars his prosecution for capital murder.

B. Jeopardy attached when – after the greater charge of special-circumstance capital murder was dismissed – the trial court accepted Jurado’s unconditional pleas of guilty to all pending charges (including first-degree murder) without objection by the prosecution.

Jeopardy attached when the trial court accepted Jurado’s unconditional pleas of guilty to all pending charges because (1) the prosecution solicited the guilty pleas by obtaining a factual basis from Jurado, (2) the prosecution did *not* object to entry of the pleas, and (3) the prosecution did *not* object to the trial court’s acceptance of the guilty pleas. *Johnson*, 467 U.S. at pp. 500-502 (the Double Jeopardy Clause is not offended when the greater offenses charged in the indictment remain “pending” at the time of a guilty plea, and when the prosecution objects to the plea to a lesser included offense); *id.* at p. 501 (“Previously we have recognized that the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense.”), citing *Brown v. Ohio*, 432 U.S. 161 (1977); *United States v. Patterson*, 381 F.3d 859, 864 (9th Cir. 2004) (for double jeopardy purposes, once a guilty plea has been accepted, the defendant stands convicted); see *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987) (assuming jeopardy attached at least when sentence was imposed on guilty plea).

In *Johnson*, greater and lesser included offenses were pending against the defendant. *Johnson*, 467 U.S. at p. 496. Over the prosecutor’s objection, the trial court accepted guilty pleas to the lesser offenses and granted defendant’s motion to dismiss

the remaining more serious charges holding that further prosecution was barred by the Double Jeopardy Clause. This Court held that further prosecution was not barred on the greater charge because it remained pending at the time of the guilty pleas and the prosecution objected to the guilty plea to the lesser offense. *Id.* at pp. 500-502.

We do not believe, however, that the principles of finality and prevention of prosecutorial overreaching applied in *Brown* reach this case. No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. Here, respondent offered only to resolve part of the charges against him, while *the State objected to disposing of any of the counts against respondent without a trial*. Respondent has not been exposed to conviction on the charges to which he pleaded not guilty

Johnson, 467 U.S. at p. 501, italics added.

The Ninth Circuit held that “the district court correctly concluded that the California Supreme Court’s determination that *Johnson*’s holding controlled was not unreasonable.” App. A, pp. 5-6. The Opinion holds that (1) this case presents a substantially similar situation to *Johnson* and (2) California’s “conclusion that the *prosecutor’s actions in this case were equivalent to an objection* was not objectively unreasonable, as *it was clear that the prosecution was opposed to the guilty plea* and wanted to pursue prosecution of the special circumstance allegation.” App. A, p. 5, italics added.

The factual record in this case does not support the conclusions reached by the Ninth Circuit, as quoted above. The first conclusion – i.e., that the prosecutor’s actions in this case were equivalent to an objection – is belied by the prosecutor’s insistence on

making sure that the penal consequences of the pleas were correctly explained to Jurado and on the prosecutor's active engagement and encouragement of the pleas by, among other things, compelling a factual basis from Jurado. App. K, pp. 230-232, 243-245 (penal consequences); App. K, pp. 245-247, 252-259 (factual basis).

Two prosecutors (Messrs. Fisher and Pettine) engaged the trial court and defense counsel Warren in the following colloquy concerning the penal consequences of the pleas:

Mr. Fisher: Your honor, if I could raise one issue about the plea form?

The Court: Yes.

Mr. Fisher: And that is with the description of the consequences of the plea, the penal consequences. I don't know if counsel has looked into this, and I only have a passing knowledge of the subject, but my understanding is that it may be an open question in California whether or not you can be punished for both count 1 and count 2. [App. K, pp. 230-231, italics added.] [¶]

Mr. Pettine: I think counsel needs to look at that before Mr. Jurado pleads guilty. [App. K, p. 231, italics added.] [¶]

Mr. Pettine: Well, the appellate courts look very keenly what a maximum punishment is and exposure when they review the sufficiency of a plea, notwithstanding counsel's comments. [App. K, p. 232, italics added.] [¶]

Mr. Pettine: *Your honor, that information that you just conveyed to Mr. Jurado about the length of his parole, I'm not sure if that's in the change of plea form, because I know that's a standard form that usually refers to 48 months of parole.*

The Court: Right. [App. K, p. 244, italics added.] [¶]

Mr. Fisher: *Technically I think maybe he is.*

Mr. Pettine: *It's not a .5 allegation.*

The Court: Okay. I guess you might be eligible for probation, but you know -- you know we're not talking about probation here. [App. K, p. 245, italics added.]

The same two prosecutors (Messrs. Fisher and Pettine) – continuing the State's active encouragement of the pleas – engaged the court and defense counsel Warren in the following colloquy concerning the factual basis for the pleas:

Mr. Warren: Your honor, with regard to that section we would submit the preliminary hearing transcript for the court's consideration as to a factual basis which the court has already read.

Mr. Pettine: *We would ask the court to get a factual basis from Mr. Jurado. We would not be inclined to stipulate to a factual basis.* [App. K, pp. 246-247, italics and underscore added.] [¶]

Mr. Pettine: *I think in a plea of this nature with the consequences at stake in this plea for Mr. Jurado, I think the court should take a factual basis from the mouth of Mr. Jurado as to what he did in this case.*

The Court: Well, I'm inclined to think so also, Mr. Warren. I -- I don't know that I need to, you know, belabor the point in great detail. . . . [App. K, pp. 246-247, italics added.] [¶]

Mr. Pettine: May we have him elaborate on the record, your honor?

The Court: In what regard, who it was or --

Mr. Pettine: Yes.

The Court: All right.

Q.² Which one?

A.³ Had discussion with Miss Shigemura.

Q. Okay. You discussed why that seemed to be necessary and why you and she concluded that it was necessary to kill Miss Holloway.

A. I can't recall the whole discussion or what about the discussion was about, but there was a discussion about about [sic] a murder.

Q. Well, the evidence seems to suggest that you were both afraid that she was going to make certain statements to another person that you were afraid of, snitch you off I guess is one way of putting it?

A. Yeah.

Q. At least tell -- tell this other person that both of you were very much afraid of certain information that might -- that in your view might jeopardize your lives. Is that basically it?

A. Yes.

² The trial court.

³ Petitioner Jurado.

Q. Okay.

Mr. Pettine: May I inquire, your honor?

The Court: All right.

By Mr. Pettine: Q. When did you have this discussion with Miss Shigemura? [App. K, pp. 252-253, italics added.]
[¶]

Mr. Pettine: His statement "it was me" and me alone, which is an indication to the court that he is not prepared to plead guilty to count 1. Just indicated that he conspired with Miss Shigemura and now he said "it was me" and me alone.

Mr. Warren: Your honor, he is indicating, contrary to what Mr. Pettine is trying to argue, that he was the one, after conspiring he was the one that committed the physical acts which resulted in the death of Miss Holloway. Now, I know that Mr. -- [App. K, p. 257, italics added.] [¶]

Mr. Pettine: May I just make one comment?

The Court: Yes.

Mr. Pettine: Counsel is absolutely incorrect in his assertion. Mr. Jurado told the police, and you saw the tape, that he acted alone. And now he's coming in here and he's pleading guilty to conspiring with Miss Shigemura to doing the murder. And I'm trying to determine if there is a true factual basis for him pleading to count 1, that is, whether he believes he's guilty of count 1. And his comment just a moment ago was that he and he alone killed her. Now, there seems to be an issue in my mind whether he's prepared to plead guilty to

count 1. I know counsel wants to plea to the sheet *but I'm not sure Mr. Jurado is prepared to state a factual basis.*

The Court: *I will be the determiner of that, Mr. Pettine, thank you.*

Q. All right, Mr. Jurado, so there's no misunderstanding now, I -- I understand you to have told me already that you and Denise Shigemura conspired?

A. We both conspired and the physical act, I -- I acted alone.

Q. That means you talked about it, you came to a mutual agreement, a mutual understanding, a shared intent and purpose that you would kill Teresa Holloway, correct?

A. Yes. [App. K, pp. 258-259, italics added.]

Before the prosecutor appeared to concur in the plea prosecutor Pettine made the following ambivalent comment:

Your honor, just for the record, *I've advised counsel that the People would not be signing the change of plea form.* I know he can plead to the face at any time, but consulting with Mr. Fisher, there's a possibility that the people may take a writ on the ruling by the court, so I just wanted counsel to be aware that the plea could conceivably be set aside at a later time depending on how that procedure goes. [App. K, p. 224, italics added.]

The prosecutor's curious comment about not signing the plea form was a "straw man" statement, as evidenced by the immediate recognition that no such action was required. App. K, p. 224 ("I know he can plead to the face at any time") The subsequent conduct by both prosecutors in ensuring that a valid, enforceable plea was taken demonstrates that the State was *not* objecting to the plea, but rather was

encouraging the plea for possible enforcement by the State later should the State decide not to pursue the trial court's dismissal of the special circumstance allegation.

Similarly, the second conclusion – i.e., that “*it was clear that the prosecution was opposed to the guilty plea* and wanted to pursue prosecution of the special circumstance allegation” (App. A, p. 5, italics added) – also is belied by the record quoted above. App. K, pp. 230-232, 243-245 (penal consequences); App. K, pp. 245-247, 252-259 (factual basis). The record reveals that it was clear from the prosecutor's actions in participating in the pleas that the prosecution was not opposed to the guilty pleas, but desired entry of a valid, enforceable plea to first-degree murder (the lesser offense of capital murder). The prosecutor's words and actions demonstrate that the State did *not* object to Jurado's pleas of guilty. The State – by the actions of its prosecutors – thus forfeited further prosecution for the greater offense of capital murder.

The State did *not* object to disposing of any of the counts against Jurado without a trial. Instead, once the special circumstance allegation was dismissed, the prosecution solicited the plea to the lesser offense of first-degree murder by participating in the plea colloquy and obtaining a factual basis from Jurado, thereby ensuring that the plea was valid and enforceable. App. K, pp. 222-268. Petitioner recognizes that the prosecution objected to dismissal of the special circumstance allegation. App. F, p. 84. But there was no objection to the subsequent unconditional pleas of guilty to all

pending charges – which the prosecution actively encouraged – and there was no objection to the trial court’s acceptance of the pleas of guilty. App. K, pp. 222-268. This distinguishes *Johnson* from the instant case. *Johnson*, 467 U.S. at p. 494 (“Respondent offered to plead guilty to charges of involuntary manslaughter and grand theft, but pleaded not guilty to charges of murder and aggravated robbery. *Over the State’s objection, the trial court accepted the “guilty” pleas to the lesser offenses, and then granted respondent’s motion to dismiss the two most serious charges on the ground that, because of his guilty pleas, further prosecution on the more serious offenses was barred ...* .”, italics added).

In sum, the Ninth Circuit incorrectly concludes that the record in this case shows objection to the plea. The record shows objection to dismissal of the special circumstance allegation, but not an objection to the taking of the pleas. Even if the prosecutor’s “straw man” statement about not signing the plea form is somehow construed as an adequate objection, the prosecutor’s subsequent actions during the taking of the plea logically operate as forfeiture and/or abandonment of any objection to the plea. The prosecutor’s actions thus demonstrate that the State did not object to Jurado’s pleas of guilty, and thus jeopardy attached when the pleas were accepted by the trial court (also without objection by the prosecution).

C. The Double Jeopardy Clause barred subsequent trial and conviction for capital murder because Jurado had previously been convicted of the lesser included offense of first-degree murder.

Jeopardy attached when the trial court accepted – without objection by the State – Jurado’s unconditional pleas of guilty to all pending charges. *Ante*, pt. II.B.

A guilty plea constitutes a conviction. *See Kercheval v. United States*, 274 U.S. 220, 223 (1927) (“A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction.”).

This Court has previously recognized that “the *Double Jeopardy Clause* prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or *convicted on the lesser included offense*.” *Johnson*, 467 U.S. at p. 501, italics added.

First-degree murder is a lesser included offense of capital murder. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (“for purposes of the Sixth Amendment’s jury trial guarantee, the underlying offense of ‘murder’ is a distinct lesser included offense of ‘murder plus one or more aggravating circumstances’”); *ibid.* (“We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment’s jury trial guarantee and what constitutes an ‘offense’ for purposes of the Fifth Amendment’s Double Jeopardy Clause.”); *id.* at p. 112 (“For purposes of the Double Jeopardy Clause, then, ‘first-degree murder’ ... is

properly understood to be a lesser included offense of ‘first-degree murder plus aggravating circumstance(s).’”).

The Ninth Circuit declined to address this issue, stating that “[b]ecause the California Supreme Court’s decision rested on application of *Johnson*, we need not and do not reach Jurado’s argument regarding whether the special circumstance was a different offense or a greater element of capital murder.” App. A, p. 16, n.1.

D. The Double Jeopardy Clause barred subsequent trial and conviction for capital murder under the “same conduct” test of *Grady v. Corbin*, 495 U.S. 508 (1990) because trial on the lying-in-wait special circumstance required the prosecution to prove the “same conduct” used to establish guilt on the charge of first-degree murder.

Jeopardy attached when the trial court accepted – without objection by the State – Jurado’s unconditional pleas of guilty to all pending charges. *Ante*, pt. II.B. Jeopardy having attached at that time, the subsequent trial and conviction on the lying-in-wait special circumstance allegation were barred by the “same conduct” test of *Grady v. Corbin*, 495 U.S. 508, 510 (1990) (*Grady*).⁴

Clearly established federal law at the time of the court’s acceptance of Jurado’s plea in November 1991 to first-degree murder held that “the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense

⁴ *Grady* was overruled three years later by *United States v. Dixon*, 509 U.S. 688 (1993) (*Dixon*). But *Grady* is clearly established federal law even though subsequently overruled because it was the law at the time at issue here. See *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (*Greene*).

charged in that prosecution, *the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.*” *Grady*, 495 U.S. at p. 510, italics added, overruled by *Dixon*, 509 U.S. 688; *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Jurado’s plea of guilty to the first-degree premeditated and deliberate murder of Holloway – and resulting conviction – required the prosecution to prove an intentional killing of Holloway. App. F, pp. 105-106.

To prove the essential elements of the lying-in-wait special circumstance allegation, the prosecution was required to prove “‘*an intentional murder* [of Holloway], committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.’” App. F, p. 106, italics added.

The intentional killing of Holloway thus was an essential element of both first-degree murder of Holloway and the lying-in-wait special circumstance, requiring the prosecution to prove conduct (i.e., the intentional killing) that constitutes an offense (i.e., first-degree murder) for which Jurado had already been prosecuted. The Double Jeopardy Clause thus barred the subsequent jury trial and conviction for capital murder (first-degree murder of Holloway plus the lying-in-wait special circumstance). *Grady*, 495 U.S. at p. 510.

The Ninth Circuit failed to address the “same conduct” test set forth in *Grady*, instead concluding that Jurado’s case is substantially similar to *Johnson* where the prosecutor objected to Johnson’s plea of guilty. App. A, pp. 5-6. Of course, Jurado’s case is materially distinguishable from *Johnson* because here the prosecutor never once objected to the plea of guilty, but instead solicited a valid and enforceable plea to first-degree murder of Holloway. *Ante*, pt. II.B.

CONCLUSION

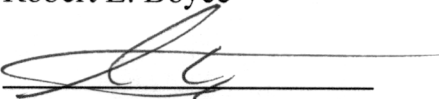
For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: January 20, 2022

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