No. 21-6954

In the Supreme Court of the United States

ROBERT JURADO,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the state court's exclusion of Jurado's videotaped police interrogation as mitigating evidence during the penalty phase of his capital trial was contrary to, or an unreasonable application of, clearly established federal law.

2. Whether the state court's rejection of Jurado's double jeopardy claim was contrary to, or an unreasonable application of, clearly established federal law.

DIRECTLY RELATED PROCEEDINGS

Supreme Court of the United States:

Jurado v. California, No. 06-5162, certiorari denied October 10, 2006 (direct appeal).

United States Court of Appeals for the Ninth Circuit:

Jurado v. Davis, No. 18-99009, judgment entered September 10, 2021; petition for rehearing and rehearing in banc denied October 25, 2021 (this case below).

United States District Court for the Southern District of California:

Jurado v. Davis, No. 08cv1400 JLS (JMA), judgment entered September 17, 2018 (this case below)

California Supreme Court:

In re Jurado, No. S181061, petition denied January 16, 2013 (state collateral review).

In re Jurado, No. S136327*,* petition denied July 23, 2008 (state collateral review).

People v. Jurado, No. S042698, judgment entered April 6, 2006 (state automatic appeal).

California Court of Appeal, Fourth District:

People v. Superior Court (*Jurado*), No. D015875, interlocutory mandamus petition granted March 24, 1992.

Superior Court of California, County of San Diego:

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

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STATEMENT

1. In May 1991, petitioner Robert Jurado and his roommate, Denise Shigemura, learned that their plan to kill drug dealer Doug Mynatt had been discovered by Mynatt's acquaintance, Teresa Holloway. Pet. App. D25-27. Concerned that Holloway would reveal their plan, Jurado (assisted by Shigemura and Anna Humiston) killed Holloway by strangling her with a cord and beating her with an automobile jack. *Id.* at A3, D24, D27-30. Holloway's body was found two days later in a culvert below a highway in San Diego. *Id.* at D24, D28.

Jurado was arrested for the murder. Pet. App. F114, H147. Two detectives questioned him, videotaping the interview without his knowledge. *Id.* Jurado at first denied involvement in the murder; after one of the detectives described the specifics of the crime, however, Jurado began to weep and admitted that he "did it." *Id.* at I154, I165-168. Claiming that he had killed Holloway because he and his family had been threatened, Jurado said he had attempted but failed to choke Holloway and then had struck her in the head with the jack. *Id.* at I168, I170-I176. Jurado told the detectives that he did not know whether Holloway was still alive when he dumped her into the ditch. *Id.* at I172. And he denied that Shigemura and Humiston had been involved. *Id.* at I168-170, I176-177.

Jurado further stated, "I don't want to spend the years of all of my life in jail," and added that he did not want to be seen as a "snitch" in jail. Pet. App.

I173, I175. Asked whether he had sustained any injuries during "the fight," Jurado replied that "[t]he only injury I got is from my, just from my conscience." *Id.* at I179. After the detectives temporarily left him alone in the interview room, Jurado said, "Lord help me get out early. I don't want to waste my life in prison." *Id.* When the detectives returned, Jurado asked how much time he was going to serve. *Id.* at I179-180. After the interview, Jurado led the police to where he had thrown the automobile jack. *Id.* at H149.

2. The prosecution charged Jurado with conspiracy to commit murder and first-degree murder. Pet. App. A3, D21, F84; Cal. Penal Code, §§ 182, 187, 190.2(a)(15). It further alleged that Jurado had committed the murder while lying in wait, a "special circumstance" making him eligible for the death penalty. *Id.*

In the trial court, Jurado filed a motion seeking to set aside the conspiracy count and the special-circumstance allegation. Pet. App. F84. The prosecution filed a written opposition. *Id.* The court denied the motion as to the conspiracy count but granted it with respect to the special-circumstance allegation on the ground that the allegation had not been supported by sufficient evidence at the preliminary hearing. *Id.* Immediately thereafter, defense counsel announced that Jurado wanted to plead guilty to the remaining conspiracy and first-degree murder charges. *Id.* Although acknowledging that Jurado could "plead to the face" of the charging document at any time, the prosecutor stated that he would refuse to sign the plea form and noted that the plea could be set aside

in the future because the prosecution might ask the appellate courts to overturn the trial court's ruling. *Id.* at A4, F84, K224. While Jurado was in the process of pleading guilty, defense counsel suggested that the preliminary hearing evidence served as a factual basis for the plea. *Id.* at K246. The prosecutor objected and asked the court to obtain a factual basis directly from Jurado instead. *Id.* at K246-247. The court did so before accepting the plea. *Id.* at K253-254, 256-257, 259-267.

Before imposition of judgment and sentencing, the prosecution filed a petition for a writ of mandate in the California Court of Appeal seeking reinstatement of the special-circumstance allegation. Pet. App. A4, F84, G135. In opposing that petition, Jurado argued that reinstatement was barred by double jeopardy principles. *Id.* at F84, G139-140. After staying imposition of sentence, the court of appeal granted the writ, concluding that the Double Jeopardy Clause posed no bar to the reinstatement of the special allegation in light of *Ohio v. Johnson*, 467 U.S. 493, 500-502 (1984). *Id.* at A4, G135, G139-145. The California Supreme Court denied review. *Id.* at A4, F84. Jurado then withdrew his guilty plea, pleaded not guilty, and denied the special circumstance allegation. *Id.*

A jury found Jurado guilty as charged of first-degree murder and conspiracy to commit murder. Pet. App. A3, D21. It also found the special-circumstance allegation true. *Id.* at D21.

At the penalty phase of the trial, Jurado sought to admit, as evidence of remorse, the video of his interview with the police (which had not been introduced into evidence at the guilt phase). Pet. App. A8. Jurado asserted that the video would rebut two elements of the prosecution's evidence: that, in a phone call to a witness after his arrest, Jurado had referred to Holloway by singing, to the tune of a rap song, lyrics like, "On, on, the bitch is gone"; and that he also had stated that he did not care if he spent the rest of his life in prison because "it was worth it." *Id.* After viewing the video, the court denied the defense motion. *Id.* at A9, J211-214. The court explained that the video constituted inadmissible hearsay; that, as to non-assertive emotions reflected on the video, there was no compelling need for the evidence; and that the video contained no substantial evidence of inherent trustworthiness or reliability. *Id.* at A9. The court further explained that, although the video depicted Jurado showing concern for Humiston and his mother, and for his own predicament of going to jail, the video showed no remorse by Jurado for killing Holloway. *Id.* at A9, F114-115. The court noted, however, that it was not preventing Jurado from presenting other evidence of remorse. *Id.* at J211- 214.

After closing arguments, Jurado again sought admission of the video, assertedly to respond to the prosecutor's argument that he "lacked a conscience." Pet. App. F115. The court denied the request. *Id.*

The jury returned a death verdict. Pet. App. D21.

3. On direct appeal, the California Supreme Court affirmed the judgment. Pet. App. F73-74. Among other rulings, it rejected Jurado's claim that exclusion of the video violated his constitutional rights. *Id.* at F114-116. Although recognizing that parts of the video showed displays of emotion amounting to non-assertive conduct rather than hearsay statements, the court noted that Jurado also had sought to admit the hearsay statements in the video—particularly his statement about an injury to his conscience—for the purpose of explaining his emotional display. *Id.* at F115-116. Such statements remained inadmissible, notwithstanding the "state of mind" exception to California's general rule excluding hearsay, because they were untrustworthy in that Jurado had made them in a post-arrest police interrogation when he had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators. *Id.* The court further noted that Jurado had sought admission of the entirety of the videotape without redacting the inadmissible hearsay. *Id.* at F115. The court concluded that exclusion of the videotape did not violate Jurado's constitutional rights to a fair trial and a reliable penalty determination. *Id.* at F116. It explained that a capital defendant has no constitutional right to the admission of untrustworthy evidence—particularly when he seeks to place his own self-serving statements before the jury without subjecting himself to cross-examination. *Id.*

The California Supreme Court also rejected Jurado's double jeopardy claim. Pet. App. F85-87. Upholding the court of appeal's earlier ruling as "law

of the case," the California Supreme Court agreed that *Ohio v. Johnson,* 467 U.S. 493 (1984), permitted Jurado's continued prosecution for special-circumstances murder. *Id.* at F85-87. Imposing a double jeopardy bar, the state court observed, would deny the prosecution one full and fair opportunity to convict a person who had violated the law. *Id.* at F87. The court also explained why the differences between *Johnson* and Jurado's case were not material: although the prosecutor in Jurado's case had not formally objected to the plea, he never acquiesced in it but instead timely sought appellate review; and the prosecutor's insistence on a factual basis for the plea "did not pose the risks that the successive prosecution aspect of the double jeopardy bar was intended to guard against." *Id.* at F86-87.

Jurado filed a petition for a writ of certiorari in this Court following the California Supreme Court's affirmance. Pet. App. E72. That petition did not challenge the state court's rulings regarding the exclusion of the video or his double jeopardy claim, which are the subject of the current petition. *See Jurado v. California*, No. 06-5162 (Oct. 10, 2006). This Court denied the 2006 petition. *Id.*

4. Jurado raised his evidentiary and double jeopardy claims in a federal petition for a writ of habeas corpus. Pet. App. D20, D36, D53. The district court denied both claims, concluding that the California Supreme Court's rejection of those claims was neither contrary to nor or an unreasonable application of clearly established federal law, and was not based on an

unreasonable determination of the facts. *Id.* at C18, D21, D36-52, D53-66, D70; *see* 28 U.S.C. § 2254(d).

5. A unanimous panel of the Ninth Circuit affirmed the denial of habeas relief. Pet. App. A3, A5-6, A8-9, A16.

With respect to the exclusion of the video, the court of appeals relied on *United States v. Scheffer*, 523 U.S. 303, 308 (1998), which recognized that a defendant's right to present evidence is subject to reasonable restrictions, including a requirement that certain evidence will be excluded if not sufficiently reliable. Pet. App. A9. In light of *Scheffer* and the deferential standard of review under 28 U.S.C. § 2254(d), the court concluded that relief was unavailable because the California Supreme Court reasonably rejected Jurado's claim on the ground that the videotaped interrogation lacked persuasive assurances of trustworthiness. *Id.*

As to the double jeopardy claim, the court agreed with the California Supreme Court that the circumstances of Jurado's case were "substantially similar" to those in *Ohio v. Johnson,* 467 U.S. 493. Pet. App. A4-5. In addition, the court determined that the state court's conclusion that the prosecutor's actions were equivalent to an objection was not objectively unreasonable because it was clear that the prosecution was opposed to the guilty plea and wanted to pursue the special-circumstance allegation. *Id.* at A5. Accordingly, the court ruled that the state court's decision was not unreasonable and thus could not be a basis for habeas relief under Section 2254(d). *Id.* at A5-6.

ARGUMENT

Jurado argues that the court of appeals erred in denying relief with respect to his exclusion-of-evidence and double jeopardy claims. Pet. 8-29. Under the particular circumstances of this case, the state court correctly rejected both of those claims. In any event, as Jurado recognizes, federal habeas relief is unavailable unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or was based on an "unreasonable determination of the facts," *id.* § 2254(d)(2). And Jurado cannot satisfy that demanding standard with respect to either claim. Moreover, Jurado does not allege that his case implicates any conflict of authority in the lower courts, or identify any other persuasive reason for this Court to grant plenary review of his fact-intensive claims.

1. Jurado first argues that the underlying California Supreme Court decision, which affirmed the exclusion of his videotaped statements at the penalty phase, depended on an unreasonable determination of the facts and was contrary to (or an unreasonable application of) *Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*), and *Skipper v. South Carolina*, 476 U.S. 1 (1986). Pet. 8-14. That argument is not correct.

"[C]learly established Federal law" under Section 2254(d) comprises only Supreme Court holdings that "squarely address[]" the legal issue. *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (*per curiam*); *see Knowles v. Mirzayance*,

556 U.S. 111, 122 (2009). This Court's precedents establish a general rule that the jury in a capital case may not be precluded from considering relevant mitigating evidence as a basis for a sentence less than death. *Skipper*, 476 U.S. at 4. But the Court has also recognized that "a defendant's right to present relevant evidence is not unlimited, but is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. at 308; *see United States v. Tsarnaev,* 142 S. Ct. 1024, 1038 (2022). (States and the Federal Government may enact reasonable capital-sentencing rules governing whether specific pieces of evidence are admissible and excluding certain evidence that may have insufficient probative value to justify its admission). For example, the constitution does not generally require a state court to admit traditionally-inadmissible hearsay testimony, so long as the court does not apply its hearsay rule "mechanistically" to unfairly exclude evidence "highly relevant to a critical issue in the punishment phase of the trial"—such as a third party's confession to the charged crime—where "substantial reasons exist to assume its reliability." *See Green*, 442 U.S. at 97.

Here, as the state court correctly recognized, the proffered video embraced not just Jurado's non-assertive conduct, but his own explanatory hearsay statements of alleged fact about what he was feeling at the time. Pet.

App. F115-116.[1] The videotaped interview came after Jurado's arrest, when he had a compelling motive to seek to minimize his responsibility for killing Holloway and to play on his interrogators' sympathies. *Id.* at F115. Indeed, during the interview, Jurado at first lied about his involvement in the murder, and later lied about the involvement of his cohorts. *Id.* at I154, I165, I168-170, I176-177. Given the content of the video and the surrounding circumstances, "[t]he California Supreme Court did not unreasonably conclude that the videotaped interrogation lacked persuasive assurances of trustworthiness." *Id.* at A9.

Nor did the state courts "mechanistically" exclude any highly relevant or critical evidence of remorse. Unlike in *Green,* Jurado did not proffer evidence that someone else had confessed to the crime. *See* 442 U.S. at 96-97. Instead, as the trial court observed in reviewing the evidence and considering its importance and reliability, the video only depicted Jurado expressing concern for Humiston and his mother, and for his own predicament; Jurado did not

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[1] Jurado suggests (Pet. 10-11) that the California Supreme Court erred in holding that the videotaped assertions were inadmissible hearsay under the California Evidence Code. As the state court explained, Jurado sought admission of extrajudicial videotaped statements of asserted fact—for example, his statement about an alleged injury to his conscience—that constituted hearsay. Pet. App. F115-116. Such statements failed to qualify for admission, notwithstanding the "state of mind" exception to California's hearsay rule, because they lacked trustworthiness. *Id.* In any event, on federal habeas corpus review, federal courts do not second-guess a state supreme court's interpretation of state evidence laws. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

express any remorse for killing Holloway or for *her* family. Pet. App. F114-115. Moreover, Jurado retained the option of directly testifying—subject to cross-examination—about any feelings of remorse on his part. *Id.* at J213-214; *see also id.* at A9 (court of appeals opinion noting the trial court's observations and its consideration of *Green*).

Even if clearly established federal law somehow required admission of the video as evidence of mitigation, the harmless-error doctrine nevertheless would preclude habeas relief under the particular circumstances here. The evidence in aggravation included the brutality of the murder; Jurado's motive for the killing (to prevent Holloway from revealing a plot to murder Mynatt); Jurado's threatened violence against his own mother; his being told by Holloway that she was pregnant before he murdered her; his involvement in a jailhouse assault; and his being armed with a weapon during a different jail altercation. Pet. App. D27-29, D32-34. Under these circumstances, any error in excluding the video plainly did not have a "substantial and injurious effect or influence in determining" the penalty verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

2. Jurado next argues that the court of appeals erred in denying federal habeas relief with respect to his double jeopardy claim. Pet. 15-29. That too is incorrect, and Jurado identifies no persuasive basis for further review.

The Double Jeopardy Clause of the Fifth Amendment offers three guarantees: "It protects against a second prosecution for the same offense after

acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). Relevant here, the Clause is violated when a defendant is tried for a greater offense after he has already been convicted or acquitted of a lesser-included offense. *Ohio v. Johnson*, 467 U.S. 493, 501 (1984); *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012).

Jurado argues that the California Supreme Court reached a decision that was contrary to (or an unreasonable application of) this Court's decision in *Johnson*. Pet. 15-29. It did not. The defendant in *Johnson* was indicted for murder, involuntary manslaughter, aggravated robbery, and grand theft. 467 U.S. at 494-495. Over the prosecution's objection, the trial court during arraignment accepted Johnson's guilty pleas to the lesser included offenses of involuntary manslaughter and grand theft, and then granted his motion to dismiss the two most serious charges on the ground that double jeopardy barred further prosecution. *Id.* at 494, 496. The judgment was affirmed on appeal in the Ohio state courts. *Id.* at 494, 496-497.

This Court reversed, concluding that the double jeopardy proscription against multiple prosecutions, based on principles of finality and prevention of prosecutorial overreaching, would not be contravened by continuing the prosecution. *Johnson*, 467 U.S. at 501. The Court noted that Johnson had offered to resolve only part of the charges against him, and that the prosecution

had objected to disposing of any of the counts without a trial. *Id.* The Court explained that the acceptance of a guilty plea to lesser-included-offenses while charges on the greater offenses remain pending did not suggest the type of "implied acquittal," implicating double jeopardy protection, that could be inferred from a verdict convicting a defendant on a lesser-included offense rendered by a jury that was charged to consider both the greater and lesser offenses. *Id*. at 502. In addition, the Court observed that short-circuiting the prosecution would deny the State its right to one full and fair opportunity to gain convictions on the more serious charges. *Id*. at 502.

The Court's decision rejecting the double jeopardy claim in *Johnson* does not establish (let alone clearly establish) that Jurado's double jeopardy claim was meritorious. To the contrary: as both the California Supreme Court and the Ninth Circuit recognized in denying relief, Jurado's claim is not materially distinguishable from the claim that was rejected in *Johnson*. Like the defendant in *Johnson*, Jurado attempted to use the Double Jeopardy Clause not as a shield from prosecutorial overreaching but as a sword to deny the State "one full and fair opportunity to gain convictions on the more serious charge[]" of the capital offense of special-circumstance murder. *Johnson,* 467 U.S. at 502. And, like the plea in *Johnson,* Jurado's guilty plea to murder did not imply that he somehow had been acquitted of the pending special-circumstance murder charge. *See id.* at 501-502.

Jurado contends that jeopardy attached at the time of his short-lived guilty plea because, unlike in *Johnson*, the prosecution here did not formally object to the plea. Pet. 17-25. As the court of appeals explained below, however, it was clear that the prosecutor opposed the guilty plea: he refused to sign the plea form and then promptly pursued an appeal that, when successful, resulted in the withdrawal of the guilty plea—as the prosecutor had predicted at the time of the plea. Pet. App. A4 (statement by prosecutor noting that he "wanted counsel to be aware that the plea could conceivably be set aside at a later time depending on how that procedure goes"). Under these circumstances, the state court correctly ruled that the prosecutor's actions were equivalent to an objection, and the court of appeals below correctly held that the state court's ruling was not objectively unreasonable under § 2254(d). *Id.*

Moreover, because this Court *rejected* the double-jeopardy claim in *Johnson*, it never held or squarely addressed whether a formal objection by the prosecutor is necessary to defeat a double-jeopardy claim in the guilty-plea context. Indeed, *Johnson* never even addressed whether jeopardy attaches with the trial court's acceptance of a guilty plea (as Jurado assumes it does), rather than attaching later, such as at imposition of the judgment and sentence based on the plea (an event that never occurred in Jurado's case). *See, e.g.*, *United States v. Santiago Soto*, 825 F.2d 616, 618-620 (1st Cir. 1987); *Gilmore v. Zimmerman*, 793 F.2d 564, 571 (3rd Cir. 1986).

Citing a portion of the opinion in *Sattazhan v. Pennsylvania*, 537 U.S. 101 (2003), that was joined by only three Justices, Jurado argues that the Double Jeopardy Clause prohibited his trial and conviction on the greater offense of capital murder because he already had been convicted, by his plea, of the "lesser included offense of first-degree murder." Pet. 26-27 (citing *Sattazhan*, 537 U.S. at 111-112 (plurality opn.)). Even if the plurality opinion invoked by Jurado qualified as "clearly established Federal law," however, the court of appeals was correct in recognizing that it would not provide a basis for relief in this case. See Pet. App. A16 n. 1. *Sattazhan* did not confront the question addressed in *Johnson*, where the Court held that a defendant's partial guilty plea as to lesser offenses did not bar the State from prosecuting him for pending greater-offense charges. Under *Johnson*, there would be no double jeopardy violation in this case even if the special-circumstance allegation were deemed to create an offense greater than the first-degree murder offense to which Jurado initially pleaded guilty.

Finally, Jurado argues that double jeopardy barred his trial and conviction for capital murder under *Grady v. Corbin,* 495 U.S. 508 (1990), because the capital murder charge required proof of the "same conduct" for which he was charged (and initially pleaded guilty) in the first-degree murder count. Pet. 27-29. That argument fails for two reasons. First, Jurado ignores that *Corbin* involved successive, distinct prosecutions, *see* 495 U.S. at 511-514; it did not address or resolve—as *Johnson* did—the constitutional validity of

continued prosecution on remaining charges following only a partial guilty plea. Second, this Court overruled *Corbin* in *United States v. Dixon,* 509 U.S. 688, 703-712 (1993), which re-affirmed the traditional understanding that double jeopardy protection against successive prosecutions depends on whether the underlying offenses comprise the "same elements" (rather than depending on whether, to establish an essential element of an offense charged in the subsequent prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted). So the court of appeals in this case had no reason even to consider *Grady*: The relevant "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d) is the precedent existing at the time of the last state court adjudication on the merits. *See Greene v. Fisher*, 565 U.S. 34, 35-36, 38-40 (2011). Here, that most recent adjudication was rendered by the California Supreme Court in 2006—more than a decade after this *Dixon* had overruled *Corbin*. Pet. App. D46.

CONCLUSION

The petition for a writ of certiorari should be denied.

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