

**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

REPLY TO BRIEF IN OPPOSITION

(Capital Case)

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Introduction

Petitioner Robert Jurado (“petitioner”) respectfully submits this reply to the brief in opposition, limited to addressing new points raised in the brief in opposition.

I. Exclusion of the videotaped confession from the penalty-phase defense case in mitigation.

Respondent argues that there was no error in excluding the videotaped confession to the murder of Holloway in Jurado’s capital sentencing trial because it was unreliable hearsay, citing *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (*Scheffer*). (Brief in Opposition, pp. 7, 9.) *Scheffer* involved the exclusion of a polygraph examination in a non-capital trial. *Scheffer* at p. 305. *Scheffer* is inapposite because it did not address a defendant’s right to present mitigating evidence in a capital sentencing trial.

Respondent’s hearsay argument is premised on assertion that “the constitution does not generally require a state court to admit traditionally-inadmissible hearsay testimony” Brief in Opposition, p. 9. The argument fails for the simple reason that when seeking the introduction of the videotaped confession, trial defense counsel expressly requested a limiting instruction that the statements were not offered for the truth of the matter asserted. App. J, pp. 185, 189. The videotaped confession was being offered for non-hearsay purposes.

Nor was the videotaped confession unreliable as respondent asserts. Brief in Opposition, pp. 10-11. This was the state’s evidence sought to be introduced for the

non-hearsay purpose of showing remorse, and which also was relevant mitigating evidence of acceptance of responsibility and Jurado's humanity. The reliability of the videotaped confession was established by the fact that

- (1) Jurado confessed to the murder, which should be viewed as reliable because it was a statement against penal interest,
- (2) the reliability of the confession was reinforced by the jury's guilt-phase verdicts,
- (3) the state itself videotaped the confession, thereby ensuring the accuracy of the words spoken and the gestures expressed by Jurado, and
- (4) immediately after the custodial interrogation Jurado accompanied the detectives to the crime scene and showed them where the murder weapon was located, further reinforcing the reliability of his confession. (Petition, pp. 10-12.)

The videotaped confession was highly reliable. The scope of a capital defendant's constitutional right to present mitigating evidence extends to the right to present evidence of a post-arrest videotaped custodial confession to the murder where it is admitted for non-hearsay purposes. See *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Green v. Georgia*, 442 U.S. 95 (1979).

II. The double jeopardy violation.

Respondent notes that the state objected to the taking of the plea from Jurado without obtaining a factual basis directly from Jurado. (Brief in Opposition, p. 3.) But

respondent omits the salient fact that this resulted in the giving of testimony by the accused – something the defense had objected to but which the state demanded in order to secure an enforceable plea by Jurado. This demonstrates that (1) the state sought and obtained an advantage by the plea, and (2) the state encouraged a valid, enforceable plea and thus did not object to the plea. App. K, pp. 253-267.

Respondent notes that the court complied with the state’s request to take a factual basis from Jurado. (Brief in Opposition, p. 3.) But respondent omits the salient fact that the court accepted the plea and then entered verdicts against Jurado of guilty of conspiracy to commit murder (count 1), guilty of first-degree murder (count 2), and found true that weapon-use enhancement attached thereto. App. K, pp. 265-267.

Respondent states that “[b]efore 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.” (Brief in Opposition, p. 3.) But respondent omits the salient fact that one day before filing the petition – and three weeks after the guilty verdicts were entered by the trial judge – the state’s probation department interviewed Jurado for sentencing. App. L., p. 275 [“PERSONAL INTERVIEW WITH DEFENDANT”]. The state gathered material information from Jurado during this interview, including the following: “According to Mr. Jurado, the whole event revolved around his kidnapping a week and a half before the offense. He was kidnapped due to a misunderstanding that took place a year ago.

The persons that kidnapped him are dangerous and are heavily involved in the use and sales of narcotics. He believed that Terry [Hollaway] was “snitching” and he feared for his life.” App. L., p. 275. Jurado “expressed remorse for his actions and said he did not have a right to take Terry’s life. Further, he is sorry he hurt Terry’s family and expressed sadness for her mother.” App. L., p. 275. The fact that the state conducted a personal interview of Jurado after the plea was accepted and entered demonstrates overreaching by the state to gain an advantage from the plea.

Finally, respondent argues that the “same conduct” test set forth in *Grady v. Corbin*, 495 U.S. 508 (1990) – which was the law at the time of petitioner’s asserted Double Jeopardy violation but was subsequently overruled by *United States v. Dixon*, 509 U.S. 688 (1993) (*Dixon*) – is inapplicable because under AEDPA the *Grady* decision cannot be considered. (Brief in Opposition, p. 16 [“”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 [court in] *Dixon* had overruled *Corbin*.”].) Respondent is mistaken. Analysis of the underlying issue whether jeopardy attached when the trial court accepted Jurado’s guilty pleas and barred further prosecution necessarily involves consideration of the law that applied at that time – i.e., at the time of the alleged violation of double jeopardy. See *Williams v.*

Taylor, 529 U.S. 362, 412 (2000) (holding that “clearly established Federal law” refers only to U.S. Supreme Court decisions at time of alleged violation).

Conclusion

For the reasons expressed above and in the Petition, 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: March 31, 2022

By:



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