No. 04-928

In The
Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

On Writ Of Certiorari To The Oregon Supreme Court

BRIEF FOR RESPONDENT RANDY LEE GUZEK

J. KEVIN HUNT, ESQ.
PMB No. 167
19093 S. Beavercreek Rd.
Oregon City, Oregon 97045
Tel. (503) 650-7782

RICHARD L. WOLF, ESQ.
Counsel of Record
12940 N.W. Marina Way
Portland, Oregon 97231
Tel. (503) 384-0910

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondent Guzek rejects Petitioner's "Question Presented," because this case does not involve "residual" or "lingering" doubt, but rather presents the following question:

"Should the writ of certiorari be dismissed as improvidently granted for want of jurisdiction, or, should a question be certified to the Oregon Supreme Court concerning application of Or. Rev. Stat. § 138.012 to Respondent's mother's testimony, where remand or certification of such question will confirm the Oregon Supreme Court's plainly erroneous reading of the trial court record and will reveal that there is no live *federal*-law case or controversy because *state* law entitles Mr. Guzek to all the relief he received below, thus making any ruling by this Court on the merits entirely advisory in nature?"

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS:

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Mr. Guzek presents this Statement of the Case to apprise the Court of salient facts omitted from Petitioner's brief. These facts demonstrate that the Court lacks jurisdiction and that the issue of 'residual doubt' was not put in issue by Mr. Guzek, the State of Oregon or the Oregon Supreme Court's decision.

In a 1988 bifurcated trial, Respondent Guzek was convicted of two counts of aggravated murder and sentenced to death by an Oregon jury. That jury heard prosecution testimony in both trial phases from his codefendants, Mark Wilson and Donald Cathey, that Mr. Guzek was the mastermind of the murders, ringleader of the trio, and the most morally culpable for the double homicide who accordingly deserved to die.[1] The codefendants received life sentences with a possibility of parole in exchange for testifying against Mr. Guzek. That jury also heard testimony at the guilt-innocence phase, offered to establish alibi, from Mr. Guzek's grandfather, that Respondent was with him from 9:00 p.m. until 2:00 a.m. and from Mr. Guzek's mother that Respondent was asleep at her house from 2:16 a.m. until 4:30 a.m., thereby accounting for Respondent's whereabouts preceding and during the commission of the double murder which occurred in the early morning hours of June 28, 1987. (J.A. 36-37, 67-68). As mandated by a provision of Oregon's capital sentencing statutory scheme – Or. Rev. Stat. § 163.150(1)(a) – the jury was instructed "that all evidence previously offered and

[1] Tr. 9/26/1997 at 236; Tr. 11/3/1997 at 46; Tr. 11/4/1997 at 18; Tr. 11/4/1997 at 33.

received [during the guilt-innocence phase] may be considered for purposes of the sentencing hearing."

In 1990, the Oregon Supreme Court affirmed Mr. Guzek's convictions but vacated his death sentences, finding unconstitutional as applied the Oregon capital sentencing statute in place during the 1988 trial, which was modeled on the Texas statute at issue in *Penry v. Lynaugh*, 492 U.S. 302 (1989). *See Wagner v. Oregon*, 492 U.S. 914 (1989), *on remand*, *State v. Wagner*, 309 Or. 5, 786 P.2d 93 (1990); *State v. Guzek*, 310 Or. 299, 797 P.2d 1031 (1990) ("*Guzek I*"). Mr. Guzek's 1991 penalty phase retrial, employing a new "fourth question" added to allow the jury to fully consider *all mitigating evidence*, resulted in another death sentence. In 1995, the Oregon Supreme Court vacated that death sentence because the trial court had admitted aggravating evidence that was irrelevant to the statutory capital sentencing special verdict questions jurors were required to answer in Mr. Guzek's 1991 sentencing trial. *State v. Guzek*, 322 Or. 245, 906 P.2d 272 (1995) (*Guzek II*). Before the 1997 penalty-only retrial, Mr. Guzek's grandfather died. At both the 1991 and 1997 penalty phase retrials, the codefendants refused to testify.

In the interval between the original 1988 bifurcated aggravated murder/capital sentencing trial and the 1997 re-sentencing proceeding, the codefendant accusers made numerous oral and written statements that greatly undermined their original 1988 trial testimony accusing Mr. Guzek of being the ringleader of the crimes for which they were all convicted. These subsequent statements by the codefendant accusers included express recantations of prior testimony about Mr. Guzek's purported ringleader status, statements that they would now "tell the truth" about the circumstances of the offense if they testified

again, and statements that they would refuse to so testify because they feared that if they told the truth in the retrial, the prosecutor would void their life-saving plea agreements and seek the death penalty against them. (J.A. 103-07).

During the 1997 retrial, the prosecution offered, pursuant to Or. Rev. Stat. § 138.012, the codefendants' prior recorded testimony from the original 1988 trial, which the trial court admitted in evidence by having police cadet surrogates read it to the jury.[2] Mr. Guzek sought to impeach the codefendants' prior recorded testimony with, *inter alia*, the live testimony of his mother and the prior

---

[2] Or. Rev. Stat. § 138.012 provides in relevant part that:

"(2)(a) If a reviewing court finds prejudicial error in the sentencing proceeding only, the court may set aside the sentence of death and remand the case to the trial court. No error in the sentencing proceeding results in reversal of the defendant's conviction for aggravated murder. Upon remand, and at the election of the state, the trial court shall either:

(2)(A) * * *

(2)(B) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding to determine if the defendant shall be sentenced to:

(i) Death;

(ii) Imprisonment for life without the possibility of release or parole; or

(iii) Imprisonment for life [with the possibility of parole].

(2)(b) The new sentencing proceeding is governed by the provisions of ORS 163.150(1), (2), (3) and (5). A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence."

recorded testimony of his deceased grandfather from the 1988 trial regarding Mr. Guzek's whereabouts on the night of the murders. (J.A. 108-09). The trial court refused to permit both the mother's and grandfather's 'alibi testimony'[3] and also excluded eight other items of impeachment evidence, including the codefendants' post-1988 recantations. (J.A. 103-08). The 1997 jury again returned sentences of death.

On direct review of the 1997 death sentences by the Oregon Supreme Court, Petitioner Oregon acknowledged reversible error mandating another penalty retrial, because of the trial court's refusal to instruct the sentencing jury that it could return a sentence of life without possibility of parole. That acknowledgement and the Oregon high court's resulting decision rested entirely on state law and thus will not be disturbed regardless of the resolution of Petitioner's claims before this Court. *State v. Guzek*, 336 Or. 424, 426, 86 P.3d 1106, 1108 (2004) (*Guzek III*); App. to Pet. for Cert. at 7.

The Oregon Supreme Court opined on another issue it believed likely to recur on retrial of the penalty phase. It found reversible error in the trial court's refusal to admit the testimony of Mr. Guzek's grandfather and mother and eight other excluded items of impeachment evidence. *Id*. 336 Or. at 447, 86 P.3d at 1119, App. to Pet. for Cert. at 38. Regarding the prior recorded testimony of Mr. Guzek's

[3] Respondent Guzek places scare quotes around 'alibi evidence' and 'alibi testimony' where those terms refer to the offer of mother and grandfather's testimony in the 1997 penalty retrial, because in that proceeding the testimony at issue was offered for purposes of rebutting and impeaching the state's case for a death sentence and not as evidence of innocence.

grandfather from the 1988 trial, the court held that its admission was required by Or. Rev. Stat. § 138.012, set forth in footnote 2 *ante*, which makes all testimony offered at the original guilt-innocence trial relevant and admissible *per se* in a penalty phase retrial as a matter of state law, by virtue of its having been adduced in the original trial. That statute also permits "either party . . . [to] recall any witness who testified at the prior trial. . . ." *Id*. 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44. The court held:

> The transcript of defendant's grandfather's testimony – like the transcript of any other witness's testimony – was relevant and subject to consideration in the penalty phase, regardless of its substance, because it was "previously offered and received" during the trial on the issue of guilt. Or. Rev. Stat. § 163.150(1)(a); *see also* Or. Rev. Stat. § 138.012(2)(b) (if reviewing court vacates death penalty, transcript of all testimony, all exhibits, and other evidence properly admitted in prior guilt and penalty-phase proceedings deemed admissible in remanded penalty-phase proceeding). The trial court therefore erred in sustaining the state's objection to admission of that evidence.

Guzek III, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44.

Mr. Guzek's mother, like his grandfather, testified at his original 1988 guilt-innocence trial. (J.A. 60-79). In the proceedings below, however, all members of the Oregon Supreme Court misapprehended the trial court record and mistakenly assumed that Mr. Guzek "did not seek to introduce [his mother's testimony] during the guilt phase" and thus that Mr. Guzek's mother did *not* testify at his

original guilt-innocence trial in 1988. *Guzek III*, 336 Or. at 462, 86 P.3d at 1127, App. to Pet. for Cert. at 60-61. *Accord*, *id*. 336 Or. at 468, 86 P.3d at 1131, App. to Pet. for Cert. at 70 (Gillette, J., dissenting) (mistakenly assuming that "the testimony of defendant's mother . . . had not been previously offered" at the 1988 guilt-innocence trial). *See* pp. 11-14, *post* (further documenting the Oregon Supreme Court's clearly erroneous understanding of the 1988 trial record). As a result, the court below mistakenly concluded that its holding with regard to the grandfather's testimony under Or. Rev. Stat. § 138.012 did not also control the admissibility of the mother's 'alibi testimony' on retrial, and as a result proceeded to analyze the admissibility of her testimony under the Eighth Amendment.

In holding that the Eighth Amendment mandated admission of the mother's 'alibi testimony,' the Oregon Supreme Court majority stated that this was not a 'residual doubt' case, distinguishing the purpose for which the 'alibi testimony' was offered in Mr. Guzek's case from the facts underlying *Franklin v. Lynaugh*, 487 U.S. 164 (1988), in which a plurality of this Court said that the Eighth Amendment does not require capital sentencing jurors to be instructed concerning " 'residual' or 'lingering' doubt" as to a defendant's guilt.[4]

[4] "We note that, in *Franklin v. Lynaugh* . . . a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the *Eighth Amendment* does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase. However, nothing in that decision lessened the direction from *Lockett*, *Bell*, *Eddings*, and *Green* that the *Eighth Amendment does* require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the

(Continued on following page)

Two Justices dissenting in part agreed that a new sentencing hearing was required under state law. They also accepted the majority's conclusion in regard to the grandfather's testimony that the prior recorded testimony of any witness at the original 1988 guilt-innocence trial is relevant and admissible *per se* under Or. Rev. Stat. § 138.012 precisely because it had been admitted in the original 1988 trial. But, as did the majority, the dissenters misapprehended the trial court record, erroneously presuming the mother did not testify in the original 1988 trial. *See* pp. 11-14 *post*. Accordingly, the dissenters likewise did not apply Or. Rev. Stat § 138.012 in considering the admissibility of the mother's testimony.

Unlike the majority, the dissenters characterized the mother's testimony as "residual doubt evidence" and would have held it inadmissible based on this Court's discussion of the proposed "residual doubt" jury instruction in *Franklin*.

STATEMENT REGARDING THIS COURT'S LACK OF JURISDICTION

For the reasons laid out at pp. 10-19 *post*, this Court is without jurisdiction to hear this case.

---

defendant's culpability in the offense. Simply stated, a 'residual' or 'lingering doubt' remaining from the guilt phase, *Franklin*, 487 U.S. at 174, is qualitatively different from actual 'evidence' proffered during the penalty phase." [Internal citations omitted.]

Guzek III, 336 Or. at 463, n. 30, 86 P.3d at 1128, n. 30, App. to Pet. for Cert. at 62-63 (emphasis in original).

SUMMARY OF ARGUMENT

A sentencing retrial will occur regardless of how this Court resolves the issues before it. At that re-sentencing proceeding, the trial court will be obliged to admit the testimony of Mr. Guzek's mother as a matter of *state* law, again regardless of how this Court resolves the federal-law issue on which it granted certiorari. Any decision the Court might render on the federal-law issue accordingly would be advisory and beyond the Court's jurisdiction.

In a portion of the Oregon Supreme Court decision below that is not under review by this Court, the Oregon Supreme Court ordered the trial court on re-sentencing to admit the testimony of Mr. Guzek's grandfather. In so doing, the Oregon high court expressly directed the trial court that "[t]he transcript of defendant's grandfather's testimony – *like the transcript of any other witness's testimony* – was relevant and subject to consideration in the penalty phase, *regardless of its substance*, because it was '*previously offered and received' during the trial on the issue of guilt*." *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44. This state-law directive makes the testimony of Mr. Guzek's mother equally "relevant and subject to consideration" in the upcoming retrial of the penalty phase because the testimony of Mr. Guzek's mother, like that of his grandfather, "was 'previously offered and received' during [Mr. Guzek's 1988] trial on the issue of guilt." (J.A. 60-79.)

The reason the Oregon Supreme Court did not expressly extend that state-law holding to Mr. Guzek's mother as well as his grandfather – both of whose testimony is similar in substance – is because the Oregon Supreme Court made a clear mistake of ineluctable fact about the prior proceedings. Although Mr. Guzek's mother

testified at the 1988 trial on the issue of alibi (J.A. 60-79), all members of the Oregon Supreme Court erroneously thought that she had *not* testified – *i.e.*, that Mr. Guzek "did *not* seek to introduce [his mother's testimony] during the guilt phase." *Guzek III*, 336 Or. at 462, 86 P.3d at 1127, App. to Pet. for Cert. at 60-61 (emphasis added). It was only because of this mistaken belief that there was a procedural "difference" between the proposed retrial testimony of Mr. Guzek's grandfather and that of his mother that the Oregon Supreme Court considered whether there was a federal-law basis for admitting the mother's testimony.

Oregon, the losing party below, did not seek rehearing or clarification of the Oregon Supreme Court's mistake, instead seeking review by this Court. But notwithstanding anything that occurs in this Court, when the case goes back for re-sentencing, the trial judge will *not* be under the same misapprehension about the record of its prior proceedings, and instead will be under the Oregon Supreme Court's directive to permit the jury to hear and consider "*any* . . . witness's testimony" – including the mother's – that "was 'previously offered and received' during the trial on the issue of guilt." Because any decision by this Court on a federal question will have no effect on the ongoing proceedings in the case, any decision the Court might render would be entirely advisory in nature and thus outside the Court's limited jurisdiction to hear "case[s] and controvers[ies]." The Court should dismiss the writ of certiorari as improvidently granted or certify a question or remand the case to the Oregon Supreme Court for clarification.

In any event, there is no federal-law basis for overturning the ruling below – that the jury should be permitted to hear the prior testimony of Mr. Guzek's mother.

Whether admitted as impeachment or as substantive evidence, the mother's proffered testimony is relevant *per se* as a matter of state statutory law. The trial court's refusal to admit the testimony at issue thus precluded Mr. Guzek from introducing evidence material to the jury's determination of his culpable mental state and to other circumstances of the offense that militate against a death sentence, in violation not only of state law but also of the Eighth Amendment and the Fourteenth Amendment Due Process Clause.

ARGUMENT

I

This Court is without jurisdiction to hear this case because no federal case or controversy is properly before the Court, and any decision the Court renders will be purely advisory and have no effect on the remaining proceedings and outcomes in the case.

Certiorari was improvidently granted because no federal question is properly before this Court. This is because at his impending retrial, Mr. Guzek is entitled *as a matter of state law* to all of the relief granted to him below, without reference to any of the Oregon Supreme Court's *dicta* in regard to the Eighth Amendment. Thus, adequate Oregon statutory law requires the admission of Mr. Guzek's 'alibi evidence' in his upcoming sentencing trial *independently* of any decision by the court below or by this Court as to whether admission of such evidence is required as well under the federal Constitution. Therefore, any judgment by this Court concerning that issue would

be contrary to U.S. Constitution Article III, to 28 U.S.C. § 1257, and to this Court's jurisprudence prohibiting the rendering of "advisory opinions."[5]

The Oregon Supreme Court expressly directed the trial court on retrial, pursuant to Or. Rev. Stat. § 138.012, to treat as relevant and admissible *per se* the prior testimony of "*any*" witness who testified at Mr. Guzek's 1988 guilt-innocence trial.[6] Because Mr. Guzek's mother testified at his 1988 guilt-innocence trial, this directive makes her testimony, as well as the grandfather's, *per se* relevant and admissible at Mr. Guzek's impending re-sentencing trial. The only reason the Oregon Supreme Court did not expressly apply the same reasoning to the mother's testimony, and instead went on to address the Eighth Amendment issue on

[5] There is a second reason the Court has no jurisdiction here, that Petitioner Oregon did not argue below that the testimony at issue was inadmissible by virtue of constituting "residual" or "lingering doubt" evidence. In its brief on direct review before the Oregon Supreme Court, Petitioner Oregon simply asserted that the 'alibi evidence' was "irrelevant," never once invoking the words "residual," or "lingering doubt," or this Court's holding in *Franklin* or any other case from this Court. That portion of Petitioner's brief in the state court is set forth as Respondent's Appendix 1.

[6] *See*, *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44 (stating that, on re-sentencing, "[e]ither party may recall any witness who testified at the prior trial or sentencing proceeding. . . "). Thus, Or. Rev. Stat. § 138.012(2)(b) makes no distinction between available and unavailable witnesses in rendering their prior testimony admissible in a penalty phase retrial. Nor does it distinguish between prior recorded testimony and live testimony by a witness who previously testified in either phase of a bifurcated trial. Because Mr. Guzek's mother is available, Or. Evid. Code 804 and Or. Rev. Stat. § 138.012(2)(b) may create a preference for producing her in person to reiterate her previously sworn testimony, thus enabling the re-sentencing jury to observe her demeanor. In any event, the form of the testimony admitted on retrial is a matter for the trial court to resolve in its discretion, and is not in issue in this case.

which this Court granted certiorari, is because all members of the Oregon Supreme Court mistakenly believed that mother had *not* testified at the original 1988 trial.

The Oregon Supreme Court majority and dissenting opinions in this case make clear that all participating members of that court erroneously assumed that Mr. Guzek's mother had *not* previously testified in the original 1988 trial. The majority said it was reviewing the admissibility of the grandfather's and mother's 'alibi evidence' under separate analytical bases "[b]ecause the analysis of their relevance is different . . . " *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43. The court did not, however, explain in this passage, why it thought "their relevance [was] different." That difference cannot be based on the content of the grandfather's and mother's testimony because the content was identical. The crime occurred in the early morning hours of June 28, 1987. The grandfather's testimony was entirely about Mr. Guzek's whereabouts during the *earlier* part of that period, from 9:00 p.m. on June 27th to 2 a.m. on June 28th. The mother's testimony was entirely about Mr. Guzek's whereabouts during the *later* part of that period, from 2:16 a.m. to 4:30 a.m. Thus, whatever made the grandfather's testimony relevant as a matter of state law under Or. Rev. Stat. § 138.012 also made the mother's testimony relevant under Or. Rev. Stat. § 138.012 – assuming (as is true, *see* J.A. 60-79) that such testimony by both witnesses was presented at the original 1988 trial.

Later in its opinion, the Oregon Supreme Court made clear why it treated identical kinds of testimony as statutorily *per se* relevant in the grandfather's case but not in the mother's case: while acknowledging that the grandfather had testified at the 1988 trial, it mistakenly believed

that the mother had *not* testified in 1988. Thus, when comparing Mr. Guzek's case to the facts of *Green v. Georgia*, 442 U.S. 95 (1979), the majority states:

> As in *Green*, defendant here already had been convicted of the murders of the victims, and, notwithstanding those earlier convictions, defendant sought to introduce evidence at his third penalty-phase proceeding – *which he did not seek to introduce during the guilt phase* – that, if believed, would have shown that he had not been present at the victims' home at the time of the murders.

Guzek III, 336 Or. at 462, 86 P.3d at 1127, App. to Pet. for Cert. at 60-61 (emphasis added).

The emphasized language plainly reveals the Oregon Supreme Court majority's mistake concerning the mother's testimony at the 1988 guilt-innocence trial. Any possible doubts are dispelled when the dissenting opinion is examined. Justice Gillette noted that "[t]he focus of the majority's analysis is on the testimony of defendant's mother, *which had not been offered previously* and which, like that of the grandfather, would (if believed) be wholly exculpatory." *Id*. 336 Or. at 468, 86 P.3d at 1131, App. to Pet. for Cert. at 70 (emphasis added).

The Oregon Supreme Court's mistaken belief – contrary to the record (J.A. 60-79) – that Mr. Guzek's mother had not previously testified as to alibi in the original 1988 trial is of critical importance to this Court's jurisdiction. The Oregon Supreme Court ruled *as a matter of state law* that Mr. Guzek's grandfather's 'alibi evidence' must be admitted at the impending re-sentencing trial pursuant to Or. Rev. Stat. § 138.012 because his testimony was previously admitted in the original 1988 trial and is therefore

per se relevant. Because of its erroneous assumption that Mr. Guzek's mother had not testified in the original trial, the Oregon Supreme Court, in addressing the admissibility of her proffered 'alibi' testimony, unwittingly deviated from its policy of deciding cases under state and subconstitutional law when possible,[7] and, solely because of that mistake, proceeded to address a federal constitutional issue.[8]

Notwithstanding the Oregon Supreme Court's mistake, its holding with regard to the grandfather's testimony obliges the trial court on re-sentencing to admit the

[7] *See, e.g., State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983) (Oregon Supreme Court first examines Oregon constitutional claims, only reaching federal constitutional claims when state constitutional level of inquiry is inadequate for rendering decision); *State v. Caraher*, 293 Or. 741, 653 P.2d 942 (1982) (Oregon Supreme Court will not resolve claims under state or federal Constitution, even if raised thereunder, when such claims may be resolved solely by resort to state statute). *See also* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 383 (1980) (explaining Oregon Supreme Court's methodology). Linde authored this article while a Justice of the Oregon Supreme Court.

[8] Because Mr. Guzek had obtained all the relief he sought below as a matter of state law, he had no basis for seeking rehearing of that portion of the Oregon Supreme Court's decision. In the briefing below, the state, like Mr. Guzek, identified no factual or legal distinctions between the grandfather's and the mother's testimony, and argued that both should be treated the same under state law. *See Guzek III*, 336 Or. at 468, n. 31, 86 P.3d at 1131, n. 31, App. to Pet. for Cert. at 69 (Gillette, J., dissenting) (noting that "[f]or some reason, the state did not, in its extensive briefing in this case, separately discuss either the grandfather's or the mother's testimony" – that reason, of course, being the one the court below misapprehended, that there was no difference in either the procedural posture or content of the two witnesses' 'alibi testimony'). Nonetheless, when the Oregon Supreme Court treated the two witnesses differently in its opinion, the state – the losing party – did not seek that court's rehearing on the point or otherwise seek clarification. Instead, it sought this Court's writ of certiorari.

mother's testimony as a matter of state law because her testimony, like the grandfather's, was admitted at the 1988 trial. The Oregon Supreme Court's directive could not be clearer: "The transcript of defendant's grandfather's testimony – like the transcript of *any other witness's testimony* – was *relevant and subject to consideration in the penalty phase, regardless of its substance*, because it was 'previously offered and received' during the trial on the issue of guilt." *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43 (emphasis added).[9]

An accurate assessment of the trial court record admits of no live case or controversy between the parties concerning a federal question. The evidence involved is clearly admissible at the re-sentencing trial pursuant to a controlling and nondiscretionary Oregon statute, Or. Rev. Stat. § 138.012, as authoritatively interpreted by the highest Oregon court in the decision below. That statute constitutes a ground independent of any federal-law rationale this Court might rely upon in any judgment rendered under the writ *sub judice*.

Regardless of any judgment this Court renders in the case, Mr. Guzek will undergo a new sentencing trial at which his mother's 'alibi testimony' will be admitted as a matter of state law as authoritatively interpreted by the Oregon Supreme Court in this very case. In such a posture, no opinion issued by this Court could be other than advisory in nature and thus outside the jurisdiction of the

[9] The second statute cited by the Oregon Supreme Court – Or. Rev. Stat. § 163.150(1)(a) (Pet. App. 1-2) – expressly mandates that capital sentencing jurors be instructed that they are to consider, in determining the appropriate penalty, all evidence admitted in both the guilt-innocence and the penalty phases. That statute has no exceptions.

Court. *See*, *e.g., Hewitt v. Helms*, 482 U.S. 755 (1987) ("The real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.") *Id*. at 761 (emphasis in original).

This Court should accordingly summarily dismiss the writ of certiorari as improvidently granted. *See Abdur'Rahman v. Bell*, 537 U.S. 88, 89 (2002) (writ of certiorari dismissed as improvidently granted because of doubts about the Court's jurisdiction); *Nike Inc. v. Kasky*, 539 U.S. 654, 658 (2003) (writ dismissed when, among other reasons, the Court deemed it appropriate to avoid "the premature adjudication of novel constitutional questions").

Alternatively, this Court should certify to the Oregon Supreme Court the questions (1) whether its decision below was premised on a misapprehension of fact, namely, that the mother did not testify at the 1988 trial; and (2) if so, whether, under a correct understanding of the testimony at the 1988 hearing, Or. Rev. Stat. § 138.012 or other state law compels the admission of the live or prior recorded 1988 testimony of Mr. Guzek's mother at his impending capital sentencing retrial?"[10] Respondent

[10] The Oregon version of the Uniform Certification of Questions of Law Act, codified as Or. Rev. Stat. § 28.200 *et seq*. provides, in relevant part:

> The [Oregon] Supreme Court may answer questions of law certified to it by the Supreme Court of the United States . . . when requested by the certifying court if there are involved in any proceedings before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of

(Continued on following page)

anticipates that once the Oregon Supreme Court corrects its misapprehension of the trial court record, it will hold that the mother's testimony is *per se* relevant and admissible pursuant to Or. Rev. Stat. § 138.012 as is the grandfather's prior recorded testimony. Respondent further anticipates that the Oregon Supreme Court will then disavow or vacate that portion of its opinion below predicated upon the Eighth Amendment, pursuant to the Oregon Supreme Court decisions cited in footnote 7 *ante*. Regardless of whether the Oregon high court takes the latter step, its certified answer that the mother's testimony is admissible as a matter of state law would render its prior Eighth Amendment analysis *obiter dicta*, mooting the issue upon which the writ was granted and therefore compelling its dismissal for want of jurisdiction.

As a third alternative, the case should be summarily remanded to the Oregon Supreme Court for clarification of its *ratio decidendi* based upon an accurate assessment of the trial court record. *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (case remanded to Florida Supreme Court for clarification when this Court could not discern whether state court judgment was predicated solely upon state law); *Michigan v. Long*, 463 U.S. 1032 (1983) (addressing the circumstances under which this Court will remand a case to a state court for

---

the [Oregon] Supreme Court and the intermediate appellate courts of this state.

* * * A certification order shall set forth:

(1) The questions of law to be answered; and

(2) statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

clarification of the state court judgment, in order to determine whether this Court has jurisdiction). In *Long*, this Court stated that "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action." *Id.* 463 U.S. at 1041, n. 6. *See also California v. Krivda*, 409 U.S. 33 (1972) (*per curiam*);[11] *Enterprise Irrigation Dist. v. Farmer's Mutual Canal Co.*, 243 U.S. 157, 163-65 (1917) ("Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged.").[12]

Ordering one of the foregoing three alternatives is appropriate because, notwithstanding the Oregon Supreme Court's misapprehension of the trial court record and consequent discussion of a federal-law issue, the Oregon high court's decision and the Oregon statutory law it cites in regard to the grandfather's testimony conclusively require the trial court as a matter of adequate and independent state statutory law to admit the mother's

[11] "After briefing and argument . . . , we are unable to determine whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States, or upon the equivalent provision of the California Constitution, or both . . . We therefore vacate the judgment of the Supreme Court of California and remand the cause to that court for such further proceedings as may be appropriate."

409 U.S. at 34-35.

[12] "[W]e are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it."

243 U.S. at 163-65 (citing authority).

testimony at the re-sentencing trial. Because nothing this Court says on a federal-law issue can alter that outcome, there is no case or controversy concerning a federal question, and the Court has no constitutional basis for exercising jurisdiction.[13]

II

Contrary not only to state law but also to the Sixth and Eighth Amendments and the Fourteenth Amendment Due Process Clause, exclusion of the mother's testimony precluded Mr. Guzek from introducing evidence material to the jury's determination of the special verdict questions, including his culpable mental state, circumstances of the offense, and other reasons militating against a death sentence.

Whether offered as impeachment or as substantive evidence, the proffered 'alibi testimony' is made *per se*

[13] "[A] review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before" it. *Brown Shoe Co. Inc. v. United States*, 370 U.S. 294, 305-06 (1968) (question as to Court's jurisdiction first raised from the bench during oral argument); *accord Sibron v. New York*, 392 U.S. 40, 50 n. 8 (1968) (question as to Court's jurisdiction first arose during oral argument). *See also*, R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, at 202 (8th ed. 2002) (Where it is inaccurately asserted that a "state ground is not independent or adequate" and the Court is "misled into assuming there is no jurisdictional problem in reaching the federal question, and accordingly grants review," the Court may subsequently "make its own thorough examination of the record and uncover a jurisdictional fault. If so . . . the Court will . . . dismiss the case for want of jurisdiction or as improvidently granted.").

relevant and admissible on re-sentencing by Oregon statute because that testimony was previously offered at Mr. Guzek's original 1988 trial. *See* Or. Rev. Stat. §§ 138.012, 163.150. That testimony also (1) is material to the three (sometimes four)[14] statutory questions submitted to the jury which determine whether a death sentence may be imposed and (2) is an essential component of Mr. Guzek's ability to rebut and impeach the state's aggravation case against him. For all these reasons, exclusion of that evidence not only violated state law, *see* Point I above, but also violated the Eighth and Fourteenth Amendments to the United States Constitution.

This Court has stated that in capital cases, the Eighth Amendment provides both substantive and procedural protections.[15] Likewise, the Fourteenth Amendment Due Process Clause guarantees fair trial procedures, including a fair capital sentencing hearing.[16] Decisions of this Court construing federal constitutional procedural requirements for capital sentencing proceedings have sometimes been grounded in the Eighth Amendment, at other times in the Fourteenth Amendment's Due Process Clause, and often in both. In *Gardner v. Florida*, 430 U.S. 349 (1977), for example, eight Justices agreed that a Florida procedure

[14] The third statutory special verdict sentencing question – whether the homicide was an unreasonable response to victim provocation – was not "raised by the evidence," and accordingly was not submitted to the jury, by stipulation. *See* Or. Rev. Stat. § 163.150(1)(b)(C) set forth at Pet. App. 3.

[15] *See Ford v. Wainwright*, 477 U.S. 399, 405 (1986) ("[T]he Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty . . . ").

[16] *In re Winship*, 397 U.S. 358 (1970); *Pointer v. Texas*, 380 U.S. 400 (1965).

governing the admissibility of evidence at the capital-sentencing phase violated the Constitution, with some Justices resting their decision on the Eighth and Fourteenth Amendments and other Justices resting it on the Fourteenth Amendment Due Process Clause alone. *See id*. at 362 (plurality opinion on Eighth Amendment grounds); *id*. at 363-64 (White, J., concurring on due process grounds). *Compare*, *e.g.*, *Green v. Georgia*, *supra* (the trial court's refusal to permit a capital defendant at the sentencing phase to introduce the testimony of a witness to whom the codefendant confided that he sent the defendant on an errand before personally killing the victim violated the Fourteenth Amendment Due Process Clause) *with*, *e.g.*, *Penry v. Lynaugh*, *supra*, 492 U.S. at 302 (vacating a death sentence imposed under a statute nearly identical to Oregon's because the "State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence" revealing the defendant's relatively low level of culpability).

Similarly, in *Simmons v. South Carolina*, 512 U.S. 154 (1994), seven of this Court's Justices agreed that it was procedurally unconstitutional for the state trial court to fail to instruct the capital sentencing jury of the fact that under the state's law, a life sentence carried no possibility of parole, where the life sentence was the jury's only alternative to a death sentence, and the state's evidence placed the capital defendant's future dangerousness in issue. As in *Gardner*, disagreements among the concurring opinions as to whether the unconstitutionality arose from violation of the Eighth, or the Fourteenth, Amendment, or both, produced a four-Justice plurality opinion stating the Fourteenth Amendment Due Process Clause to be the

source of the right violated, but acknowledging the interplay between Eighth and Fourteenth Amendment procedural fairness requirements in capital cases:

> In *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court held that a defendant was denied due process by the refusal of the state trial court to admit evidence of the defendant's good behavior in prison in the penalty phase of his capital trial. Although the majority opinion stressed that the defendant's good behavior in prison was "relevant evidence in mitigation of punishment," and thus admissible under the Eighth Amendment, *id*., at 4, citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), the *Skipper* opinion expressly noted that the Court's conclusion also was compelled by the Due Process Clause. The Court explained that where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal. 476 U.S., at 5, n. 1. *See also id*., at 9 (Powell, J., opinion concurring in judgment) ("Because petitioner was not allowed to rebut evidence and argument used against him," the defendant clearly was denied due process).

Simmons, 512 U.S. at 154.

In *Penry v. Lynaugh*, *supra*, this Court noted, in vacating a death sentence under a statute nearly identical to Oregon's:

> [I]t was clear from *Lockett* and *Eddings*, that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence

> relevant to the defendant's background or character or the circumstances of the offense that mitigate against imposing the death penalty.

Id. 492 U.S. at 302.

In *Kelly v. South Carolina*, 534 U.S. 246 a majority of this Court held that Fourteenth Amendment due process was violated when the trial judge excluded a capital defendant's evidence that he would never be paroled if the jury opted for a life sentence.

Given the overlapping requirements of fair capital procedures under the Eighth and Fourteenth Amendments and under the Fourteenth Amendment Due Process Clause alone, and this Court's prior holding in *Skipper* that denial of a defendant's right to present evidence militating against a death sentence may violate both constitutional provisions, Mr. Guzek invokes both provisions here, as he did below. Below, Mr. Guzek also grounded his claims in the Confrontation Clause of the Sixth Amendment, which he likewise invokes here.[17] (Mr. Guzek reiterates, however, that his claims are fully grounded in the first instance under *state* statutory law.)

[17] *See*, *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (Sixth Amendment Confrontation Clause applies to states); *see also*, *Crawford v. Washington*, 541 U.S. 36, 50-51, 57, 68 (2004) (in absence of *adequate* opportunity for prior cross-examination, admission of prior recorded testimony of accuser without confrontation in subsequent proceeding, violates Confrontation Clause).

A. Excluding the mother's 'alibi evidence' unconstitutionally prevented Mr. Guzek from demonstrating to the jurors that the evidence of his guilt was not morally sufficient to justify his execution – as it must be under Oregon law to permit a death sentence.

The Oregon Supreme Court was correct in holding that the Eighth Amendment gave Mr. Guzek the right to respond to any evidence the prosecution offered in support of a death sentence that related (*inter alia*) to the "circumstances of the offense." As this Court has held, "[t]he sentencer must be able to consider and give effect" to any evidence that enables it to reach "'*a reasoned moral response* to the defendant's background, character, *and crime*.'" *Penry*, *supra*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis added)). *See Penry v. Lynaugh*, *supra*; *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Lockett v. Ohio*, 438 U.S. 586 (1978).

As is noted above, Oregon statutory law as authoritatively interpreted by the Oregon Supreme Court makes relevant and admissible at the penalty phase *all* evidence admitted at the guilt-innocence phase. Or. Rev. Stat. §§ 138.012, 163.150 (discussed p. 11, *ante*). These provisions require and enable the re-sentencing jury to revisit all the evidence of the crime and to make a judgment that the death penalty not only is *factually* warranted by the evidence of the crime (the issue litigated at the guilt-innocence phase), but also and in addition that execution is *morally* warranted by the evidence of the crime in its entirety (the issue at the penalty phase).

Oregon law is clear that the judgment the jury is to make at the capital sentencing phase – about the crime as

well as the defendant – is a *moral* one that transcends the factual questions that govern the decision at the guilt-innocence phase. In *State v. Wagner*, 309 Or. 5, 786 P.2d 93 (1990), the Oregon Supreme Court authoritatively interpreted the statutory "fourth question" for the jury at the penalty phase of a capital trial: "Whether the defendant should receive a death sentence." Or. Rev. Stat. § 163.150(1)(b)(D). The Oregon high court held that this factor is not "subject to proof in the traditional sense," because "it frames a discretionary determination for the jury." *Id*. 309 Or. at 25, 786 P.2d at 100. In construing the fourth question, "we are asking the jury, in making its finding, to consider any mitigating aspect of defendant's life, alone or in combination, *not necessarily related causally to the offense*." *Id*. 309 Or. at 20, 786 P.2d at 101 (emphasis added).

Under Oregon law, the range of "mitigating circumstances" is far reaching.

> In answering all of these questions, you are to consider *any circumstances* you find to be mitigating in the defendant's background or character or the circumstances of the offense. Mitigating circumstances include *but are not limited to* such matters as the defendant's age, the extent and severity of the defendant's prior criminal conduct, and the extent of the mental and emotional pressure under which the defendant was acting at the time the murder was committed. *Any circumstance is mitigating if it leads any one of you to conclude that the defendant ought to receive a sentence less than death or that the answer to these questions should be "no." There is no burden of proof for mitigating circumstances. If any one of you believes a mitigating circumstance exists, you*

> *may consider it in answering all of the questions in this case.*

Or. Uniform Crim. Jur. Instr. No. 1319 (emphasis added). Under the Oregon Supreme Court's interpretation of Or. Rev. Stat. § 163.150(1)(b)(D), jurors are permitted to decline to impose a death sentence for *any* reason having to do with its assessment of the crime or the defendant. *State v. Compton*, 333 Or. 274, 283-84, 39 P.3d 833, 839 (2002). *See also State v. Pinnell*, 311 Or. 98, 117, 806 P.2d 110, 122 (1991) (the fourth question permits the jury to spare a defendant's life if the jury believes, under all the circumstances, that it is appropriate to do so); *State v. Simonsen*, 310 Or. 412, 414, 798 P.2d 241, 242 (1990) (the fourth question permits a jury to spare a defendant from the death penalty); *State v. Stevens*, 319 Or. 573, 584, 879 P.2d 162, 167-68 (1994) (under the "fourth question," juries may consider, "as a mitigating factor, any aspect of a defendant's character * * * that the defendant proffers as a basis for a sentence less than death.") *accord*, *Guzek II*, 322 Or. at 256, 906 P.2d at 279.

The substantive standard on which a death penalty is or is not warranted is a matter of state law. *See*, *e.g.*, *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). But once the state's standard identifies facts and circumstances about the crime and the defendant that morally mitigate against a death sentence, the state may not, consistently with the Eighth and Fourteenth Amendments, bar a defendant from adducing evidence in support of that basis for mitigation. *See*, *e.g.*, *Skipper v. South Carolina*, 476 U.S. at 5, n. 1 (where state law treats predictions about a defendant's future behavior as a factor relevant to sentencing, it violates the Eighth Amendment

to prevent him from adducing mitigating evidence revealing that he is capable of adjusting well in prison).

At the 1997 re-sentencing hearing, the state took advantage of its statutory right to reintroduce its guilt-innocence phase evidence in an effort to convince the sentencing jury that a sentence of death was morally warranted by the evidence of the crime. In particular, the state put the entire guilt phase testimony of Mr. Guzek's codefendants before the jury in support of the claim that the evidence of Mr. Guzek's actions on the night of the killings made him (1) morally culpable enough to deserve a death sentence and (2) *more* morally culpable than the codefendants, who received life sentences. Under the Oregon statutory law discussed at p. 24, *ante*, the contrary testimony of Mr. Guzek's own witnesses about his actions on the night of the killings was equally "relevant and subject to consideration in the penalty phase" as a basis for the jury's assessment whether the evidence of the crime, taken as a whole, provided not only a factually sufficient basis for convicting him (the sole focus of the guilt-innocence phase) but additionally, whether the evidence provided a *morally* sufficient basis for executing him that is required at the penalty phase. *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44. To forbid Mr. Guzek to present this evidence that state law makes "relevant and subject to consideration at the penalty phase" accordingly violates not only state law, but also the Eighth Amendment principle that capital defendants are entitled to the full moral weight of their evidence in favor of a sentence less than death. *See*, *e.g.*, *Penry v. Lynaugh*, *supra*, 492 U.S. at 323; *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *Eddings v. Oklahoma*,

supra, 455 U.S. at 114; *Lockett v. Ohio*, *supra*, 438 U.S. at 604.

B. Excluding the mother's testimony unconstitutionally prevented Mr. Guzek from demonstrating to the jurors that he did not "deliberately" kill the victims – a culpable mental state required by Oregon law to permit a death sentence – and that his culpability as a whole did not justify a death sentence.

Mr. Guzek had a statutory and constitutional right to put on his guilt-innocence phase 'alibi testimony' even if the state at the 1997 re-sentencing trial had not sought to reintroduce the testimony of his codefendants from the 1988 trial. But once the state did introduce the codefendants' testimony, Mr. Guzek had a particularly clear and compelling right, as a matter of state and federal law, to use his 'alibi testimony' to rebut the state's case. As the Oregon Supreme Court stated below:

> [t]he state did not offer the transcripts only because they were transcripts from the guilt-phase proceeding. Instead, the state relied on [codefendant] Wilson's and Cathey's transcript testimony, in lieu of their live testimony, also to prove two elements of the state's case in the *penalty-phase proceeding*, namely, that defendant had acted deliberately within the meaning of ORS 163.150(1)(b)(A) and that a probability existed that defendant would commit violent criminal acts in the future, thus posing a continuing threat to society within the meaning of ORS 163.150(1)(b)(B). In other words, even though Wilson's and Cathey's transcript testimony introduced during the penalty-phase proceeding consisted of their testimony from the guilt phase,

> the state put that testimony to an additional use in the penalty phase, specifically, to prove that defendant should receive a sentence of death. That is significant, because it demonstrates that the state made the credibility of Wilson and Cathey relevant to the *penalty-phase proceeding* and opened the door for defendant's impeachment of their testimony. *See State v. Johanesen*, 319 Or. 128, 135-37, 873 P.2d 1065 (1994) (discussing relevance of extrinsic evidence for impeaching credibility of witness).

Guzek III, 336 Or. at 449, 86 P.3d at 1120, App. to Pet. for Cert. at 40-41 (emphasis added).

As the Oregon Supreme Court held, Mr. Guzek's rejected evidence tended *inter alia* to rebut and impeach the state's evidence that he "deliberately" caused the deaths of the victims. "Deliberation" is one of the three (or in some cases four) statutory sentencing elements that is crucial to the jury's determination at the capital-sentencing phase in Oregon. *See* Or. Rev. Stat. § 163.150(1)(b), setting forth statutory special verdict issues, reproduced in full in Pet. App. at 1-6.

Oregon's statute under which Mr. Guzek was indicted and convicted provides that a person is guilty of aggravated murder if the perpetrator "intentionally causes the death of another human being." Or. Rev. Stat. § 163.095. In deciding whether to impose a death sentence after convicting a defendant of aggravated murder, the jury must additionally determine, *inter alia*, whether the defendant "deliberately" caused the death of the victim. Or. Rev. Stat. § 163.150(1)(b)(A). The mental state of "deliberate" is, under Oregon law, a more culpable one than "intentional." A person acts "intentionally" under

Oregon law if the person " . . . acts with a conscious objective to cause the result . . . " Or. Rev. Stat. § 161.105(7). "The word *deliberately* has a different meaning from *intentionally.* Deliberately means that state of mind that examines and considers whether a contemplated act should or should not be done. Deliberation is present if the thinking is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a careful weighing of the proposed decision." Oregon Uniform Criminal Jury Instruction No. 1319; *see State v. Quinn*, 290 Or. 383, 401, 623 P.2d 630, 640 (1981).

Because the original 1988 convicting trial jury had already found that Mr. Guzek acted "intentionally," the question whether he acted under the aggravating, more culpable "deliberate" mental state was the sole mental state question the 1997 re-sentencing jury had to resolve in deciding whether to impose a death sentence. On that crucial question, the only evidence presented by the state was the testimony of Mr. Guzek's codefendant-accusers that he conceived, plotted and choreographed the double homicide.

One way for Mr. Guzek to rebut the codefendants' testimony, of course, would be to show that he was elsewhere than the codefendants claimed when the crucial planning activities occurred or, at least, that there is a reasonable doubt on the issue. Sowing reasonable doubt as to deliberation in the mind of a single juror in this way would render Mr. Guzek ineligible for the death penalty regardless of whether he was present at the time of one or both homicides and regardless of whether he committed one or both of them intentionally. In other words, proof that Mr. Guzek was elsewhere at the time of the activities commensurate with deliberation would render

him ineligible to be executed (because the killing was not deliberate), notwithstanding the jury's belief that he was guilty of murder (because the killing was intentional).

Another way for Mr. Guzek to accomplish the same goal was to convince the penalty-phase jury that other aspects of the codefendants' testimony were false and thus that their testimony relating to deliberation should similarly be discredited. Under Oregon law, demonstrating that the codefendant-accusers lied about *any aspect* of the circumstances of the offense would entitle the jury to discredit other aspects of the codefendants' stories. *See* Or. Rev. Stat. § 10.095(3) (where supported by the evidence, trial judge may instruct the jurors that "[a] witness false in one part of the testimony of the witness is to be distrusted in others.") One well-established and long-recognized method of proving that the codefendants lied in at least some respects and thus are not entitled to belief in regard to their testimony on the question of deliberation was by way of "impeachment by contradiction," *i.e.*, by introducing other witnesses to testify to facts that contradict material facts to which the codefendants testified. *See*, *e.g.*, *Blue Ribbon Bldgs. v. Struthers*, 276 Or. 1199, 1205, 557 P.2d 1350, 1353 (1976) (impeachment of an adverse witness by production of a party's witness, who specifically contradicts testimony of the adverse witness on a material or non-collateral issue is an acceptable method of impeachment under Oregon law). If, that is, the jury believed that Mr. Guzek was elsewhere than the codefendants claimed at *any* time during which the crimes were being committed, doubts on that material issue would entitle the jurors to disregard or give little weight to the codefendants'

testimony in regard to other facts, including Mr. Guzek's alleged deliberation on the victims' deaths.[18]

If any part of Mr. Guzek's 'alibi testimony' were believed, therefore, it could have rebutted or impeached the state's evidence of deliberation in either or both of these two ways. First, crediting the testimony of Mr. Guzek's mother that he was at her home between 2:16 a.m. and 4:30 a.m., might have convinced the jury that (or at least created a reasonable doubt in the mind of one or more of the jurors as to whether) he was present at the time of events that were central to the prosecution's case in favor of deliberation.

Second, if one or more jurors concluded that Mr. Guzek was with his grandfather for several hours prior to the murders, such doubt about the codefendants' testimony on that score would entitle jurors to reject the codefendants' testimony on *all other matters*, including matters relating to Mr. Guzek's role in the murders, including deliberation. Based on the 'alibi testimony' of Mr.

[18] State evidentiary rules denoting what evidence is admissible, including what testimony is admissible "extrinsic" evidence, are different in each state and not subject to plenary interference by this Court absent their application in a manner that violates federal law. *See*, *e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Gardner*, *supra*, 430 U.S. at 362. As a matter of Eighth and Fourteenth Amendment jurisprudence, however, any evidence that under state law is material "to the defendant's background or character or the circumstances of the offense that mitigate against imposing the death penalty" is *constitutionally relevant* and cannot constitutionally be excluded at the penalty phase. *Penry*, *supra*, 492 U.S. at 327-28. *See Skipper v. South Carolina*, *supra*, 476 U.S. at 4-5 ("Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, . . . there is no question but that such inferences [adjustment to incarceration] would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.' ")

Guzek's grandfather and mother, one or more jurors might conclude that the codefendants lied to reduce their evident culpability and increase Mr. Guzek's. Under these circumstances, a juror again would be entitled to conclude that, although Mr. Guzek was guilty of intentional murder (the issue resolved at the guilt-innocence phase), *everything* to which the codefendants testified on the subject of Mr. Guzek's relative culpability was false and thus, there was a reasonable doubt whether Mr. Guzek deliberated at any time on the killings. In the absence of proof beyond a reasonable doubt of *deliberation* satisfying all twelve jurors, the jury again would be required to reject the death penalty, notwithstanding its belief (whether based on evidence or mandatory instruction) that Mr. Guzek had been properly convicted of *intentional* murder.[19]

---

[19] Admitting the extrinsic 'alibi testimony' of Mr. Guzek's mother to impeach the codefendants' testimony is consistent with longstanding evidentiary common law. *See, e.g.*, McCormick, Handbook of the Law of Evidence, 2nd ed. § 47: *Impeachment by "Contradiction"*: *Disproving the Facts Testified to by the First Witness*," at p. 99. Facts admissible under the rule permitting the admissibility of extrinsic evidence to impeach by contradiction include "facts showing . . . want of capacity or opportunity for knowledge." *Id.* If Mr. Guzek was not present at the scene of the homicides when circumstances of the offenses attributed to him occurred, or was absent when the homicidal plot was hatched, then the codefendants would lack "capacity or opportunity for knowledge" of those circumstances of Mr. Guzek's purported involvement. McCormick describes a third category of facts admissible to impeach through contradiction:

> Suppose a witness has told a story of a transaction critical to the controversy. To prove him wrong in some trivial detail of time, place or circumstance is 'collateral.' But to prove untrue some fact recited by the witness that if he were really there and saw what he claims to have seen, he could not have been mistaken about, is a convincing kind of impeachment that the courts must make place for, although the contradiction evidence is otherwise inadmissible because it

(Continued on following page)

Accordingly, Mr. Guzek was entitled both under the procedural aspects of the Court's Eighth Amendment capital jurisprudence and under the Fourteenth Amendment Due Process Clause (as well as under Oregon state law, *see* p. 11, *ante*) to rebut or impeach the testimony of codefendants Wilson and Cathey as to his deliberation. Under federal (as well as state) law, Mr. Guzek was entitled to accomplish those goals by offering extrinsic evidence that undermined specific details of the codefendants' tales – including the testimony of his mother that, contrary to what the codefendants said, Mr. Guzek was not present when important aspects of the criminal events occurred. His mother's testimony was accordingly critical evidence of Mr. Guzek's moral culpability for the crimes – and of his moral culpability compared to that of the codefendants – which was directly material in challenging the state's assertion that he acted deliberately and that he, alone among the three defendants, deserved the death penalty.

In this respect, the error committed by the trial court here is similar to the Due Process violation found by this Court in its decision in *Green v. Georgia*, *supra* – a case cited by the majority in the *Guzek III* opinion below. In *Green*, the capital defendant sought to introduce in the penalty phase, by recitation of an inmate witness, the

---

> is collateral under the tests mentioned above. *To disprove such a fact is to pull out the linchpin of the story*. So we may recognize this . . . type of allowable contradiction, namely, the contradiction of any part of the witness' account of the *background and circumstances of a material transaction*, which as a matter of human experience he would not have been mistaken about if his story were true.

Id. (footnotes omitted; emphasis added).

extrajudicial admission of the separately adjudicated codefendant that the codefendant alone had inflicted the fatal gunshots after sending Green away on errands. This Court held that the trial court's refusal to permit that evidence violated Mr. Green's due process right to present crucial defensive evidence at the penalty phase of his capital trial. *Green*, *supra*, 442 U.S. at 97.

The trial court's exclusion of the testimony of Mr. Guzek's mother strongly implicates the holding in *Green*. In both cases, the capital defendant was denied the opportunity to deny or explain evidence introduced in aggravation by the prosecution that identified the defendant as the principal moving force behind the homicide and thus was highly material to the sentence ultimately imposed.

The similarity between this case and *Green* is especially clear given other evidence the Oregon Supreme Court, in rulings not challenged here, ordered the trial court to admit at the upcoming re-sentencing hearing. *Guzek III*, 336 Or. at 449-50, 86 P.3d at 1120-21. (J.A. 41-42). That evidence includes statements made by the codefendants in the years since Mr. Guzek's original trial that (1) expressly recanted their prior testimony that Mr. Guzek was the ringleader, (2) indicated that the codefendants would finally "tell the truth" about the circumstances of the offense if they were called to testify again, then (3) indicated that the codefendants instead would refuse to testify at any re-sentencing (as indeed occurred) out of fear that if they told the truth at the retrial, the prosecutor would void their life-saving plea agreements

and seek the same fate against them that the prosecutor secured against Mr. Guzek.[20] (J.A. 103-07).

This undeniably admissible evidence that the codefendants lied at Mr. Guzek's guilt-innocence trial to save their own lives – including on the issue of Mr. Guzek's ringleader status and thus on whether he deliberated on the killings – lends new weight to the testimony of Mr. Guzek's mother that he was not present during at least some portions of the events in which the codefendants implicated him. Although jurors are instructed they may not reconsider guilt at this stage of proceedings, this new evidence does not come too late to undermine the testimony of his codefendants. The state has consistently asked the jury to premise a conclusion that Mr. Guzek deliberated on the killings and otherwise deserves to die, predicated upon the codefendants' 1988 testimony. By depriving Mr. Guzek of his evidence in its *entirety* – including his mother's testimony undermining the codefendants' claims that he was present and leading the way – the trial court violated Due Process principles this Court applied in *Green*.[21]

---

[20] As is discussed in the Statement of the Case (pp. 3-6 *ante*), the state avoided the introduction of these statements at the 1997 resentencing trial by securing two rulings from the judge. First, the state was permitted to introduce the codefendants' testimony through "dramatic readings" by police cadets of the codefendants' testimony at the 1988 guilt trial. Second, the trial court forbade Mr. Guzek to introduce extrinsic evidence of the codefendants' subsequent statements. The Oregon Supreme Court reversed the latter of these two rulings on state-law grounds that are not in issue here. *Guzek III*, 336 Or. at 447-50, 86 P.3d at 1119-21, App. to Pet. for Cert. at 38-42.

[21] The post-1988 evidence that the codefendants lied at Mr. Guzek's guilt-innocence trial illustrates that the inferences he is asking the jury to draw on retrial are not "*lingering* doubt" inferences remaining after

(Continued on following page)

This Court has recognized that a party usually should be allowed "to present to the jury a full picture of the events relied upon," because evidence in combination "has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." *Old Chief v. United States*, 519 U.S. 172, 187 (1997). All ten of Mr. Guzek's items of impeachment – consisting of his grandfather's and mother's 'alibi evidence' presented in 1988 *and* of the post-1988 inconsistent statements of the codefendants – together have "force beyond any linear scheme of reasoning" and beyond what any subset of that evidence by itself could attain. Mr. Guzek accordingly was entitled in his 1997 penalty retrial to each juror's assessment of the moral weight of *all* of his rebutting and impeaching

---

the jury convicted him in the first trial phase. On the contrary, he is asking the jury (*inter alia*) to rely on *newly* sown doubts about what happened arising from statements by the codefendants made *after* the 1988 trial. Those statements have been held admissible at the upcoming re-sentencing trial as a matter of state law, and together with the 'alibi testimony' at issue here place the entirety of the state's evidence at the penalty phase in a new light – one that a jury might well conclude is inconsistent with believing the codefendants and with imposing the death penalty. Because both the new, post-1988 evidence and the prior 'alibi testimony' adduced in the original guilt phase are admissible under state statutes (*see* p. 11, *ante*), Oregon's objection to the admissibility of this evidence in essence seeks to nullify *state* legislative policy. That policy permits Mr. Guzek to rely on the entirety of his evidence, old and new, that the codefendants are not worthy of belief and that he does not deserve to die. Oregon's qualms about this legislative judgment are properly directed to its own statehouse, not to this Court.

evidence in order for each juror to have a full picture of the crime and of the codefendants' veracity.[22]

As this Court has stated:

> Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause, *Clemons* v. *Mississippi*, 494 U.S. 738, 746 (1990), and one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him. *Cf. Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986).

Simmons v. South Carolina, 512 U.S. at 175 (quoting *California v. Ramos*, 463 U.S. 992, 1002-03 (1983)). Although Oregon and its *amici* argue that Mr. Guzek should not be permitted to "relitigate his guilt," what Mr. Guzek in fact was prevented from doing at his 1997 re-sentencing trial was to impeach and rebut evidence offered by the prosecution as justification for the jury's imposition of the death penalty.

---

[22] Petitioner overlooks another salient fact: Mr. Guzek was convicted of the aggravated murder of two victims even though the state's proof at trial was that he caused only one death "personally." The state's theory of liability with respect to the other killing was that Mr. Guzek acted in concert with codefendant Wilson, who "personally" killed the other victim. Wilson testified in 1988 that he killed one victim upon Mr. Guzek saying "Do it." The excluded defense evidence – including the testimony of Mr. Guzek's mother as to his whereabouts during specific time periods on the night of the homicides – would have impeached the state's star witnesses and potentially caused one or more of the jurors to reasonably doubt whether Mr. Guzek personally committed or commanded either slaying. It further would have rebutted the state's aggravating evidence depicting Mr. Guzek as a cold-blooded homicidal plotter who choreographed the crimes. Whether admitted as impeachment or as substantive evidence, the testimony at issue would have both undermined the credibility of the codefendant accusers and militated against the jury findings requisite to a death sentence.

Although Respondent here has focused on the first of the statutory special verdict questions, the same reasoning applies with equal force to Mr. Guzek's right to impeach the codefendants by means of direct contradiction and to rebut the state's aggravation case in favor of death, regarding the other two special verdict questions before the sentencing jury.

C. Excluding the mother's 'alibi evidence' violated other due process principles when the trial court allowed admission of prior testimony as aggravating evidence under Or. Rev. Stat. § 138.012 while simultaneously construing the statute in a *non*-reciprocal manner to deny admission of Mr. Guzek's impeaching, rebutting and mitigating evidence.

At the 1997 retrial proceeding, the trial court permitted the State to invoke Or. Rev. Stat. § 138.012(2)(b) as a basis for presenting at the capital re-sentencing phase, testimony previously admitted at the guilt-innocence phase. Yet, the trial court denied Mr. Guzek the benefit of the same statute to rebut the state's testimony. Together, these rulings violate the due process principle that this Court enforced in *Wardius v. Oregon*, 412 U.S. 470 (1973):

> This Court has . . . been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. *See*, *e.g.*, *Washington v. Texas*, 388 U.S. 14, 22 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). *Cf.* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1180-1192 (1960)."

Id. at 474, n. 6.

This Court has long disapproved of unjustifiable limitations on a defendant's ability to respond in kind to the prosecution's claims. For example, in *Chambers v. Mississippi*, *supra*, this Court reversed a murder conviction where the defendant's evidence that another person had confessed to the crime was excluded by the trial court on the basis of a state evidentiary rule that prohibited a party from impeaching its own witnesses. This Court held that fundamental fairness under the Due Process Clause required that under such circumstances, such technical application of state court evidentiary rules be forbidden where such application interfered with the ability of a defendant to respond to the state's case. *Id*. 410 U.S. at 302.

Petitioner Oregon seeks a death sentence for Mr. Guzek under a procedure in which the prosecution would introduce – before a jury that did not hear the original guilt-innocence case – only such evidence and testimony admitted therein which painted Mr. Guzek as a ringleader and the most culpable of three men convicted of double aggravated murder, while excluding other testimony casting doubt on such claims. Such a non-reciprocal and fundamentally unfair formula strikes at the very heart of the Due Process Clause. *See Gardner v. Florida*, *supra*, 430 U.S. at 362 ("We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.").

True, the state may not be required to adopt rules allowing the broad admissibility of guilt-phase evidence at subsequent re-sentencing proceedings. But once the state does adopt such rules, it is obliged to apply them even-handedly and consistently with the Due Process Clause.

See Vitek v. Jones, 445 U.S. 480, 488-89 (1980) (even where Fourteenth Amendment Due Process Clause otherwise would not require a particular state procedure, the *state's* creation of that procedural right created liberty and property interests that the Due Process Clause forbade the state to exercise or withdraw in an arbitrary manner).

Accordingly, the trial court's refusal to apply Or. Rev. Stat. § 138.012 even-handedly to allow Mr. Guzek to present his mother's prior guilt-phase testimony in order to respond to the guilt-phase evidence the state was permitted to introduce was fundamentally unfair, resulting in the statute's application for the state's benefit only. As a result, Mr. Guzek was not permitted to meet the aggravation case against him, denying him the process which he was due under Oregon's capital sentencing procedures, in violation of the Fourteenth Amendment.

D. The State's "residual doubt" characterization of the uses the Oregon Supreme Court permitted Mr. Guzek to make of his mother's testimony on retrial is manifestly wrong, as is its characterization of that testimony as "irrelevant."

Oregon's characterization of the proffered 'alibi evidence' as "residual" or "lingering doubt" evidence is based on the unfounded speculation that jurors will put the evidence to improper use in violation of appropriate limiting instruction *to consider the evidence solely insofar as it rebuts and undermines the credibility of the codefendants' penalty-phase testimony.* "The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the [Constitution] are at issue. *See*, *e.g.*, *Frazier v. Cupp*, 394 U.S. 731, 735

(1969)." *Tennessee v. Street*, 471 U.S. 409, 415, n. 6 (1985). Here, Oregon effectively asks this Court to assume ahead of time that Oregon jurors will decline to follow appropriate limiting instructions, without any proof or indication that such "nullification" would occur at a retrial conducted under the watchful eye of the trial judge in this case. A more concrete example of a request for an advisory opinion is difficult to postulate.

In addition, the "residual doubt" uses of evidence that the state argues are not constitutionally required are *different* from the uses the Oregon Supreme Court has allowed Mr. Guzek to make of his mother's 'alibi testimony.' As is explained in detail above, the Oregon Supreme Court permitted Mr. Guzek to introduce that evidence *not* because of its "tend[ency] to negate his guilt" but because of its capacity to rebut and impeach the state's own case at the *capital-sentencing* phase. That two of Mr. Guzek's ten offers of proof rejected by the trial court consisted of testimony that – *if offered at the guilt phase* – would have tended to "negate guilt," is immaterial to their admissibility for purposes of rebutting and impeaching evidence the state itself presented at the penalty phase. It was exactly on this ground that the Oregon Supreme Court majority concluded that the 'alibi testimony' was *not* 'residual doubt' evidence and distinguished it from the type of "residual doubt" evidence this Court addressed in *Franklin v. Lynaugh*, *supra*.[23] *Guzek III*, 336 Or. at 463, n. 30, 86 P.3d 1128, n. 30, App. to Pet. for Cert. at 62-63.

[23] Oregon thus in effect has procured a writ of certiorari to review a question addressed by the dissenting opinion below but *not* the majority opinion. As the majority recognized, the testimony of Mr. Guzek's mother was not offered as substantive 'residual doubt" evidence, but

(Continued on following page)

The central argument of both Petitioner Oregon and its supporting *amici* is that the 'alibi testimony' Mr. Guzek's mother provided at the 1988 guilt-innocence trial and that he is seeking to present again at the re-sentencing trial is "irrelevant" as a matter of state law. Brief of Pet. at 14, Brief of U.S. Solicitor General at 16, Brief of States at 15-16. This argument is flatly wrong. In a portion of the Oregon Supreme Court judgment below that the state does not and cannot challenge here, the Oregon high court ruled as a matter of Oregon law that the testimony "of *any* witness[ ]" is "*relevant* and subject to consideration in the penalty phase, regardless of its substance" as long as "it was 'previously offered and received' during the trial on the issue of guilt. Or. Rev. Stat. § 163.150(1)(a); *see also* Or. Rev. Stat. § 138.012(2)(b)." *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44. Because there is no doubt that the 'alibi testimony' of Mr. Guzek's mother "was 'previously offered and received' during [his] trial on the issue of guilt" in 1988,[24] there likewise is no doubt under state law that the mother's testimony is "relevant and subject to consideration in the penalty phase."

The same conclusion is mandated by the plain terms of the statutes the Oregon Supreme Court cited, Or. Rev.

---

rather to impeach the unavailable codefendants' prior recorded testimony and to rebut the prosecution's claims that Mr. Guzek was more culpable than those codefendant accusers, who were spared jeopardy of death in exchange for that 1988 testimony, but who then refused to testify in the subsequent sentencing re-trials. Only the dissent below – not the majority – erroneously labeled the excluded testimony as " 'residual' or 'lingering' doubt" evidence.

[24] The mother's trial testimony is in the Joint Appendix by the parties' stipulation (J.A. 60-79). The state has never suggested that the testimony was not properly received at the guilt trial. *See* footnotes 6, 8 *ante*.

Stat. §§ 138.012, 163.150. Thus, § 138.012(2)(b) expressly permits the introduction by either party of evidence and transcripts from the original trial in any penalty phase retrial and further provides that "*[e]ither party* may recall *any witness* who testified at the prior trial or sentencing proceeding and may present additional relevant evidence" (emphasis added). Further, § 163.150 provides "that *all* evidence previously offered and received [during the guilt-innocence phase] may be considered for purposes of the sentencing hearing" (emphasis added). Faced with this plain language, it is impossible to make sense of the state's claim that the proffered 'alibi evidence' was "irrelevant" under state law. Pet. Br. at 14.[25]

Nor does Oregon point to any provision of state law that makes evidence irrelevant and inadmissible when offered for the other set of purposes for which the Oregon Supreme Court ruled the mother's 'alibi testimony' admissible. The State points to nothing in Oregon law that prevents a capital defendant from presenting testimony designed to rebut evidence the prosecution itself presents "in the penalty phase . . . to prove that defendant should receive a sentence of death" or to facilitate the "defendant's impeachment of [the] testimony" of the state's penalty-phase witnesses. *Guzek III*, 336 Or. at 449, 86 P.3d

[25] Petitioner Oregon appears to contend that where a death sentence is vacated due to denial of the capital defendant's rights to present relevant sentencing evidence, the defendant on penalty retrial is permitted fewer rights to introduce evidence relevant to sentencing than existed in the procedurally defective prior proceeding. A statutory scheme which operated to penalize a defendant who prevailed on direct review, by mandating exacerbation of the reversible error on remand, would be odd, indeed. The Oregon statutory scheme, however, is not, of course, as odd as Petitioner Oregon contends.

at 1120, App. to Pet. for Cert. at 40-41. Nowhere, that is, does Oregon law forbid the defendant at the penalty phase of a capital trial to present testimony, such as that of Mr. Guzek's mother, which demonstrates any of the following:

- that the evidence of the crime in its entirety is insufficient to provide a moral justification for the death penalty (*see* pp. 19-28, *ante*);
- that the defendant was not present at the time of the events on which the state relies to show that the killings were "deliberate" and not simply "intentional" (*see* pp. 28-39, *ante*);
- that when compared to the actions of codefendants, who were spared the death penalty, the defendant's actions do not warrant that penalty (*see* pp. 33-35, *ante*); and
- that, particularly in conjunction with admissible post-guilt-phase statements by codefendants strongly suggesting that they lied at the original trial, their *penalty-phase* testimony offered against the defendant to show his whereabouts, actions, deliberation, culpability, and comparative culpability is not to be believed (*see* pp. 29-34, *ante*).

There being multiple reasons why the mother's testimony was "relevant and subject to consideration in the penalty phase," the trial court's exclusion of the testimony violated the federal Constitution as well as state law.

It bears further mentioning that a long line of Oregon Supreme Court cases construing the "fourth question" – asking jurors "[w]hether the defendant should receive a

death sentence," Or. Rev. Stat. § 163.150(1)(b)(D) – holds that this issue is not "subject to proof in the traditional sense," because "it frames a discretionary determination for the jury." *Wagner*, *supra*, p. 24, *post*, 309 Or. at 25, 786 P.2d at 100. Rather, the fourth question asks "the jury, in making its finding, to consider any mitigating aspect of defendant's life, alone or in combination, *not necessarily related causally to the offense*." *Id*., 309 Or. at 20, 786 P.2d at 101 (emphasis added). The fourth question "does no more than to provide the sentencing jury with the *data* traditionally available to the sentencing judge under the discretionary sentencing model for criminal cases." *Id.*, 309 Or. at 20 (emphasis added).

In interpreting the breadth of "mitigating data" admissible under Oregon law, the Oregon Supreme Court has held it to be reversible error to exclude the opinion testimony of a defendant's wife regarding the likely impact of his execution upon their nine-year-old child. *State v. Stevens*, *supra*, 319 Or. at 583-84, 879 P.2d at 167. The court reasoned that although the wife's opinion was not direct evidence of defendant's character, it was circumstantial evidence from which the jury could infer positive aspects of defendant's character militating against death. *Id*.

But the court has not limited the range of "mitigating data" permitted by the fourth question to "evidence" in its traditional sense. In *State v. Rogers*, 330 Or. 282, 4 P.3d 1261 (2000), the court held that the Oregon Constitution entitles a capital defendant to allocute to the sentencing jury without being under oath or subjected to cross-examination, extending to such proceedings a state constitutional right which had always applied to Oregon non-capital defendants.

In *Rogers*, the Oregon Supreme Court found reversible error mandating vacation of a death sentence where the defendant had proposed to, during his allocution to the sentencing jury, face the judge and ask that if the jury spared his life, the court run all life sentences imposed for the murders of which he had been convicted, consecutively to each other and to a life sentence with 30-year minimum he already was serving. The trial court struck the proposed statement to the judge from Rogers' jury allocution and the Oregon Supreme Court – *after holding that no Eighth or Fourteenth Amendment rights were implicated or violated by the trial judge's actions* – reversed, holding that Rogers' proposed mid-allocution statement to the judge was "an aspect of his character" which the jury was entitled as a matter of state law to consider under the fourth question in determining whether to impose a death sentence:

> A primary traditional purpose for allocution is to allow a criminal defendant to plead for leniency *or to establish mitigation* . . . By informing the jury that he already would be in prison for many years, defendant was attempting to communicate a relevant mitigating consideration, *viz.*, the fact that he already was separated from the community for his conduct, and would continue to be for at least 30 years . . . [The stricken language] invited the judge to impose consecutive life sentences but conditioned that request on the jury's acceptance of defendant's plea that it spare his life. Defendant sought to express that statement to the judge, but also in the jury's presence and for its benefit. *The question whether a defendant might qualify for any sentence less than death is one that ORS 163.150*[ ] *requires the jury to decide. By making the statement in question, defendant*

> *sought to demonstrate to the jury that a facet of his character – his willingness to accept lifetime imprisonment – should induce them to decline to sentence him to death* . . . [U]nder Oregon's death-penalty sentencing scheme, the jury is a participant in the sentencing decision. We conclude that both excluded sentences fell within the proper scope of allocution and that the court violated Article I, section 11, of the Oregon Constitution, in striking them from defendant's proposed unsworn statement.[26]

Rogers, 330 Or. at 307-08, 4 P.3d at 1276 (emphasis added).

Under Oregon law, an allocution is not "evidence." The *Rogers* decision thus stands for the proposition that solely as a matter of state law, aspects of an Oregon capital defendant's character calling for a sentence of less than death need not necessarily be shown by traditional evidentiary methods. Petitioner Oregon here asks this Court not merely to sanction violation of Mr. Guzek's federal constitutional rights to impeach and rebut the state's evidence presented in favor of death, but to revise Oregon's state statutory and constitutional law in the process.

Here, Mr. Guzek requested nothing approaching such non-traditional a method of demonstrating that a death sentence was not appropriate as did the capital defendant, pursuant to state law, in *Rogers*. Rather, Mr. Guzek merely sought to exercise his statutory right to introduce traditional forms of evidence that are *per se* admissible under

[26] Or. Const. Art. I, § 11, provides, in part: "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]"

Oregon's capital sentencing scheme. Petitioner's attempt to characterize the evidence at issue as "irrelevant" by virtue of being "residual doubt" evidence is specious.

CONCLUSION

This Court should dismiss the writ of certiorari as improvidently granted due to a want of jurisdiction. In the alternative, this Court should either certify a question to the Oregon Supreme Court to clarify whether mother's 'alibi evidence' is admissible in the upcoming trial under Or. Rev. Stat. § 138.012 independently of any federal constitutional ground, or remand the case to the Oregon Supreme Court for clarification of its *ratio decidendi*. If the Court can do so without rendering an unconstitutional advisory opinion, it should affirm the Oregon Supreme Court judgment because that ruling is compelled by Mr. Guzek's rights under the Sixth, Eighth and Fourteenth Amendments to "meet the state's case" by responding to, rebutting and impeaching prosecution evidence offered in support of a death sentence.

Respectfully submitted,

J. KEVIN HUNT
Of Counsel for Respondent

RICHARD L. WOLF*
Of Counsel for Respondent

**Counsel of Record*

Excerpt of Petitioner's brief below responding to Mr. Guzek's claim that the alibi evidence was improperly excluded, at page 160:

> * * * Mrs. Wilson would have testified that her husband had told her that the aggravated murder at issue in this case was basically a burglary "gone bad."[48]

The trial court excluded all of the evidence referred to above, apparently on the ground argued by the prosecutor that the evidence was all hearsay not within any exception. (10/27/97 Tr 77-78; 103).

2. The proffered testimony was correctly excluded as hearsay or as irrelevant.

The excluded testimony falls into two general categories: alibi evidence and evidence that is inconsistent with Wilson's and Cathey's transcript testimony. The alibi evidence was irrelevant. The sole issue in the penalty phase of an aggravated murder trial is what sentence the defendant shall receive. *See*, *e.g.*, *Montz*, 309 Or at 604 ("The penalty phase does not redetermine guilt; it determines only the appropriate sentence."). Alibi evidence, although potentially relevant to the guilt phase of an aggravated murder trial, simply has nothing to do with sentencing considerations. Because, at the time of the penalty phase, it has been established as a matter of law that defendant committed the crime, evidence that he

[48] In addition, defendant filed a pretrial "Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence." That notice referred to the previous testimony of defendant's grandfather, Clarence Guzek, and his mother, Kathleen Guzek. Both proffers had to do with alibi evidence.

could not have done so is not relevant. Evidence of alibi was correctly excluded.

* * *