SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	**S050102**
	)	
v.	)	**(San Joaquin County**
	)	**Superior Court**
PAUL LOYDE HENSLEY,	)	**No. SC054773A)**
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Automatic Appeal from the
Superior Court of the State of California
In and for the County of San Joaquin
Honorable Frank A. Grande, Judge

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SUPPLEMENTAL ARGUMENTS

I. SUBJECTING APPELLANT TO A PENALTY RETRIAL AFTER HIS ORIGINAL JURY FAILED TO REACH A VERDICT VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

Appellant's first trial ended in a penalty-phase mistrial. On December 7, 1994, following three days of deliberations, appellant's first jury indicated that it remained hopelessly deadlocked 9-to-3 on the question of penalty. The court discharged that jury and declared a penalty mistrial.

(7 CT 1785; 36 RT 10100.)

A second trial, as to penalty only, began on January 10, 1995. (7 CT 1815.) Jury selection was concluded on March 13, 1995, and presentation of evidence began that day. (7 CT 2017.) The jury received the case on May 16. (8 CT 2200-2201.) On May 18, following approximately two days of deliberations, the second jury returned a verdict fixing the penalty at death. (8 CT 2207-2208.)

Allowing the penalty retrial under these circumstances constituted federal constitutional error.[1] An overwhelming majority of the jurisdictions that allow the death penalty to be imposed do not permit the penalty phase to be retried after a jury has been unable to reach a unanimous verdict as to penalty. As one of the few remaining jurisdictions that permits a penalty retrial following a hung jury, California's death penalty scheme is an anomaly and is contrary to the "evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles (1958) 356 U.S. 86, 101 [2 L.Ed.2d 630, 78 S.Ct. 590]; see Atkins v. Virginia (2002) 536 U.S. 304, 321 [153 L.Ed.2d 335, 122 S.Ct. 2242].) Holding a penalty retrial following a hung jury violated appellant's federal constitutional rights to a fair jury trial,

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[1] Appellant acknowledges that an issue similar to the present was rejected in People v. Taylor (2010) 48 Cal.4th 574, 633-634. Appellant respectfully submits that this issue should be reexamined for the reasons set forth herein.

a reliable penalty determination, freedom from cruel and unusual punishment, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments, as well as state constitutional protections in article I, sections 1, 7, 15, 16 and 17 of the California Constitution.

Despite the lack of objection at trial on this ground, this Court has consistently considered "as applied" challenges, such as this one, to California's death penalty scheme on their merits without requiring objection below. (People v. Hernandez (2003) 30 Cal.4th 835, 863; People v. Seaton (2001) 26 Cal.4th 598, 691; People v. Davenport (1995) 11 Cal.4th 1171, 1225; People v. Garceau (1993) 6 Cal.4th 140, 207; People v. Roberts (1992) 2 Cal.4th 271, 323.) A reviewing court also may consider on appeal a claim raising a pure question of law on undisputed facts. (People v. Yeoman (2003) 31 Cal.4th 93, 118; People v. Hines (1997) 15 Cal.4th 997, 1061; Hale v. Morgan (1978) 22 Cal.3d 388, 394; Wade v. Taggart (1959) 51 Cal.3d 736, 742.)

B. Standard of Review

Analysis of a claim that a death penalty scheme violates the cruel

and unusual punishment prohibition of the Eighth Amendment involves two inquiries: First, a court considers "[o]bjective indicia that reflect the public attitude toward a given sanction" (Gregg v. Georgia (1976) 428 U.S. 153, 173 [49 L.Ed.2d 859, 96 S.Ct. 2909]), including the "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made." (Enmund v. Florida (1982) 458 U.S. 782, 788 [73 L.Ed.2d 1140, 102 S.Ct. 3368].) Second, "informed by [these] objective factors to the maximum extent" (Coker v. Georgia (1977) 584, 592 [54 L.Ed.2d 982, 97 S.Ct. 2861]), the court then "bring[s] its own judgment to bear on the matter" (Enmund v. Florida, supra, 458 U.S. at 788-789) to determine whether the punitive sanction "comports with the basic concept of human dignity at the core of the Amendment." (Gregg v. Georgia, supra, 428 U.S. at 182; accord Roper v. Simmons (2005) 543 U.S. 551, 563-564 [161 L.Ed.2d 1, 125 S.Ct. 1183].)

C. Constitutional Analysis

The death penalty is currently barred altogether in 15 states[2] and in the District of Columbia and Puerto Rico. The death penalty is currently authorized under federal law and in 35 state jurisdictions. However, in the vast majority of these jurisdictions, 25 of these 35 states, if the jury is unable to agree unanimously on a penalty phase verdict, there is no penalty retrial and the defendant is instead sentenced to life imprisonment without the possibility of parole (LWOP).[3] A penalty retrial following a hung jury

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[2] The death penalty is prohibited in the following jurisdictions: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The death penalty is also prohibited in the District of Columbia and Puerto Rico.

[3] Ark. Stat. Ann. § 5-4-603(c) (1993); Col. Rev. Stat. § 18-1.3-1201(2)(b)(II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); Id. Code § 19-2512(7)(c) (2003); Ill. Ann. Stat. ch. 720, § 5/9-1 (Smith-Hurd 1993); Kan. Stat. Ann. § 21-4624(e) (Supp. 1994); La. Code Crim. Proc. Ann. art. 905.8 (West Supp. 1995); Md. Ann. Code art. 27, §§ 413(k)(2), 413(k)(7) (Supp. 1994); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995); Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001); Pa. Stat. Ann. tit. 42, § 9711(c)(1)(v) Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); SD Codified Laws Ann. §§ 23A-27A-4 (1988); Tenn. Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990); Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994).

is also prohibited under the federal death penalty statute.[4]

Formerly, under its 1977 death penalty statute, California followed the more enlightened trend and prohibited a penalty retrial following a hung jury. (See People v. Kimble (1988) 44 Cal.3d 480, 511.)[5] However, under the harsher 1978 death penalty statute, California reverted to the minority group of states which permit such penalty retrials. (Pen. Code, § 190.4, subd. (b).) This position is followed by statute in only seven other states: Alabama, Arizona, Delaware, Florida, Indiana, Montana and Nevada.[6] Statutes in Connecticut and Kentucky are silent about the consequences of a hung jury in the penalty phase of a capital case, but case law suggests that penalty retrials are permissible. (State v. Daniels (Conn. 1988) 542 A.2d 306, 317; State v. Ross (Conn. 2004) 849 A.2d 648, 726, fn. 68; Skaggs v. Commonwealth (Ky. 1985) 694 S.W.2d 672, 682; Dillard v. Commonwealth (Ky. 1999) 995 S.W.2d 366, 374.)

Thus, of those jurisdictions that rely on jury determination of penalty in a capital case, California stands with only nine other states which permit

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[4] 18 USCA § 3593(e) (West Supp. 1995); 21 USCA § 848(1) (West Supp. 1995).

[5] See former Penal Code section 190.4, subdivision (b).

[6] Ala. Code § 13-A-5-46(g) (2002); Ariz. Crim. Code § 13-703.01L (2002); 11 Del. Code § 4209(d)(1) & (2) (2003); Fla. Stat. Ann. § 921.141(2) & (3); Ind. Code § 35-50-2-9(f) (2002); Mont. Code Ann. § 46-18-305 (2003); Nev. Rev. Stat. § 175.556 (2003).

penalty retrials following a hung jury. This shows that California is out of step with an emerging national consensus prohibiting penalty retrials following a hung jury. The "contemporary values" reflected in this "national consensus" should cause this Court to ask the question of "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (Atkins v. Virginia, supra, 536 U.S. at 312-313, 316.)

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In Trop v. Dulles, supra, 356 U.S. at 100-101, the United States Supreme Court stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Following Trop, the United States Supreme Court has prohibited the use of the death penalty in several cases under the evolving standards of decency theory of the Eighth Amendment. (Roper v. Simmons, supra, 543 U.S. at 570-578 [individuals under the age of 18]; Atkins v. Virginia, supra, 536 U.S. at 321 [mentally retarded]; Thompson v. Oklahoma (1988) 487 U.S. 815 [101 L.Ed.2d 702, 108 S.Ct. 2687] [15-year-old minor]; Ford v. Wainwright (1986) 477 U.S. 399 [91

L.Ed.2d 335, 106 S.Ct. 2595] [insane person]; Enmund v. Florida, supra, 458 U.S. 782 [accomplice in a robbery]; Coker v. Georgia (1977) 433 U.S. 584 [53 L.Ed.2d 982, 97 S.Ct. 2861] [person convicted of rape].)

In Atkins, the Court stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (Atkins v. Virginia, supra, 536 U.S. at 312 [citing Penry v. Lynaugh (1989) 492 U.S. 302, 331 [106 L.Ed.2d 256, 109 S.Ct. 2934]].) In addition to reviewing the laws of the various states, the Court must also apply its "own judgment . . . on the question of the acceptability of the death penalty under the Eighth Amendment." (Atkins v. Virginia, supra, 536 U.S. at 312-313.)

In Roper v. Simmons, supra, 543 U.S. at 564, 568, 570-578, the Supreme Court applied the Atkins standard to the issue of executing juvenile offenders under the age of 18. The Court found a national consensus against the death penalty for juveniles and then applied the Court's own independent judgment to determine whether the death penalty is a disproportionate punishment for juveniles. (Id. at 564-569.) The Court stated: "A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment." (Id. at 567-568.)

Eighth Amendment as cruel and unusual punishment. The Court found that only three states provided the death penalty for rape. (Id. at 594.) The Court stated that "the current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." (Id. at 596.)

"The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (Penry v. Lynaugh, supra, 492 U.S. at 331.) The existence of a "national consensus" against imposing the death penalty in certain contexts can provide the basis for finding that the Eighth Amendment operates as a substantive ban on the death penalty in those contexts. (Roper v. Simmons, supra, 543 U.S. at 563-564; Graham v. Florida (2010) 560 U.S. ___ [176 L.Ed.2d 825, 837, 130 S.Ct. 2011].) When the nation's state legislatures have developed a consensus, a court must ask "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (Atkins v. Virginia, supra, 536 U.S. at 313.)

The figures set forth above reveal a strong national consensus against allowing prosecutors to make multiple attempts to convince juries to impose the death penalty against a single defendant. Over 70% of the

The figures set forth above reveal a strong national consensus against allowing prosecutors to make multiple attempts to convince juries to impose the death penalty against a single defendant. Over 70% of the jurisdictions in which the death penalty is available limit the prosecution to one attempt.[7] Factoring in the 16 jurisdictions in which the death penalty is prohibited, no authority exists in over 80% of the jurisdictions in this country for prosecutors to make multiple attempts to convince juries to impose the death penalty against a single defendant.[8]

This national consensus against death penalty retrials is borne out of recognition that concern for fundamental fairness and human dignity require that a capital defendant should only be "forced to run the gauntlet once" on death. (Green v. United States (1957) 355 U.S. 184, 190 [2 L.Ed.2d 199, 78 S.Ct. 221].) Normally, "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause" (Richardson v. United States (1984) 486 U.S. 317, 324 [82 L.Ed.2d 242, 104 S.Ct. 3081]), and this general rule has been held applicable to capital case penalty proceedings. (Sattazahn v. Pennsylvania (2003) 537 U.S. 101, 108-110 [154 L.Ed.2d

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[7] As noted above, 26 of 36 jurisdictions in which the death penalty is available allow only one attempt. 25 is 72.2% of 36.

[8] In 42 out of 52 jurisdictions (the 50 states plus the District of Columbia and the federal judiciary), no repeat attempt may be made to secure the death penalty. 42 is 80.7% of 52.

588, 123 S.Ct. 732].) But a substantial majority of states allowing the death penalty have recognized that one penalty trial is enough. Even if double jeopardy does not apply, it is still indisputable that death is a penalty different from all others. (Gregg v. Georgia, supra, 428 U.S. at 188 [joint opinion of Stewart, Powell and Stephens, JJ.].) No capital defendant should be subject to repeated attempts by the State to sentence him to death "thereby subjecting him to embarrassment, expenses and ordeal and compelling him to live in a continuing state of anxiety and insecurity." (United States v. Scott (1978) 437 U.S. 82, 95 [57 L.Ed 65, 98 S.Ct. 2187].) Such penalty retrials also take a tremendous toll on the other trial participants – defense counsel, the prosecutors, the trial judge and court personnel, and the families and friends of the victims and defendants.

Compelling a capital defendant to endure the ordeal of a second full blown trial concerning whether he will live or die is constitutionally inconsistent with the "evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles, supra, 356 U.S. at 101; accord Atkins v. Virginia, supra, 536 U.S. at 321.)

Appellant's death sentence should be reversed.

II. THE COURT ERRED IN PERMITTING THE PROSECUTOR TO ARGUE FACTS NOT IN EVIDENCE CONCERNING THE FAMILY AND FRIENDS OF GREGORY RENOUF[9]

In his closing arguments, the prosecutor argued that, in assessing penalty, the jury should consider the "parents," "family," "friends," "[a]cquaintances" and "[c]o-workers" of Gregory Renouf. (59 RT 18953-18954, 19080; see quotations at AOB 294-295.) Defense counsel objected to this line of argument on the grounds that no evidence had been presented concerning such persons; these objections were overruled. (59 RT 18953-18954; see AOB 294-295.)

The trial court erred in overruling defense counsel's objection and permitting the prosecutor to make these arguments given the absence of any evidence concerning Renouf's family, friends or acquaintances. (People v. Bolton (1979) 23 Cal.3d 208, 212-213; People v. Kirkes (1952) 39 Cal.2d 719, 724; see discussion at AOB 297.)

Also, the prosecutor's arguments regarding Renouf's family, friends

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[9] Appellant previous addressed these statements by the prosecutor as a claim of prosecutorial misconduct. (See AOB, Argument X.C.1.) However, in light of this Court's recent statements in People v. Foster (2010) 50 Cal.4th 1301, 1350-1351, appellant now asserts an alternative claim of judicial error.

and acquaintances violated the trial court's May 9, 1995 Order, which precluded the prosecutor from engaging in "[a]rgument regarding a victim's family member's characterization or opinions about the crime, the defendant, or the appropriate sentence." (8 CT 2156.) The prosecutor violated this directive by arguing in favor of a death verdict based on consideration of Renouf's family members and friends. The prosecutor should not have been permitted to engage in a forbidden line of argument after the court had indicated it would not be permitted. (See People v. Williams (1997) 16 Cal.4th 153, 252; People v. Rich (1988) 45 Cal.3d 1036, 1088; People v. Pitts (1970) 223 Cal.App.3d 606, 733, fn. 33.)

The effect of the prosecutor's improper arguments concerning Renouf's family, friends and acquaintances was to deny appellant a fair jury trial and due process of law under the Fifth, Sixth and Fourteenth Amendments. (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643 [40 L.Ed.2d 431, 94 S.Ct. 1868]; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, 1384-1386; Jammal v. Van de Kamp (9th Cir. 1991) 926 F.2d 918, 920.) Moreover, this error deprived appellant of his right under the Eighth and Fourteenth Amendments to be sentenced in accordance with procedures which are reliable, rather than arbitrary and capricious. (Johnson v. Mississippi (1988) 486 U.S. 578, 584 [100 L.Ed.2d 595, 108

S.Ct. 1981]; Beck v. Alabama (1980) 447 U.S. 635, 638 [65 L.Ed.2d 392, 100 S.Ct. 2382].)

Although appellant's trial counsel failed to cite federal constitutional provisions in objecting to the prosecutor's improper statements concerning Renouf's family, friends and acquaintances, appellant's federal constitutional claims in this regard are adequately preserved for appeal because appellant's present constitutional arguments rest upon the same factual and legal issues as the objections defense counsel did assert. (People v. Partida (2005) 37 Cal.4th 428, 433-439; People v. Yeoman, supra, 31 Cal.4th at 117-118.) Because this error deprived appellant of his due process rights under the Fifth, Sixth and Fourteenth Amendments, this error should be reviewed under the Chapman[10] standard and reversal is required unless this error was "harmless beyond a reasonable doubt." (Sullivan v. Louisiana (1993) 508 U.S. 275, 278 [124 L.Ed.2d 182, 113 S.Ct. 2078]; Delaware v. Van Arsdall (1986) 475 U.S. 673, 684 [89 L.Ed.2d 674, 106 S.Ct. 1431].)

Appellant incorporates by reference the analysis of prejudice set forth in his opening brief at Argument X.E. (AOB 319-328.) Given the closeness of the penalty determination, it is reasonably probable that this

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[10] Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].

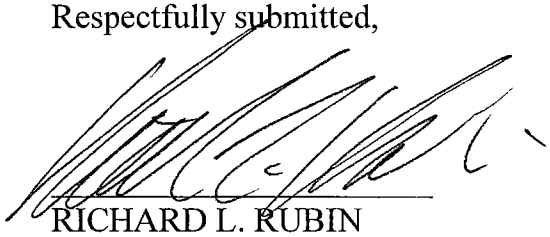
error contributed to the judgement of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be concluded that this improper evidence "had no effect" on the penalty verdict. (Caldwell v. Mississippi (1985) 472 U.S. 320, 341 [86 L.Ed.2d 231, 105 S.Ct. 2633].) Accordingly, the judgment of death must be reversed.

CONCLUSION

For the reasons stated herein appellant's sentence of death should be reversed.

Dated: March 7, 2011

Respectfully submitted,



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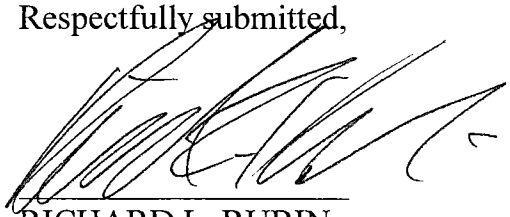
CERTIFICATE RE WORD COUNT

I, Richard L. Rubin, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 3,093 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(d) of the California Rules of Court. This document was prepared in Word Perfect, 13 point Times New Roman font and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California.

Dated: March 7, 2011

Respectfully submitted,



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I am employed in the City of Oakland, State of California. My business address is 4200 Park Blvd., # 249, Oakland, CA 94602. I am over 18 years of age, and not a party to the action captioned in the document(s) herein. On the date of execution below, I served the following legal document(s) on the following person(s)/office(s) by placing a true copy thereof in a sealed envelope, with postage thereon fully prepaid, in a United States Post Office mail box at Oakland, California:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 17, 2011, at Oakland, California.

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