SUPREME COURT COPY

No. S075875

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TIMOTHY RUSSELL Defendant and Appellant.	(Riverside County Sup. Ct. No. RIF72974)

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

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THE COURT ERRED IN EXCLUDING FROM THE PENALTY RETRIAL APPELLANT'S VIDEOTAPED STATEMENTS TO THE POLICE WHICH WERE INTRODUCED BY THE PROSECUTION AT THE GUILT PHASE

A. Introduction

Appellant's penalty retrial was fundamentally unfair. The original jury saw and heard all the evidence introduced at the entire trial which, at the prosecution's request, included the two and one-half hour videotaped interrogation of appellant on the day of, and the day after, the murders. It deadlocked eight-to-four on the appropriate penalty. The penalty retrial jury, again at the prosecution's request, did not see or hear any of

appellant's videotaped statements. It sentenced him to death. The viewing of the interrogation was the major difference between the two penalty trials – between a chance for life and a sentence of death. There was no legitimate reason for the trial court's decision to preclude the retrial jury from considering relevant evidence that the prosecutor had used in obtaining the capital murder convictions against appellant and the original jury had weighed in trying to fix his punishment. The error in prohibiting use of the videotaped interrogation requires reversal of appellant's death sentence.

In his prior briefs, appellant raised this claim of error on both state law and federal constitutional grounds. (See Appellant's Opening Brief ["AOB"], Argument 6, at 102-113; Appellant's Reply Brief ["ARB"], Argument 6, at 28-33.) Appellant adheres to those arguments, but now elaborates additional reasons that the error requires reversal of his death sentence. Appellant does not burden the Court with repetition of the procedural facts relevant to this issue, which are contained in the prior briefing (see AOB 102-103; see also Respondent's Brief ["RB"] 63-65), except to underscore those facts relevant to the arguments offered here.[1]

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[1] Appellant takes this opportunity to clarify the record about the admission of appellant's interrogation statements. Riverside Sheriff's Detective Eric Spidle interrogated appellant on January 5 and 6, 1997, after his arrest. Appellant sought to play only the videotaped segments of the interrogation at the penalty retrial. (14 CT 3638.) These consisted of (1) an interview on January 5, 1997, beginning at 11:32 a.m., at the Spruce Street Sheriff's station which was videotaped and introduced at the guilt phase as People's Exhibits 30-31 (4 CT 871; 7 RT 832) and (2) an interview on January 6, 1997, beginning at 11:41 a.m., at the Sheriff's office in Riverside, which was videotaped and introduced at the guilt phase as People's Exhibit 33 (12 CT 3334; 8 RT 995-996). People's Exhibit 32 is a

(continued...)

B. To Ensure Basic Fairness And To Avoid Death Judgments That Violate The Federal Constitution, This Court Should Construe Penal Code Sections 190.3 And 190.4 To Require That At A Penalty Phase Retrial Following A Jury Deadlock, The Trial Court Must Permit The Defendant To Use Evidence In Seeking A Life-Without-Parole Sentence That The Prosecution Already Introduced At The Guilt Phase In Obtaining The Capital Murder Conviction

As this Court asserted long ago, "[i]t is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice." (*People v. Rhodes* (1974) 12 Cal.3d 180, 185.) These concerns are important in every criminal case, but they assume added importance when society's ultimate sanction – capital punishment – is at issue and even greater importance when one jury already has heard an entire capital case, but was unable to reach a sentencing verdict. California is one of only a handful of death penalty jurisdictions that permits a penalty retrial after a jury deadlocks on whether to sentence the defendant to life or death. (*People v. Taylor* (2010) 48 Cal.4th 574, 634.) Under the state Constitution, a penalty retrial, like any criminal trial, must be fair (*In re Sakarias* (2005) 35 Cal.4th 140, 149; *People v. Sarazzawski* (1945) 27

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[1](...continued)
transcript of the videotaped interview on January 5, 1997 (4 Supp. CT 1-94), and People's Exhibit 102 is a transcript of the videotaped interview on January 6, 1997 (4 Supp. CT 99-146).

Appellant corrects one mistake in his reply brief. (See ARB 32.) His spontaneous expression of remorse when told by Detective Spidle that officers Haugen and Lehmann was dead was not videotaped. This interview was memorialized only in Detective Spidle's written report (4 CT 871, 878-880), which was considered for the purposes of the Evidence Code section 356 motion before the guilt phase (1 RT 13), but not admitted into evidence at trial.

Cal.2d 7, 11) and under the federal Constitution, a fair trial resulting in a reliable penalty determination is a prerequisite for a valid death sentence (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [basing death sentence in part on a reversed prior felony conviction violates the Eighth Amendment's requirement of heightened reliability in capital-sentencing]).

Ensuring a fair penalty retrial after a jury has deadlocked poses unique challenges which the California courts must meet. At a minimum, the jury's inability to reach a verdict should not place the defendant in a worse position at the penalty retrial than he held at the original penalty phase. But that is precisely what happened to appellant here. The trial court unjustifiably denied the retrial jury access to the relevant mitigating evidence contained in appellant's statements that the first jury had considered.[2] As a result, the prosecution was permitted to use appellant's videotaped interrogation to obtain a capital murder conviction, but appellant was precluded from using that very same evidence to try to save his own life. Plainly, the penalty retrial did not take place on anything even remotely resembling a level playing field. (See *People v. Zapien* (1993) 4 Cal.4th 929, 1015 (dis. opn. of Kennard, J.) [noting that "a level playing field" between defense and prosecution at a penalty retrial would "erase any appearance of impropriety and assure that no unfair advantage had been exploited"].) Rather, the exclusion of appellant's statements rendered the sentencing retrial fundamentally unfair under the Fourteenth Amendment.

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[2] There is no question that the evidence in the videotaped interrogation was relevant to the penalty phase as the trial court explicitly found (21 RT 1862), and respondent never has disputed its relevance (see 15 CT 3956-3958 [prosecution's opposition to defense motion]; 21 RT 1856-1859, 1861-1862 [prosecutor's argument at hearing]; RB 63-72).

(See *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [recognizing the federal due process clause as the mechanism for relief when undue prejudice results from evidentiary rulings at a capital penalty phase].)

To remedy that basic unfairness, and to avoid a death judgment that is unconstitutional under the Eighth and Fourteenth Amendments, this Court should construe Penal Code sections 190.3 and 190.4 to require that at a penalty retrial in a capital case following a jury deadlock, the trial court must make available for presentation to the jury at the defendant's request any evidence the prosecution already introduced at the guilt phase. More specifically, under the circumstances in this case, the Court should rule that appellant was entitled to present to the penalty retrial jury the entirety of People's Exhibits 30-33 and 102, his own videotaped interrogation statements and accompanying transcripts, which already had been introduced in the prosecution's case-in-chief at the guilt phase and considered by the jury at the initial penalty phase. Such a rule would be in harmony with the purpose of and intent underlying Penal Code sections 190.3 and 190.4 and with basic principles of equity.

It is well-settled that a statute is to be construed, where possible, in a manner that renders it "'reasonable, fair and harmonious'" with its purpose (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 357) and avoids both "absurd and unfair consequences" (*Stanton v. Panish* (1980) 28 Cal.3d 107, 115) and "difficult constitutional questions" (*People v. McKee* (2010) 47 Cal.4th 1172, 1193). Initiative measures, such as California's 1978 death penalty law, are interpreted according to the same principles that govern statutory construction. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) The question here involves the necessary scope of evidence at a penalty retrial in a capital case. Both the basic purpose of the penalty phase

and the unique circumstances of a retrial following a jury deadlock point to the answer that appellant urges here.

First, under California's death penalty statute, a penalty jury that also hears the guilt phase is not only permitted, but is required, to consider all the evidence from the entire trial including the guilt, special circumstances and sanity phases. (Pen. Code, § 190.4, subd. (d); CALJIC No. 8.85; CALCRIM No. 761.)[3] Appellant's first jury was given such an instruction. (13 CT 3550; 15 RT 1640.) This requirement makes complete sense given the intent underlying Penal Code section 190.3 that a sentencing jury hear a

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[3] Penal Code section 190.4, subdivision (d) provides:

> In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a pleas of not guilty by reason of insanity pursuant to Section 1026, shall be considered on any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

CALJIC No. 8.85 (1996 ed.), which was in effect at the time of appellant's 1998 trial, provided in pertinent part:

> In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed].

CALCRIM No. 761 currently provides in relevant part:

> You must decide whether (the/each) defendant will be sentence to death or life in prison without the possibility of parole. It is up to you and you alone to decide what the penalty will be. [In reaching our decision, consider all of the evidence from the entire trial [unless I specifically instruct you not to consider something from an earlier phase].]

broad range of evidence about the defendant's crime and his character.[4] Indeed, unlike many other states, California explicitly designates the "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true" as a sentencing factor to be weighed at the penalty phase. (Pen. Code, § 190.3, factor (a); see *Brown v. Sanders* (2006) 546 U.S. 212, 222-223 [the "circumstances of the crime" factor permits the sentencing jury to consider all facts and circumstances about crime, including those relating to invalidated crime-related special circumstances, in assessing the appropriate penalty].) The guilt phase usually will provide most of the evidence about the circumstances of the crime, and in some cases, as in this one, guilt-phase evidence also will relate to the defendant's character and other mitigating factors. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 955-956 [guilt phase contained mitigating evidence regarding defendant's

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[4] In its first paragraph, section 190.3 describes the evidence admissible at the penalty phase as follows:

> In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

These categories of evidence also are included in the statute as specific sentencing factors. (Pen. Code, §190.3, factors (a) - (k)).

mental deficits]; *People v. Smith* (2007) 40 Cal.4th 483, 494-495 [sanity phase contained mitigating evidence regarding defendant's mental illness and psychiatric hospitalization].) Under Penal Code sections 190.3 and 190.4, the penalty jury must weigh this evidence. Indeed, at the guilt phase, the trial court explicitly found with regard to Evidence Code section 356 that "out of fairness to the trier of fact" all of appellant's videotaped statements should be admitted at the guilt phase. (1 RT 12.) A similar concern with fairness should apply to their use at the penalty retrial.

The importance of having the sentencing jury consider all the mitigating evidence, including that presented at the guilt phase, does not evaporate when a jury deadlocks at the penalty phase. On the contrary, given that "'the sentencing function is inherently moral and normative'" (*People v. Redd* (2010) 48 Cal.4th 691, 757; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779), it is just as imperative for the retrial jury as for the original penalty jury to hear all the available evidence relevant to punishment. If the penalty retrial jury is deprived of relevant evidence that the first jury heard, then, as this Court has recognized in an analogous context, "'the second jury necessarily will deliberate in some ignorance of the total issue.'" (*People v. Gay* (2008) 42 Cal.4th 1195, 1218-1219, quoting *People v. Terry* (1964) 61 Cal.2d 137, 146 [trial courts erroneously excluded defendant's lingering doubt evidence from penalty retrials].) That is simply unacceptable under Penal Code sections 190.3 and 190.4 when a jury is deciding whether to sentence the defendant to life or death.

Second, the question of the necessary scope of evidence at a penalty retrial takes on added urgency when the retrial follows a jury deadlock. Such a stalemate, especially one that does not result from a single hold-out juror, generally indicates a close case. (*Ouber v. Guarino* (1st Cir. 2002)

293 F.3d 19, 33; *Hunley v. Godinez* (7th Cir.1992) 975 F.2d 316, 320; *Farmer v. State* (Del. 1997) 698 A.2d 946, 948 [all recognizing that a deadlocked jury demonstrates a close case].) In that situation, the retrial court must be particularly careful that its evidentiary rulings do not significantly alter the picture of the defendant or his crimes presented to the first jury by restricting the evidence available to the new jury. This does not mean that, when justified, the parties may not present additional evidence at a penalty retrial. (See, e.g. *People v. Robertson*, *supra*, 48 Cal.3d at p. 45 [no double jeopardy violation when the prosecution, on retrial of the penalty phase after reversal of the death penalty, introduced evidence of incidents in aggravation that had not been offered at the first trial].) But the trial court must not arbitrarily upset the evidentiary balance by shielding the retrial jury from mitigating evidence the deadlocked jury considered.

That is precisely what happened in this case. The trial court's exclusion of the videotaped interrogation prevented the penalty retrial jury from considering indisputably relevant mitigating evidence that already had been introduced in the guilt phase of the trial. Appellant's statements bore on the circumstances of his crimes and his character, which were highly pertinent under Penal Code section 190.3, factors (a) and (k) to the retrial "'jury's moral assessment of . . . whether [he] should be put to death.'" (*People v. Moon* (2005) 37 Cal.4th 1, 40, quoting *People v. Brown* (1985) 40 Cal.3d 512, 540.) Just three days after the jury deadlock, the trial court shared its assessment of the choice that would face the jury at the penalty retrial given that, in its view, "the case was tried" and "the evidence is fixed" (18 RT 1787):

> From my position, it depends on how the jury digests the evidence that's there. Either they are going to feel

> sympathetic towards the defendant, that he was intoxicated and that was a substantial contributing factor and the sympathetic value, *his remorsefulness during the interview*, depends on how the jury is going to digest that versus the argument that it was a premeditated, planned out, cold blooded killing.

(*Ibid.*, italics added.) And yet, despite recognizing the importance of the videotaped interrogation, the trial court excluded it and drastically changed the evidentiary landscape at the penalty retrial. Indeed, as noted above, the absence of the videotapes was the major difference between the penalty retrial resulting in death and the original penalty phase resulting in an eight-to-four deadlock. (See AOB 112.) In precluding appellant's videotaped statements, the trial court "deprived the jury of an examination of the whole picture" (*People v. Terry*, *supra*, at p. 147), which was plainly inconsistent with Penal Code section 190.3's intent that all relevant evidence be presented to the sentencing jury. The Court should remedy this error by reversing appellant's death sentence and should hold that at a penalty retrial after a jury deadlock, the trial court must allow the defendant to use any evidence relevant to the issue of punishment that the prosecution presented to the original jury at the guilt phase.[5]

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[5] Because the rule appellant advocates is limited to evidence that was admitted at the guilt phase, it would not disturb this Court's rulings upholding the exclusion of out-of-court statements, offered as mitigating evidence by the defendant, which were *not* introduced at the guilt phase. (See, e.g. *People v. Thornton* (2007) 41 Cal.4th 391, 443-444 [no error at the penalty phase in excluding a videotaped lecture about the inappropriate treatment of learning disabilities in schools which had not been introduced at the guilt phase]; *People v. Jurado* (2006) 38 Cal.4th 72, 129 [no error at the penalty phase in excluding defendant's videotaped confession which had not been introduced at the guilt phase]; *People v. Livaditis* (1992) 2

(continued...)

C. Having Chosen To Introduce Appellant's Entire Videotaped Statements When Their Use Suited Its Purposes At The Guilt Phase, The Prosecution Should Not Have Been Heard To Object To Appellant's Use Of That Same Evidence In Seeking To Save His Life At The Penalty Retrial

Having elected to use appellant's videotaped statements at the guilt phase, the prosecutor should not have been allowed to object to their admissibility at the penalty retrial. Plainly put, the prosecution should not be permitted to have gained the benefit of using this evidence to obtain a capital murder conviction and then have been permitted to dispute appellant's right to use the very same evidence when the jury would decide his fate. Basic notions of equity prohibit such gamesmanship, which is particularly unseemly in a capital trial where the defendant's life is at stake. As this Court stated in granting a new penalty retrial because the prosecutor used inconsistent theories of culpability without a good faith justification, "'[t]he criminal trial should be viewed not as an adversarial sporting contest, but as a quest for truth." (*In re Sakarias*, *supra*, 35 Cal.4th at pp. 159-160, quoting *United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, 127.)

Well-settled law holds that a party who introduces evidence at trial is precluded from complaining on appeal about its admission. (*People v. Ramos* (2000) 15 Cal.4th 1133, 1168 [defendant is estopped from contesting his own admission of his diary, even if he acted preeemptively to reduce the diary's impact on the jury].) At bottom, the rule functions as a

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[5](...continued)
Cal.4th 759, 779-780 [no error at the penalty phase to exclude testimony of defendant's mother, which had not been introduced at the guilt phase, that defendant was very sorry about his actions]; see AOB 109-110 and ARB 31.)

form of estoppel to ensure equity and fair dealing in judicial proceedings. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 612 ["[t]he forfeiture rule . . . prevents a party from engaging in gamesmanship"].) Similarly, a party, like respondent here, should not be permitted first to request admission of evidence and then later to object to its opponent's use of the same evidence in the same trial. ""California public policy 'will not permit a litigant "to blow hot and cold"' by taking the benefits of a doctrine 'when it suits his purpose' and then repudiating the same facts 'when it is no longer profitable or to his advantage to do so.'"" (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 525 [agency may not rely on statutory provision to overcome a conflict of interest and simultaneously deny the existence of the conflict of interest].)

There is no question that the prosecution blew "hot and cold" about the use of appellant's videotaped statements. The issue of their admissibility first arose before the guilt phase when appellant learned that the prosecution intended to introduce the bulk of appellant's statements. Appellant filed a motion under Evidence Code section 356 requesting that if the prosecution introduced part of the statements, the entire videotaped interrogation be admitted. (3 CT 715-721 [motion] and 3 CT 724 - 4 CT 869 [interview transcripts].) Opposing the motion, the prosecutor argued only that the separate sections of appellant's statements were not dependent upon and did not explain each other. (4 CT 870-872 [opposition] and 874-888 [police report summarizing interviews]; see also 1 RT 4-14 [hearing on motion].)[6] The trial court ruled that if the prosecutor used any of

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[6] At the guilt phase the prosecutor did not raise any concern that appellant's statements that he did not intend to kill deputies Haugen and

(continued...)

appellant's Mirandized statements, then all of the statements must be admitted. (1 RT 11-12.) At that point, the prosecutor had the choice of using all appellant's statements in compliance with the court's ruling or not using them. He indicated that he needed a week to consider his options (1 RT 13-14), and ultimately decided to introduce the statements in their entirety (4 RT 548-550).

As defense counsel pointed out before the penalty retrial, at the "guilt phase trial, the prosecution made defendant's video taped confession a cornerstone of [its] case in chief." (14 CT 3639.) The prosecutor did not simply seek admission of the very evidence that he later opposed. He also relied on that evidence in his closing argument at the guilt phase, telling the jury that appellant was guilty of first-degree lying-in-wait murder even if they "believe[d] 100 percent what Mr. Russell had to say to Mr. Spidle on those videotaped interviews." (11 RT 1303.) Before leading the jury through appellant's statements, the prosecutor stated:

> So, Ladies and Gentlemen, believe everything that the defendants says, he is still guilty of first-degree murder. And why? Here's the defendant's own words. The exhibits, the transcripts of his interview, as well as the tapes are in evidence.

(11 RT 1305.) The prosecutor repeatedly referred to appellant's statements, at times quoting them verbatim (11 RT 1305-1310), and pointed out to the jury which statements to believe and which to reject (11 RT 1305-1306, 1309). He told the jury to recall appellant "on videotape, tell[ing] his side

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[6](...continued)
Lehmann should be excluded as unreliable. The first jury's guilt-phase verdict and its inability to reach a penalty-phase verdict did not render unreliable the very same statements the prosecutor had introduced against appellant.

of the story." (11 RT 1306.) Undoubtedly, the videotaped interrogation was central to the prosecutor's closing argument at the guilt phase.

The prosecutor also relied on appellant's statements at the original penalty phase. In his closing argument he again referred to "defendant's own words" (15 RT 1652) in an attempt to emphasize the aggravated nature of the murders (15 RT 1652, 1661-1662) and to minimize the mitigating impact of evidence about appellant's mental state, character, and life experiences (15 RT 1652-1657).

However, when the jury deadlocked on penalty, the prosecutor did an abrupt turnabout. He seized the opportunity to disavow the admissibility of the very evidence he previously had championed – in a game of "gotcha" – on the theory that appellant's statements no longer were being offered against a party declarant under Evidence Code section 1220 and suddenly had become unreliable. (15 CT 3956-3958; 21 RT 1856-1859; see *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1036 [party cannot use of cross-examination to turn "the trial into a game of "'gotcha'"].) The prosecutor was no more entitled to reverse course by objecting to his own evidence at the penalty retrial than he would have been at the original penalty phase. Having chosen to introduce appellant's videotaped statements at the guilt phase and having exploited them throughout the original trial, the prosecutor should not have been heard to challenge their admissibility at the penalty retrial.[7]

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[7] Defense counsel made this point in his argument on the admissibility of the videotaped statements at the penalty retrial when he told the trial court, "we're not asking to do anything other than what the district attorney's office did in the first trial, which was present this evidence for the fact finders and use that evidence in deciding the case." (21 RT 1855.)

D. The Exclusion Of Appellant's Videotaped Statements At The Penalty Retrial Prejudiced His Chances For A Sentence Less Than Death

The experience of watching appellant during the course of the videotaped interviews gave the first jury, which could not reach a verdict as to appellant's punishment, an immediate, inimitable and humanizing portrait of appellant that the retrial jury, which reached a death verdict, was not permitted to see. As appellant has stated, this was the most significant difference between the two penalty trials. (See AOB 112.) Respondent does not contest this point. Rather, respondent focuses its entire harmless error argument on the fact that defense counsel was able to elicit testimony from Detective Spidle about appellant's emotional, teary reaction to learning that Haugen and Lehmann were dead and Spidle's view, which was at odds with his contemporaneous report, that appellant expressed regret, not remorse, about the murders. (RB 71-72.) Respondent sidesteps the abject inadequacy of Spidle's cramped testimony to substitute for the personal experience of watching appellant during two and a half hours of law enforcement interviews. (See ARB 33.) The Court only needs only to watch People's Exhibits 30, 31 and 33 to understand this point. As justifiably angry at appellant for his crimes as the jury might have been, there is a reasonable possibility that at least one juror would have responded sympathetically to the videotapes – to seeing appellant distraught, incredulous, remorseful – and would not have voted for death. The prejudice flowing from the trial court's error rests on several factors.

First, this was a close case on penalty. Respondent entirely avoids the significance of the eight-to-four deadlock of the original jury. (See RB 71-72.) Whether the majority of jurors voted for death or for life without the possibility of parole was not reported. Nevertheless, this deep divide

indicates that there was something about appellant that compelled, at the very minimum, a third of the jury to reject a death sentence. As discussed previously, such a split is a sure sign that this was a very close case. (See *ante* at p. 8.)

Second, not only did the first jury deadlock, but the aggravation did not so far outweigh the mitigation that a reasonable juror could not have concluded that a sentence of life without the possibility of parole was the appropriate penalty. To be sure, the murder of two peace officers in the course of their duties is an extremely aggravated crime. But that fact, by itself, does not guarantee a death sentence. (See *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1116-1117 [jury rejected death penalty in favor of life for defendant convicted of first degree murder of one peace officer with peace-officer murder special circumstance as well as attempted premeditated murder of second peace officer].)

The prosecution's case in aggravation at the retrial consisted of the circumstances of the crime and victim impact evidence. (See AOB 29-35; RB 15-19.) The prosecution added several new victim impact witnesses, including two young children, but the substance of this evidence remained largely the same as at the first penalty phase. (See AOB 29-30, 33-35; RB 15-19.) Notably missing from the prosecution's case were some major aggravating factors. Although appellant had been physically abusive to his wife, unlike many capital defendants, he did not have a long history of other violence (see, e.g., *People v. Allen* (1986) 42 Cal.3d 1222, 1246 [defendant committed multiple other violent crimes) or *any* felony convictions (see, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1278 [defendant had several felony convictions]). Nor did he exhibit a callous or cavalier attitude toward his crime or his victims. (See, e.g., *People v. Cain* (1995) 10

Cal.4th 1, 77 ["defendant, still bloody from the killings, returned to his friends and boasted of what he had just done"].) Appellant presented mitigating evidence from his mother, pastor, treating psychiatrist, friends, employers and co-workers to show that the shooting was an aberrant act of decent man who was beset by addictions and mental problems and whose life was unraveling. (See AOB 4-6, 35-43.) The mitigation case would have been greatly enhanced by the overall humanizing effect of seeing and hearing appellant during the videotaped interrogation soon after the crimes.

In short, appellant's offense may have been heinous, but he was not one of the most heinous offenders, and a death sentence was not inevitable. (See *People v. Gay*, *supra*, 42 Cal.4th at p. 1227 [death verdict was not a foregone conclusion despite aggravating evidence that defendant murdered peace officer in the performance of his duties and had committed prior violent crimes, which were "unusually – and unnecessarily – brutal and cruel," and scant evidence in mitigation]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [although defendant's crime – murdering three friends after he had bound them and as they cried or begged for mercy – "was undeniably heinous," a death sentence "was by no means a foregone conclusion"]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 962 [despite egregious nature of capital double murder, along with prior assaults on inmates, possession of assault weapon, and possession of shank in jail, "a death verdict was not a foregone conclusion"].)

Third, the exclusion of the videotaped statements deprived appellant of his best evidence on two potentially powerful mitigating factors – lingering doubt about whether he intended to kill officers Haugen and Lehmann and his remorse for his actions. The trial court found that appellant's statements were relevant to both mitigating factors (21 RT

1862), but its order excluding the videotapes stripped appellant of evidence of his own words and demeanor that was probative on both points.

Defense counsel told the jury that any lingering doubt it had as to appellant's intent to kill could be considered as a mitigating factor (31 RT 3165), and the trial court instructed the jury on lingering doubt (31 RT 3203). As other courts have noted, "residual doubt is perhaps the most effective strategy to employ at sentencing." (*Chandler v. United States* (11th Cir.2000) 218 F.3d 1305, 1320, fn. 28; accord, *Williams v. Woodford* (9th Cir.2002) 384 F.3d 567, 624; see also Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1563.) But in this case the trial court's decision to exclude appellant's statements gutted the lingering doubt argument by cutting off its evidentiary foundation. In his videotaped interrogation, appellant repeatedly asserted that he did not intend to hit, hurt or kill officers Haugen and Lehmann (See, e.g. 4 Supp. CT 139 ["Boy oh boy, oh Jesus, you know my intentions weren't that way. How'd they get hit, man, how'd they f___' get hit?"]; see also 4 Supp. CT 2, 9 [P.Exh. 32]; 4 Supp. CT 119, 122, 125, 141, 145 [P.Exh. 102]), but the trial court did not let the jury hear or see any of that evidence.

Defense counsel also argued remorse and argued it strenuously. (See 31 RT 3177-3180.) Indeed, as the trial court predicated, the penalty retrial boiled down to competing visions of appellant: the defense urging sympathy for appellant based in large part on appellant's remorsefulness for his rash, deadly act and the prosecution urging harsh justice for appellant's cold, calculated killing. At the original penalty phase, in arguing remorse, defense counsel was able to appeal directly to the jury's own perception of appellant as the person they saw and heard on the videotapes. (See, e.g. 15

appellant as the person they saw and heard on the videotapes. (See, e.g. 15 RT 1677 [based on the prosecutor's comments "would you not have expected an entirely different person had you not heard Tim on the tape?"]; RT 1678 [referring to appellant as "showing remorse throughout the course of the videotape"].) At the retrial, defense counsel could offer the jury only Detective Spidle's constricted testimony, which disavowed his contemporaneous report that appellant appeared "remorseful," and asserted his revised opinion that appellant showed only "regret" and did not say he was sorry. (29 RT 2984; see AOB 112.)[8] The contrast could not have been more stark.

In assessing the prejudice resulting from the trial court's error, the impact of remorse at a capital penalty phase should not be underestimated. As empirical studies of jury decision-making in capital cases show, a defendant's remorse, or lack of remorse, is one of the primary considerations that drives jurors in choosing between life and death sentences. (Blume, Johnson & Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation* (2008) 36 Hofstra L.Rev. 1035, 1037 [hereafter "*Competent Capital Representation*"].) In California capital cases, a defendant's degree of remorse is a frequently-discussed issue in the jury room and a factor that

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[8] Detective Spidle's full explanation is worth noting:

> Well, I differentiated that word "remorse" from the word "regret," and did some dictionary research on the two. And feel the more semantically correct description would be regret. He did display disappointment or distress over his actions, as opposed to some type of moral anguish or compassion, which is more of a definition of remorse.

(29 RT 2984.)

a majority of jurors cited as the most compelling reason for their decision. (Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L.Rev. 1557, 1560 [hereafter "*The Capital Jury and Absolution*"].)[9]

Not surprisingly, the more sympathy a juror feels for the defendant, the more likeable he finds the defendant to be, and the more able he is to imagine himself in the defendant's situation, the more likely a juror is to vote for life. (*Competent Capital Representation*, *supra*, at p. 1051; Garvey, *The Emotional Economy of Capital Sentencing* (2000) 75 N.Y.U L.Rev. 26, 63.) Showing that the defendant is remorseful often is a key component to creating this sympathetic reaction in the jury. Conversely, when jurors believe the defendant is not remorseful, they are angry, and they see little of value in the defendant that is worth saving. (*Competent Capital Representation*, *supra*, at p. 1049.)

In fact, the presence or absence of remorse in the defendant is so influential in shaping the outcome of capital trials that, whenever possible, prosecutors will emphasize the defendant's apparent lack of remorse in their closing argument. (*The Capital Jury and Absolution*, *supra*, at p. 1558; Costanzo & Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments* (1994) 50 J. Soc. Issues 125, 137.) This case was no exception. In his rebuttal closing argument, the prosecutor adamantly challenged the notion that appellant was sorry for

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[9] These conclusions are based on data gathered from the California segment of the Capital Jury Project, a nationwide study of the factors that influence the decision of capital jurors on whether or not to impose the death penalty. The California segment of the study included thirty-seven sentencing proceedings where the jury was asked to return a sentence of death. (See *The Capital Jury and Absolution*, *supra*, at p. 1559.)

what he had done and insisted that appellant's apparent *lack* of genuine remorse was "really important." (31 RT 3184-3185.) The prosecutor argued that appellant did not talk to Detective Spidle until almost six hours after the crime, and even then appellant did not express that he was sorry. (31 RT 3185.) The prosecutor argued that it was not until many hours later that appellant, in the custody of the sheriff deputies, "show[ed] some tears." (*Ibid.*) And the prosecutor argued that appellant's decision to say something was not "true remorse" and asked rhetorically, "Is someone truly sorry after you have to [b]erate them and tell them that they did something wrong?" (*Ibid.*)

The videotape of appellant's interviews would have offered the jurors a very different picture of appellant from which they reasonably could have concluded that appellant had expressed genuine remorse for his actions without having been upbraided by the police. Unlike the jury that deadlocked, the jury that sentenced appellant to death did not see appellant's visible upset, hear the sadness in his voice, or observe his respectful demeanor toward his interrogators. Nor did the sentencing jury hear appellant's phone call to his brother at the end of the interviews. Appellant apparently did not reach his brother, but left a message, caught on camera, saying in part:

> I love you Jerry. I'm just really sorry, just really sorry for what's happened. I'm gonna let you go, but again, I'm really, I'm really sorry for, for doing what I've done.

(P. Exh. 33; 4 Supp. CT 146 [P.Exh. 102 at p. 48].) Without the videotape of the interrogation, the retrial jury was denied the opportunity to evaluate all the relevant evidence and decide for itself whether appellant was genuinely remorseful on the day of and the day after his crimes.

Finally, the retrial jury did not reach its death verdict quickly. Even without appellant's videotaped statements, the jury spent two and a half days deliberating his fate. (21 CT 5770 [jury starts deliberating on December 1, 1998, at 12:05 p.m.]; 21 CT 5848 [jury deliberates throughout December 2]; 21 CT 5851 [jury deliberates throughout December 3, and returns its verdict at 4:50 p.m.].) The length of the deliberations suggests that the evidence favoring a death sentence was not so overwhelming that the addition of the excluded videotapes into the evidentiary mix would have made no difference to the verdict.

For all these reasons, under *Chapman v. California* (1967) 386 U.S. 18, 24, respondent cannot prove beyond a reasonable doubt that the unconstitutional exclusion of appellant's videotaped statements did not contribute to the death verdict, and under *People v. Brown* (1988) 46 Cal.3d 432, 448, appellant has shown there is a reasonable possibility that the erroneous exclusion of his statements affected the verdict. The trial court's error was prejudicial, and appellant's death sentence must be reversed.

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E. Conclusion

As stated above, the death verdict must be reversed, and as stated in Appellant's Opening Brief and his Reply Brief, the entire judgment of conviction and sentence must be reversed.

DATED: June 30, 2010

Respectfully submitted,

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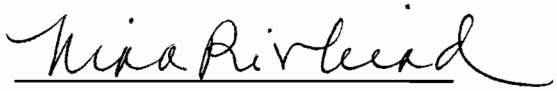

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Certificate of Counsel
(Cal. Rules of Court, rule 8.630(b)(2)

I, Nina Rivkind, am one of the Supervising Deputy State Public Defenders who is representing appellant Timothy Russell in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 6,466 words in length.

NINA RIVKIND
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Timothy Russell* Cal. Supreme Ct. No. S075875

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing the same in an envelope (or envelopes) addressed (respectively) as follows:

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TIMOTHY RUSSELL
(Appellant)

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Each said envelope was then, on July 1, 2010, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 1, 2010, at San Francisco, California.

Glenice Fuller

DECLARANT