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 REPLY 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

In his original briefs, appellant challenged the exclusion of his videotaped interrogation statements from his penalty retrial 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.) He argued that his statements were erroneously excluded because they were admissible as non-hearsay as well as for non-hearsay purposes (AOB 111-112; ARB 31-32) and that their erroneous

exclusion violated his Eighth Amendment right to present relevant mitigating evidence (AOB 103-105) and his Fourteenth Amendment right to due process (AOB 105-111; ARB 29-31.) Appellant continues to assert these claims as valid grounds for reversal of his death sentence.

In his supplemental briefing, appellant has raised two additional grounds for remedying the erroneous exclusion of his videotaped statements from the penalty retrial. These claims are based on this Court's authority to construe the California death penalty statute's provisions governing the penalty phase and to invoke equitable principles when necessary to ensure a fair trial in a capital case. Appellant's supplemental arguments present alternatives to his original claims because they provide a basis for relief even if the Court concludes that appellant's videotaped statements were inadmissible hearsay and even if the Court concludes that their exclusion did not violate the Eighth or Fourteenth Amendments to federal Constitution. In this brief, appellant answers to respondent's opposition to these additional state law claims.

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

To guarantee the fundamental fairness of a capital prosecution under the unique facts of this case, appellant urges this Court to interpret Penal Code sections 190.3 and 190.4 to require that at a penalty retrial following 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. (ASOB at 3-10.) In answering this claim, respondent sidesteps the pivotal and limiting part of the rule appellant advocates – that the relevant evidence a defendant should be permitted to introduce at a penalty retrial is *evidence that the prosecutor already used at the guilt phase*. Respondent does not address this crucial aspect of appellant's argument. (See RSB 3-5.) Instead, arguing against a claim appellant does not make, respondent asserts that "[n]either Penal Code section 190.3 nor 190.4 implies, let alone requires, all evidence presented at a guilt phase be the same at the penalty phase if there is a different trier of fact at the penalty phase." (RSB 4.) Appellant's does not contend that *all* guilt phase evidence must be presented at a penalty retrial. Rather, he more narrowly asserts that if the defendant wants to introduce relevant evidence at a penalty retrial that the prosecuted used at the guilt phase, it must be admitted.[1]

Respondent objects to the rule appellant proposes because it would allow the admission of hearsay that does not fall within an established state-law hearsay exception. (See RSB 4-5.) That concern, however, does not defeat appellant's rule. As noted in previous briefing, hearsay exceptions are not limited to those enumerated in the Evidence Code. (AOB 110.) Evidence Code section 1200, subdivision (b) states: "Except as provided by law, hearsay evidence is inadmissible." That law is contained in the

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[1] Respondent also recites several rulings of this Court that do not pertain to appellant's statutory-construction argument. (RSB 4.) Appellant has not claimed that penalty retrials are unconstitutional per se or that all such trials invariably violate federal constitutional rights, arguments which, as respondent notes, this Court has rejected. (*Ibid.*)

decisions of this Court as well as in the statutes enacted by the Legislature. (See AOB 110 and RB 67, both citing *People v. Demetrulias* (2006) 39 Cal.4th 1, 27 [acknowledging judicial authority to recognize nonstatutory exceptions to the hearsay rule].) The unusual facts here – where the prosecutor was allowed to use appellant's videotaped interrogation statements to convict him of capital murder, but after the jury could not reach a unanimous penalty verdict, on retrial appellant was not allowed to use that same indisputably relevant evidence to try to save his own life – warrant the Court's exercise of its authority to recognize the limited, capital-case hearsay exception that appellant advocates.

Finally, respondent argues that appellant's videotaped statements were not reliable. (RSB 5.) Throughout its brief, respondent repeats its view that appellant's videotaped statements were self-serving and unreliable (see RSB at 2, 5, 7, 8, 9, 11) and not subject to cross-examination (see RSB 6, 8-9).[2] The purported unreliability arises from the fact that although appellant admitted many incriminating facts, he denied that he planned or intended to kill officers Haugen and Lehmann. (RSB 2.) To be sure, the reliability of appellant's videotaped statements is relevant to his federal due process claim, and he has argued they are reliable under *Green v. Georgia* (1979) 442 U.S. 95. (See AOB 106-108; ARB 29-30.) However, respondent's view that the statements were unreliable because some of what

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[2] Although respondent alleges that appellant sought to introduce the videotaped statements simply "to avoid any cross-examination" (RSB 6) and insists that "the need for cross-examination was especially strong in this situation," (RSB 9), it is curious that the prosecutor at the guilt phase and original penalty phase never voiced any worry about his inability to cross-examine appellant these same exhibits were used. Nothing about the substance of the evidence changed with the jury deadlock.

appellant said tended to minimize his degree of culpability does not answer his supplemental, state law argument. The rule appellant proposes does not depend on proof that the statements were reliable beyond the essential fact that the prosecutor chose to use them. It was the prosecutor's decision to make the videotaped statements part of his case at the guilt phase that, by itself, imbued them with sufficient reliability to justify their use by appellant at the penalty retrial. Respondent has not shown that the rule appellant seeks would be unwise or unworkable or would be unfair to the prosecution, which elected to have the original jury consider this very evidence in deciding both whether to convict appellant of capital murder and whether to impose society's ultimate sanction on him.

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

Respondent disputes that basic notions of equity should have precluded the prosecutor, who had used appellant's videotaped interrogation statements to convict appellant of capital murder, from objecting to appellant's use of the very same evidence when the jury would decide whether to impose the death penalty. (RSB 6-9.) In its view, principles of estoppel should not apply because (1) the penalty retrial raised "a related, but different issue" than that tried at the guilt phase (RSB 6); (2) in using the statements at the guilt phase, "the prosecutor did not vouch for the reliability of the evidence" (RSB 7); and (3) no case law supports appellant's position (RSB 6). All three points are mistaken.

First, contrary to respondent's analysis, the different purposes of the guilt phase and a penalty phase do not justify the prosecutor's inconsistent

positions about the admissibility of appellant's videotaped statements. The fact that different legal determinations were made at each phase of the trial did not affect the relevance of the videotape to the factual determinations the jury would make at the penalty retrial. The trial court found, and respondent has not contested, that appellant's statements were relevant to prove mitigating factors, in particular that appellant's version of the shootings would be relevant to the issue of lingering doubt and that his mental state would be relevant to the issue of remorse. (21 RT 1862.) To the extent that respondent's argument is a disguised attempt to relitigate the question of relevance, it should be rejected outright. Because appellant's videotaped statements were indisputably relevant to the penalty retrial, the prosecutor's objection to appellant's use of them in his case in mitigation was not justified simply because the jury would decide a different legal issue.

Respondent's argument about "different issues" glosses over what happened in this case. When, after thinking about his evidentiary options for a week, the prosecutor elected to use appellant's statements in their entirety at the guilt phase, he must have understood that the jury's use of them would extend to the penalty phase. (See ASOB 12-13.) In doing so, the prosecutor necessarily conceded their relevance at the penalty phase. At the first trial, the prosecutor never disavowed the videotape for purposes of the penalty phase, nor did he seek a limiting instruction as to their use. (See 12 CT 3380 [prosecutor did not request instruction under CALJIC No. 2.09 ("Evidence Limited as to Purpose")].) After the jury deadlock, the trial court, which had heard and seen all the evidence including the videotape of appellant's interrogation, told counsel that the result of the retrial would depend on whether the jury viewed the evidence sympathetically as

showing appellant's intoxication as a substantial contributing factor and "his remorsefulness during the interview" or unsympathetically as showing "a premeditated, planned out, cold blooded killing." (18 RT 1787; see ASOB at 9-10.)

The trial court's observation was not lost on the prosecutor. In deadlocking, at least one-third and possibly two-thirds of the jury had voted for life. The prosecutor very likely was worried about the mitigating effect his introduction of appellant's videotaped statements had on the jury, so he decided not to present those exhibits at the penalty retrial. And he then opposed their use by appellant with evidentiary objections that apparently did not trouble him when it was in his interest to introduce the exhibits. (See ASOB 14, citing 15 CT 3956-3958; 21 RT 1856-1859; see 4 CT 870-872; 1 RT 4-14 .) In light of these facts, appellant's concern with gamesmanship by the prosecution is well-placed. (See ASOB 11-14.) The prosecution should not have been permitted to exploit the happenstance of the jury deadlock to gain an evidentiary windfall that placed appellant in a worse position than at the original trial and denied him a fair penalty retrial.

Second, contrary to respondent's representation, appellant's equity argument is not premised on the assumption that the prosecutor gave his imprimatur to or vouched for everything appellant said on the videotapes. (See RSB 7-8.) The point, as noted above at pages 4-5, is that by deciding to introduce appellant's statements in their entirety and thereby relying on them at all, the prosecutor signaled that they were sufficiently reliable for use in a capital case. Respondent misses this point in detailing the portions of appellant's statement that the prosecutor relied on and the portions he urged the jury to reject at the guilt phase. (See RSB 7-8.) In his closing argument the prosecutor was entitled to urge any reasonably supported

interpretation of appellant's statements. But a prosecutor's argument does not define or limit the jury's use of this evidence. That is done by the trial court's instructions, and there was no instruction restricting the jury's use of appellant's statements at either the guilt phase or the first penalty phase. (See 11 RT 1381-1402; 15 RT 1638-1644.)[3]

Third, in addition to the general authority on estoppel cited by appellant, the Court's decision in *In re Sakarias* (2005) 35 Cal.4th 140 supports appellant's argument by acknowledging the fundamental unfairness of a prosecutor pursuing contradictory and incompatible positions at trial without adequate justification. (See ASOB 11-12.) In *Sakarias*, the prosecutor intentionally pursued inconsistent and irreconcilable factual theories about the culpability of two defendants by arguing in their separate trials that each defendant inflicted the most serious blows on the victim when the evidence showed only one of them committed these acts. (*Id.* at pp. 147-148.) This Court found that the prosecutor's use of these inconsistent and irreconcilable theories violated "'the due process requirement that the government prosecute fairly in the search for truth. . . .'" (*id.* at p. 160), and required reversal of the death sentence of the defendant against whom the false theory was used (*id.* at p. 156, 160-167).

Obviously, there are significant differences between *Sakarias*, which involved the prosecutor's use of inconsistent theories of culpability, one of

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[3] Respondent continues to cite *People v. Jurado* (2006) 38 Cal.4th 72, 129-130 as a decision that "upheld the exclusion of self-serving post crime statements made under similar circumstances." (RSB 9; see also RB 67-68.) However, as appellant previously has explained, *Jurado* is not analogous because the prosecutor in that case chose not to use the defendant's interrogation statements at all. (See AOB 109; ARB 31; ASOB 10, fn. 5.)

which was false, in the separate trials of two defendants, and this case, which involves the prosecutor's inconsistent and unjustifiable position about the admissibility of appellant's interrogation statements at the guilt phase and the penalty retrial. Nevertheless, the fundamental due process principle underlying *Sakarias* applies here: a prosecutor's intentional pursuit of inconsistent theories, without a good faith justification, in seeking a conviction or a death sentence undermines the fairness of the trial and the reliability of its verdict. (*Id.* at pp. 156, 159.) The prosecutor in this case did not knowingly pursue a false theory of culpability. But he deliberately and unjustifiably manipulated the evidence to enhance his chances of obtaining a death sentence at the penalty retrial. After using Evidence Code section 1220 as a sword at the guilt phase to introduce appellant's videotaped interrogation statements, he used Evidence Code section 1220 as a shield to make sure the penalty retrial jury would not see the videotaped interrogation which the jury that deadlocked had viewed and which, as the trial court implicitly acknowledged, could give rise to sympathy for appellant. (See 18 RT 1787.) To paraphrase this Court in *Sakarias*, the prosecutor's goal in a capital case must be not simply to obtain a death sentence, but to obtain a fair penalty verdict. (*In re Sakarias*, *supra*, 35 Cal.4th at p. 159.) That did not happen in appellant's case as a result of the prosecutor's deliberate strategy at the penalty retrial of objecting to the admission of evidence he already had introduced.

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

In answering appellant's argument that the erroneous exclusion of appellant's videotaped statements from the penalty retrial was prejudicial,

respondent presents three arguments, none of which is persuasive.[4] First, respondent repeats its prior contention that Detective Spidle's testimony was sufficient to present evidence of appellant's remorse. (See RB 71-72; RSB 10-11.) Respondent overlooks appellant's argument that Spidle's tepid testimony, revising his contemporaneous description of appellant as appearing "remorseful" upon learning that officers Haugen and Lehmann were dead to an opinion that appellant displayed "regret" (29 RT 2984), was a very poor substitute for the first jury's experience of watching appellant during two and a half hours of law enforcement interviews. (See ASOB 15.) The jurors observing appellant during the videotaped interrogation might have viewed appellant's statements and demeanor differently than Detective Spidle who, as a senior detective in the Riverside Sheriff's Department (28 RT 2964), was a colleague of the slain officers. At least some of the jurors might have seen in appellant anguish or conscience about what he had done to the officers and not just disappointment over his actions, as Spidle believed, or regret or remorse about finding himself in an uncomfortable situation, as the prosecutor argued to the retrial jury (31 RT

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[4] In asserting that any error in excluding the videotaped statements was harmless, respondent ignores or does not dispute appellant's showing that (1) even in cases of extremely aggravated murders, a death sentence is not a foregone conclusion (wee ASOB 16-17); (2) lingering doubt and remorse are extremely important to a jury's penalty determination (see ASOB 18-20); and (3) the videotaped interrogation was relevant not only to show remorse or lingering doubt, but would have served generally to humanize appellant by permitting the jury to see and hear him soon after the crimes (see ASOB 17).

3153).[5]

Second, respondent suggests that any error was harmless because appellant could have testified about his version of the shootings and the remorse he felt. (RSB 11-12, 15; see also RB 65.) Although appellant could have chosen to testify, his testimony would not have adequately compensated for the loss of the videotaped statements, which would have allowed the penalty retrial jurors to watch and hear appellant as he was questioned on the day he killed officers Haugen and Lehmann and draw their own conclusions about his attitude and character. As defense counsel explained at the hearing on their admissibility, the videotapes would have given the jury something appellant's testimony could not provide: a "very clear picture" of appellant "in living color" on same day as the shooting. (21 RT 1855.) Moreover, defense counsel was right that any attempt to recreate that contemporaneous portrait in the courtroom would lose its impact. (See *ibid.*) No testimony by appellant after he had seen the prosecution's case and consulted with counsel could possibly be viewed by the jury in the same way as his uncounseled statements given in the immediate, stressful aftermath of the killings and his arrest. Trial testimony two years after the fact simply was no substitute for the real-time video of

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[5] In arguing that appellant did not display remorse in the videotaped statements, respondent seems to suggest that a showing of genuine remorse would have required him to state explicitly to his interrogator that he was truly sorry he killed the officers and inflicted so much pain on their families and that his telephone statement to his brother that "I'm really sorry for doing what I've done" (P. Exh. 33; 4 Supp. CT 146 [P.Exh. 102 at p. 48]) was not sufficient. (See RSB 13.) But remorse need not be stated so directly. As this Court has recognized, "a defendant's demeanor may reflect remorse, or otherwise arouse sympathy in either jury or judge." (*People v. Valencia* (2008) 43 Cal.4th 268, 308.)

appellant's interrogation.

Third, in arguing that the exclusion of the videotaped interrogation was harmless, respondent essentially asserts that the evidence would not have mattered to the penalty verdict because it would not have presented the penalty retrial jury with a sympathetic view of appellant. (See RSB 12 [contending that the videotapes show "that Russell in no way expresses remorse or any other outward emotion for having gunned downed [sic] Deputies Haugen and Lehmann."]; see also RSB 12-13.) In light of the jury deadlock, this assertion seems disingenuous. The absence of the videotaped interrogation was the major difference between the penalty retrial resulting in death and the original penalty phase resulting in an eight-to-four deadlock – a point respondent does not contest. (See AOB 112; ASOB 9.) Throughout its brief, respondent spins the evidence in the videotaped interrogation to fit its view of appellant as a cold, calculating, unrepentant killer. As the trial court's comments after the mistrial indicated, there also was another, more sympathetic narrative about appellant as a troubled man whose life was falling apart, who shot the officers while intoxicated, and who was remorseful for his crimes. (See 18 RT 1787.) Certainly, appellant's videotaped statements contributed significantly to this alternative, mitigating portrait of him and more than likely influenced a substantial portion of the first jury to vote for a life-without-parole sentence.

In assessing prejudice, the Court's task is not to decide which of the competing versions about the videotaped interrogation is true, but rather to determine whether there is a reasonable possibility that removing the videotapes from the evidentiary mix affected the result at the penalty retrial. In other words, the question is whether this Court can say with confidence

that had the retrial jury viewed the videotaped interrogation, not even one juror would have refrained from voting for death. That cannot be said on the facts of this case. Notwithstanding respondent's unexplained and unsupported insistence to the contrary (RSB 14), the eight-to-four deadlock at the first penalty phase, where appellant's videotaped statements were in evidence, proves that this was a close case. The erroneous exclusion of that evidence at the penalty retrial was prejudicial under both the state-law harmless error standard (*People v. Brown* (1988) 46 Cal.3d 432, 448) and the federal constitutional harmless error standard (*Chapman v. California* (1967) 386 U.S. 18, 24).

E. Conclusion

For the reasons stated above and in appellant's prior briefing on Argument 6, 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: August 9, 2010

Respectfully submitted,

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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 3,539 words in length.

Nina Rivkind

NINA RIVKIND
Attorney for Appellant

DECLARATION OF SERVICE

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

I, Neva Wandersee, 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 REPLY BRIEF

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TIMOTHY RUSSELL
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Each said envelope was then, on August 9, 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.

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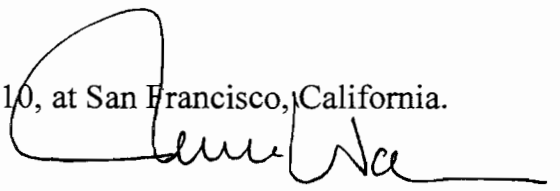

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