In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **TIMOTHY R. RUSSELL,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S075875

Riverside County Superior Court Case No. RIF72974
Patrick F. Magers, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. THE TRIAL COURT PROPERLY EXCLUDED RUSSELL'S VIDEOTAPED INTERVIEW WITH POLICE FROM THE PENALTY PHASE RETRIAL

In Argument 6 of his Opening Brief, Russell complained that the trial court denied him due process when it excluded the videotape of police interviewing him on the ground that his self-serving statements to police were not reliable. He contended that he was entitled to rely on the videotape in the penalty phase retrial as mitigating evidence to show the circumstances of the offense and his character, including his state of mind before, during and after the shooting, the fact that he surrendered without incident, led the police to where he had hidden the gun, made an early acknowledgement of culpability, and expressed remorse for the shootings, because the videotapes were relied on by the prosecution in its case in chief in the guilt phase and considered by the jury in the penalty phase of his initial trial. (AOB 103-111.) Russell has filed a Supplemental Opening Brief (SAOB) in order to advance two additional arguments supporting his contention that the trial court committed reversible error in excluding the videotape of his statements to police in the penalty phase retrial. (SAOB at 2.) First, Russell argues that the intent and purpose of Penal Code sections 190.3 and 190.4 compel the defendant's use in a penalty phase retrial of any evidence relied upon by the prosecution in the guilt phase to secure a conviction of capital murder. (SAOB 3-10.) Russell also argues that the prosecution should be estopped from objecting to the admission of evidence in a penalty phase retrial if the prosecution introduced that evidence in the guilt phase. (SAOB 11-14.) Neither contention is persuasive as the trial court properly excluded Russell's self-serving and unreliable statements to police.

As set forth in detail in Respondent's Brief at pages 62 through 73, prior to the start of the second penalty phase trial, Russell sought to introduce his taped statements to Detective Spidle as evidence in mitigation under sections 190.3, subdivisions (a), and (k). (14 CT 3638; 21 RT 1854-1855.) He argued the statements were reliable, given the nature and timing of Detective Spidle's questioning of Russell and relevant to provide the jury with a "picture of Mr. Russell on the same day that he actually did the shooting." (21 RT 1854-1855.) Russell claimed the evidence was reliable and not self-serving, that he could not present this type of evidence by any other means, and that given the passage of almost two years, the videotaped statements were "the only reliable means" of presenting the information to the jury. (14 RT 3640.)

The court rejected Russell's argument. The court found although the evidence would be relevant on the issues of lingering doubt and remorse (21 RT 1862), the statements were self-serving and unreliable. (21 RT 1863-1865.) In particular the court found:

> [T]he only reasonable interpretation as to Mr. Russell's state of mind at that point in time he knew, number one, the police officers could prove that he was the shooter, and two, that the officers at that point in time had been killed.
>
> His version of the incident is, in fact, self-serving because he attempted to mitigate or negate the element of intent that this was a planned premeditated killing and that he intended to kill the officers.

(21 RT 1864-1865.)

Mindful of the defendant's right to present evidence of lingering doubt and remorse, the court did not preclude Russell from "telling his version" of the circumstances of the crime; he simply was not permitted to introduce his hearsay statements to police for the purpose of testifying without being subject to cross-examination. (21 RT 1865.) Additionally,

Russell had acknowledged he could (and did) present evidence, as he did at the first penalty phase trial, of his statements to Detective Spidle that he contends evidenced his remorse. (21 RT 1865.) The trial court properly distinguished evidence of Russell's statements of remorse from his unreliable hearsay statements relating his version of what occurred when he shot Deputies Haugen and Lehmann to death. (21 RT 1865-1866.) Indeed, as the prosecutor aptly noted, Russell never said during the interview by police that he was sorry about what had occurred. (21 RT 1866.)

1. Penal Code Sections 190.3 and 190.4 Do Not Require a Court to Admit Unreliable Hearsay Evidence in Mitigation in a Penalty Phase Retrial Simply Because the Prosecution Introduced the Evidence in the Guilt Phase

Penal Code section 190.4 contemplates situations in which the trier of fact in the guilt phase of a capital case may be different than the one in the penalty phase. Section 190.4, subdivision (b) in pertinent part provides:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

Section 190.4, subdivision (d), specifically 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 plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered an [*sic*] 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.*
>
> (Italics added.)

This Court has repeatedly rejected the argument that penalty phase only retrials are unconstitutional per se and that they deprive a defendant of due process and equal protection, his Sixth Amendment right to a fair trial, and his Eighth Amendment right to a reliable and proportional sentence. (*People v. Williams* (2006) 40 Cal.4th 287, 317-318; *People v. Gurule* (2002) 28 Cal.4th 557, 645; *People v. Davenport* (1995) 11 Cal.4th 1171, 1192-1194.) This Court has rejected an equal protection claim based on the premise that by being tried by a penalty phase jury that did not hear "all" the guilt phase evidence, a defendant was placed in a worse position than a similarly situated, death-eligible defendant whose guilt and penalty were decided by the same jury, "because he could not benefit from lingering doubt to the same degree as the latter defendant." (*People v. Hawkins* (1995) 10 Cal. 4th 920,967.) Neither 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. To the contrary, a fair reading of the statutes contemplates different evidence will be considered in a penalty phase retrial if there is a different trier of fact. A capital defendant's trial by different guilt and penalty phase juries is lawful, so long as the defendant is able to introduce to the penalty phase jury guilt phase evidence intended to show lingering doubt. (See *People v. Terry* (1964) 61 Cal.2d 137, 146-147.) Here, the trial court specifically ruled Russell could present evidence showing the circumstances of the crime, including any lingering doubt and remorse. (21 RT 1864-1865.)

The ability to introduce evidence at the penalty phase is not without limitation. Neither this Court nor the United States Supreme Court "has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code." (*People v. Edwards* (1991) 54 Cal.3d at 787, 837.) "Application of the ordinary rules of evidence does

not impermissibly infringe on a capital defendant's constitutional right to a fair trial." (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.) "[A] defendant. . . has no right to introduce evidence not otherwise admissible at the penalty phase for the purpose of creating a doubt as to his or her guilt." (*People v. Williams* (2009) 45 Cal.4th 863, 912.) "The evidence must not be unreliable [citation omitted], incompetent, irrelevant, lack probative value, or solely attack the legality of the prior adjudication." (*Id.* at p. 912; *Terry, supra,* 61 Cal.2d at pp. 144-145.)

Incompetent evidence includes hearsay. (*People v. Terry, supra,* 61 Cal.2d at p. 144, fn. 4.) "[F]oundational prerequisites are fundamental to any exception to the hearsay rule." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 57.) Objectionable hearsay evidence is no more admissible at the penalty phase than at the guilt phase. (*People v. Nye* (1969) 71 Cal.2d 356, 372.) The evidence Russell sought to admit was inadmissible hearsay. He has not cited any hearsay exception to admission of the evidence. Russell's statutory argument that the evidence is required to be admitted based on Penal Code sections 190.3 and 190.4 is not supported by the plain language of the statutes, nor any reasonable interpretation of the statutes. Moreover, Russell's statutory construction argument would conflict with the Evidence Code relating to hearsay statements, and longstanding hearsay rules. Russell's argument that the Constitution compels admission of the hearsay statements (AOB 102, 105-110) is likewise without merit because the statements he sought to admit were not reliable. (*Green v. Georgia* (1979) 442 U.S. 95, 97[99 S.Ct. 2150, 60 L.Ed.2d 738; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297]). Thus, his argument is without merit.

2. Russell's Reliance on Estoppel Principles is Misplaced

Russell argues that because the prosecution chose to introduce the videotaped statements at the guilt phase, to avoid "gamesmanship" then it should be estopped from objecting to Russell's attempt to introduce the statements at the penalty phase retrial. (SAOB 11-14.) By having his videotaped statements admitted at the penalty phase, Russell merely sought to avoid any cross-examination. Rules of estoppel have no bearing on whether the trial court should have admitted the videotapes.

Russell does not cite any authority to support his position that because a party introduces evidence at one trial, it is foreclosed from objecting to that same evidence during a subsequent trial raising a related, but different issue. His only support for his proposition is a general argument about estoppel, citing to *People v. Ramos* (2000) 15 Cal.4th 1133, 1168. (SAOB at 11.) However, *Ramos* does not support his position. In *Ramos*, the defendant complained on appeal about admission of a diary that he introduced at trial. This Court held he was foreclosed from raising the issue on appeal. (*People v. Ramos, supra*, 15 Cal.4th at p. 1168.) *Ramos* applied a basic principle of forfeiture—i.e., a party cannot complain on appeal about evidence he or she did not object to, or in fact sought to admit at trial. (Evid. Code, § 353; *People v. Harrison* (2005) 35 Cal.4th 208, 235.) Certainly, the prosecution would have been prohibited from complaining on appeal about admission of Russell's videotaped interview in the guilt phase because the prosecution introduced that evidence. That, however, did not preclude the prosecution from objecting to the statements in a subsequent penalty phase retrial, where Russell had already been found guilty of murder, and the prosecutor no longer had to prove the first degree murder and special circumstances.

Nor are Russell's general appeals to claims of equity and fairness convincing. (SAOB 11-14.) Russell's argument in this regard rests on the faulty premise that the prosecutor, by introducing the evidence in the guilt trial, was giving his imprimatur or vouching for their reliability. Russell's argument is based on the fact that the prosecutor made the evidence a "cornerstone of its case . . ." (SAOB 13), by primarily relying on that evidence in arguing Russell was guilty of first degree murder on a lying-in-wait theory (SAOB 13-14). What Russell overlooks, however, is that the prosecutor did not vouch for the reliability of the evidence. To the contrary, the prosecutor repeatedly told the jury Russell's statements were self-serving (11 RT 1309), discussed whether he was lying (11 RT 1310, 1348- 1349), and explained that the statements were generally unreliable, and should be rejected. For example, the prosecutor told the original jury in the guilt phase that the "evidence doesn't support a belief in what the defendant had to say." (11 RT 1305.) He said, "[n]ow I'll give you an example of why one view of the evidence is that Mr. Russell is not to be believed when he was interviewed by Mr. Spidle," (11 RT 1306), that Russell was "out there trying to talk his way out of it. He says he crouched down. But earlier he said he knelt down. Why? A very subtle way, Mr. Russell, is trying to make himself look better. He's trying to dig himself out of the ultimate hole." (11 RT 1306.) In discussing a telephone call that Russell made to his supervisor while the videotape was still running, the prosecutor explained to the jury that Russell "almost goes into this gratuitous speech to his boss, 'I didn't intend to hurt anybody,' and he's looking at the camera while he's saying this, almost like he's trying to get this point across for the benefit of the camera." (11 RT 1347.) He asked the jury to look closely at the statement, and pointed out "a few other things to make you wonder whether he's telling the truth or not." (11 RT 1348.) The prosecutor argued the various statements Russell gave were

inconsistent with the other evidence, and gave numerous examples (11 RT 1351-1353, 1357) in an effort to explain to the jury that Russell's statements were self-serving lies and unreliable. The prosecutor also argued Russell exaggerated how many beers he had, and "underexaggerate[d]" the number of shots he fired. (11 RT 1358.) He explained Russell was "trying to talk his way out of something." (11 RT 1358.) In short, the prosecutor did not, as Russell now claims, rely on Russell's statements to prove his case; rather, he repeatedly told the jury they were unreliable and Russell was lying.

The prosecutor admitted the videotapes for a small point, but that does not require this Court to find, as Russell contends, that the videotapes are reliable, or that they were required to be admitted regardless of their reliability when that point is no longer in issue. The prosecutor correctly told the jury that even if you believe Russell's unreasonable version of events that he was shooting in front of the police officers, for purposes of showing that he was lying in wait, he admitted he was in a position from which he could launch a surprise attack. (11 RT 1303-1306.) The prosecutor's reliance on this one statement did not establish the reliability of two and a half hours of videotaped testimony that contained self-serving hearsay statements. The prosecutor's argument in no way vouched for the reliability of the statements, as Russell implies, and as his equity argument relies on.

Because the videotapes were admitted at the guilt phase to prove appellant's guilt of the special circumstance murders, it does not follow that the prosecution was estopped from contesting their admission at the penalty phase retrial when appellant sought admission on totally different grounds. Russell's motive to deceive was a critical issue in determining whether the tapes were admissible at the penalty phase retrial. Russell has attempted to invoke principles of estoppel simply to avoid cross-examination on his

motive when making the statements. Yet, the need for cross-examination was especially strong in this situation, and fully warranted exclusion of the hearsay evidence. (See *People v. Edwards, supra,* 54 Cal.3d at p. 838 [defendant could have testified and, if appropriate, refreshed his recollection with the tape or notebook, or presented expert testimony which could have used these materials as a basis for an expert opinion, but defendant had no right to effectively have someone else testify for him and thereby prevent cross-examination].) As the trial court correctly determined, Russell made his statements during a post arrest interrogation, thus giving him a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators. This Court has upheld the exclusion of self-serving post crime statements made under similar circumstances. (*People v. Jurado* (2006) 38 Cal.4th 72, 129-130.)

Russell also argues exclusion of the videotapes deprived him of "his best evidence on two potentially powerful mitigating factors – lingering doubt about whether he intended to kill Deputies Haugen and Lehmann and his remorse for his actions." (SAOB 17.) However, the trial court did not prevent or restrict Russell from presenting evidence to show such "powerful mitigating factors." Since it was Russell's own statement he sought to admit, he could have testified to his remorse and any issue that showed lingering doubt.

Because the issues involved in determining whether to grant Russell's motion to admit the videotapes at the penalty phase were radically different than those involved at the guilt phase, the prosecution was not estopped from objecting to their admission.

3. There is no Reasonable Possibility the Jury Would have Rendered a Verdict less than Death had the Trial Court Admitted the Videotapes

Even assuming the trial court erred in excluding the videotapes, the tapes were not "the sort of evidence that [was] likely to have [had] a significant impact on the jury's evaluation of whether [Russell] should live or die." (*People v. Danielson* (1992) 3 Cal.4th 691, 738.) Under state law, error at the penalty phase not amounting to a federal constitutional violation will be held harmless if there is no reasonable possibility the error affected the verdict. (*People v. Williams, supra,* 45 Cal.4th at p. 912, quoting *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) This "reasonable possibility" standard is "the same in substance and effect" as the *Chapman* standard for determining where an error of federal constitutional dimension is harmless beyond a reasonable doubt. (*People v. Williams, supra,* 45 Cal.4th at p. 917 quoting *People v. Prince* (2007) 40 Cal.4th 1179, 1299.)

At the penalty phase retrial, Detective Spidle testified to Russell's expression of "remorse," or lack thereof. This penalty phase jury heard that on the morning after the murders, after waiving his constitutional rights and agreeing to speak with investigators, Russell asked what had happened to the deputies. Detective Spidle testified that when he told Russell the deputies were dead, Russell tilted his head back, closed his eyes, and became a little teary eyed. (29 RT 2971.) As Russell concedes in his Supplemental Opening Brief, this conversation was not videotaped. (SAOB at 3, fn. 1.) Thus, the trial court's ruling excluding the videotape did not operate to deny the jury the opportunity to watch Russell's reaction to being told the deputies were dead. Detective Spidle also testified Russell was cooperative. Though Spidle used the word "remorseful" in his report to describe Russell's demeanor, he explained that his use of the term "remorseful" was not semantically correct. (29 RT 2983.) Russell

appeared regretful to Detective Spidle as he displayed disappointment or distress over his actions as opposed to moral anguish or compassion. (29 RT 2983-2984.)

Investigator Spidle testified that when he first came into contact with Russell on January 5th, Russell said he would show Detective Spidle where the gun was, but otherwise he wanted to speak with a lawyer. (29 RT 2969.) Russell then directed deputies a mile by car and then a mile on foot to where he had hidden the gun. (29 RT 2970.) After stopping at a paved area, Russell asked what had happed to the two deputies. (29 RT 2971.)

Counsel was permitted to question Detective Spidle about his subsequent questioning of Russell at the sheriff's station and then returning to the scene where Russell showed them "some of the relevant locations with respect to the situation that occurred where the two deputies were killed." (29 RT 2973.)

Although Russell takes issue with Detective Spidle's characterization of Russell's "emotional display," Russell had every opportunity to testify at the penalty phase to rebut that characterization and explain what, if any, remorse he felt. He chose not to do so. By affording Russell the opportunity to present evidence of remorse through Russell testifying or Detective Spidle's testimony regarding Russell's statements expressing remorse, the trial court ensured a fair trial. If permitted to introduce the videotapes of his statements to Detective Spidle, Russell necessarily would have been allowed to present unchallenged his self-serving statements and inconsistencies in those statements. Avoiding cross-examination during the penalty phase retrial regarding his state of mind is not something that fundamental fairness or due process compels simply because unreliable self-serving hearsay happens to be relevant to the issue of mitigation.

Additionally, these statements were not, as Russell argues, "the only reliable means of presenting this evidence, as this incident occurred all most [*sic*] two years ago and even Mr. Russell's memory is inadequate to present the facts and emotions to the jury." (See 14 RT 3640.) Had Russell testified at the penalty retrial he could have recounted his version of the shootings. Had he any difficulty remembering the events surrounding the shootings, counsel could have refreshed his memory with the taped interview or the transcript of the taped interview. (*People v. Edwards, supra,* 54 Cal.3d at p. 838.)

As set forth in Respondent's Brief, in closing argument defense counsel took advantage of Detective Spidle's testimony, to argue that Russell had expressed remorse and was sorry for having killed the deputies. (RB 72-73; 31 RT 3177-3178.) One need only view the videotapes to see that Russell in no way expresses remorse or any other outward emotion for having gunned downed Deputies Haugen and Lehmann. The videotapes do not show Russell to be "distraught, incredulous, remorseful" as Russell claims. (SAOB 15.) He is not shown mourning their deaths in the least. During the first interrogation the morning after he killed the deputies, Russell appears tired. Yet he not only answers all of Detective Spidle's questions, but does so without hesitation. He volunteers details, assists in drawing a diagram of the scene and of his position and that of the deputies at the time he shot them, he stands to mimic the manner in which he knelt with the rifle when taking aim at the deputies, and he smokes cigarettes throughout the interview. (Exhs. 30 & 31.) He takes time to sip soda and eat French fries. During the entirety of the interview he tries to makes certain detectives believe what he claims was his intent that evening: to shoot in front of the deputies to scare them, never intending to kill them. (Exhs. 30 & 31.) Far from showing a lack of "callous or cavalier attitude toward his crimes or victims" (SAOB 16), the videotapes demonstrate that

at every turn he sought to deceive the deputies and his attention was on setting up his defense, not with the slain officers and their loved ones.

The next morning after he had spent the night in jail, Russell appears rested on the videotape, and he acknowledges having a good night's sleep notwithstanding he had just taken the lives of two police officers. Russell continues answering questions, providing detailed descriptions and volunteering information as he did the previous day. (Exh. 33.) Not once during either interview does Russell tell the detectives he is sorry that he killed the deputies, or display any recognition of the impact their deaths will have upon their families. Russell apparently appreciated the impact that the slain officers would have on their colleagues based on what Russell characterizes as "his respectful demeanor towards his interrogators." (SAOB 21.) Russell argues his respectful demeanor toward investigating officers is mitigating evidence, but the real value lies in the contrast between his comments and lack of respect toward the officers who were summoned to protect Russell's wife from his abuse. Unarmed and under arrest, Russell's respectful demeanor towards the officers is simply consistent with his self-serving statements and all a part of his effort to minimize his culpability and punishment for killing two police officers.

Notably, it is not until the interview is over and Russell is allowed to make phone calls is he heard saying he "fucked up" and is "sorry" to his boss, Mel, and when leaving a message for his brother. (Exh. 33.) Of course, nothing in his having "fucked up" and being "sorry" evidences regret at more than his own circumstances upon being arrested for killing two police officers.

Russell also argues there was mitigation in that the "shooting was an aberrant act of a decent man who was beset by addictions and mental problems whose life was unraveling." (SAOB 17.) Russell could have elicited the testimony about his respectful demeanor from Detective Spidle.

In fact, Detective Spidle testified Russell was cooperative and showed them where the gun was. In addition, Russell could have presented testimony that he was a decent man who was beset by addictions and mental problems, and that his life was unraveling. He was not prohibited from testifying as to such information, or calling other witnesses to so testify. What he was prohibited from doing, was telling about how his life was unraveling, without being subject to cross-examination.

While the original penalty phase jury could not reach a verdict on punishment, the deadlock did not mean this was a close case. (SAOB 15.) To bolster his argument that the second penalty phase jury would have seen a contrite Russell and not some raging cop killer had they seen the videotapes, in his Supplemental Opening Brief, Russell quotes defense counsel's closing argument at the first penalty phase, "'Would you not have expected an entirely different person if you had not heard Tim on tape?'" (SAOB 19 citing 15 RT 1677.) Counsel continued by arguing, "Just based on the district attorney's comment to you, would you not have considered or thought that you would have had somebody entirely different speaking to Detective Spidle? And I'm suggesting to you that, yes, you would." (15 RT 1677.) Counsel emphasized that Russell "had concern for what had happened." (15 RT 1677.) Defense counsel's argument was in the context of rebutting the prosecutor's argument that Russell has no respect for authority and the police (15 RT 1649-1650, 1665-1666), and instead pointing out that Russell was cooperative during the videotape (15 RT 1677.) He goes on, "[w]ho would have thought that he would have been as cooperative as he was during the several hours that he spent with the detectives. He helped Detective Spidle. He located the gun. Took that out of play as being any further harm to anybody else. Directed them to where the shooting would have occurred and where they found casings and basically took them through and assisted them in every way that he could."

(15 RT 1677.) These comments and this argument could still have been made based on the testimony given at the penalty retrial; it was not dependent on the videotapes.

The trial court did not prevent Russell from presenting evidence that was similar to that presented to the original jury. He could have testified or presented evidence regarding the information in the videotape. He chose not to, presumably because he did not want to be cross-examined. So, while Russell argues the most significant difference between the two trials was the videotape (SAOB 15), that was not due to the court's ruling. The court did not prevent Russell from presenting the evidence—it only prevented him from presenting it in the form of the videotapes, without cross-examination.

Citing his lack of prior violent criminal history aside from being "physically abusive to his wife," his lack of felony convictions, and his lack of a callous or cavalier attitude toward his crime or his victims, Russell argues that "notably missing from the prosecution's case were some major aggravating factors." (SAOB 16.) This argument overlooks or minimizes that Russell gunned down two police officers in the line of duty, who were summoned to assist his wife from his harm. Both police officers had young families, and the death of the officers caused irreparable harm to those families—which was tragically predictable. In addition, Russell did have a callous or cavalier attitude towards the police officers, who responded to the aid of his wife. On several occasions prior to murdering the officers, Russell made his disdain for the police clear and said it would not bother him to shoot a police officer. (25 RT 2393-2394, 2403.) The night of the murders while holding his gun, Russell told Beverly he was going to kill responding officers. (25 RT 2424.) There was nothing decent or mitigating in Russell's attitude toward police officers prior to slaying the two officers dispatched to protect Russell's wife from him.

Russell also notes that the jury deliberated for two and a half days, which he contends "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." (SAOB 22.) Two and a half days is not a long time for deliberations in a capital case where the jury was tasked with deciding whether Russell should be sentenced to life without the possibility of parole or death. Thus, the length of deliberations "demonstrates nothing more than that the jury was conscientious in its performance of high civic duty." (*People v. Cooper, supra*, 53 Cal.3d at pp. 771, 837.)

Considering Russell was not prevented from presenting evidence of remorse, lingering doubt, or the circumstances of the crime during the penalty phase, and given the lack of remorse or any evidence to raise a lingering doubt on the videotapes, even if the videotapes should have been admitted there is no reasonable possibility the error affected the verdict. (*People v. Brown, supra,* 46 Cal.3d at pp. 447-448.) Similarly, any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

CONCLUSION

For these reasons and those set forth in Respondent's Brief, respondent respectfully requests this Court affirm the judgment of the trial court in its entirety.

Dated: July 26, 2010

Respectfully submitted,

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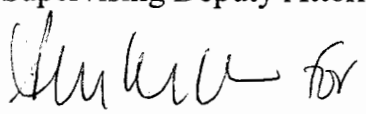

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 4,991 words.

Dated: July 26, 2010

EDMUND G. BROWN JR.
Attorney General of California

for

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Timothy R. Russell v. The People of the State of California**

Case No.: **S075875**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 27, 2010, at San Diego, California.

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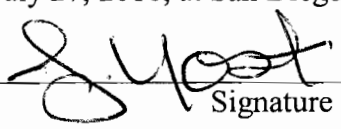
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