IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROYCE LYN SCOTT,

Defendant and Appellant.

S064858

CAPITAL CASE

Riverside County Superior Court No. ICR16374
The Honorable H. Morgan Dougherty, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

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STATEMENT OF THE CASE

On February 13, 1993, in Riverside County, Royce Lyn Scott was charged by grand jury indictment with burglary (Pen. Code[1], § 459; counts 1, 5, 6, 7, 8, 9); the rape and sodomy of Della Morris (§§ 261, subd. (2) & 286, subd. (c); counts 2 & 3); the murder of Morris (§ 187; count 4); robbery (§ 211; counts 10, 11); assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); counts 12 & 13); and battery (§ 242; counts 14 & 15). As to count 4, it was alleged that the murder of Morris was committed with special circumstances, specifically that the murder was committed while Scott was engaged in the crimes of burglary, rape, and sodomy. (§ 190.2, subd. (17)(vii), (a)(17)(iii) & (iv).) As to counts 9 through 12, it was alleged that Scott personally used a deadly and dangerous weapon. (§ 12022, subd. (b).) It was further alleged that Scott had one prior serous felony conviction (§ 667), and had served one prior prison term (§ 667.5, subd. (b)). (17 C.T. 4485-4492.)

On February 7, 1997, Scott's motion to dismiss the burglary charge alleged in count 5 was granted. (21 C.T. 5525.) On March 10, 1997, Scott pled

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1. Unless otherwise noted, all further statutory references are to the Penal Code.

guilty to counts 6 through 15, and admitted the deadly weapon allegations as to counts 9 through 12. (22 C.T. 5744.)

On March 27, 1997, a jury trial on the remaining counts commenced.[2] On April 30, 1997, a jury found Scott guilty as charged in counts 1 through 4. The jury found true the special circumstances, that Scott committed the murder of Morris while engaged in the crimes of burglary, rape, and sodomy. (§ 109.2, subd. (a)(17) (iii),(iv) & (vii).) (22 C.T. 5795-5802; 23 C.T. 6128-6130.) The trial court found that Scott had one prior serious felony conviction and had served one prior prison term. (22 C.T. 5796.)

On May 6, 1997, the penalty phase of the trial commenced. On May 8, 1997, the jury returned a verdict of death. (22 C.T. 5803.) On September 17, 1997, the trial court denied Scott's motion to modify the judgment and for a new trial and sentenced him to death for murder committed with special circumstances (count 4). Scott was sentenced to a total determinate term of 35 years and eight months on the remaining charges and allegations. (23 C.T. 6067-6078, 6128-6130.) This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

In 1992, between the months of July and November, Scott burglarized several residences in Palm Springs, California. During the July burglary of the home of elderly siblings Della and Webbie Morris[3], Scott raped, sodomized, and killed Morris in her bed. The facts and circumstances of Scott's crimes are detailed below.

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2. Scott's motion for a bifurcated trial on the prior conviction and prison term enhancement allegations was granted (21C.T. 5525), and he waived trial by jury on those allegations. (22 C.T. 5794.)

3. Webbie is referred to herein by his first name to avoid confusion since he has the same surname as his sister.

Guilt Phase-Prosecution

Seventy-six year-old Webbie lived in Palm Springs, California, with his older sister, 78 year-old Morris. On the evening of July 9, 1992, the night before Morris was murdered, Webbie went to bed around 10:00 p.m. while his sister stayed up to watch television. The next morning, around 8:00 a.m., Webbie awoke to find Morris in her bedroom, dead. Webbie noticed blood on the bed, underneath Morris. At some point, he noticed that the sliding glass door in his bedroom was ajar, and that the sliding glass door in the living room was open. Webbie called 9-1-1. (9 R.T. 1696-1701, 1707, 1712.) He also noticed that the VCR and his wallet were missing. A neighbor later found Webbie's wallet. (9 R.T. 1705, 1708, 1710-1711.)

Around 8:13 a.m., Palm Springs Police Officer Jose Vega was dispatched to the Morris home in response to a call about an unconscious female. When Vega arrived at the house, he contacted Webbie and took Webbie's statement. Vega located Morris in a bedroom. Morris was laying on the bed, covered by a blanket. Vega called for investigators and a lab technician. Vega checked around the house but found no signs of forced entry, nor did he find any signs of a struggle in the bedroom where he found Morris. (9 R.T. 1725-1729.)

Around 9:00 a.m., detectives and other officers began to arrive at the Morris home. Detective Barry Dallas spoke to Webbie before he left. Webbie was emotionally upset at having found his sister dead in her room. (9 R.T. 1754-1755, 1908-1909; 11 R.T. 2008-2015.)

Around 10:00 a.m., the coroner, Warren Horton, arrived on the scene. Horton found Morris laying on her bed, covered by a blanket or bedspread. Horton noticed two small bruises below Morris' right eye. Horton rolled Morris' body over, and noticed a small amount of blood directly underneath her vaginal area. The blood, which appeared dried, stained Morris' buttocks and the sheet on

her bed. Horton also found a small hair directly underneath her pubic area that did not appear to be consistent with her pubic hair. (10 R.T. 1790-1795, 1800.) Horton noted that Morris' body was positioned in an unusual manner in that she was laying with her feet at the end of the bed with the headboard. Also, the mattress was shifted about four inches away from the box spring, and the radio on the night stand was near the edge of the table such that but for the electrical cord, it would have fallen off of the table. (10 R.T. 1797.)

Forensic pathologist Darryl Garber performed the autopsy of Morris. Morris weighed approximately 140 pounds, and was about five feet tall. Garber's significant findings included multiple abrasions and contusions on the right side of Morris' face, left nostril, and left anterior neck. Garber found pinpoint hemorrhages in Morris' eyes which indicated she had been strangled or smothered. Garber also found evidence of traumatic sexual assault. Morris suffered contusions to her vaginal area, and abrasions to, and signs of dilatation of, her anus. (10 R.T. 1880-1881, 1883-1885, 1893.)

Inside Morris' mouth, inside her cheek, and on her tongue, Garber found evidence of bruising associated with smothering. A layered dissection of Morris' neck revealed several small bruises or hemorrhages which were characteristic of someone having been strangled by hand. Additional bruising indicated that a great deal of pressure was applied to her neck which stopped the supply of blood to her head. The injuries were consistent with the sexual assault occurring prior to death. Garber opined that Morris died from strangulation and smothering. (10 R.T. 1886-1892.) A sexual assault kit was obtained from Morris which included the collection of vaginal swabs, rectal swabs, mouth swabs, fingernail clippings, and hair samples from her head and pubic area. (11 R.T. 1993-2005.)

In August 1992, Criminalist Ricci Cooksey received evidence from the investigation, including some bedding, as well as sexual assault kits and blood samples. On one of the bed sheets, Cooksey found two stains that contained

semen. He also found sperm cells on the vaginal and rectal swabs in the sexual assault kit taken from Morris. (12 R.T. 2074-2078.)

As part of the investigation, family members and friends were contacted and interviewed, as were other possible suspects who were investigated and eliminated. (11 R.T. 2022-2031.) Scott became a suspect in the murder of Morris after he was arrested on November 4, 1992, and then connected to a series of burglaries occurring in a five block radius of the Morris home that had the similar modus operandi of gaining entry into the homes through sliding doors. (11 RT 2032-2033.)

On November 4, 1992, around 8:27 a.m., Dallas interviewed Scott. Dallas told Scott that he wanted to question him about a crime in the area that involved a murder. Dallas asked Scott's permission to obtain physical evidence from his person such as hair samples, saliva, and blood. Scott became defensive and claimed he was not involved in anything else, and refused to cooperate with Dallas's request. Shortly thereafter, the interview ended. (11 R.T. 2036-2038.)

On November 13, 1992, around 2:25 p.m., a search warrant for Scott's person was served on Scott while he was in custody at the Indio jail, and hair exemplars, including pubic hair, blood, and saliva were collected from Scott's person pursuant to the warrant. (11 R.T. 2039-2045, 2047.)

In November 1992, criminalist Cooksey received evidence related to Scott including a sexual assault kit and a sample of Scott's blood. Cooksey typed Scott's blood, saliva, and hair samples. Cooksey compared Scott's hair samples to hair taken from the murder scene. Cooksey concluded that four hair strands taken from the crime scene were consistent with and could have come from Scott's pubic area. There were no major discrepancies. (12 R.T. 2084-2087.)

In February 1993, Criminalist Donald Jones received, for testing: blood samples, and rectal and vaginal swabs from Morris; blood samples from Scott; and stains from Morris' bed sheet. (13 R.T. 2186-2187.) After testing the

samples, Jones determined that Scott's semen profile matched those found in the vaginal swabs taken from Morris, and the samples taken from her bed sheet. (13 R.T. 2224-2225, 2228, 2230-2231.) The DNA profile found in the stains from the bed sheet, and the vaginal swabs taken from Morris matched Scott's DNA profile. (13 R.T. 2274.)

Evidence Of Other Offenses

Scott burglarized three other homes within an eight block radius of the Morris home. Prior to trial, Scott pled guilty to several burglaries, which he admitted to having committed during an interview with police. (10 R.T. 1862-1866.) Evidence of these crimes was admitted in the guilt phase for the limited purpose of showing Scott's intent in burglarizing the Morris' home. (8 R.T. 1629-1631.)

A few weeks after Della Morris was murdered, on August 3, 1992, at about 2:27 a.m., Dorothy Pruss, who lived at 889 Spencer Drive, in Palm Springs, was hanging her laundry outside the back door of her kitchen. After Pruss sat down to watch television, she heard a small rustle, from inside the kitchen. Pruss initially thought her dog made the noise. When Pruss checked around, the noise stopped. Moments later, Pruss heard a another noise. Pruss jumped up, "whirled" around, and about three feet behind the couch where she had been sitting, she saw Scott holding her purse and purple fanny pack. Scott asked, "Where's the money?" Pruss replied, "There is none." Scott moved towards Pruss and said, "Just tell me where the money is." Pruss backed away and screamed. Pruss' roommate, Kate Porter, came out of her bedroom. Pruss grabbed a brass object and held it up as a weapon. Afterwards, Scott left, taking Pruss' purse and fanny pack with him. (10 R.T. 1816-1823.)

On August 9, 1992, around midnight, Marc Daley, who lived at 309 Desert Holly Circle in Palm Springs, returned home to find that a sliding screen

door in the kitchen area was open. The door was closed when Daley left home. Thinking someone had played a trick, Daley entered his house and called out to see if anyone was inside. No one answered. Daley walked through the house, and encountered Scott inside the middle bedroom, hiding behind the door. Daley asked, "What are you doing here?" Scott replied, "I don't want to hurt you. I just want your money." (10 R.T. 1825-1829.)

Daley turned and ran out the sliding door. Daley heard Scott behind him. Daley ran to his neighbor's house. Scott did not follow Daley, instead he went the other way, perhaps over the back fence. When Daley eventually returned home, he noticed that the sliding glass door in the master bedroom was open. That door had been closed the last time he had seen it. A small television in the middle bedroom had been knocked off a counter. (10 R.T. 1830-1833.)

On August 9, 1992, Palms Springs Police Officer Mark Stafford was dispatched to an "interrupted cat-burglary" at Daley's residence. Stafford was directed to a television that had been moved. Stafford recovered fingerprints from the television, which were booked into evidence. (10 R.T. 1836-1841.) The print on the television set was subsequently matched in November to a known palm print obtained from Scott. (11 R.T. 1920-1924.)

On August 25, 1992, Emily "Lee" Pollard, Daley's neighbor, was home watching televison. A guest staying with Pollard was asleep in the guestroom. At some point, Pollard heard a loud crash. Pollard found Scott inside her kitchen. Scott said something but Pollard could not recall what. Pollard "scream[ed] bloody murder," and screamed for her friend to get out of the house. Pollard ran out of her house to Daley's home. Pollard called the police, who arrived some time later. Early the next morning, Pollard returned home. Pollard's purse and Polaroid camera, which were last seen on the kitchen counter, were missing. A rock had been "bashed" through the sliding glass door that led from the kitchen to the backyard patio. (10 R.T. 1848-1852.)

On November 4, 1992, around 12:50 a.m., Kenneth Osburn and Jeffrey Cole who lived at 307 Desert Willow in Palm Springs, were in the den talking and watching television. Their houseguest, Kevin Duffield, was asleep in the guestroom. At some point, Osburn heard the sliding glass door between the dining room and pool open. Osburn stood up and turned around, and saw Scott standing in the dining room. Scott told Osburn and Cole to get down on the floor. They did. Scott asked for their wallets and money. Osburn emptied his pockets, and Scott took Osburn's wallet. Afterwards, Osburn heard noises in the kitchen which sounded as if Scott was going through the kitchen drawers. Scott said he needed a microwave. Scared, Osburn remained silent. Scott said he was going to take the microwave, and told Osburn and Cole to "stay put." Osburn heard Scott go towards the back door, but then Scott returned. Scott told the men to stay on the floor. (11 R.T. 1900-1904.)

Around 12:54 a.m., Palm Springs Police Officer Donald Way was dispatched to Osburn's and Cole's residence. (10 R.T. 1854-1855, 1857.) Way entered the house through a window. As Way looked down the hallway for a television room or den, he observed Scott "hunched down" over another male who was laying on the floor. Way and Sergeant Joe Rodriguez entered the room to stop Scott. Way removed a wallet from Scott's person. Way obtained a driver's license from inside the wallet that bore the name Kenneth Ray Osburn. Way spoke to Cole and Osburn. Way also found a microwave oven in the backyard. (10 R.T. 1858-1861.)

In August 1992, Palms Springs Police Officer Gerald Bucklin investigated the burglaries which occurred at the residences located at 309 Desert Holly, 320 Desert Holly Circle, and a crime which occurred at 889 Spencer. In November 1992, Bucklin was informed of Scott's arrest. Bucklin interviewed Scott while Scott was in jail on the burglaries. Detective Donovan was also present. Scott was informed of and waived his constitutional rights, and agreed to talk to

Bucklin. Bucklin informed Scott that he had been identified in some burglaries. About half-way through the interview, Scott admitted his involvement in the burglaries of the homes of Daley, Pruss, and Pollard. (10 R.T. 1862-1866.)

Defense

For a few weeks during July 1992, Scott stayed with his step-sister, Audrey Mickens. Mickens could not say whether Scott was home the morning of July 10, 11, or 12, 1992. On occasion, Scott stayed out all night, but Mickens could recall the exact dates of those occurrences. (15 R.T. 2362-2369.)

Detective Dallas was questioned about an unspecified report in which he had referred to a Randy Williams who apparently entered a location through a sliding glass door then raped an elderly woman. Williams was excluded as a suspect for the instant crimes, as was another suspect, David Summy. (15 R.T. 2374-2377.)

In September 1992, Dallas received a report from Cooksey wherein genetic markers related to the semen obtained from swabs taken from Morris and the sheets were discussed. Cooksey apparently provided Dallas with a list which contained the names of 19 possible suspects who had the same genetic markers. According to Dallas, 10 of the19 names on the list were Black individuals and known sex offenders. Dallas did not give that list to the district attorney until trial. (15 R.T. 2377-2380.) Dallas did not reference the list of 19 names submitted by Cooksey in his police reports. He could not recall why. The list was placed in a folder or case file and Dallas forgot about it. (15 R.T. 2382-2383.)

Penalty Phase-Prosecution

In March 1988, Thomas Meyer and Dan King worked on a construction site in Palm Springs. They also lived on the site in a camper. According to

Meyer, one morning a man, Scott, opened the camper door and demanded money. Scott told Meyer, "Give me all your money or I will blow your mother fucking head off." Meyer said, "Just take it easy. I will get you what I have here," and he threw Scott his jacket. (18 R.T. 2629-2632, 2638.)

Scott looked inside the jacket. After finding nothing, Scott became angry. Scott banged on the bottom of the doorsill and stated, "I have a double-barreled sawed-off shotgun here, and I am going to blow your mother fucking head off if you don't give me some money now." Meyer told King, "Dan, this person wants all our money." King got down from his bed, took his gun from underneath his pillow, and shot Scott four times. Meyer thought Scott had returned fire from a gun that fired .457 ammunition. Shortly thereafter, Meyer saw Scott laying on the ground, rolling around. Scott said, "God. I am never going to do this again." Afterwards, Meyer and King left the camper. Scott appeared to be injured. Meyer never actually saw a shotgun. The object Scott was holding was covered by a shirt of some sort. (18 R.T. 2632-2637.)

According to King, the morning of the incident, sometime between 4:30 and 5:00 a.m., he awoke to a loud banging on the camper door. Meyer had his hands up in the air, and King saw Scott standing at the door with what he believed to be a shotgun. He did not actually see what Scott was holding, but Scott told him it was a shotgun. King heard Scott say something to the effect of "this is a shotgun, give me your wallet or I will blow your fucking head off." (18 R.T. 2637, 2639, 2647-2648.)

Concerned for his safety, King knew he had to react. Meyer was blocking King's view, so King told Scott that his wallet was on a counter and that he had to get it. King continued to talk to keep Scott "pacified." Scott said things like, "I am going to kill you," and "Give me your wallet," and "Hurry up." Scott was holding something that was wrapped and about two feet long. King thought Scott had a gun. Scott was intimidating, he demanded money, and he threatened

to kill them. King stepped down from his bed, pulled his gun around, and fired his gun at Scott. (18 R.T. 2640-2641.)

King fired about four shots. Once the smoke from the gun cleared, King could not see anyone. King walked towards the door and something "flew across" the doorway. King looked out the door. Scott was laying about 10 feet off to the side of the camper. King checked to see if Scott was holding anything. King did not see anything. Scott moaned and said to King, "You got me, you got me good." King approached Scott and could tell he was wounded. King ran to some nearby houses and yelled there had been a robbery, that someone had been shot, and asked someone to call the police. Within minutes the police arrived. (18 R.T. 2642-2645.)

Around 5:00 a.m., Palm Springs Police Officer Donald Fallon arrived on the scene. Fallon found Scott holding his stomach. Scott had an obvious gunshot wound. Fallon called for paramedics and secured the scene. Investigator Mark Harvey searched the scene. He found no weapon but he did find a piece of wood and a T-shirt. (18 R.T. 2649-2653.)

Osburn testified regarding the crimes committed at his home by Scott in November 1992. Osburn was arguing with Cole when Scott entered the house. Scott told Osburn and Cole that they had disturbed him having a beer in Osburn's and Cole's backyard. Scott ordered the two men to the ground. The men complied with Scott's demand. Scott was very upset at Cole, and he hollered and screamed at Cole. Osburn recalled that he himself must have moved because Scott kicked him in the ribs. Scott then kicked Cole and jumped on Cole's back. Scott also hit Cole in the back with a fireplace poker. (18 R.T. 2654-2657, 2667-2668.)

Scott told the men to stay on the floor, then he went into the kitchen and went through the drawers. Scott took the microwave outside then came back inside the house. Scott stomped on Osburn's back. Scott kicked and hit Cole

with the fireplace poker. Scott threatened to kill Cole. Neither Osburn or Cole resisted or fought back. The men were very afraid that they were going to die. Scott asked Osburn for his wallet. Osburn put his wallet on a coffee table. Scott held the fireplace poker over Cole and said he was going to stick him, at which point the police entered the room. (18 R.T. 2657-2659.)

Victim Impact Evidence

Raymond Abelin, Morris' nephew, testified about Morris. Morris was a dancer and she taught dance to young adults. Prior to living in Palm Springs, Morris lived in Los Angeles where she organized entire theatrical shows at venues such as the Wilshire Theater, Los Angeles Street Scene, and various fairs and parties. Dance was a family business and Morris, the family matriarch, was in charge. (18 R.T. 2683-2688, 2691.)

Morris was never concerned with property or money. Morris wanted only to dance her way through life and express herself artistically to inspire others. Dancing was everything to her. Morris was a very inspirational woman, and she inspired many people, including Abelin. It was because of Morris that Abelin became involved in the arts. It was also because of Morris that Abelin attended UCLA for his undergraduate studies, and U.S.C for his graduate studies. Morris was very supportive of Abelin's studies. Morris was more like a mother to Abelin rather than an aunt, as the two shared the same interests. While growing up, Abelin spent a substantial amount of time with her. (18 R.T. 2691-2692.)

Abelin had repeatedly encouraged Morris to move to Palm Springs. After Webbie's wife passed away, Abelin also asked Webbie to move to Palm Springs. Webbie suffered a stroke about six months to a year before Morris was murdered. Morris took care of Webbie after his stroke. Around the time Morris was murdered, Webbie's physical and mental condition deteriorated. (18 R.T. 2688, 2690-2691.)

Morris moved to Palm Springs in order to have a family home. No one in her generation of the family had ever owned a house. Palm Springs was supposed to be a nice place to settle down, and it had a good reputation for safety and security. After Morris moved to Palm Springs, she continued her involvement in dance. She was going to have a troop of dancers perform in an annual festival. Morris did not get the chance fulfill that goal. (18 R.T. 2692-2694.)

Abelin was in Los Angeles when he learned that Morris had died. Initially, Abelin thought she had died from natural causes. Abelin was devastated when he learned she had been murdered. For Abelin, Morris' murder has been "a horror, a living nightmare." To date, Abelin feels guilty about her murder. Morris wanted to stay in Los Angeles, but Abelin reassured her that living in Palm Springs would be for the best. Abelin struggles with his feelings everyday. Morris' murder has divided the family. (18 R.T. 2695, 2697, 2700.)

Morris was well known in the area of dance, and she was once awarded Woman of the Year by the wife of Los Angles Mayor Tom Bradley for her contributions to the arts. Morris was well known and active in the Lebanese community, and the community was outraged and horrified by her murder. (18 R.T. 2701-2702.)

Defense

Scott's Family Members

Narlena Black, Scott's mother, had eight living children. She could not recall Scott's age. Scott was born in Jacksonville, Texas. She described Scott as a very intelligent boy who loved sports. When Scott was young, he lived in Texas. She testified that Scott was not close to his father who lived in California. Scott had a step-father, and she said they loved each other. (19 R.T. 2719-2721.)

Scott had an older brother who was hit by a car and killed when he was a senior in high school. Black said that Scott was not himself after his brother was killed. Scott joined the Army, and then the Air Force. She testified that Scott had problems in the military. She said Scott could not stand for the sergeant to talk about his mother. She described another change in Scott after he left the military. She said he started "running with the wrong type of boys." Black testified that she loved Scott when she raised him, and she did her best to teach him wrong from right. (19 R.T. 2721-2725.)

Terry Roberts was Scott's younger brother. Growing up, Roberts and Scott did the "normal things" that brothers do, i.e., played sports. They had disagreements but did not fight. (19 R.T. 2726-2728.) After their brother died, Roberts noticed that Scott engaged in "mischief." (19 R.T. 2730.) According to Roberts, their parents were good to them growing up. They taught them right from wrong, and taught them how to be good to people. (19 R.T. 2733.)

Anthony Casas, a criminal justice consultant and private investigator, reviewed several documents and interviewed Scott. Casas questioned Scott and compared the information Scott gave him, to the information he had obtained from the Department of Corrections. Casas determined Scott's information was truthful. Casas learned that Scott had been confined in five or six prisons. In an effort to evaluate what type of confinement would best suit Scott, Casas questioned Scott about his relations in prison, the kind of jobs he had, if he was tied in with a gang, etc. (19 R.T. 2734, 2747-2749.) Upon reviewing several of Scott's medical records, Casas noticed that Scott had been issued "Mellaril," an anti-psychotic drug. There were indications that Scott heard voices that laughed at him and told him to kill, and that he had nightmares. The records indicated that the drug had been either changed, elevated or diminished. Casas found nothing in the records to indicate that Scott had an attitude or behavioral problem. Casas opined that if Scott were sent to prison in the instant case, he would not be a

threat to other inmates, or correctional personnel. (19 R.T. 2750-2752.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED SCOTT'S *WHEELER/BATSON* MOTION

Scott claims his state and federal constitutional rights were denied in contravention of *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (AOB 22-49.) The trial court properly concluded that Scott failed to make a prima facie showing of a discriminatory race based exercise of peremptory challenges as to the two Black jurors identified by Scott below. Further, the race-neutral explanations noted in the record by the trial court, and by the prosecutor, demonstrate that there was nothing improper in the challenges. Accordingly, the trail court properly denied Scott's motion, and his constitutional rights were not violated by the prosecution's exercise of peremptory challenges of two Black jurors.

"Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution. [Citations.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 732.) Under both state and federal law, the trial court must follow a three-step analysis when one party claims that the other has improperly discriminated in the exercise of peremptory challenges. (*People v. Silva* (2001) 25 Cal.4th 345, 384.) First, the movant must make out a prima facie case by establishing that the totality of the relevant facts gives rise to an inference of discriminatory purpose against a cognizable group. Second, if the movant establishes a prima facie case, the burden of production shifts to the proponent of the challenge to come forward with a race-neutral explanation for the challenge. Third, if a race-neutral explanation is tendered, the trial court must then decide whether the moving party has proved purposeful racial discrimination. (*Ibid.*; *Purkett v. Elem* (1995) 514 U.S. 765, 767 [115 S.Ct. 1769,

131 L.Ed.2d 834]; *Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129]; *People v. Lancaster* (2007) 41 Cal.4th 50, 73.)

A defendant establishes a prima facie case of discrimination "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California, supra,* 545 U.S. at p. 170.) An inference is a logical conclusion based on a set of facts. (*Id.* at p. 168, fn. 4.) When the trial court concludes that a defendant has failed to make a prima facie case, a reviewing court reviews the voir dire of the challenged juror to determine whether the totality of the relevant facts supports an inference of discrimination. (*Johnson, supra,* 545 U.S. at p. 168; *People v. Lancaster*, *supra*, 41 Cal.4th at p. 73.)

Scott contends that the record reveals a prima facie case of discrimination. (AOB 31-36.) He is mistaken. The trial court correctly explained the three step process for a *Batson/Wheeler* challenge. (8 RT 1581, citing *Purkett v. Elem, supra,* 514 U.S. at p. 765.) The trial court incorrectly indicated that the claim "appeared to be waived since the jury has been sworn" but it nevertheless went on to address the motion, and found the absence of a prima facie case.[4/] (8 RT 1582.)

Notwithstanding its belief that the issue had been waived, the trial court clearly indicated it wanted to "cover all the bases." The trial court noted it could arguably be said that a prima facie case could be made as to prospective juror Roberts, and it asked the prosecution whether it wanted to respond, or rest on the waiver of the issue. The prosecutor asked the court to clarify whether or not the

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4. Scott objected to the prosecution's exercise of peremptory challenges after the 12 jurors had been sworn, but before the alternates were selected and sworn. (8 R.T. 1580-1581.) A *Batson/Wheeler* motion is timely if it is made before the jury impanelment has been completed, which does not occur until such time as the alternates are selected and sworn. (*People v. McDermott* (2002) 28 Cal.4th 946, 969.)

defense had made a prima facie showing. (8 RT 1582-1583.) The trial court responded that it was "just completely obvious" why the prosecutor excused prospective juror Coleman. The trial court indicated a willingness to proceed "with the exercise" although it sensed that prospective juror Roberts' answers to the questionnaire suggested a legitimate basis for excusing him since his questionnaire revealed a "substantial reluctance" regarding the death penalty. (8 RT 1583.) The prosecutor again requested clarification as to whether the trial court was finding that Scott had made the requisite prima facie showing, or whether the trial court was soliciting the prosecutor's reasons notwithstanding a failure to show a prima facie case. The trial court indicated it was soliciting the prosecutor's reasons even though no prima facie case had been shown. (8 RT 1584-1585.)

"When a trial court expressly rules that a prima facie case was not made, but allows the prosecutor to state his or her justifications for the record, the issue of whether a prima facie case was made is not moot." (*People v. Box* (2000) 23 Cal.4th 1153, 1188; *People v. Davenport* (2005) 11 Cal.4th 1171, 1200; *People v. Turner* (1994) 8 Cal.4th 137, 166-167.) No implied finding of a prima facie case occurs when the trial court turns to the prosecutor and asks for her reasons. (*People v. Davenport, supra*, 11 Cal.4th at p. 1200.) Rather,

> when an appellate court is presented with such a record, and concludes that the trial court properly determined that no prima facie case was made, it need not review the adequacy of counsel's justifications for the peremptory challenges.

(*Ibid.*, quoting *People v. Turner, supra*, 8 Cal.4th at p. 167.)

Substantial evidence supports the trial court's ruling that Scott failed to make a prima facie case of discriminatory purposes against a cognizable group. When defense counsel brought his motion, he asserted that he thought that Coleman and Roberts could have been fair and impartial jurors. (8 RT 1580-1581.) Defense counsel's bare statements that he thought the challenged

individuals could be fair and impartial failed to establish a strong likelihood that the challenges were unconstitutional, especially since the statements were silent on the prospective jurors' individual characteristics. (See, e.g., *People v. Davenport, supra*, 11 Cal.4th at p. 1200; *People v. Howard* (1992) 1 Cal.4th 1132, 1154-1155.) Put another way, "such a bare claim falls far short of "rais[ing] a reasonable inference that the opposing party has challenged the jurors because of their race or other group association."" (*People v. Panah* (2005) 35 Cal.4th 395, 442, quoting *People v. McDermott, supra,* 28 Cal.4th at p. 970.)

> '[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.'

(*People v. Bonilla* (2007) 41 Cal.4th 313, quoting *People v. Bell* (2007) 40 Cal.4th 582, 598, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111.) That is particularly true, when as here, defense trial counsel stipulated to one of the two Black jurors being excused. Specifically, defense counsel stipulated to Coleman being excused. (6 RT 1115.)

On appeal, Scott attempts to expand the basis of his motion by arguing that he made a prima facie showing below because the prosecutor exercised challenges to three Hispanic jurors prior to challenging prospective juror Roberts. From this, Scott argues that in his first 10 exercises of peremptory challenges, the prosecutor excused five minority jurors (3 Hispanics, 2 Blacks) which constituted 50% of the challenges exercised by the prosecution. (AOB 36.) It was incumbent upon Scott to identify the cognizable group that was the subject of discriminatory race based challenges in the trial court at the time the motion was being heard. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 70-71, fn. 4.) A prima facie case depends on showing a "pattern" of striking jurors of a "specific race." (*People v. Bell, supra,* 40 Cal.4th at p. 592.) Scott cannot support his claim that he made a prima facie showing below by expanding the cognizable classes that are the subject of his motion to include Hispanics for the first time on

appeal.

A trial court may consider all relevant evidence in the trial court record, including statements during voir dire in determining whether the defense has made a prima facie case. (*People v. Bell, supra*, 40 Cal. 4th at p. 597.) Here, of the two black jurors cited by Scott as being the subject of discriminatory race based peremptory challenges, the parties stipulated to one of those jurors (Coleman) being excused. The trial court indicated that notwithstanding the stipulation, it had a duty to inquire of the juror. (6 R.T. 1115-1117.) In response to questioning by the trial court, prospective juror Coleman indicated that her son was in prison, and she knew the prosecutor in this case, but believed she could be fair and impartial. (6 R.T. 1147-1151.) The prosecutor pointed out to Coleman that she had indicated in her juror questionnaire that she had been very upset at the time of her son's trial. The prosecutor pointed out that he was the prosecutor who handled her son's case, and that the same police detective and police department were involved in both her son's case and the case she would be serving on the jury. Coleman stated she thought she could nevertheless be fair and impartial. The prosecutor noted that Coleman's questionnaire indicated that she had an issue about the description of the perpetrator in her son's case. Coleman said that should would not have any problems if identity were an issue in this case. (6 R.T. 1189-1193.)

The trial court later noted with respect to Scott's *Wheeler* motion, that if anyone who read the transcript of the trial believed that prospective juror Coleman would be a fair juror to the People, the court would "give up making decisions." (8 RT 1585.) The same prosecutor who was prosecuting Scott had prosecuted Coleman's son, and the same detective from the Palm Springs Police Department who investigated the murder of Morris was the investigating officer in the case against Coleman's son. As the trial court aptly observed, no prosecutor would have kept Coleman on the jury after she admitted being angry

with the prosecutor over the sentencing of her son. (8 RT 1582.) It is clear that a peremptory challenge can properly be used to challenge a juror who has relatives who have been the subject of criminal prosecutions. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1123-1124[dismissal of prospective jurors who had family members who had trouble with the law]; *People v. Arias* (1996) 13 Cal.4th 92, 137-139 [same]; and *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [same].) Here, the situation was even more compelling since it was the same trial prosecutor and same detective involved in the case on trial, and the matter that involved the juror's son.

After Coleman was excused, the prosecutor exercised the People's seventh peremptory challenge to excuse Juror No. 6, Roberts. (8 R.T. 1568-1569.) The record demonstrates that the prosecutor excused Roberts because of his inconsistent answers in the questionnaire about the death penalty. In one instance, Roberts placed himself in a group that would never under any circumstances vote for the death penalty. The questionnaire clearly demonstrates that Roberts' responses to several questions were inconsistent. (See XIV CT 3938-3943.) Under these circumstances, it was likely Roberts had issues with the death penalty, in which case the prosecutor was justified in excusing Roberts. It is well established that "[a] juror's reluctance to impose the death penalty, even if insufficient to justify a challenge for cause, is a valid reason for a prosecutor to exercise a peremptory challenge." (*People v. Ledesma* (2006) 39 Cal.4th 641, 678; see *People v. Johnson* (1989) 47 Cal.3d 1194, 1222.)

Scott fell far short of "showing that the totality of the relevant facts [gave] rise to an inference of discriminatory purpose." (*Batson, supra,* 476 U.S. at p. 94, 106 S.Ct. 1712; see also *Johnson v. California, supra,* 545 U.S. at p. 168; *People v. Cornwell, supra,* 37 Cal.4th at p. 66.)

Further, assuming the trial court had found a prima facie case, it nevertheless accepted the prosecution's explanation as race-neutral, and that

determination is entitled to deference on appeal. A trial court's determination regarding the sufficiency of a prosecutor's proffered justifications for excusing a juror will be reviewed with great restraint. (*People v. Ervin* (2000) 22 Cal.4th 48, 74.) When the trial court makes a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications offered for the challenged strikes, the court's conclusions shall be entitled to great deference by the reviewing court. (*Id.* at p. 75.) "The determination whether substantial evidence exists to support the prosecutor's assertion of a nondiscriminatory purpose is a 'purely factual question.' [Citation.]" (*Ibid.*; see, e.g., *People v. Box, supra,* 23 Cal.4th at pp. 1188-1189 ["trial judge, who had performed much of and observed the remainder of the voir dire, was in the best position to determine under 'all the relevant circumstances' of the case whether there was a strong likelihood or reasonable inference" of discrimination].)

Here, the prosecutor explained that he had excused Roberts because he gave inconsistent answers about the death penalty in his questionnaire. The prosecutor pointed out that, in one instance, Roberts placed himself in a group that would never under any circumstances vote for the death penalty. Based on Roberts' answers in the questionnaire, the prosecutor did not believe he knew where Roberts stood on the death penalty. (8 R.T. 1585.) In reference to "*Medina* II"[5/], the court pointed out that the California Supreme Court had confirmed that the exercise of a challenge based upon a reluctance to impose the death penalty is an appropriate basis for the exercise of the challenge. Accordingly, the trial court accepted the prosecutor's explanation. (8 R.T. 1585-1586.)

Scott's motion was properly denied, and therefore his claim fails.

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5. *People v. Medina* (1995) 11 Cal.4th 694, 747.

II.

THE TRIAL COURT PROPERLY DENIED SCOTT'S SEVERANCE MOTION

Scott claims that the trial court erred in denying his severance motion. (AOB 50-92.) Because Scott has failed to demonstrate that the trial court abused its discretion in denying his severance motion, this claim should be rejected.

Prior to trial, Scott moved to sever counts 1 through 4, the crimes against Morris, which involved one count each of the crimes of murder, burglary, rape, and sodomy, from the remaining 10 counts, which involved three burglaries in August 1992, and one burglary, two robberies, two assaults, and two batteries which occurred during one incident in November 1992. (20 C.T. 5362.) The prosecution filed an opposition to Scott's motion. (21 C.T. 5479-5497.)

It is well established that "the law prefers consolidation of charges." (*People v. Smith* (2007) 40 Cal.4th 483, 510; *People v. Manriquez* (2005) 37 Cal.4th 547, 574; *People v. Ochoa* (1998) 19 Cal.4th 353, 409.) When the offenses charged are from the same class, joinder is proper under section 954. (*People v. Manriquez, supra*, 37 Cal.4th at p. 574; *People v. Kraft* (2000) 23 Cal.4th 978, 1030.) Section 954 states, in part:

> An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.

Section 954.1 specifically provides:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried

together before the same trier of fact.

> The severance provisions of [Penal Code] section 954 reflect 'an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial.'

(*People v. Hawkins* (1995) 10 Cal.4th 920, 940, quoting *People v. Bean* (1988) 46 Cal.3d 919, 935; *United States v. Lane* (1986) 474 U.S. 438, 446 fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814] ["Improper joinder does not, in itself, violate the Constitution" but rather "rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."].) The defendant must make a "clear showing of prejudice" to prevent consolidation of properly joined charges. (*People v. Stanley* (2006) 39 Cal.4th 913, 933; *People v. Ochoa, supra,* 19 Cal.4th at pp. 408-409.)

A trial court's denial of a severance motion is reviewed for abuse of discretion. (*People v. Ochoa, supra*, 19 Cal.4th at p. 408.) On appeal, this Court "must consider whether a gross unfairness occurred that denied the defendant a fair trial or due process." (*People v. Smith, supra*, 40 Cal.4th at p. 510.) In determining whether the trial court abused its discretion in denying a severance motion, the record before the trial court at the time it ruled on the motion is examined. (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1120.) In order to establish that the trial court's decision to deny a severance motion resulted in reversible error, a defendant "must clearly establish that there was a substantial danger of prejudice requiring that the charges be tried separately." (*Ibid.*; internal quotes omitted.)

A trial court's refusal to grant a severance motion may be an abuse of decision where:

> (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of the aggregate evidence on several charges might well

> alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

(*People v. Smith, supra*, 40 Cal. at pp. 510-511; *People v. Manriquez, supra*, 37 Cal.4th at p. 574; *People v. Valdez* (2004) 32 Cal.4th 73, 120.)

Cross-admissibility is a factor affecting prejudice. Ordinarily, cross-admissibility dispels any inference of prejudice; however, the absence of cross-admissibility alone does not demonstrate prejudice. (*People v. Stitely* (2005) 35 Cal.4th 514, 531-532.) Penal Code section 954.1 specifically provides that evidence concerning one offense need not be admissible as to any other offense in order to be tried together, that is, cross-admissibility of evidence is not dispositive in determining whether to join offenses. Additionally, the "joinder of a death penalty case with noncapital charges does not by itself establish prejudice." (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 119-120; *People v. Marshall* (1997) 15 Cal.4th 1, 28.)

Scott argues that the August and November burglaries were not of the same class as the offenses related to Morris' murder. (AOB 60-61.) He is mistaken. Where the offenses charged are "connected together in their commission" or "of the same class," joinder is proper. (Pen. Code, § 954; *People v. Manriquez, supra*, 37 Cal.4th at p. 574; *People v. Kraft, supra*, 23 Cal.4th at p. 1030.) Moreover, offenses

> committed at different times and places against different victims are nevertheless connected together in their commission when they are . . . linked by a common element of substantial importance.

(*People v. Mendoza* (2000) 24 Cal.4th 130, 160, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 276 [internal quotations and citations omitted].)

This Court has found joinder proper where, as here, a defendant engages in a crime spree and the "element of intent to feloniously obtain property runs like a single thread through the various offenses . . . ." (*People v. Mendoza, supra*, 24 Cal.4th at p. 160 [kidnappings, robberies, rape, murder, and burglaries

occurred during two-day crime spree and all involved the intent to illegally obtain property][internal citations and quotations omitted]; *People v. Lucky, supra,* 45 Cal.3d at p. 276 [six robberies properly joined with a robbery-murder charge because of common element of intent to feloniously obtain property and crimes' shared characteristics]; *People v. Chessman* (1959) 52 Cal.2d 467, 492 [simple robbery and robbery-kidnaping charges properly joined with robberies involving rape and oral copulation because one-month crime spree involved common thread of intent to feloniously obtain property].)

Scott was initially charged with five separate burglaries. The trial court properly concluded that all of the burglaries fell within the same class. Scott's crime spree involved a series of home invasion burglaries that shared the common characteristic of Scott's intent to feloniously obtain property from each of his victims.

Contrary to Scott's assertion, the evidence of his other burglaries was cross-admissible. (AOB 62-71.) As pointed out by the prosecution, all of the offenses occurred approximately at the same time in the evening, within an eight block radius, the residences were similar in that they were built by the same builder, and entry in all the incidents was made through an open sliding glass door. Those circumstances were "sufficiently similar," and established a reasonable inference that Scott entered all the residences with the same intent, to commit a theft. (2 PTM[6] R.T. 254.)

Scott contends that the August and November burglary counts were likely to have inflamed the jury. (AOB 74-76.) As pointed out by the trial court, those burglaries constituted "lesser crimes," and were "not inflammatory." (2 PTM R.T. 325-326.) Simply put, none of the noncapital offenses were particularly inflammatory in comparison to the capital murder charge. (*People v. Stanley, supra,* 39 Cal.4th at p. 935; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 640.)

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6. "Pre-Trial Motions" transcript.

Scott also asserts that joinder would have permitted a weak case to be joined with a strong case. (AOB 76-77.) This assertion is based upon Scott's flawed view of the People's homicide case. In short, Scott alleges that the prosecution's DNA evidence linking him to Morris' murder was weak, inconclusive, or otherwise inadequate. (AOB 76-78.) On the contrary, at trial, criminalist Cooksey testified that his tests concluded that four hairs found at the scene of the homicide "were consistent with and could have come from Scott's pubic area. There were no major discrepancies." (12 R.T. pp. 2084-2087.) Perhaps even more damaging was the fact that DNA evidence found in the vaginal swabs obtained from Morris, "in fact match[ed] Mr. Scott . . . ." (13 R.T. p. 2274.) This evidence was undisputed. Consequently, contrary to Scott's assertion (see AOB 77), this was not a situation which would have resulted in "a substantial risk that the unrelated burglaries . . . would have [had] a "spillover effect," so as to bolster the prosecution's case. The prosecution's undisputed DNA evidence linking Scott to Morris' murder was strong in and of itself.

Contrary to Scott's assertion (AOB 80-92), he suffered no prejudice as a result of the trial court's denial of his motion. In light of the fact that as stated above, and as will be further demonstrated in respondent's next argument, the evidence of Scott's other burglaries was cross-admissible under Evidence Code section 1101, subdivision (b), he suffered no prejudice as a result of the denial of his severance motion. As previously stated, "Ordinarily, cross-admissibility dispels any inference of prejudice . . . ." (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 531-532.) Consequently, this claim should be rejected.

III.

EVIDENCE OF SCOTT'S OTHER CRIMES WAS PROPERLY ADMITTED

Scott next challenges the admission of evidence of other burglaries committed by him. (AOB 93-115.) The trial court properly admitted evidence

of the other burglaries for the limited purpose of showing his intent to burglarize Morris' home.

As previously discussed, in Argument II, in relation to the denial of Scott's severance motion, the trial court concluded that the evidence of Scott's other crimes was cross-admissible. After Scott plead guilty to the charges unrelated to Morris, the prosecution filed a motion to introduce evidence of Scott's other crimes pursuant to Evidence Code section 1101, subdivision (b), to prove Scott's intent to commit burglary when he entered Morris' home, and a common design or plan in that the present burglary shared substantial similarities with the other burglaries committed by Scott. (22 C.T. 5756-5767.)

Evidence Code section 1101, subdivision (b), specifies that evidence of other misconduct is admissible when relevant to prove such issues as intent, motive, knowledge, identity, or common plan or design. (Evid. Code, 1101, subd. (b); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) "Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue . . . ." (*People v. Daniels* (1991) 52 Cal.3d 815, 856; see also, *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-394.) To be relevant, the evidence must tend to prove either an ultimate fact or an intermediate fact from which the ultimate fact may be presumed or inferred. (*People v. Thompson* (1980) 27 Cal.3d 303, 315.)

> Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.

(*People v. Kipp, supra*, 18 Cal.4th at p. 369.)

Although characteristics of an uncharged offense must be highly similar to a charged crime for purposes of establishing identity, a lesser degree of similarity is required to establish relevance on the matter of common design or

plan. (*People v. Kipp, supra*, 18 Cal.4th at pp. 369-371; *People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.) Furthermore,

> [t]he *least degree of similarity* is required to establish relevance on the issue of *intent*. [Citation.] For this purpose, the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]"' [Citation.]

(*People v. Kipp, supra,* 18 Cal.4th at p. 371; emphasis added.) Accordingly, if found relevant, the probative value of evidence of the other crimes must be weighed against the dangers "of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

"On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp, supra*, 18 Cal.4th at p. 369.) Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

Here, the trial court did not abuse its discretion in granting the People's motion to introduce evidence of Scott's other burglaries. At the outset, it must be noted that the evidence was not admitted, nor used, to prove identity.

In its motion, the prosecution relied on the degree of similarity between the charged and uncharged burglaries evidenced by the following shared characteristics:

> all the burglaries were committed within an eight block radius[,] between midnight and 3:00 a.m. All of the houses had a similar design and build. Entry in all cases was made through the rear sliding door. Property was either taken or an attempt was made to take property in each instance. In most crimes the property was small such as a purse, wallet, or fanny pack.

(22 C.T. 5762-5763.)

Based upon relevant case law, the court found the evidence of Scott's

other crimes was not admissible to prove identity in relation to the murder charge, because there did not appear to be enough similarities between the charged and uncharged crimes. However, the court found the evidence relevant as to the issue of common plan because it tended to show that Scott entered Morris' home for the purpose of committing a theft rather than just to commit a sexual offense as suggested by the People's other evidence. The court appeared concerned that it could be argued that Scott "wandered in there and then these other events occurred." The court further determined that the evidence was relevant under Evidence Code section 352, and stated that although the evidence was "damaging, to the defendant, its probative value [was] not substantially outweighed by the prejudicial effect." (8 R.T. 1611.)

A short while later, the trial court and counsel discussed, at length, evidence surrounding the circumstances of how entry was gained into Morris' home, and what inferences could be drawn from such evidence, compared to the other burglaries. Defense counsel insisted that there were no similarities in regards to how the residences were entered because there was no eyewitness to demonstrate how entry was gained into Morris' home, which was not the case in the other incidents. The court pointed out that it was reasonable and logical to infer "that a 75 year old woman would not late at night let someone in," and that entry into Morris' home was gained through the sliding glass door that was found open. (8 R.T. 1618-1625.)

After a brief discussion regarding the physical location of the other residences, the court concluded the other burglaries were "really close." Defense counsel continued his argument as to the lack of similarity in regards to entry, and asserted, in sum, that entry through an open sliding glass door was not unique, but rather common. The court noted that was why the evidence was not admissible for purposes of proving identity. Defense counsel maintained that because there was, allegedly, no evidence to establish the point of entry into Morris' home,

there were no similarities at all between any of the burglaries. (8 R.T. 1626-1628.)

The court held that the other crimes evidence was admissible to prove "common design or plan going into the house to prove the burglary." The court also pointed out that the jury would be given a limited instruction on the matter. (8 R.T. 1629-1631.)

Without citing to the record, Scott contends that during argument the prosecutor impermissibly "encouraged the jurors to use the other crimes evidence to prove identity." (AOB 113.) This assertion is belied by the record. Indeed, in relation to the burglary charged in count 1, the record clearly demonstrates that the prosecutor argued "we have further evidence of what Mr. Scott's *actual intent* was when he entered [Morris'] house, and that evidence is all the other burglaries that he committed in the neighborhood." (16 R.T. 2485, emphasis added.)

After summarizing the other burglaries, the prosecutor continued,

> so, the Court has told you that you can look at all of these burglaries, all of this conduct on Mr. Scott's part, and you can see that clearly in all of those cases he went in and stole property or attempted to steal property when he was caught, and you may then take that and look back at the entry in[to] [Morris'] house, and you may say if he *intended* to commit theft in all these other cases, we may consider that as evidence that when he entered [Morris'] house, he *intended* to commit theft, and that's why we went through all of those burglaries with you, and that is the relevance of those other cases to this charge. They clearly show what Mr. Scott's *intent* was when he went into [Morris' house].

(16 R.T. 2485-2486; emphasis added.) Later, in relation to the other crimes evidence, the jury was instructed pursuant to CALJIC No. 2.50 as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purposes of determining if it tends to show the existence of the intent which is a necessary element of the crime of burglary. For the limited purpose for

> which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider this evidence for any other purpose.

(22 C.T. 5822; 16 R.T. 2456-2457.) It must be presumed that the jurors followed the instructions given to them. (*People v. Valdez, supra,* 32 Cal.4th at p. 114, fn. 14; *People v. Mooc* (2001) 26 Cal. 4th 1216, 1234; *People v. Fletcher* (1996) 13 Cal.4th 451, 464.)

Scott complains that any similarities between the charged and uncharged burglaries were "common to most burglaries," and not "distinguishable." (AOB 104.) Since

> the least degree of similarity is required to establish relevance on the issue of intent . . . the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]

(*People v. Kipp, supra*, 18 Cal.4th at p. 371.)

The charged and uncharged burglaries shared the following similarities: all the burglaries were committed within an eight block radius; they occurred between midnight and 3:00 a.m; all the residences had a similar design and build; in each instance entry was made through a rear sliding door; property was either taken or an attempt was made to take property in each case; and in most cases the property was small such as a purse, wallet, or fanny pack. (22 C.T. 5762-5763.) These similarities were sufficiently similar such that it could be inferred that when Scott entered Morris' home, he harbored the intent to commit a theft. (*People v. Kipp, supra*, 18 Cal.4th p. 371.)

Scott also complains that the evidence regarding the charged offenses was "purely circumstantial, speculative, and rested on largely on DNA evidence which, as the trial court itself noted, jurors might not find to be credible evidence identifying him as the perpetrator of the homicide." (AOB 107; see PTM 257-258.) The other crimes evidence was not admitted to prove identity, nor was it impermissibly used in such manner. Moreover, the evidence clearly established

that Scott was responsible for the murder of Morris. Scott continues to ignore that the evidence established that four hairs found at the scene "were consistent with and could have come from Scott's pubic area," and "[t]here were no major discrepancies," regarding that determination. (12 R.T. 2084-2087.) Even more incriminating was the DNA evidence found in the vaginal swab obtained from Morris, that "in fact match[ed] Mr. Scott." (13 R.T. 2274.)

Scott also asserts that admission of the other crimes evidence violated his federal constitutional rights because it amounted to "inadmissible propensity evidence." (AOB 109-110.) This portion of Scott's claim should be summarily rejected because he did not advance any objection on the ground that the challenged evidence violated his federal constitutional rights before the trial court. (*People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14.)

Lastly, contrary to Scott's assertions (AOB 105, 107, 110-111), the trial court properly concluded that the probative value of the other crimes evidence outweighed any potential prejudice, and that the evidence was relevant under Evidence Code section 352. The court acknowledged that the evidence was "damaging," however it found that "its probative value [was] not substantially outweighed by the prejudicial effect." Indeed, just prior to announcing its decision, the court pointed out the relevance of the uncharged crimes in that it tended to show that Scott entered Morris' home for the purpose of committing a theft. The court found this significant because, in light of the other evidence, it could have been argued that Scott merely "wandered [into the home] and then these events just occurred]." Due to the fact that Scott was charged with one count of burglary and that burglary was one of the three special circumstances alleged, it was relevant to show that Scott entered Morris home with the intent to commit a theft. (8 R.T. 1611.)

As such, Scott was not prejudiced as a result of the court's evidentiary ruling. In light of the strong evidence that established Scott as the perpetrator of

the murder, it is highly unlikely he would have received a more favorable outcome had the challenged evidence been precluded. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924-925; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Under these circumstances, it cannot be said that the trial court exceeded the bounds of reason in concluding that the probative value of the uncharged crimes was not outweighed by undue prejudice. Therefore, this claim should be rejected.

IV.

THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NO. 8.21

Scott claims that the trial court erroneously instructed the jury on first-degree felony murder pursuant to CALJIC No. 8.21. (AOB 116-123.) Scott's claim is meritless.

As previously stated, count 4 of the grand jury indictment alleged that Scott violated section 187 in that "he did wilfully and unlawfully and with malice aforethought murder Della M., a human being." It was further alleged that Scott committed the murder after committing or attempting to commit the crimes of burglary, rape, and sodomy (§ 190.2, subd. (17) (vii)(iii)(iv)). (17 C.T. 4486-4487.)

Prior to deliberations, without objection, the jury was instructed with CALJIC No. 8.21 as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crimes of rape, burglary, or sodomy is murder of the first degree when the perpetrator had the specific intent to commit those crimes. Specific intent to commit rape, burglary, or sodomy and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(16 R.T. 2464; see 22 C.T. 5836.)

Scott never objected to having the instruction submitted to the jury. (See 15 R.T. 2407-2408; 16 R.T. 2464.) Consequently, Scott has forfeited any challenge to this instruction on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 326-327; *People v. Arias, supra,* 13 Cal.4th at p. 195; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) In any event, there was no error.

In support of this claim, Scott argues that the court lacked jurisdiction to try him for first-degree murder "because the indictment charged only second degree murder in violation of section 187." (AOB 118.) Scott further contends that, essentially, the United States Constitution requires a more specific pleading than the indictment herein. (AOB 122-123.) This Court has previously rejected such arguments, and Scott does not present any reason for this Court to deviate from its previous decisions.

Scott argues that based on the language of the indictment, he was charged "exclusively with second degree malice-murder in violation of section 187, not with first degree murder in violation of section 189." (AOB 117.) This Court has long acknowledged that the definition of murder in section 187, subdivision (a), includes first-degree murder, felony murder, and second-degree murder. (*People v. Witt* (1915) 170 Cal. 104, 107-108; see also *People v. Hughes* (2002) 27 Cal.4th 287, 368-369.) In other words, a general allegation of murder under section 187, subdivision (a) in an accusation, as stated in the indictment in this case (see 17 C.T. p. 4486), is sufficient to put a defendant on notice of a possible conviction of first-degree murder under a felony-murder theory. (*People v. Witt, supra*, 170 Cal. at pp. 107-108; *People v. Kipp* (2001) 26 Cal.4th 1100, 1131.)

In *Hughes*, this Court rejected the argument that section 189 had to be invoked in the information to charge felony murder when the information charged malice murder under section 187. (*People v. Hughes, supra*, 27 Cal.4th at pp. 368-370.) This Court also rejected the four-part attack which included: (1) the trial court lacked jurisdiction to try him for the crime of first-degree felony

murder; (2) the information failed to put him on notice that the prosecution planned to proceed under a theory of first-degree felony murder; (3) the felony murder instructions violated his right to have all elements of the charged crime proved beyond a reasonable doubt; and (4) charging both malice and felony murder in a single count violated his right to a unanimous verdict and unconstitutionally subject him to double jeopardy. (*People v. Hughes, supra*, 27 Cal.4th at pp. 369-370.)

In support of his claims, Scott relies on this Court's decision in *People v. Dillon* (1983) 34 Cal.3d 441, and asserts that *Witt* was "completely undermined" by *Dillon*. (AOB 120-121.) Scott is mistaken. In *Hughes*, this Court rejected arguments that *Dillon* overruled *Witt*. (*People v. Hughes, supra*, 27 Cal.4th at p. 371.) Nonetheless, Scott complains this Court "has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*." (AOB 120.) On the contrary, this Court explained an accused receives adequate notice of the prosecution's theory of the case from the evidence at the preliminary hearing or at post-indictment proceedings. (*People v. Hughes, supra*, 27 Cal.4th at pp. 369-370.)

In *Kipp*, this Court explained that the language in *Dillon*, to the extent that it stated that felony murder and murder with malice "are not the same crimes," means that murder with malice and felony murder had different elements but were still "a single statutory offense of murder." (*People v. Kipp, supra*, 26 Cal.4th at p. 1131, accord, *People v. Nakahara* (2003) 30 Cal.4th 705, 712 ["Although the two forms of murder have different elements, only a single offense of murder exists."]; *People v. Carpenter* (1997) 15 Cal.4th 312, 394.)

Scott claims that if there is a single statutory offense of first-degree murder, "it is the offense defined by section 189." (AOB 121.) This Court has repeatedly held that section 187 is the applicable statute for first-degree murder. (See *People v. Witt, supra*, 170 Cal. at pp. 107-108; *People v. Hughes, supra*, 27

Cal.4th at pp. 369-370; *People v. Kipp, supra*, 26 Cal.4th at p. 1131; *People v. Nakahara, supra*, 30 Cal.4th at p. 712.)

Scott next argues that "regardless of how this Court construes the various statutes defining murder," based upon the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], "it is now clear that the federal constitution requires more specific pleading in this context." (AOB 122.) While *Apprendi* does require that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 476), this Court has rejected defense arguments based on *Apprendi* that require a unanimous jury verdict as to a particular theory to justify a finding of first degree murder. (*People v. Morgan* (2007) 42 Cal.4th 593, 617; *People v. Nakahara, supra,* 30 Cal.4th at pp. 712-713.)

Here, Scott was on notice of the first-degree murder charges in the indictment, as well as the special circumstances that the murder was committed during the course of a burglary, rape and, sodomy. The facts were submitted to the jury and the jury was fully instructed regarding first-degree felony murder. As such, Scott's claim that the jury was permitted to convict him "of an uncharged crime" has no basis in law or the facts. (AOB 123.) Accordingly, Scott's claim should fail.

V.

THE JURY WAS PROPERLY INSTRUCTED REGARDING THE PROSECUTION'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT

Scott claims that his right to due process was violated because the jury was instructed with CALJIC Nos. 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, and 8.83, which he alleges improperly shifted the prosecution's burden of proof and denied

him a determination of his guilt beyond a reasonable doubt. (AOB 124-136.) Scott concedes that this Court has repeatedly rejected the majority of the constitutional challenges he makes herein but raises them nevertheless "in order to preserve the claims for federal review if necessary." (AOB 133.) Scott's entire claim has been forfeited. Moreover, even if properly preserved for appeal, Scott proffers no compelling justification why this Court should depart from its earlier holdings rejecting similar claims.

During the discussion of applicable guilt-phase instructions, defense counsel did not object to any of the instructions challenged in the instant claim. (See 15 R.T. 2387-2481.) Although defense counsel initially objected to CALJIC No. 2.51, the objection was withdrawn. (15 R.T. 2401-2402.) Consequently, Scott's failure below to object to the instructions challenged in this claim, forecloses any challenge to the instructions on appeal. (*People v. Bolin*, *supra*, 18 Cal.4th at pp. 326-327; *People v. Arias*, *supra*, 13 Cal.4th at p. 195; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1192.) Furthermore, defense counsel specifically agreed that CALJIC Nos. 2.22 and 8.83 should have been submitted to the jury. (See 15 R.T. 2396, 2481.) Therefore, any error that may have resulted therefrom, was invited. (*People v. Davis* (2005) 36 Cal.4th 510, 539 [barring appellant from challenging instruction on appeal which he had expressly agreed to at trial under invited error doctrine]; *People v. Wader* (1993) 5 Cal.4th 610, 657-658.) In any event, there is no merit to any of Scott's complaints.

Scott complains that two standard instructions on circumstantial evidence, CALJIC Nos. 2.01 (Sufficiency of Circumstantial Evidence-Generally) and 8.83 (Special Circumstances—Sufficiency of Circumstantial Evidence—Generally), "in effect . . . informed the jurors that if [Scott] reasonably appeared guilty, they could find him guilty- even if they entertained a reasonable doubt as to guilt." (AOB 126.) In short, Scott asserts that these instructions "had the effect of shifting, or at least lightening, the burden of proof . . . ." (AOB 128.) Based

upon his argument, Scott essentially claims that these instructions undermined the prosecution's burden of proof. This Court has repeatedly rejected identical claims (*People v. Cook* (2007) 40 Cal.4th 1334, 1361; *People v. Stewart* (2004) 33 Cal.4th 425, 521; *People v. Crittenden* (1994) 9 Cal.4th 83, 142-144), and Scott has failed to provide any reason to reconsider those decisions.

The trial court also instructed the jury with standard instructions CALJIC Nos. 2.21.1 (Discrepancies in Testimony), 2.21.2 (Witness Willfully False), 2.22 (Weighing conflicting testimony), 2.27 (Sufficiency of Testimony of One Witness), and 2.51 (Motive), which informed the jurors of the respective duties of the judge and jury. Scott complains the instructions "implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence test." (AOB 129-133.) Scott readily concedes (see AOB 133), that this Court has previously rejected similar claims "on the basis that the court's instructions on evaluating evidence and testimony must be read in context with its other instructions on the prosecution's burden of proving its case beyond a reasonable doubt." (*People v. Cook, supra*, 40 Cal.4th at p. 1361; e.g., *People v. Maury* (2003) 30 Cal.4th 342, 429; *People v. Snow* (2003) 30 Cal.4th 43, 97; *People v. Frye* (1998) 18 Cal.4th 894, 958.) Consequently, his entire claim fails.

VI.

SCOTT'S DEATH ELIGIBILITY DID NOT VIOLATE THE EIGHTH AMENDMENT

Scott contends that imposition of the death penalty based on a felony-murder special circumstance violates the Eighth Amendment due to "the lack of any requirement that the prosecution prove that a perpetrator had a culpable state of mind with regard to a homicide . . . ." (AOB 137-155.) Scott acknowledges that this Court has repeatedly "held that to seek the death penalty for a felony-murder, the prosecution need not prove that the defendant had any mens rea as to the homicide." (AOB 139.) Scott nonetheless urges the Court to

> revisit its previous decisions upholding the felony-murder special circumstance and hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant had an intent to kill or acted with reckless disregard for life.

(AOB 148.)

Scott has failed to demonstrate why this Court should revisit its previous rejections of this claim. (*People v. Smithey* (1999) 20 Cal.4th 936, 1016; *People v. Earp* (1999) 20 Cal.4th 826, 905; *People v. Anderson* (1987) 43 Cal.3d 1104, 1146-1147.)

As for Scott's claim that California's use of the death penalty violates international law, particularly, the International Covenant on Civil and Political Rights ("ICCPR") (AOB 155), this Court has rejected the contention that the death penalty violates international law, evolving international norms of decency, or the ICCPR. (See *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown* (2004) 33 Cal.4th 382, 403-404; see also *People v. Guerra, supra,* 37 Cal. 4th at p. 1164 ["international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements"]; *People v. Smith* (2005) 35 Cal.4th 334, 375 [same]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511 [same].) Consequently, this claim should be rejected.

VII.

JUROR NO. 12 WAS PROPERLY EXCUSED FOR CAUSE

Scott argues the trial court erred in granting the prosecutor's challenge for cause of Juror No. 12 (Carr), after she stated she was unsure if she could vote for the death penalty. (AOB 156-183.) The record fully supports the trial court's decision to excuse Carr for cause.

In *People v. Roldan* (2005) 35 Cal.4th 646, this Court stated:

> In *Wainwright v. Witt, supra*, 469 U.S. 412, 105 S.Ct. 844, the United States Supreme Court set forth the proper procedures for choosing jurors in capital cases. That case "requires a trial court to determine 'whether the juror's views would prevent or substantially impair the performance of his

> duties as a juror in accordance with his instructions and his oath.' [Citation.] 'Under *Witt*, therefore, our duty is to "examine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would 'substantially impair the performance of [the juror's] duties . . .' was fairly supported by the record." '[Citations.] [¶] In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts."

(*People v. Roldan*, *supra*, 35 Cal.4th at p. 696, quoting *People v. Fudge* (1994) 7 Cal.4th 1075, 1093-1094.)

This Court has held that "it [is] permissible to excuse a juror who [has] indicated [she] would have a 'hard time' voting for the death penalty or would find the decision 'very difficult.' (*People v. Pinholster, supra*, 1 Cal.4th at pp. 916-917)." (*People v. Roldan*, *supra*, 35 Cal.4th at p. 697.)

Applying the foregoing standards, it must be concluded that the trial court was justified in excusing Carr for cause. As demonstrated below, Carr was anything but certain about her views on the death penalty.

Carr appeared in the first panel questioned by the trial court and counsel. The court was first to question Carr on voir dire. The court confirmed with Carr that, if after listening to the evidence, if life was appropriate she would vote for life, and if death was appropriate she would vote for death. When asked whether, if the jury decided that the case resulted in first-degree murder with special circumstances, she would weigh the mitigating and aggravating factors in determining the appropriate penalty, Carr replied, "Yes. Yes, I would." The court again asked Carr whether if she felt the appropriate case was death she would give death, and if she felt it was life she would give life. Carr answered, "Yes. If I had to." Carr then stated, "If everyone agreed and other jurors

convinced me that it was." The court replied, "But it's an individual decision on your part." Carr said, "Yes." The court asked, "And you could do that? If the evidence was . . . sufficient?" Carr replied, "Yes." (3 R.T. 367-368.)

Defense counsel did not ask Carr any questions about her position on the death penalty. (3 R.T. 371, 374, 379, 383, 390, 392-394, 396-397, 401.)

After questioning Carr about her upcoming vacation plans, the prosecutor pointed out that, in her opening statement on her questionnaire, Carr stated that she would not want to be on a case that involved the death penalty. Carr confirmed, "I prefer not to, yes." The prosecutor asked, "Is that feeling so strong that . . . you would not be able to follow the law?" Carr said, "No." The prosecutor asked, "Okay. Do you think you would be able to weigh the factors that lean towards death versus the factors that lean away from death? Would you be able to keep an open mind?" Carr replied, "Well, I could - - I would probably be more toward the other way." The prosecutor asked for clarification, "Toward life or death?" Carr answered, "Life, yes. But I'm not saying that I am set." (3 R.T. 411-412.)

In reference to question number 61 in Carr's questionnaire, the prosecutor pointed out that Carr stated she "would always vote for life without." Carr explained, "Well, I prefer life without." When posed with a scenario of this case coming to the point where it would be time to decide life without or death, Carr indicated she would be open to weighing the factors. (3 R.T. 412-413.) Thereafter, the prosecutor asked,

> If we get down to this bottom part here where it [] comes time to make a decision in life without parole or death, are you going to be able to come back in the courtroom - - now, we're not talking abstract or theoretical anymore. We've got a real man sitting here - - are you going to be able - - if the factors warrant death, are you going to be able to come in here and look at all the people and vote for death?

(3 R.T. 413-414.)

Carr replied, "Well, would it be just up to me?" The prosecutor said it

would be up to the jury. Carr repeated, "The jury." The prosecutor explained to Carr that there might come a time in the case when each juror would be asked to say, "Yes, my verdict is death," and he asked Carr, "would you be able to do that given how you feel about the death penalty?" Carr replied, "I don't know if I could," and "I really don't." Shortly thereafter, Carr reiterated, "I'm not sure that I could do that part." (3 R.T. 414.)

Next, the prosecutor addressed the entire panel, and ultimately asked, "Is there anybody among the group who could not come into this courtroom, face Mr. Scott and return a verdict of death?" Carr responded, "I'm not sure." When the prosecutor suggested that Carr was "obviously struggling with a very tough question," Carr nodded her head.[7] (3 R.T. 414-419.)

Afterwards, the court and counsel discussed the panel, and the prosecutor asked to excuse Carr for cause. The court asked for argument on the matter. Defense counsel asserted that Carr "was close, but she never said that she could not listen and make a decision." He further argued that Carr

> would be willing to listen, though it would be extremely difficult for her and hard. But she said she could sit and listen and make a decision as to death, even though she would be leaning towards life without the possibility of parole.

(3 R.T. 421-423.)

The court observed, "These are the most difficult. You know these people have fought back and forth." Referring to Carr's questionnaire, the prosecutor emphasized that Carr "initially indicated that she would not want to be on a death penalty case. She indicated that she would always vote for life without parole. She indicated orally that she's not sure that she can vote for death." He also pointed out that as to his final question to the panel of whether anyone would not be able to return a death verdict, Carr repeated, "I don't know if I could." The

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7. The record does not specify whether Carr nodded in the affirmative or negative. (3 R.T. 419.)

prosecutor asserted that, based on the applicable standard, Carr's responses demonstrated her feelings would substantially impair the performance of her duty as a juror. (3 R.T. 423-424.)

The trial court found that Carr's indication that she would not want to be on a case that required the death penalty, was subject to the interpretation that such circumstance "was a tough job." Then, apparently in reference to the questionnaire, the court noted that, as for the question which asked, "Is there any particular reason why you feel as you do?," Carr had answered, "Religious beliefs." Defense counsel interjected, and stated that Carr had answered question number 75 with, "I have doubts about the death penalty, but I would not vote against it in every case." (3 R.T. 424.)

Thereafter, the court stated,

> She is one of these jurors that - - it is my understanding in looking at these cases that there are those jurors who - - for example, if you asked them whether or not Adolph Hitler - - assuming he was the defendant in this case - - whether he would deserve the death penalty they would say, "Yes." Then you ask them - - and you bring them back to the real world, [and] . . . what they're really saying is that although they could conceive in an abstract sense of voting for the death penalty, that when you apply . . . it to the real world, that what they're saying is that they could not. [¶] In listening to [Carr's] testimony, and although this is certainly a close call, Mr. Porter, *it seems to me that reading between the lines and watching her, her body language, and the way she answered, her reluctance to look up*, that what she's really saying is she couldn't vote for the death penalty in the real world.

(3 R.T. 424-425; emphasis added.)

Thus, the court sustained the prosecutor's challenge for cause. The court again noted the matter was a close call, but it found that Carr had signaled "she could not vote for the death penalty in the real world . . . if the factors were established by the People pursuant to law." (3 R.T. 425.)

Although Carr indicated that she would weigh the aggravating and mitigating factors (3 R.T. 367-368), and when pressed, stated that her feelings

were not prevent her from following the law, these comments were heavily outweighed by Carr's statements that she preferred not to be on a case that involved the death penalty, and that she would lean towards life without parole. (3 R.T. 412.) Moreover, when asked if she could return to the courtroom and say, "Yes, my verdict is death," Carr replied, "I don't know if I could," "I really don't," and "I'm not sure I could do that part." (3 R.T. 414.)

The trial court acknowledged that the issue with Carr was close, but overall it found that in "reading between the lines and watching her, her body language, and the way she answered, her reluctance to look up, that she[] [was] really saying [that] she couldn't vote for the death penalty in the real world." In other words, the court opined that Carr had "signal[ed]" that she could not vote for the death penalty in the real world. (3 R.T. 425.) Thus, in accordance with this Court's holdings in *Fields* and *Pinholster*, the court properly excused Carr for cause.

Contrary to Scott's assertions (see AOB 170), the record clearly demonstrates that Carr would not have been able to set aside her personal feelings and impose the death penalty if appropriate. As pointed out by the prosecutor, Carr's responses demonstrated that her feelings about the death penalty would have substantially impaired the performance of her duty as a juror. (See 3 R.T. 423-424.)

Scott criticizes both the court and prosecutor, and asserts that the court and prosecutor failed to fulfill their obligations in that the prosecutor failed to develop the facts in support of his challenge and that the trial court failed properly assess the matter and conduct further inquiry. This Court has established that "there is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity." (*People. v. Roldan*, *supra*, 35 Cal.4th at p. 697, quoting *People v. Rodrigues*, *supra,* 8 Cal.4th at p. 1146.) Carr's responses to the both the court and the prosecutor went beyond clarifying that she could not vote

for the death penalty. Consequently, the trial court properly excused Carr for cause, and Scott's claim to the contrary should fail.

VIII.

SCOTT HAS FORFEITED HIS CLAIM THAT PHOTOGRAPHS OF THE VICTIM WERE ADMITTED IN ERROR

Scott next asserts that he was deprived a fair penalty trial as a result of the admission of photographs of Della and her family. Scott specifically asserts that "[a]t least three of the photographs overstepped the bounds of admissible victim impact evidence." (AOB 184-195.) Because Scott objected below to the admission of photographs on grounds other than those being asserted on appeal, his claim is forfeited. In any event, the claim is meritless.

During the penalty phase, the prosecution sought to introduce four photographs of Morris when she was alive. (18 R.T. 2670.) Defense counsel objected and asserted:

> *My objection is just the number*, your Honor. As an example, here is a photo. And that is Exhibit 79 with the decedent and a dog. There is another photo I guess a younger person that would be Exhibit No. 76 in a pose. Then we have another exhibit, No. 77 with three small children. Then we have another exhibit, No. 78.

(18 R.T. 2670; emphasis added.)

The trial court interrupted, and it was determined that the children depicted in the photograph with Morris were her nephews. The fourth picture depicted Morris with her brother Webbie. Defense counsel stated, "I understand that counsel can use some photos for victim impact evidence, however, *I am objecting to the number.*" (18 R.T. 2670-2671; emphasis added.)

The discussion then turned to when the photographs were taken. The court noted that photograph number 77 was taken about 30 years previously, when Morris was possibly in her late forties. Another picture, also possibly 30 years old, depicted Morris in her "dancing regalia." The photograph of Morris

and Webbie was about 10 years old. The photograph of Morris with her dog was taken about one year before Morris was murdered. (18 R.T. 2671-2672.)

Defense counsel reiterated, "My objection is based on the ground under 352 as being cumulative, your Honor." The prosecutor stated that he had limited the number of photographs to four, and he tried to pick photographs that were not unduly inflammatory. He then proffered, "They show I think in a neat brief succinct capsulization of her life that is . . . not unduly inflammatory." (18 R.T. 2672-2673.)

The court agreed and stated,

> I can't say that the probative value is substantially outweighed by its prejudicial effect. I think they reflect factors in her lifetime over a period of time. They are not baby pictures. They are not the kind of pictures that would have a prejudicial effect. I think they are just ordinary pictures.

(18 R.T. 2673.) Thereafter, the court overruled defense counsel's objection. (18 R.T. 2673.)

The instant claim has been forfeited. As demonstrated above, Scott objected to the admission of the photographs solely on the ground that there were to many and the photos were cumulative. Indeed, defense counsel twice stated that his only objection to the photographs was based on the "number." (18 R.T. 2670-2671.) Scott now complains that the photographs were improperly admitted "because of their highly emotional impact," the purpose of which was to "evoke sympathy only for the victim." He also claims admission of the photographs violated his state and federal constitutional rights to due process, and he appears to suggest the photographs were too remote in time. (AOB 184, 192-193.)

Because Scott did not complain below about the admission of the photographs on the same grounds he asserts on appeal, this entire claim has been forfeited. (*People v. Lucero* (2000) 23 Cal.4th 692, 714-715; *People v. Hart* (1999) 20 Cal.4th 546, 648, fn. 37; *People v. Carpenter, supra,* 15 Cal.4th at pp. 385; *People v. Davenport, supra,* 11 Cal.4th at p. 1205; *People v. Benson* (1990)

52 Cal.3d 754, 786, fn. 7.) "No special exception to this rule of waiver exists for capital cases." (*People v. Cain* (1995) 10 Cal.4th 1, 28.)

In any event, the photographs were properly admitted. Although this Court has expressed caution about the dangers of admitting photographs of murder victims when they were alive (see, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 677; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230), in those cases, the photographs were admitted at the guilt phase of trial. (*People v. Lucero, supra*, 23 Cal.4th at pp. 714.) As recently explained, however, photographs are "generally admissible" when, as here, the prosecutor seeks to introduce them at the penalty phase. (*Id.* at pp. 714-715; *People v. Carpenter, supra*, 15 Cal.4th at pp. 400-401.)

Here, as the prosecutor pointed out, he had limited the number of photographs he presented and had tried to choose pictures that were not unduly inflammatory. The trial court agreed with the prosecutor that the proffered photographs showed "a neat brief succinct capsulization of [Morris'] life," in that they reflected factors in the victim's lifetime over a period of time. The court pointed out that they were not baby pictures, nor were they the kind of pictures that would have a prejudicial effect. Rather, because they were "just ordinary pictures," the probative value was not substantially outweighed any prejudicial effect. (18 R.T. 2673.)

This Court has previously held that the People may introduce pictures of a victim's family as victim impact evidence pursuant to *Payne v. Tennesse* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]). (*People v. Stitley* (2005) 35 Cal.4th 514, 565 [photograph of victim and husband properly admitted as victim impact evidence, photograph illustrated husband's expression of love for victim and implied that victim's loved ones suffered grief and pain over loss of victim].) As was the case in *Stitely*, the photographs admitted in this case implied that Della's loved ones, as testified by her nephew, Abelin, suffered grief and pain

over her loss. (*Ibid.*, see e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 444 [Court upheld admission of photographs of murder victims taken at unspecified times].)

Contrary to Scott's position, the photographs were not unduly prejudicial and they were not inadmissible because they illustrated details of Morris' early life which Scott knew nothing about. (*People v. Stitely, supra*, 35 Cal.4th at p. 565; see also *People v. Pollock* (2004) 32 Cal.4th 1153, 1183 [rejecting claim that victim impact evidence involves only circumstances known or reasonably foreseeable to the defendant at the time of the crime].) Nor did the photographs "fall [outside] any reasonable common-sense definition of the phrase 'circumstances of the crime'" as provided in factor (a) of section 190.3. (AOB 193.) As this Court has already stated,

> [e]vidence of the impact a victim's death has on their family members is evidence of "the specific harm caused by the crime" [Citation], and accordingly is properly admitted as a circumstance of the crime under section 190.3, factor (a) [Citation].

(*People v. Cook, supra*, 39 Cal.4th at p. 609.)

Consequently, no error resulted.

IX.

SCOTT WAS NOT ENTITLED TO INSTRUCTIONS ON LINGERING DOUBT

Scott contends that the court erred when it rejected his proposed penalty phase instructions on lingering doubt. (AOB 196-205.) Scott is mistaken.

Proposed penalty phase instruction number 4 read as follows: "Any lingering doubts you entertain on the question of guilt may be considered in your determining the appropriate penalty." (22 C.T. 5951.) Scott alleges that proposed penalty phase instruction number 30,[8] would have permitted the jury

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8. The entire text of Scott's lengthy proposed instruction is set forth in Volume 22 of the Clerk's Transcript at pages 5978-5981.

to consider "Any lingering or residual doubt you may have about the defendant's guilt," and was intended to expand, supplement, or modify CALJIC No. 8.85, the instruction on factors to be considered in determining the appropriate penalty. (AOB 196, 204, citing 22 C.T. 5933-5934.)

Although this Court has held that it is proper for a jury to consider lingering doubt (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219), as recognized by Scott (AOB 198), this Court has consistently held that neither federal nor state constitutional law imposes an obligation to give a lingering doubt instruction. (See *People v. Bonilla, supra,* 41 Cal.4th at p. 357, *People v. Abilez* (2007) 41 Cal.4th 472, 531; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1067; *People v. Harris* (2005) 37 Cal.4th 310, 359; *People v. Gray* (2005) 37 Cal.4th 168, 231-232.) Scott offers no reason for this Court to depart from these decisions, and this Court should decline to do so.

Furthermore, the United States Supreme Court in *Oregon v. Guzek* (2006) 546 U.S. 517 [126 S.Ct. 1226, 163 L.Ed.2d 1112], confirmed, yet again, there was no recognized Eighth Amendment right to present evidence of lingering doubt. In *Franklin v. Lynaugh* (1988) 487 U.S. 164 [108 S.Ct. 2320, 101 L.Ed.2d 155], a plurality of the Justices clarified that previous decisions have not recognized an Eighth Amendment right to present evidence casting doubt on a capital defendant's guilt at the sentencing phase. (*Oregon v. Guzek, supra*, 546 U.S. at p. 525.) "The *Franklin* plurality said it was 'quite doubtful' that any right existed." (*Ibid.*)

In this case, "the lingering doubt concept [was] sufficiently encompassed in other instructions ordinarily given in capital cases." (*People v Harris, supra*, 37 Cal.4th at p. 359; *People v. Hines* (1997) 15 Cal.4th 997, 1068.) Accordingly, the trial court properly refused the requested instructions.

X.

SCOTT'S PROPOSED MERCY INSTRUCTIONS WERE PROPERLY REJECTED

Scott next argues that the court erred when it rejected six proposed instructions regarding mercy. (AOB 206-222.) Because the jury was adequately instructed in other instructions on the role of mercy, the court properly rejected Scott's proposed instructions.

Proposed instruction number 1 read as follows: "Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without the possibility of parole." (22 C.T. 5948.) Proposed instruction number 2 stated: "A juror might be disposed to grant mercy on other factors." (22 C.T. 5949.) Proposed instruction number 7 read: "In determining whether to sentence the defendant to life imprisonment without the possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant." (22 C.T. 5954.) Proposed instruction number 8 read as follows:

> An appeal to the sympathy or passions of a jury is inappropriate at the guilt phase of a trial. However, at the penalty phase, you may consider sympathy, pity, compassion or mercy for the defendant in determining the appropriate punishment. [¶] You are not governed by conjecture, prejudice, public opinion, or public feeling. [¶] You may decide that a sentence of life without the possibility of parole is appropriate for the defendant based upon the sympathy, pity, compassion and mercy you felt as a result of the evidence adduced during the penalty phase.

(22 C.T. 5955.)

Proposed instruction number 31 stated: "You may consider as mitigation that ROYCE LYN SCOTT has a family that loves him if you find that to be a fact." (22 C.T. 5982.) Proposed instruction number 32 read as follows:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case[.] [¶] But you should not limit your consideration of mitigating

> circumstances to these specific factors. You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [¶] Any one of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case.

(22 C.T. 5983.)

After the penalty trial, the jury was instructed with several instructions including CALJIC No. 8.85 which informed the jury it could consider such factors as that of factor K which stated:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse, and any sympathetic or other aspect of defendant's character or record that defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(20 R.T. 2800; 22 C.T. 5933.)

The jury was also instructed with CALJIC No. 8.88 which stated in part: "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (20 R.T. 2845; 22 C.T. 5946.)

This Court has consistently held that the language of CALJIC Nos. 8.85 and 8.88, sufficiently conveys to the jury that it can consider mercy and compassion for the defendant in determining which penalty it deems appropriate. In *People v. Brown* (2003) 31 Cal.4th 518, this Court noted:

> [W]e have held that a "'jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed it may exercise mercy.'" Because the defendant's jury had been instructed in the language of section 190.3, factor (k), we must assume the jury already understood it could consider mercy and compassion; accordingly the trial court did not err in refusing the proposed mercy instruction.

(*Ibid.* at p. 570, citations omitted.)

In *People v. Panah, supra,* 35 Cal.4th at p. 395, this Court reiterated that when CALJIC 8.85 and 8.88 are given to the jury "no additional instruction [is] required." (*Ibid.* at p. 497, quoting *People v. Bolin, supra*, 18 Cal.4th at p. 344.)

Scott provides no reason why this Court should depart from its previous decisions rejecting this claim. (*People v. Brown, supra,* 31 Cal.4th at p. 570; *People v. Taylor* (2001) 26 Cal.4th 1155, 1180-1181; *People v. Bolin, supra*, 18 Cal.4th at p. 344; *People v. Wader, supra,* 5 Cal.4th at p. 633.)

Scott relies, in part, on *People v. Andrews* (1989) 49 Cal.3d 200, and asserts that "the prosecutor's argument was anything but acknowledgment that the jury could consider mercy as a reason to spare [his] life." (AOB 217.) *Andrews* is of no assistance here. In *Andrews*, this Court held that the jury was not misinformed of its ability to show mercy in light of the fact that it had been instructed on such. The Court further held that neither party suggested during closing argument that mercy could not be considered. (*Id.* at pp. 227-228.)

Likewise, here, the jury adequately instructed that it could exercise mercy and compassion. Also, contrary to Scott's assertion, the prosecutor twice noted to the jurors that they would be asked to consider mercy, but he asked instead for "justice." (20 R.T. 2804, 2827.) As such, "there is no reason to believe the jury may have been misled about its obligation to take into account mercy or any of [Scott's] other mitigating evidence in making its penalty determination." (*People v. Hughes, supra*, 27 Cal.4th at p. 403.) Furthermore, based upon the instructions that were given and counsels' arguments, there is no reasonable possibility that the alleged instructional error affected the verdict. (*People v. Carter, supra*, 30 Cal.4th at pp. 1221-1222.) Accordingly, this claim should be rejected.

XI.

CALJIC NO. 8.84, AS GIVEN, WAS PROPER

Scott asserts that the trial court erred in refusing his request to modify CALJIC No. 8.84. (AOB 223-234.) This claim must fail.

The jury was instructed with CALJIC No. 8.84 as follows:

> The defendant in this case has been found guilty of murder in the first degree. The allegation that the murder was committed under one or more

> of the special circumstances has been specially found to be true. It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without the possibility of parole in any case in which the special circumstances alleged in this case have been specially found to be true. Under the law of this state, you must now determine which of these penalties shall be imposed on the defendant.

(22 C.T. 5915; 20 R.T. 2787-2788.)

Scott now claims that the court erred in refusing his request to modify CALJIC No. 8.84 with the following language:

> These sentences mean just what they say. If you recommend that the defendant, ROYCE LYN SCOTT, be sentenced to death, he will be sentenced to death and executed. [¶] If you recommend life imprisonment he will be so imprisoned for the balance of his natural life.

(22 C.T. 5968.)

In support of his claim that the court erred in failing to modify CALJIC No. 8.84 as requested, Scott argues the court in effect failed to define for the jury "life without the possibility of parole." (AOB 224.) Scott acknowledges that this Court has consistently rejected similar claims, but urges the Court to reconsider the issue. (AOB 225.) This Court has clearly established that a trial court has no duty to instruct the jury on the meaning of "life imprisonment without the possibility of parole." (See *People v. Wilson* (2005) 36 Cal.4th 309, 355; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Sakarias* (2000) 22 Cal.4th 596, 641; *People v. Holt* (1997) 15 Cal.4th 619, 688.) Because Scott offers no new reason why this Court should depart from its previous holdings, this claim should be rejected.

XII.

SCOTT'S PROPOSED PENALTY PHASE INSTRUCTIONS NUMBERS 24 AND 25 WERE PROPERLY REJECTED

Scott next contends the court erred when it rejected proposed penalty phase instructions numbers 24 and 25. (AOB 235-244.) As demonstrated below,

the proposed instructions were properly rejected as they were duplicative of applicable CALJIC instructions submitted to the jury.

After the presentation of evidence during the penalty phase, the court and counsel engaged in a lengthy discussion regarding the applicable jury instructions. (19 R.T. 2765; 20 R.T. 769-2776.) Scott proposed 42 penalty phase instructions. Ultimately, the court rejected all but one of Scott's proposed instructions.[9/] In support of its decision, the court, at one point, stated that the proffered instructions were "otherwise covered in CALJIC or are not otherwise appropriate," and noted that it would "go through each one and find cases." The court also stated that, "*Many of them are essentially the same as CALJIC*, just some slight wording change. So on that basis I would be fearful to depart from CALJIC." (19 R.T. 2765, emphasis added.)

Although the record does not demonstrate that there was any specific discussion about proposed instructions numbers 24 and 25, as noted above, the court rejected all but one of the defense's proposed penalty phase instructions because they were duplicative in that the court found them "essentially the same as CALJIC, just some slight wording change." (19 R.T. 2765.)

A trial court has no duty to administer duplicative, incomplete or erroneous instructions to the jury. (*People v. Cook, supra,* 40 Cal.4th at pp. 1362-1363; *People v. Benson, supra,* 52 Cal.3d at p. 805, fn 12.) Proposed instruction number 24[10/], which would have told the jurors that they could not

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9. After a lengthy discussion with the prosecutor, the court accepted proposed instruction number 26, the only proposed instruction the prosecutor agreed was appropriate. (20 R.T. 2776-2780, 2793-2784.)

10. Proposed penalty phase instruction No. 24 read as follows: You may not treat the verdict and finding of first degree murder committed under [a] special circumstance[s], in and of themselves, as constituting an aggravating factor. For, under the law, first degree murder committed with a special circumstance may be punished by either death or life imprisonment without the

consider the guilty verdict and special circumstances as aggravating factors, was properly rejected as it would have been inconsistent with CALJIC No. 8.85, "which allows the jurors to consider all the evidence in the case, including the circumstances of the crime and the existence of any special circumstances." (*People v. Cook, supra*, 40 Cal.4th at p.1363.)

Proposed penalty phase instruction No. 25 read as follows:

> In deciding whether or not you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you finding him guilty of murder in first degree unless the fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found Mr. SCOTT guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance.

(22 C.T. 5974.)

This Court has also previously found no error in a trial court's refusal to instruct the jury with the language encompassed in proposed instruction number 25. (*People v. Cook, supra*, 40 Cal.4th at p. 1363.) Consequently, this claim should be rejected in its entirety.

XIII.

SCOTT'S PROPOSED PENALTY PHASE INSTRUCTIONS NOS. 1, 10, 30 THROUGH 34, 36 AND 42 WERE PROPERLY REJECTED

During the penalty phase, Scott proposed 42 penalty phase instructions in support of his case. As previously stated in Argument XII, the court rejected all

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> possibility of parole. [¶] Thus, the verdict and finding which qualifies a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over the other. You may, however, examine the evidence presented in the guilt and penalty phases of this trial to determine how the underlying facts of the crime bear on aggravation or mitigation.

(22 C.T. 5973.)

but one of Scott's proposed penalty phase instructions. In this claim, Scott challenges the rejection of defense proposed penalty phase instruction numbers 1, 10, 30[11] through 34, 36, and 42. (AOB 245-275.) As demonstrated below, these instructions were properly rejected because the standard jury instructions sufficiently instructed the jury.

Proposed penalty phase instruction number 1 stated, "Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without the possibility of parole." (22 C.T. 5948.) Proposed penalty phase instruction number 10 read as follows:

> A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established, regardless of the number of jurors who concur that the factor has been established.

(22 C.T. 5957.)

Proposed penalty phase instruction number 31 stated: "You may consider as mitigation that ROYCE LYN SCOTT has a family that loves him if you find that to be a fact." (22 C.T. 5982.) Proposed penalty phase instruction number 32 read:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into accounts as reasons for deciding not to impose a death sentence in this case[.] [¶] But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [¶] Any one of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case.

(22 C.T. 5983.)

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11. As explained in Argument IX, which is incorporated herein, the trial court properly refused Proposed Defense Instruction number 30.

Proposed penalty phase instruction number 33 stated:

> A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offense or about the defendant which, in fairness, sympathy, compassion, or justifies a sentence of less than death, although it does not justify or excuse the offense.

(22 C.T. 5984.)

Proposed penalty phase instruction number 34 stated:

> Any aspect of the offense or of the defendant's character or background that you consider mitigating can be the basis for rejecting the death penalty even though it does not lessen legal culpability for the present crime.

(22 C.T. 5985.)

Proposed penalty phase instruction number 36 stated:

> A mitigating circumstance need not be proved beyond a reasonable doubt nor even by a preponderance of the evidence, and each juror may find a mitigating circumstance to exist if there is any evidence to support it.

(22 C.T. 5987.)

Proposed penalty phase instruction number 42 read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] You are not permitted to consider any factor as aggravating unless it is specified on the list of factors you have been given previously. There is, however, no limitation on what you may consider as mitigating. [¶] An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequence which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale,

or the arbitrary assignments of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstance with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that a death sentence, instead of life without the possibility of parole, is justified and appropriate under all the circumstances. In such a case, you are permitted to return a verdict of death, but you are not required to do so. But if you conclude that the mitigating factors are equal to or outweigh the aggravating, you must return a verdict for confinement in the state prison for life without the possibility of parole.

(22 C.T. 5993-5994.)

In rejecting the above proposed instructions, the trial court did not err. This Court has repeatedly explained that the standard jury instructions which were given to Scott's jury are adequate to inform the jurors of their sentencing responsibilities, and those instructions fully comply with federal and state constitutional standards. Nothing more was required. (*People v. Kelly* (2007) 42 Cal.4th 763, 799.) Accordingly, Scott's claim fails.

XIV.

SCOTT'S UPPER TERM SENTENCE SHOULD BE UPHELD; IMPOSITION OF CONSECUTIVE SENTENCES WAS PROPER

Scott claims that under *Cunningham v. California* (2007) ___U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856], the trial court erred by imposing an upper term on count 11 based on facts that were neither found by the jury nor admitted by appellant, and that imposition of consecutive sentences as to counts 2 and 3 was improper. Accordingly, he claims that his Sixth Amendment right to a jury trial was violated and his sentences should be reversed. (AOB 276-298.) The trial court properly imposed the upper term based on facts that the jury necessarily

found. Any error was harmless beyond a reasonable doubt. Also, the trial court did not err in imposing consecutive sentences on counts 2 and 3.

Scott was convicted of first degree burglary (§ 459; counts 1, & 6-9); rape (§ 261; count 2); sodomy (§ 286, subd. (c); count 3), murder (§ 187; count 4); second-degree robbery (§ 211; counts 10 & 11); and assault with a deadly weapon (§ 245, subd. (a)(1); counts 12 & 13). It was found true that Scott committed the murder while engaged in the crimes of burglary, rape, and sodomy. (§ 190.2, subd. (a) (17) (iii), (iv), & (vii).) (23 C.T. pp. 5795-5802; 23 C.T. pp. 6128-6130.) Scott admitted that he had one prior serious felony conviction and had served one prior prison term. (§§ 667 &667.5, subd. (b).) (22 C.T. 5744.)

At the sentencing hearing, after confirming imposition of the death penalty for the special circumstances murder, count 4, the trial court announced the determinate sentences as to the remaining counts as follows: count 11 was pronounced the principal term. "Based upon [its] analysis of the sentencing factors as set forth in the probation report," the court imposed the upper term of six years, plus one year for the use-enhancement. As for counts 12 and 13, the court imposed one year each, one-third the mid-term, and imposition of each sentence was stayed pursuant to section 645. (21 R.T. 2902-2904, 2906.)

As for counts 1 and 6-10, the court imposed a total of seven years, eight months, consecutive. As for counts 2 and 3, the court imposed, consecutively, the upper term of eight years for each count, for reasons stated in the probation report. The court imposed five years for the prior conviction enhancement and one year for the prior prison term enhancement. The total sentence imposed was thus 35 years and eight months. (21 R.T. 2905-2907.)

As previously mentioned, as to count 11, the court imposed the upper term of six years "[b]ased upon [its] analysis of the sentencing factors as set forth in the probation report." (21 R.T. 2902.) Per California Rules of Court, rule 4.421

(formerly Rule 421), the probation report listed the following circumstances in aggravation, as for facts related to the crimes: the crimes involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. (California Rules of Court, rule 421, subd. (a)(1)); Enhancement (the defendant was armed with or used a weapon at the time of the commission of the crime.) (California Rules of Court, rule 421, subd. (a)(2)); The victim was particularly vulnerable (California Rules of Court, rule 421, subd. (a)(3)); The manner in which the crime was carried out indicates planning, sophistication, or professionalism. (California Rules of Court, rule 421, subd. (a)(8)); The crimes involved an attempted or actual taking or damage of monetary value. (California Rules of Court, rule 421, subd. (a)(9)).

As for facts related to the defendant: The defendant has engaged in violent conduct which indicates a serious danger to society. (California Rules of Court, rule 421, subd. (b)(1)); the defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. (California Rules of Court, rule 421, subd. (b)(2)); the defendant has served a prior prison term. (California Rules of Court, rule 421, subd. (b)(3)); The defendant was on probation or parole when the crime was committed. (California Rules of Court, rule 421, subd. (b)(4)); the defendant's prior performance on probation or parole was unsatisfactory. (California Rules of Court, rule 421, subd. (b)(5).)

In *Cunningham*, the United States Supreme Court held that California's procedure for selecting upper terms violates the defendant's Sixth and Fourteenth Amendment right to jury trial because it gives "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra,* 127 S.Ct. at p. 860.) The Court explained,

> the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a

jury or admitted by the defendant.

(*Cunningham v. California, supra,* 127 S.Ct. at p. 860.)

An upper term sentence based on at least one aggravating circumstance complying with *Cunningham* "renders a defendant *eligible* for the upper term sentence," so that "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black* (2007) 41 Cal.4th 799, 812.) (*Black II).* An aggravating circumstance accords with *Cunningham* if it was based on the defendant's criminal history. (*Id.* at pp. 816-818.) This "exception" for a defendant's "[r]ecidivism" must not be read "too narrowly" and encompasses "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Id.* at pp. 818-820) [trial court's finding that prior convictions were numerous or of increasing seriousness falls within the exception]; *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223 [trial court's finding that the defendant had served a prior prison term falls within the exception], cited with approval in *People v. Black, supra,* 41 Cal.4th at p. 819)

In imposing the upper term, the trial court permissibly relied on Scott's criminal history, finding that Scott's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings were numerous or of increasing seriousness (California Rules of Court, rule 421, subd. (b)(2)); Scott had served a prior prison term (California Rules of Court, rule 421, subd. (b)(3)); Scott was on probation or parole when the crime was committed. (California Rules of Court, rule 421, subd. (b)(4)); and that Scott's prior performance on probation or parole was unsatisfactory. (California Rules of Court, rule 421, subd. (b)(5).) (See Probation Report.) This rendered Scott eligible for the upper term. Under these circumstances, the trial court's additional aggravating circumstance findings did not violate Scott's right to jury trial under *Cunningham.*

Furthermore, an aggravating circumstance is "legally sufficient" under *Cunningham* if it was "found to exist by the jury" or "has been admitted by the defendant . . . ." (*People v. Black, supra,* 41 Cal.4th at p.816.) Here, the aggravating circumstance that the victim was a 78 year-old woman, presumably asleep in her bed when attacked, was inherent in the jury's findings that the victim was particularly vulnerable and fully satisfied the constitutional requirement in *Cunningham*. This rendered Scott eligible for the upper term. Under these circumstances, the trial court's additional aggravating circumstance findings did not violate *Cunningham*.

An appellate court properly finds *Cunningham* error harmless if it

> concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury . . . .

(*People v. Sandoval* (2007) 41 Cal.4th 825, 839.)

Here, the jury would have found the circumstances beyond a reasonable doubt had they been presented, rendering the *Cunningham* error harmless. At trial, the evidence was undisputed that the victim was vulnerable in that she was a 78 year old woman, and it was highly likely that she was asleep in her bed at the time Scott attacked her. That evidence and the resulting injuries, which obviously constituted to great bodily harm, amounted to clearly indicated that Scott's crimes involved a high degree of cruelty, viciousness and callousness. Therefore, the jury would have found any of these facts beyond a reasonable doubt had they been presented, rendering the *Cunningham* error harmless. Accordingly, this Court should reject appellant's contention.

If this Court disagrees and finds prejudicial *Cunningham* error, however, it should remand for resentencing under the reformed system prescribed by the California Supreme Court. (See *People v. Sandoval, supra,* 41 Cal.4th at p. 843-852].) Under this reformed system, the resentencing court would again exercise

its "discretion to select among the three available terms," giving a statement of reasons for its selection, but with no requirement of additional factfinding. (*People v. Sandoval, supra,* 41 Cal.4th at p. 850, 852.) The court would use the amended rules of court as guidance. (*Id.* at pp. 846-847; see Cal. Rules of Court, rules 4.405-4.452, as amended May 23, 2007.)

Scott also claims that under *Cunningham v. California, supra,* 127 S.Ct. at p. 856, the imposition of a consecutive sentence based on facts that were neither found by the jury nor admitted by him violated his Sixth Amendment right to a jury trial. (AOB 276, 280-284, 287-295.) The claim is without merit. *Cunningham* is inapplicable to the decision whether to run individual sentences consecutively or concurrently. (*People v. Black, supra,* 41 Cal.4th at pp. 822-823.) Because Scott's argument raises no issue not resolved by our Supreme Court in *Black*, it must be rejected. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

XV.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT SCOTT'S TRIAL, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Scott claims that California's capital sentencing scheme violates the United States Constitution. (AOB 299-319.) As Scott concedes, this Court has consistently rejected his arguments. (AOB 299.) Scott proffers no compelling reason why this Court should reexamine its rejection of these claims.

A. California's Death Penalty Statute Adequately Narrows Class Of Death Eligible

Scott asserts that section 190.2 is "impermissibly broad" because it "fails to identify the few cases in which the death penalty might be appropriate." Scott also states this Court should reconsider its decision in *People v. Stanley* (1995)

10 Cal.4th 764, 842-843. (AOB 299-300.) This Court has previous held that "[t]he death penalty law adequately narrows the class of death-eligible offenders." (*People v. Manriquez, supra,* 37 Cal.4th at p. 589; *People v. Dickey* (2005) 35 Cal.4th 884, 931; *People v. Brown, supra,* 33 Cal.4th at p. 401; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) Scott proffers no persuasive argument to depart from these decisions.

B. California's "Factor A" Is Not Unconstitutional

Contrary to Scott's assertion (AOB 300-301), "[s]ection 190.3, factor (a), is not unconstitutionally overbroad, arbitrary, capricious, or vague, whether on its face (*People v. Guerra, supra,* 37 Cal.4th at p.1165, 40 Cal.Rptr.3d 118,129 P.3d 321) or as applied to [Scott]." (*People v. Morgan, supra,* 42 Cal.4th at p. 626.)

C. Findings Beyond A Reasonable Doubt Not Required Regarding Aggravating Factors

Scott claims that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. (AOB 302-303.) As conceded by Scott, this Court has already rejected his "argument that *Apprendi*, *Blakely*, and *Ring*, impose a reasonable doubt standard on California's capital penalty phase proceedings." (AOB 303 citing *People v. Prieto, supra,* 30 Cal.4th at p. 263.) For the same reasons this Court rejected a similar claim in *People v. Manriquez, supra*, 37 Cal.4th at p. 590, *People v. Dickey, supra*, 35 Cal.4th at pp. 930-931, and *People v. Ward* (2005) 36 Cal.4th 186, 221, it should do so here. Scott has presented no justification for departing from this Court's well-considered precedent.

Scott claims that his "[d]eath verdict not premised on unanimous jury findings." (AOB 305-308.) This Court has repeatedly held that "[t]here is no constitutional requirement that the jury find aggravating factors unanimously."

(*People v. Morgan, supra*, 42 Cal.4th at p. 627; *People v. Osband, supra,* 13 Cal.4th at pp. 709-710.) The Court also stated that "[n]either *Apprendi* nor *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, has changed our prior conclusion regarding jury unanimity." (*People v. Morgan, supra*, 42 Cal.4th at p. 627.)

D. There Is No Requirement Of Written Findings

Scott contends that the "fail[ure] to require that the jury make written findings violates [his] right to meaningful appellate review." (AOB 314-315.) Scott concedes that this Court has previously rejected this claim in *People v. Cook* (2006) 39 Cal.4th 566, 619 and *People v. Fauber* (1992) 2 Cal.4th 792, 859. Nonetheless, Scott "urges" the Court to reconsider "its decisions on the necessity of written findings." (AOB 314-315.) This contention must fail in light of this Court's well established and well reasoned precedent to the contrary. (*People v. Dunkel* (2005) 36 Cal.4th 861, 939; *People v. Dickey, supra*, 35 Cal.4th at p. 931; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Prieto, supra*, 30 Cal.4th at p. 267; and *People v. Snow, supra,* 30 Cal.4th at p.126.)

E. CALJIC Nos. 8.85 And 8.88 Are Constitutional And Proper

Scott's asserts CALJIC Nos. 8.85 and 8.88 are inadequate. (AOB 304-305.) As previously argued above, see Argument X, this Court has repeatedly held that CALJIC Nos. 8.85 and 8.88 adequately inform the jury that it can consider mercy and compassion in determining the appropriate penalty.

Scott asserts that the determination of the appropriate punishment, "hinged on whether the jurors were 'persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'" (AOB 308, citing CALJIC No. 8.88.) Thus, "the phrase so substantial," as used in the instruction "caused the penalty determination to turn on an impermissibly vague and ambiguous standard."

(AOB 308.) Scott concedes this claim has been previously rejected by this Court in *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14. (AOB 308.) Indeed, this claim was also recently rejected in *People v. Morgan, supra*, 42 Cal.4th at p. 626, and *People v. Avila* (2006) 38 Cal.4th 491, 614. There is no reason to depart from these sound decisions.

Next, Scott claims that the "[i]nstructions failed to inform the jury that the central determination is whether death is the appropriate punishment." (AOB 308-309.) Scott concedes that this Court has previously rejected this claim in *People v. Arias, supra,* 13 Cal.4th at p. 171. (AOB 309.) Scott proffers to reason to depart from this precedent.

Scott contends that "[CALJIC No. 8.88] failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole." (AOB 309-310.) This Court has consistently rejected this argument, and Scott proffer no basis for its reconsideration here. (See *People v. Morgan*, *supra*, 42 Cal.4th at p. 626; e.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 124; *People v. Kipp, supra,* 18 Cal.4th at p. 381.)

Scott further asserts "that even if aggravating circumstances outweighed mitigating circumstances, the could return sentence of life without the possibility of parole." (AOB 310-311.) This Court has ruled that a defendant is "not entitled to a specific instruction that the jury may choose life without possibility of parole even if it finds that the aggravating circumstances outweigh those in mitigation." *People v. Morgan, supra* 42 Cal.4th at pp. 625-626; *People v. Kipp*, *supra*, 18 Cal.4th at p. 381; *People v. Medina, supra,* 11 Cal.4th at pp. 781-782.)

Scott next asserts that "[t]he failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence." (AOB 312.) Based upon his arguments in support of this claim, Scott appears to suggest that the jury should have been instructed that it had to

unanimously agree to on the aggravating factors. (See AOB 312-313.) This Court has repeatedly held that "[t]here is no constitutional requirement that the jury find aggravating factors unanimously." (*People v. Morgan, supra*, 42 Cal.4th at p. 627; *People v. Osband, supra*, 13 Cal.4th at pp. 709-710.)

Scott argues that "[t]he penalty jury should be instructed on the presumption of life." (AOB 313-314.) This Court recently confirmed that "[t]he death penalty law is not unconstitutional for failing to require an instruction on the presumption of life." (*People v. Morgan, supra*, 42 Cal.4th at p. 627; *People v. Arias, supra,* 13 Cal.4th at p. 190.)

Scott contends that

> the inclusion in the list of potential mitigating factors of such adjectives as "extreme"and "substantial" acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal constitution.

(AOB 315.)

This claim has been consistently rejected by this Court. (*People v. Cook, supra,* 40 Cal.4th at p. 1366; e.g., *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Anderson* (2001) 25 Cal.4th 543, 601.) This Court should affirm its earlier holdings in this case.

Scott argues that the court erred in failing to delete "inapplicable sentencing factors from CALJIC No. 8.85." (AOB 315-316.) This claim has been repeatedly rejected by this Court. (*People v. Cook, supra*, 40 Cal.4th at p. 1366; e.g., *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064.) Scott offers no basis for this Court departing from its prior rejections of this argument.

Scott next argues that "[i]n accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85" were aggravating or mitigating. (AOB 316-317.) Scott provides no basis for this Court reconsidering its decision in *People v. Hillhouse,*

supra, 27 Cal.4th at p. 509, wherein this claim was previously rejected.

F. There Is No Requirement Of Inter-case Proportionality Review

Scott asserts that the "prohibition against inter-case proportionality review guarantees arbitrary and disproportionate impositions of the death penalty." (AOB 317.) This Court has repeatedly rejected similar claims that the California death penalty law violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution for failing to provide intercase proportionality review. (*People v. Moon* (2005) 37 Cal.4th 1, 48, citing *People v. Gurule* (2002) 28 Cal.4th 557, 663, and *People v. Lawley* (2002) 27 Cal.4th 102, 169.) Moreover, as this Court has recognized, the United States Supreme Court agrees. (*People v. Moon, supra*, 37 Cal.4th at p. 48, citing *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29] [intercase proportionality review not required by United States Constitution]; see also *People v. Morrison* (2004) 34 Cal.4th 698, 731; *People v. Prieto, supra,* 30 Cal.4th at p. 276; *People v. Snow, supra*, 30 Cal.4th at p. 126; *People v. Box, supra,* 23 Cal.4th at pp.1153, 1217.)

Scott next claims that "California's capital sentencing scheme violates the equal protection clause." (AOB 318-319.) This Court has previously rejected this claim and should do so here. (*People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288; see also *People v. Morrison, supra*, 34 Cal.4th at p. 731.) The considered analysis in *Allen* remains persuasive. This Court affirmed its decision in *Allen* in *People v. Brown, supra*, 33 Cal.4th at p. 382, noting that "[d]eath penalty defendants are not denied equal protection because the statutory scheme does not contain disparate sentence review. [Citing *People v. Jenkins* (2000) 22 Cal.4th 900, 1053, and *People v. Allen, supra*, 42 Cal.3d at pp. 1286-1288]." (*Id.* at p. 402.) Moreover, capital and noncapital defendants are not similarly situated and thus may be treated differently without offending equal protection principles. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith, supra,* 35 Cal.4th

at p.374; see also *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.)

Scott asserts that "California's use of the death penalty as a regular form of punishment falls short of international norms." (AOB 319.) Noting the "international community's overwhelming rejection of the death penalty as a regular form of punishment," Scott appears to contend that the use of the death penalty is so contrary to the international trend against capital punishment and evolving standards of decency that California's use of capital punishment contravenes due process and Eighth Amendment considerations. (AOB 319.) This Court has repeatedly rejected similar arguments. (*People v. Martinez* (2003) 31 Cal.4th 673, 703.) "'International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Panah, supra*, 35 Cal.4th at p. 500, quoting *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; see also *People v. Dickey, supra*, 35 Cal.4th at p. 932.) Scott proffers nothing to justify departure from this solid line of precedent.

XVI.

THERE WAS NO CUMULATIVE ERROR

Scott contends that the effect of cumulative errors herein compel reversal. (AOB 320-322.) There was no error committed in either the guilt or penalty phase of trial, from which to accumulate error. Even assuming arguendo any errors occurred, even viewed cumulatively, such errors would not have significantly influenced the fairness of Scott's trial or detrimentally affected the jury's determination of the appropriate penalty. (*People v. Avila, supra*, 38 Cal.4th at p. 615.) Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Manriquez, supra,* 37 Cal.4th at p. 591; *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa, supra*, 19 Cal.4th at pp. 447, 458; *People v. Catlin, supra*, 26 Cal.4th at p. 180.) Scott was entitled only to a fair

trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal .4th 926, 1009; *People v. Box, supra*, 23 Cal.4th at pp. 1214, 1219.) Scott received a fair trial, and his claim of cumulative error should be rejected. (See *People v. Geier* (2007) 41 Cal.4th 555, 620; *People v. Stanley, supra,* 39 Cal.4th at p. 966; *People v. McDermott, supra*, 28 Cal.4th at pp. 946, 1005.) The penalty judgment should be affirmed. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1038.)

CONCLUSION

Based on the above, respondent respectfully requests this Court affirm the judgment in its entirety.

Dated: March 3, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 22777 words.

Dated: March 3, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Royce Lyn Scott** **CAPITAL CASE**

No.: **S064858**

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.

On March 3, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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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 March 3, 2008, at San Diego, California.

Anna Herrera
Declarant

Signature

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