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SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROYCE LYN SCOTT

Defendant and Appellant.

(Riverside County Superior Court No. ICR 16374)

APPELLANT'S REPLY BRIEF

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

In this brief, appellant does not reassert or reallege his arguments that respondent failed to address or respond to in the state's brief. Appellant also does not reply to respondent's cursory arguments which contended only that this Court has decided a similar issue contrary to appellant. In these instances, respondent wholly failed to address appellant's argument and authority in support of the facts of this case. The failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, waiver or forfeiture of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds by *Price v. Superior Court* (1991) 25 Cal.4th 1046, 1069, fn. 13), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

I

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S *BATSON/WHEELER* MOTION[1]

In his opening brief, appellant argued that the denial of his *Batson/Wheeler* motion constituted reversible error. The primary bases for appellant's argument were that the trial court erroneously: (1) determined that his motion was untimely and the issue waived; (2) substituted its own reasons for the prosecutor's peremptory challenges against the only Black prospective jurors to be seated in the jury box;[2] and (3) found that there was no improper motive by the prosecutor even though the justification offered for one of the Black jurors, Harold Roberts, was not supported by the record and failed to rebut the presumption of discriminatory purpose. (AOB 22-49.)[3]

Respondent concedes that the trial court incorrectly determined that appellant's *Batson/Wheeler* objection had been waived, but nonetheless maintains that the motion was properly denied because appellant failed to establish a prima facie case of discrimination. Respondent also contends that even assuming a prima facie showing had been made, the prosecutor's explanation for removing prospective juror Roberts demonstrated that the

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1980) 22 Cal.3d 258.

[2] Prospective jurors Ruth Coleman and Harold Roberts.

[3] Throughout this brief, the following abbreviations are used: "AOB" refers to Appellant's Opening Brief, "RB" refers to Respondent's Brief, "RT" refers to the Reporter's Transcript on Appeal, "PTRT" refers to the Pre-Trial Reporter's Transcript on Appeal, and "CT" refers to the Clerk's Transcript on Appeal. Unless otherwise indicated, all statutory references are to the Penal Code.

peremptory challenge was not impermissibly race-based. (RB 16-22.) Respondent's contentions are without merit.

A. Appellant's *Batson/Wheeler* Objection Was Timely.

Appellant's *Batson/Wheeler* objection was made after the 12-seated jurors were sworn, but before the selection of the alternates had commenced. (8 RT 1580-1581.) As appellant has argued in his opening brief, and which respondent concedes (RB 17, fn. 4), the trial court's determination that the objection was untimely and the issue waived (8 RT 1582) was erroneous. (*People v. Roldan* (2005) 35 Cal.4th 646, 701-702.)

B. The Prima Facie Case.

1. This Court May Move Past The First Prima Facie Step With Regard To Juror Roberts

Respondent alleges that even though the prosecutor provided his reasons for removing Mr. Roberts there was neither an implied finding of a prima facie case nor did it moot a contrary determination by the trial court. (RB 18.) Contrary to this allegation, the trial court first elicited the prosecutor's justification for removing Mr. Roberts and then ruled on the ultimate question of racial discrimination as to him. This Court may thus assume appellant has satisfied the prima facie step and move to the second and third steps of the *Batson* inquiry with regard to Mr. Roberts. (*People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. 8; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1010; *Hernandez v. New York* (1991) 500 U.S. 352, 359; *United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 906.)

Because it is unclear whether the trial court employed the correct legal standard in assessing the prima facie case, this Court may likewise proceed directly to the inquiry whether there was discriminatory purpose by the prosecutor in striking Black jurors. (*People v. Salcido* (2008) 44

Cal.4th 93, 137; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1105-1106, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)[4] Otherwise, this Court must conduct a de novo review of the record as to whether it supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis under the correct legal standard as clarified by the United States Supreme Court in *Johnson v. California* (2005) 545 U.S. 162,168. (*People v. Zambrano, supra,* 41 Cal.4th at pp. 1105-1106; see *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 [federal court conducted de novo review of *Batson* claim because state court used wrong legal standard to assess prima facie case].)

2. De Novo Review Of The Record Reveals A Sufficient Showing To Permit An Inference Of Discrimination

An independent review of the relevant facts and circumstances in this case demonstrates that the prosecutor's peremptory strikes against the only Black jurors who had been summoned to the jury box gave rise to an inference of discriminatory purpose sufficient to move beyond step one of the *Batson/Wheeler* inquiry. (AOB 31-36.) Contrary to the allegations respondent makes, "the burden for making a prima facie case is not an onerous one." (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1151; accord, *Johnson v. California, supra*, 545 U.S. at pp. 170-171.)

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[4] This Court has recognized in such instances that deference to the trial court's ruling on the issue may not be accorded on review. (*People v. Salcido, supra*, 44 Cal.4th at p. 137 [different standard of review required in cases predating *Johnson v. California* were trial court determined defendant failed to make prima facie case of group discrimination]; *People v. Zambrano, supra*, 41 Cal.4th at p. 1105 [same]; see *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1195 [when state court uses wrong legal standard to determine whether prima facie case was established the rule of deference does not apply].)

Respondent alleges that defense counsel's "bare statements" in support of appellant's *Batson/Wheeler* motion were insufficient to establish a prima facie case. (RB 18-19.) Whether the level of proof necessary to raise a mere inference of discriminatory purpose was met in this case, however, may not be resolved solely on the statements of counsel. Instead, "[t]he correct test for a prima facie case of discrimination is whether the defendant has shown that '(1) the prospective juror is a member of a cognizable racial group, (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motivated by race.'" (*United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 919, quoting *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1143.) In determining whether there was a prima facie showing of discriminatory intent, this Court must not only consider the "totality of the relevant facts" and "all relevant circumstances" in this case (*Batson v. Kentucky, supra*, 476 U.S. at pp. 94, 96), but it must also analyze the context in which each strike arose (*Johnson v. California, supra*, 545 U.S. at p. 173). This Court must also consider "any relevant circumstances" brought to its attention that may support or refute an inference of discriminatory purpose. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107 [inference of discrimination based on bare statistics alone]; see *Johnson v. California, supra*, 545 U.S. at pp. 164, 171 [two inferences based on trial court finding the issue to be "very close" and prosecutor struck all three Black prospective jurors]; *Batson v. Kentucky, supra*, 476 U.S. at p. 100 [prosecutor struck all Blacks on the venire]; *United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 904 [prosecutor struck only Latino prospective juror and only Latino prospective alternate juror].)

Respondent does not dispute that the first and second elements of the

test for determining a prima facie case have been met in this case. Nor does respondent dispute that there were only four Black prospective jurors in the venire, and the prosecutor used two of his first ten peremptory challenges to remove prospective jurors Coleman and Roberts – the only Black jurors who had been qualified, passed for cause, called to the jury box and who otherwise would have served in this case. Instead, respondent alleges that appellant "fell short of 'showing that the totality of relevant facts [gave] rise to an inference of discriminatory purpose.'" (RB 21.)

In an attempt to substantiate this allegation, respondent points to defense counsel's pre-voir dire stipulation to excuse Ms. Coleman and also contends there was no "pattern of impermissible exclusion" in this case. (RB 19.) Respondent's reliance on these "factors" is misguided.

First, the proposed stipulation by defense counsel does not undermine appellant's claim that an inference of discriminatory intent was raised by the prosecutor's peremptory strike against the two Black jurors. (See *People v. Arias* (1996) 13 Cal.4th 92, 136-137 [defendant's dismissal of minority jurors is not relevant to determination whether prima facie showing of prosecutor's discriminatory use of peremptory challenges has been established]; *United States v. Collins, supra*, 551 F.3d at pp. 919-921 [prima facie case shown when first of two African-American prospective jurors was peremptorily challenged by defense and second was challenged by the prosecutor].) Notably, respondent does not address the fact that defense counsel's stipulation was offered before the substantive voir dire of Ms. Coleman had commenced. (6 RT 1117.) At that point, neither the court nor counsel had been afforded the opportunity to question her about the prosecution of her son and her ability to be a fair and impartial juror in this case, including negative feelings, if any, she may have had towards

appellant's prosecutor who had also handled her son's prosecution.

During voir dire, Ms. Coleman said that she could impose a penalty verdict based on the evidence presented, her ability to be fair would not be affected by her son being in prison, she had an open mind, her son's case was behind her and that she had no hard feelings about it. She also stated the district attorney was not "in trouble" having her on the case, she could impose the death penalty if the evidence so warranted and she could be fair to both sides. (6 RT 1147-1151.) Contrary to respondent's suggestion, it cannot be maintained that defense counsel was still willing to stipulate to her excusal when the prosecutor later exercised his seventh peremptory challenge against her. Defense counsel objected to the prosecutor's removal of Ms. Coleman by stating that "she would have been a fair juror in this particular case" because she could put aside any feelings she had about her son's prosecution and determine the case solely upon the evidence. (8 RT 1581.) This objection confirms that defense counsel had changed his mind, the earlier stipulation was premature, and it was not based on sufficient information.

Respondent's additional contention, that no prima showing was made because there was no "pattern" of exclusion in this case (RB 19), is likewise without merit. Although a pattern of striking members of a cognizable racial group may raise an inference of improper motive (*Batson v. Kentucky, supra*, 476 U.S. at pp. 66-67), "a prima facie case does not require a pattern because 'the Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*United States v. Collins, supra*, 551 U.S. at p. 919, quoting *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902; *Fernandez v. Roe* (9th Cir.2002) 286 F.3d 1073, 1078; accord, *Synder v. Louisiana* (2008) ___U.S. ___ [128 S.Ct. 1203,

1208.)

In this case, the "totality of relevant facts" and "all relevant circumstances" raise an inference that the prosecutor's peremptory strikes against prospective jurors Coleman and Roberts were motivated by group bias and, accordingly, were sufficient to move the *Batson* inquiry to step two. (AOB 31-36.) These facts and circumstances consisted of evidence relevant to prove a prima facie case: (1) there were only four Black prospective jurors in the venire; (2) only two of the Black jurors were actually summoned to the jury box, and the prosecutor exercised peremptory challenges against both of them; (3) juror Roberts, particularly, other than being Black, was as heterogeneous as the community as a whole; (4) appellant is a member of the excluded group; and (5) the victim is a member of the group to which the majority of the remaining jurors belonged. (See *People v. Kelly* (2008) 42 Cal.4th 763, 779-780; *People v. Bell* (2007) 40 Cal.4th 582, 597; *United States v. Clemons* (3rd Cir. 1988) 843 F.2d 741, 748 ["When assessing the existence of a prima facie case, trial judges should examine all relevant factors, such as: how many members of the 'cognizable racial group' . . . are in the panel; the nature of the crime, and the race of the defendant and the victim"].) Appellant is also "entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Johnson v. California, supra*, 545 U.S. at p. 169, quoting *Avery v. Georgia* (1953) 345 U.S. 559, 562.)

The prosecutor's exercise of peremptory challenges against three Hispanic jurors who were seated in the box prior to the exclusion of the Black jurors at issue is relevant to the question whether there was an inference of discriminatory intent. Respondent misses the point by alleging

that appellant has attempted "to expand the cognizable classes" that are the subject of his motion. (RB 19-20.) The prosecutor's peremptory challenges against other minority jurors in this case is a factor which may indicate racially motivated purpose. (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078-1080 [prior peremptory challenge of Hispanic prospective juror supported inference of general discriminatory intent germane to strike of two African-American prospective jurors].) Here, one-half of the prosecutor's first ten peremptory challenges were against minority jurors – three Hispanics and two Blacks. (8 RT 1564-1570.)

The bare statistics in this case also indicate discriminatory intent. (*Williams v. Runnels, supra,* 432 F.3d at p. 1107.) Even respondent cannot dispute that the limited number of qualified Black prospective jurors in the jury pool (4 of 87), coupled with the prosecutor's challenge of the only two Black jurors who were actually seated in the jury box, makes the prosecutor's action suspect and justified close scrutiny of each challenge. (See *United States v. Collins, supra*, 551 F.3d at p. 920-921, citing *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698, fn. 5.) The prosecutor eliminated 50% of the total number of Black jurors in the 87 person jury pool. The possibility that remaining Black jurors in the venire would not be seated in the jury box was in fact realized. Moreover, two of the first ten peremptory challenges made by the prosecutor were against members of the same group as appellant and besides the fact that no Black jurors served on appellant's case, the majority of the sworn jurors and alternates were the same race as the victim.

The above facts and circumstances give rise to an inference of racial bias in jury selection. (See *Williams v. Runnels, supra*, 432 F.3d at p. 1107 [inference of discriminatory purpose under *Batson v. Kentucky* based on

statistical analysis alone where defendant was African-American, only four of first 49 prospective jurors were African-American and prosecutor used three of first four peremptory challenges against African-Americans]; *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 822 [two of four African-American jurors stricken].)

Even assuming, arguendo, that an assessment whether there was a prima facie case is limited to the single strike against Mr. Roberts, the facts and circumstances surrounding his removal from the jury are sufficient to establish an inference of discriminatory intent – this is especially so since after the prosecutor struck Ms. Coleman, Mr. Roberts became the only remaining Black juror to be seated in the box. (*United States v. Collins, supra*, 551 F.3d at p. 919 [prosecutor struck only remaining African-American juror on panel]; *United States v. Chalan* (10th Cir. 1987) 812 F.2d 1302, 1313-1314 [removal of only minority juror].) It is particularly telling that the prosecutor twice accepted non-Black jurors who provided responses on the death penalty that were similar to those provided by Mr. Roberts. (AOB 43-45 and *infra*.) The fact that those non-Black jurors were similarly situated and/or shared the same characteristics as Mr. Roberts, yet the prosecutor was willing to accept them as jurors in this case, shows, at a minimum, an inference of discriminatory purpose. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241, 247-248 [comparative juror analysis may be utilized to conduct meaningful appellate review whether a prima facie showing of discriminatory intent (step one of the *Batson* procedure) has been demonstrated]; *United States v. Collins, supra*, 551 F.3d at pp. 921-922 [same].)

Because appellant demonstrated that the facts in this case gave rise to an inference of discriminatory purpose, the burden shifted to the

prosecution to explain the racial exclusions by providing valid race-neutral reasons for the peremptory strikes of the Black jurors. (*United States v. Collins, supra*, 551 F.3d at pp. 922-923.)

B. The Prosecution Did Not Sustain Its Burden Of Justification Regarding the Peremptory Challenge Of Prospective Juror Roberts, And The Trial Court's Ruling With Respect To The Prosecutor's Reasons Is Not Entitled To Deference

Appellant has argued that the trial court erroneously substituted its own reasons for the peremptory challenges of prospective jurors Coleman and Roberts. This procedure not only improperly confounded step one of the *Batson* inquiry with step three, but it laid the groundwork for the prosecutor to provide reasons for the peremptory strike against Mr. Roberts which the court would inevitably and without question accept as race-neutral. (AOB 36-39.) Even assuming that the reasons the prosecutor provided for the strike against Mr. Roberts constituted ones upon which he actually relied, they failed to rebut the presumption of group bias.[5] Review of the record demonstrates that the proffered reasons failed to comport with Mr. Roberts' voir dire or the responses he provided in the questionnaire. Moreover, because the prosecutor accepted the jury with non-Black jurors who provided responses similar to the ones given by Mr. Roberts, those reasons amounted to nothing more than pretexts. (*Synder v. Louisiana* (2007) ___ U.S. ____ [128 S.Ct.1203, 1211-1212 ; AOB 39-44.)

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[5] The reasons for striking Mr. Roberts alleged by the prosecutor were that: (1) he provided inconsistent answers on the death penalty; (2) he had marked Groups, Three, Four and Five in his questionnaire; and (3) all he would indicate during voir dire is that he was leaning towards Group Four. Based on these responses, the prosecutor alleged he did not know where Mr. Roberts stood on the death penalty. (8 RT 1584-1585.)

Respondent contends that the trial court's acceptance of the prosecutor's reasons for striking Mr. Roberts as race-neutral is entitled to deference on appeal. (RB 21-22.) Although "[r]eview is deferential to the factual findings of the trial court, . . . that review remains a meaningful one. . . . and 'deference does not by definition preclude relief.'" (*People v. Lenix, supra*, 44 Cal.4th at p. 621, quoting *Miller-El v. Dretke*, *supra*, 545 U.S. 231, 240 [internal quotation marks omitted].) When a prosecutor gives his reasons for the exercise of a peremptory challenge, "the plausibility of those reasons will be reviewed, but not reweighed, in light of the entire record." (*People v. Lenix, supra*, 44 Cal.4th at p. 621, citing *Miller-El v. Dretke, supra*, 545 U.S. at pp. 265-266; see *McGahee v. Alabama Department of Corrections* (11th Cir. 2009) __ F.3d __ [2009 WL 530771, 6-7].) Deference to the trial court's ruling that a particular reason is genuine may only occur when the court has made a "sincere and reasoned" attempt to evaluate the reason. (*People v. Silva* (2001) 25 Cal.4th 345, 385.) The trial court's determination on purposeful discrimination is reviewed for substantial evidence. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1104.) Where, as here, "'the facts of the record are objectively contrary to the prosecutor's statements, however, serious questions about the legitimacy of the prosecutor's reasons for exercising peremptory challenges are raised.'" (*Ibid.* at p. 385, quoting *Mc Clain v. Prunty* (9th Cir. 1993) 217 F.2d 1209, 1221.)

The trial's court's determination that the prosecutor's stated reasons for striking Mr. Roberts were race-neutral is not supported by substantial evidence. As appellant has set forth in his opening brief, the prosecutor's reasons – that Mr. Roberts' views on the death penalty were "inconsistent" or the prosecutor did not know where Mr. Roberts stood on the

issue – were not factually supported by the record in this case. (AOB 39-45.) Mr. Roberts made clear that he did not fit the description of Group Five because he was not someone who could never vote for the death penalty regardless of the evidence. (7 RT 1481.) Moreover, review of the entire record of Mr. Roberts' voir dire as well as the responses he provided in the questionnaire establish that he was not someone who would be reluctant or unwilling to impose the death penalty in this case. For instance, he repeatedly stated that he would impose the death penalty if the evidence warranted. (7 RT 1481-1482, 1534-1535.) He said the death penalty would be appropriate in cases when there is sufficient evidence the crime has occurred. (XIV CT 3942; Questionnaire, Question No. 64.) Indeed, when confronted with facts similar to this case, he: (1) "Strongly agree[d]" with the statement "Anyone who commits a murder in the commission of rape, sodomy, burglary, should always get the death penalty," and (2) "Strongly disagree[d] with the statement "Anyone who commits murder in the commission of rape, sodomy, burglary, should never get the death penalty." (XIV CT 3942, Questionnaire, Question Nos. 71 & 72.) These responses indicated he could vote for the death penalty if appropriate.

The reasons the prosecutor advanced for excusing Mr. Roberts also constituted an inherently implausible explanation in light of the prosecutor's acceptance of non-Black jurors who provided responses relating to the death penalty which were similar to those articulated by Mr. Roberts. The comparisons between Mr. Roberts and non-Black jurors Mary Hodur, Delores Bernd and Byron Chaney are particularly telling. Each of those jurors also characterized themselves as favoring life but could vote for the death penalty (Group Four), indicated they had some reluctance to imposing the death penalty in general, and expressed views on the death penalty

which could be construed as "inconsistent" so as to have raised questions as to where they really "stood" on the death penalty. Notwithstanding the views on the death penalty articulated by jurors Hodur, Bernd and Chaney, the prosecutor twice accepted the jury as constituted when all three were seated in the jury box. (8 RT 1563-1572; AOB 42-45.)

The implausibility of the reasons the prosecutor advanced for striking Mr. Roberts is further demonstrated when he is compared to another non-Black juror, Juror No. 6, who served in this case. Like Mr. Roberts, Juror No. 6 had initially marked multiple categories to describe her beliefs on the death penalty. (VI CT 1453 [Questionnaire, Question No. 75].)[6] Although Juror No. 6 ultimately characterized herself as Group Two (someone who favors the death penalty but will not always vote for it in cases of murder with special circumstances), the responses she provided when confronted with facts generally similar to those in this case also suggested "inconsistent" views on the issue. Juror No. 6 said she "Disagree[d] somewhat" with the statement "Anyone who commits murder in the commission of rape, sodomy, burglary, should always get the death penalty." She also said she "Agree[d] somewhat" with the statement "Anyone who commits murder in the commission of rape, sodomy, burglary, should never get the death penalty." (VI CT 1452 [Questionnaire, Question Nos. 71 & 72].)[7]

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[6] During voir dire, Mr. Roberts explained that he had marked Group 3, 4, and 5 in Question No. 75 by mistake and when asked to choose which category described him best, he indicated Group 4. (7 RT 1481, 1483-1484; see AOB 40-42.)

[7] Juror No. 6 provided an explanation to her responses for Questions 71 and 72: "If there is a mental problem and the person does not really

(continued...)

The trial court in this case did not indicate any awareness of the discrepancy between the reasons claimed for exercising the strike against Mr. Roberts and the facts as disclosed by the transcript of his voir dire, the responses provided in his questionnaire, or similar responses provided by non-Black prospective jurors who the prosecutor was willing to have serve on the jury. It therefore cannot be concluded that the trial court met its obligation to conduct a "sincere and reasoned" attempt to evaluate the prosecutor's justification. (*People v. Silva, supra*, 25 Cal.4th at p. 386.) The record shows that the prosecutor's justification for striking Mr. Roberts was pretextural, which gave rise to an inference of improper discriminatory purpose. (*Snyder v. Louisiana, supra*, ___ U.S. ___ [128 S.Ct. at pp. 1212-1213].)

C. Reversal Of The Judgment Of Conviction And Sentence Is Required

Appellant has demonstrated that the prosecutor's exercise of a peremptory challenge against Mr. Roberts was impermissibly motivated by race. Under *Batson v. Kentucky, supra*, the peremptory strike of even a single Black juror violates the equal protection clause. (*Snyder v. Louisiana, supra*, ___U.S. ___ [128 S.Ct. at p. 1208].) Accordingly, the judgment of conviction and sentence in this case must be reversed.

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[7](...continued)
understand the crime as such – How can death mean anything to him." (VI CT 1452 [Questionnaire, Question Nos. 71 & 72].) This explanation does not resolve the inconsistency of the responses she provided.

II

THE TRIAL COURT'S REFUSAL TO SEVER COUNTS WHICH WERE SEPARATE AND UNRELATED TO THE CAPITAL MURDER CHARGE RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR AND VIOLATED HIS CONSTITUTIONAL RIGHTS

Appellant argued in his opening brief that the trial court's refusal to sever four unrelated burglary counts from charges relating to the murder of Della Morris was a prejudicial abuse of discretion which resulted in the deprivation of his right to due process, a fundamentally fair trial on guilt, and a fair and reliable penalty determination. (AOB 51-92.) Respondent contends that appellant has failed to demonstrate that the trial court abused its discretion, or that he has suffered any prejudice from the denial of his severance motion. (RB 23-27.) Respondent's contentions are without merit.

Appellant has extensively set forth points and authorities regarding the erroneous and prejudicial ruling by the trial court denying his motion to sever the unrelated burglary charges, and many of the allegations raised by respondent have already been addressed in the opening brief. To the extent that there are allegations which warrant further comment, appellant addresses them below.

A. The Trial Court's Refusal To Sever The Unrelated Burglary Counts Was An Abuse Of Discretion.

Appellant alleged in his opening brief that the unrelated burglary counts were neither connected together in their commission nor the same class of crimes as the homicide. In support of this claim, appellant argued that the August and November, 1992 burglaries were incidents separate and apart from the homicide and were also distinctly different from the homicide case because: (1) none of the August burglaries involved assaultive crimes against the person and (2) the November burglary did not

involve sexually assaultive conduct. (AOB 60-61.) It is appellant's position that even if unrelated counts satisfied the statutory criteria for permissive joinder under section 954, the facts and circumstances apparent at the time of the severance motion show that permitting joinder would result in substantial prejudice, which is exactly what occurred. The trial court's ruling denying the motion was, accordingly, an abuse of discretion. As appellant has demonstrated, the judgment and sentence in this case require reversal because the joinder actually resulted in "gross unfairness" amounting to a denial of due process. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083-1086; see *People v. Soper* (2009) 45 Cal.4th 759, 783; AOB 80-92.)

1. Evidence Of The Unrelated Burglaries Was Not Properly Cross-Admissible To Prove Intent Of The Perpetrator With Regard To The Burglary Charge

Respondent contends that the evidence of appellant's unrelated burglaries was cross-admissible because the circumstances of those offenses were "sufficiently similar" to prove that appellant entered the Morris residence with the intent to commit a theft. (RB 26.) Respondent is mistaken.

As a preliminary matter, respondent's argument fails to recognize or even address the fact that: (1) the requisite intent for the burglary charge connected to the homicide could be readily inferred from the evidence in this case and (2) such intent was not at issue. The evidence at the time of the severance motion revealed that personal property was missing from the Morris residence and a homicide as well as a sexual assault had occurred

within the residence.[8] These facts were circumstantial evidence of the perpetrator's intent, and established that the crime of burglary had been committed by someone. (AOB 66-68.) Evidence of the unrelated crimes to prove intent for the burglary connected with the homicide was therefore merely cumulative and had little if any probative value. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423 [victim's testimony defendant placed gun to her head was evidence of intent so that other crimes evidence of rape and robbery had limited probative value on issue of intent]; *People v. Earle* (2009) 172 Cal.App.4th 372, 391 [based on evidence jury had no reason to doubt purpose of assault was to rape and other crimes evidence of indecent exposure was of probative value to establish intent].) Any limited probative value of the unrelated burglaries to prove intent in this case was outweighed by the substantial prejudicial effect of the evidence. (*People v. Balcom, supra,* 7 Cal.4th at pp. 422-423.) (AOB 68-69.)

Second, even if intent with regard to the instant burglary charge was at issue, the similarities between the unrelated burglaries and the offenses connected with the Morris homicide were not sufficiently substantial to support the inference that appellant "probably harbored the same intent in each instance." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402; *People v. Guerrero* (1976) 16 Cal.3d 719, 724.) Respondent's bald claim to the contrary (RB 26), fails to refute the fact that the alleged "similarities" between the two sets of offenses were common to residential burglaries in general as well as to burglaries reported by law enforcement which had occurred in the same neighborhood but had been committed by a perpetrator

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[8] See XVII CT 4519-4520; XVII CT 4525-4526; XVII CT 4608-4610; XX CT 5368-5375.

other than appellant. Moreover, the similar design of the residences and sliding glass doors involved in both sets of charges did not constitute a meaningful commonality for which probative value could be attributed because the homes in the neighborhood were built by the same company. (AOB 72-73.)[9] The evidence also shows that dissimilarities between the unrelated burglaries and the instant offense were numerous.[10] (AOB 73.) Any probative force of the similarities between the two sets of offenses was significantly weakened by the dissimilarities. (*People v. Thompson* (1980) 27 Cal.3d 303, 321.)

Although the least degree of similarity between the instant charges and the unrelated offenses is required to prove intent, the unrelated offenses must nonetheless be substantially similar to have probative value. (*People v. Guerrero, supra,* 16 Cal.3d at p. 728.) In *People v. Thompson, supra*, 27 Cal.3d 303, this Court stated that:

> It has been assumed on occasion that a showing of substantial similarity is not required if intent is the material fact sought to be

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[9] Respondent relies on the "similarities" asserted by the prosecutor that all of the offenses occurred: (1) approximately at the same time in the evening; (2) within an eight block radius; (3) in residences that were similar, and (4) with entry made though an open sliding glass door. (See XVII CT 4564-4565; XVII CT 4659; XX CT 5368-5375; 2 PTRT 251-254; 8 RT 1627.)

[10] These dissimilarities were that: (1) none of the unrelated incidents involved sexual offenses; (2) three of the four incidents did not involve any assaultive conduct; (3) in all but one incident appellant fled the scene when encountered by the residents; and (4) in one incident entry was accomplished by shattering the sliding glass door with a rock. (See XVIII CT 4800-4824 [8/3/92]; XVIII CT 4853-4861 [8/9/92]; XIX CT 4948-4960 [8/25/92]; XVIII CT 4693-4719 [11/4/92]; XX CT 5368-5375; 2 PTRT 247, 258.)

> proved by the introduction of the evidence of an uncharged offense. This assumption is too broad. It is correct only when the similarity of offenses is irrelevant to the chain of inference sought to be drawn between the uncharged offense and the fact of intent in the charged offense. . . . [S]imilarity is often necessary to bridge the gap between other crimes evidence and the material fact sought to be proved. Thus, in *People v. Guerrero, supra*, 16 Cal.3d 719, a defendant was accused of the murder of a 17-year-old girl by means of a blunt object. The victim had been found with her blouse pulled up but there was no evidence of sexual molestation. The prosecution was allowed at trial to introduce evidence that defendant had recently raped another 17-year-old girl and had thereafter threatened her with a lug wrench. This evidence was admitted to establish, inter alia, that in the charged offense defendant had intended to rape the victim, thus invoking the felony-murder rule. This court unanimously ruled the evidence was inadmissible to prove intent since the prosecution had "not shown that the similarities between the two offenses are substantial enough to have probative value." (16 Cal.3d at p. 728.)

(*People v. Thompson, supra*, 27 Cal.3d at p. 321, fn. 23.) In appellant's case, a showing of substantial similarity between the offenses was necessary to "bridge the gap" between the other crimes evidence and the material fact sought to be proved. (*People v. Guerrero, supra,* 16 Cal.3d at p. 728.) That degree of similarity simply did not exist between the two sets of offenses. Accordingly, the evidence of the unrelated burglaries was not probative of, or properly cross-admissible on, the issue of intent. (AOB 73-74; see Arg. III, *infra*.)[11] Appellant recognizes that the absence of cross-admissibility on the issue of intent in the present case is alone insufficient to establish that

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[11]At the subsequent hearing on the prosecution's motion to admit evidence of the unrelated burglaries under Evidence Code section 1101, subdivision (b), the trial court correctly determined that the similarities between the two sets of offenses were insufficient to prove identity. (8 RT 1626.)

there was an abuse of discretion by the trial court. (*People v. Soper, supra*, 45 Cal.4th 779-780; section 954.1.) The lack of cross-admissibility in this case, however, is one factor to weigh against the benefit of joinder. (*Ibid.*) As appellant has established, other relevant factors show that the benefit of joinder in this case was outweighed by the substantial prejudicial impact that resulted from the trial court's refusal to sever the unrelated burglary counts. (AOB 74-92.)

2. The Unrelated Burglary Charges Were Likely To Inflame The Jury Against Appellant

Respondent alleges that "none of the noncapital burglaries were particularly inflammatory in comparison to the capital murder charge." (RB 26.) Appellant does not dispute that a single burglary count may not have been particularly inflammatory when compared with the capital murder. However, what respondent has failed to acknowledge is that four, not just one, unrelated serious felonies were joined in this case. The number of counts alone was inflammatory as it would have been difficult for the jury not to regard appellant as anything but a serial felon once the multiple instances of other crimes were known to them. Moreover, there is a high risk of undue prejudice whenever the joinder of counts allows other crimes evidence to be introduced in a trial, and in this case a capital homicide trial, where such inherently prejudicial evidence would otherwise be inadmissible. (*United States v. Daniels* (D.C. Cir. 1985) 770 F.2d 1111, 1116.) Here, evidence of the unrelated burglaries was admitted to prove intent as to only the burglary charge connected to the homicide; they were irrelevant to and inadmissible to the other counts. These factors would have only evoked an emotional bias against appellant which would have unfairly influenced the jury with regard to the murder charges. (AOB 74-75.)

3. The Joinder Permitted Strong Evidence Appellant Had Committed Multiple Residential Burglaries To Be Joined With The Relatively Weaker, But More Serious Capital Murder Case

Contrary to respondent's assertion (RB 27), the trial court's erroneous refusal to sever the unrelated burglary counts allowed the prosecutor to use the spillover or cumulative effect of the stronger evidence of the unrelated burglary counts to bolster the relatively weaker capital murder case. (See *Williams v. Superior Court* (1984) 36 Cal.3d 441, 453-454; *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 138.) (AOB 76-78.)

The primary issue in this case was identity, and there was no eyewitness or other direct evidence linking appellant to the crime. The entire defense consisted of raising reasonable doubts with regard to the prosecution's evidence on this issue. Although DNA and hair evidence found at the scene constituted circumstantial evidence that appellant was the perpetrator, such evidence did not conclusively establish this important fact. (XVII CT 4671-4672; XVII CT 4678-4679.) There was evidence suggesting appellant was not the perpetrator, including numerous fingerprints found in the residence, of which none matched appellant. (XVIII CT 4787; XIX CT 4964.) Indeed, other similar burglaries, including ones that had occurred in the same neighborhood led the police to investigate other suspects. (XVII CT 4591; XVII CT 4659; XVIII CT 4879.) In comparison to the evidence regarding the homicide, the evidence concerning the unrelated burglaries was stronger – not only was there fingerprint evidence linking appellant to two of the burglaries, but he was also caught in the act in another, and admitted his guilt with regard to others. (XVII CT 4649-4651, XIX CT 5009; XX CT 5368-5375.)

Appellant's case is similar on its facts to *Coleman v. Superior Court*, supra, 116 Cal.App.3d 129, where two sexual molestation charges were joined with a separate rape-murder offense. In the first set of charges, the victims were prepared to testify against the defendant, but in the second case the evidence linking him to the murder consisted of only fingerprint evidence. Evidence of the two sets of crimes was not cross-admissible. (*Id.*, at p. 138.) On petition for writ of mandate, the court of appeal in *Coleman* ordered separate trials based on the fact that the strong evidence on the molestation counts would bolster the relatively weaker murder case. (*Id.*, at pp. 138, 140.) The *Coleman* court found that the difficulty in independently judging the crimes would be exacerbated by the fact that the murder case consisted primarily of circumstantial evidence. In making this determination, the court stated that "[i]f a juror has a reasonable and appropriate doubt about the identity of the murderer, the jury may find it difficult to maintain that doubt in the face of direct evidence [of other crimes]." (*Id.*, at p. 138.) As in *Coleman, supra*, the overwhelming strength of appellant's culpability for the unrelated burglaries predictably made it difficult for a juror to maintain any reasonable doubt he or she might otherwise have had as to the identity of the perpetrator of the capital murder.

Here, the trial court's duty in assessing appellant's motion for severance required more than a mere "examination of the evidence." Instead, the task before it was to assess the evidence, to carefully, explicitly and thoughtfully weigh the need for conservation of judicial resources – which is the only justification for joinder in this case – against appellant's constitutional rights to a fundamentally fair trial with regard to the capital charges brought against him. As this Court has recognized, "[e]ven if such

an ill-considered ruling were justifiable in a less serious case, it was impermissible where questions of life and death were at stake." (*People v. Smallwood* (1986) 42 Cal.3d 415, 430-431.) (AOB 76-77.)

4. The Charges Relating To The Morris Homicide Carried The Death Penalty But The Unrelated Burglary Charges Did Not

Because the charges relating to Ms. Morris involved a capital offense, this Court must provide a higher degree of scrutiny and care in evaluating appellant's severance motion. In this case, the trial court's assessment of the prejudice that would result from the failure to sever the unrelated burglary counts from the capital murder was inadequate. (AOB 78-79.)

5. The Actual Judicial Benefits To Be Gained By Joining The Trials Were Minimal

Appellant recognizes that the "systemic economies" of joint trials is an important factor that must be weighed when assessing the risk of prejudice resulting from the denial of appellant's severance motion. (*People v. Soper, supra*, 45 Cal.4th, at p. 782.) The risk of substantial prejudice and appellant's right to a fundamentally fair trial on the capital offense, however, outweighed the advantage of judicial economy which would result from joinder in this case. The unrelated burglary charges did not involve overlapping evidence or witnesses. Even assuming that there was possible overlap in law enforcement witnesses, such as an investigating officer, that overlap was minimal. Indeed, because appellant readily admitted his guilt to a number of the unrelated burglaries when questioned by the police, it is unlikely that a separate trial on those offenses would have even occurred, or amounted to a significant amount of time. If the trial

court had performed the necessary weighing, it would have determined that joinder of the unrelated charges would not have yielded any substantial benefits. The failure to make this determination further shows that the refusal to grant appellant's motion to sever was an abuse of discretion. (AOB 79-80.)

B. The Joinder Of The Unrelated Burglary Counts To The Capital Offense Was Prejudicial And Violated Appellant's Constitutional Rights To Due Process, A Fundamentally Fair Trial, And Reliable Determinations Of Guilt And Penalty

Appellant has met his burden of showing that the joinder of the unrelated burglary counts to the capital charges resulted in gross unfairness depriving him of his constitutional rights to due process, a fundamentally fair trial and reliable guilt and penalty verdicts. Factors demonstrating that the prejudice from the denial of appellant's severance motion was substantial and amounted to a denial of his constitutional rights are set forth in detail in the opening brief. These factors included: (1) the prosecutor's emphasis of the other crimes evidence throughout the guilt and penalty phases, which effectively caused the jury to draw the impermissible inference that because appellant had committed multiple burglaries in the neighborhood he was the perpetrator of the Morris homicide and related offenses;[12] and (2) the trial court's failure to provide adequate instructions

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[12] Upon further review of the record, counsel for appellant has determined that a portion of the prosecutor's closing argument was inadvertently misquoted at Argument II, AOB 85. The correct first sentence of the prosecutor's argument should read: "Now when we get to the second part of our argument and we show that the person who entered the house was, in fact, Royce Scott, we have further evidence of what Mr.

(continued...)

to the jury to properly limit their "use" of the other crimes evidence as well as to effectively alleviate the prejudicial effect of the evidence on the entire case. (AOB 80-92.)

Respondent's answer to appellant's claim is that because the unrelated burglary charges were cross-admissible under Evidence Code section 1101, subdivision (b), appellant suffered no prejudice from the joinder. (RB 27.) Appellant has demonstrated, that the unrelated charges were not probative of any issue in dispute with regard to the capital murder, and were not properly cross-admissible. (AOB 62-74; Arg. III, AOB 103-105) Because respondent has provided no other substantive argument contesting the gross unfairness resulting from the joinder of the unrelated charges, no further reply by appellant on this issue is necessary.

The trial court's denial of appellant's severance motion was not harmless beyond a reasonable doubt and reversal of the judgment of conviction is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.) (AOB 80-92.)

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[12](...continued)
Scott's actual intent was when he entered that house, and the evidence is all the other burglaries he committed in the neighborhood." (16 RT 2485.) Appellant's argument is based on counsel's mistaken interpretation of the closing argument.

III

THE ERRONEOUS ADMISSION OF PREJUDICIAL OTHER CRIMES EVIDENCE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND RELIABLE DETERMINATIONS OF GUILT AND PENALTY

Appellant argued that the trial court erroneously admitted evidence of four unrelated burglaries, for the purpose of proving intent with regard to the burglary charge alleged in connection with the capital homicide.[13] Appellant demonstrated that the evidence should not have been admitted because the unrelated offenses were: (1) not properly relevant or material to issues in the case; (2) the similarities between the unrelated burglaries and the instant offense were insufficient to establish the requisite intent for burglary; (3) the prosecution used the other crimes evidence for the impermissible purpose of trying to prove appellant committed the crimes against Ms. Morris based on propensity; (4) and the emotional impact of the other crimes evidence unfairly prejudiced and inflamed jurors against appellant. (AOB 93-115.) Respondent contends the trial court did not abuse its discretion because the evidence regarding the unrelated burglary offenses was sufficiently similar to prove intent, it was not unduly inflammatory, and its admission had no prejudicial impact on the jury's assessment of the case. Respondent also alleges that the constitutional bases for appellant's claim were forfeited. (RB 27-35.) Each of respondent's contentions are without merit.

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[13] Following the denial of his motion for severance of the four unrelated burglary charges (Arg. II, *supra.*), appellant entered a guilty plea to each count. The prosecutor then moved to admit the other crimes evidence to establish intent for the single burglary charged with the homicide. (AOB 93-94.)

A. The Unrelated Burglary Counts Were Neither Relevant Nor Of Legitimate Probative Value To Issues In This Case.

1. The Requisite Intent For The Charged Burglary Was Not Genuinely In Dispute And The Other Crimes Evidence Was Cumulative To That Issue

This Court has made clear that evidence of other crimes is admissible only if it is relevant to prove a material fact at issue which is separate from criminal propensity. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 14.) In *People v. Thompson* (1980) 27 Cal.3d 1, this Court stated,

> In order to satisfy the requirement of *materiality*, the fact sought to be proved may be either an ultimate fact in the proceeding or an intermediate fact "from which such ultimate fact[] may be presumed or inferred." (See Law Revision Com. comment to Evid. Code, § 210). Further, the ultimate fact to be proved must be 'actually in dispute.'" (See Law Revision Com. comment to Evid. Code, § 210.) If an accused has not "actually placed that [ultimate fact] in issue," evidence of uncharged offenses may not be admitted to prove it.

(*Id.*, at p. 15, quoting *People v. Thomas* (1978) 20 Cal.3d 457, 467; emphasis in original, footnotes omitted.) Evidence of the unrelated burglaries was neither relevant nor material to any issue in this case. It was undisputed that personal property was missing from the residence, and a homicide and a sexual assault had occurred therein. The reasonable inference from this evidence was that the perpetrator entered the Morris residence with the intent to commit a theft and/or a felony. (See *People v. Hughes* (2002) 27 Cal.4th 287, 351 ["intent to commit *any* felony (or theft) suffices for burglary"], emphasis in original; Pen. Code §459.) (AOB 103-105; Arg. II, AOB 66-69.) Appellant never seriously contested that the requisite intent for the crime of burglary was at issue in this case. (*People v. Bigelow* (1984)

37 Cal.3d 731, 748.)

The unrelated burglary evidence was merely cumulative with respect to other evidence the prosecution presented which demonstrated the intent necessary for the burglary charged in connection with the homicide. Accordingly, it should have been excluded under a "rule of necessity." (*People v. Thompson, supra*, 27 Cal. 3d at p. 318, quoting *People v. Shader* (1989) 71 Cal.2d 761, 774-775; accord, *People v. Balcom* (1994) 7 Cal.4th 414, 423 [victim's testimony defendant placed gun to her head was compelling evidence of defendant's intent and evidence of prior similar offenses merely cumulative]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 406 [other crimes evidence inadmissible on issue of intent because perpetrator's intent in committing the charged offenses "could not reasonably be disputed"]; *People v. Bigelow, supra*, 37 Cal.3d at p. 748 [evidence of prior robberies and thefts inadmissible to show motive for murder, robbery and kidnaping because motive not "seriously contested" and no question whoever shot victim committed charged offenses as part of plan to steal]; *United States v. Coades* (9th Cir. 1977) 549 F.2d 1303, 1306 ["The government's contention that the evidence was relevant to establish the existence of an intent to rob is frivolous. . . . It was uncontroverted that the person who entered the bank was wearing a mask and gloves and carried a gun which he fired at the guard before fleeing"].) Although appellant's not guilty plea put all elements of the burglary charge at issue, the policy of excluding "cumulative evidence" prohibits the use of other crimes evidence to prove intent, when such intent is genuinely not at issue. (*People v. Thompson, supra*, 27 Cal.3d at pp. 315-316; see *People v. Price* (1991) 1 Cal. 4th 324, 462-463 [although prosecution must show defendant entered premises with felonious intent, when evidence justifies reasonable inference

of felonious intent, sufficient evidence supports burglary conviction and special circumstance allegation].)

Contrary to respondent's assertion, the substantial prejudicial effect of the other crimes evidence to prove intent for the alleged burglary, simply outweighed any limited probative value. (*People v. Balcom, supra*, 7 Cal.4th at p. 414; *People v. Earle*, supra, 172 Cal.App.4th at pp. 390-391 [victim's testimony established assault committed with intent to commit rape and "patent abuse of discretion to admit evidence of indecent exposure for purpose of proving intent of perpetrator"].) (AOB 103-105; Arg. II, AOB 66-69.)

2. The Unrelated Burglary Offenses Were Not Substantially Similar To Prove Intent

Even assuming that intent was at issue in this case, or evidence of the unrelated burglaries not cumulative, the shared marks between the unrelated and instant offenses fell short of the threshold degree of similarity that was required for the evidence to be admitted. (*People v. Guerrero* (1976) 16 Cal.3d 719, 728; *People v. Harvey* (1984) 163 Cal.App.3d 90, 105.) Respondent contends, and appellant recognizes, that the least degree of similarity is required to establish relevance on the issue of intent. (RB 29, 32.) This Court has made clear, however, that where evidence of a defendant's intent in another criminal episode is introduced to prove he harbored a similar intent in the currently charged offense, the similarities between the two offenses must be "substantial enough to have probative value." (*People v. Thompson, supra*, 27 Cal.3d at pp. 319-320, fn. 23, quoting *People v. Guerrero, supra*, 16 Cal.3d at p.728.)

Respondent's assertion that the offenses were "sufficiently similar" (RB 32) fails to address the fact that the alleged "similarities" were factors

common to residential burglaries in general as well as to burglaries reported by law enforcement which had occurred in the same neighborhood but were committed by perpetrators other than appellant. (*People v. Haston* (1968) 69 Cal.2d 233, 245 [some marks are of such common occurrence that they are shared by charged and uncharged offense but also by numerous other crimes committed by persons other than defendant]; *People v. Harvey* (1984) 163 Cal.App.3d 90, 1103-105 [same].) Given the factors common to most residential burglaries, and to burglaries in this specific neighborhood by a perpetrator other than appellant, the "similarities" were not "substantial enough" to have probative value within the meaning of *People v. Guerrero, supra,* 16 Cal.3d at p. 728.

The similarities between the two sets of offenses alleged by the prosecutor, and upon which respondent relies, were that: (1) they occurred within an eight block radius; (2) they occurred at approximately the same time at night; (3) entry through a sliding glass door; and (4) property or an attempt to remove property occurred. (XXII CT 5756-5766 RB 32.) During the proceedings in the instant offense, however, it was revealed by law enforcement reports that burglaries by perpetrators other than appellant had occurred in the same neighborhood with entry accomplished through a sliding glass door. It was also revealed that the homes in the neighborhood were built by the same company, demonstrating that there was nothing unique about entry through a sliding glass door, or the fact that the residences were "similar." Information was also provided that in August, 1992, roughly the same time period as the two sets of offenses, a burglary and rape of an elderly woman, where entry was made through a sliding glass door, was committed by a man other than appellant. (E.g., 8 RT 1627, 11 RT 2027; 15 RT 2375, 2378-2379.)

Even assuming respondent's alleged points of similarity approached the quantum amount of evidence that is "substantial enough" to be probative on the issue of intent, there were numerous dissimilarities between the sets of offenses which weakened any such conclusion. (See *People v. Guerrero, supra*, 16 Cal.3d at p.728.) In contrast to the instant offense, (1) none of the unrelated burglaries involved sexual assault; (2) none of the August burglaries involved assaultive conduct; (3) in the August burglaries, the intruder fled the homes when confronted by residents; and (4) entry in the August 25, 1992 burglary was accomplished by shattering the glass door with a rock. (E.g., 10 RT 1816-1834; 1849-1852; 1860-1861; 11 RT 1900-1904; 2032.) Based on these circumstances, it is clear the prosecution did not meet its burden of showing that the similarities between unrelated crimes and those in the instant matter were substantial enough to have probative value. Accordingly, evidence of the unrelated burglaries should not have been admitted to prove intent. (*People v. Guerrero, supra*, 16 Cal. 3d at p. 728; *People v. Harvey, supra*, 163 Cal.App.3d at p. 105.) (AOB 103-105; Arg. II, AOB 71-74.)

B. The Other Crimes Evidence Was More Prejudicial Than Probative And Should Not Have Been Admitted For This Reason.

Notwithstanding the fact that the trial court recognized that evidence of the unrelated burglaries was "damaging" to appellant, it erroneously determined that the probative value of the evidence outweighed its prejudicial effect. As respondent notes, the trial court initially ruled that the unrelated burglary evidence was admissible to show intent or common

design/plan. (RB 31.)[14] However, the court subsequently accepted the prosecutor's concession that the "appropriate method of using this evidence . . . is to prove intent." (8 RT 1631.)[15] Appellant argued that any probative value of the evidence on the issue of intent necessary for the burglary count was limited or non-existent. The requisite intent of the perpetrator to establish the crime of burglary could be readily inferred from other evidence presented by the prosecution. The unrelated burglary evidence was therefore not relevant to any genuine issue in dispute. The prosecutor did not meet his burden of proving substantial similarity between the two sets of offenses and the evidence, accordingly, had no probative value to prove intent. (AOB 103-105.) The trial court's reasoning that the evidence was necessary to refute any argument appellant had just "wandered" inside (8 RT 1611) was inconsistent with evidence that the front door was routinely locked each night, entry through either sliding door from the outside could be only be accomplished by the fenced-in back yard area, it was unlikely Ms. Morris would have let anyone in the home late at night, and property of value was missing from the house. (8 RT 1608-1634.)

In contrast, the risk of prejudice to appellant from admission of the other crimes evidence was great because its sole purpose was to demonstrate appellant's propensity to commit burglaries. Even though the trial court ruled that evidence of the unrelated burglaries was inadmissible to show

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[14] Appellant has demonstrated in his opening brief, the other crimes evidence was not properly admissible to prove common design or plan. (Arg. II, AOB 69-71.)

[15]The jury was instructed that the other crimes evidence was admissible to show intent necessary for the burglary charge. (16 RT 2456-2457.)

identity (8 RT1626), the inevitable conclusion the jury would reach was exactly that — i.e., appellant had committed the instant burglary and the capital homicide. The potential for misuse of the evidence by the jury was exacerbated by the trial court's failure to provide adequate limiting instructions regarding the jury's "use" of the evidence during both phases of the trial. Prior to deliberations in the guilt phase, the trial court provided the jury with CALJIC No. 2.50, which informed them that the "limited purpose" of the other crimes evidence was to show intent for the burglary charge. The court, however, refused to provide other instructions appellant proposed which would have specifically informed the jury they could not consider the evidence to establish the identity of the perpetrator. There was no instruction informing the jury the evidence could not be used for identity was provided before or after the prosecutor's opening argument describing the unrelated burglaries, or when evidence on the other crimes was presented at the guilt or penalty phases. The trial court also refused to provide the jury instructions appellant had proposed during the penalty phase which would have made clear that evidence of the August burglaries could not be used as other violent activity factors in aggravation. (AOB 113-114; Arg. II, AOB 87-89.)

Moreover, although the jury knew appellant had committed the other crimes, it was never told that appellant had actually been convicted of those offenses. It was thus more likely to believe the jury would seek to punish appellant for his wrong-doings regardless of whether they believed he was guilty of the instant charges. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405.)

The evidence appellant was a serial burglar was clear and undisputed by virtue of appellant's own admission of guilt to the unrelated burglary

cases. On the other hand, evidence connecting appellant with the homicide was circumstantial and rested on DNA and hair comparison analysis, which was not conclusive.[16] Although ABO/PGM evidence indicated appellant had a similar genetic profile to the semen found at the scene, 19 paroled sex offenders also shared the same genetic profile; 10 of the 19 individuals were Black. Notwithstanding this evidence, numerous fingerprints found at the scene did not match appellant. There was also evidence that burglaries had been committed in the neighborhood which involved entry through a sliding glass door by perpetrators other than appellant. In one instance, a burglary and rape of an elderly woman occurred in August 1992 where the perpetrator entered and exited through a sliding glass door. Law enforcement had also received the names of other individuals who had committed similar crimes involving elderly women. (AOB 9-10, 82.)

It is clear that the real issue in this case was identity, not the intent necessary for the charged burglary. Although the prosecutor asserted that the other crimes evidence was needed to prove intent for the burglary count, criminal intent by the perpetrator could be readily inferred from the evidence, and was not genuinely a material issue in dispute. Indeed, this is exactly what the prosecutor argued during the guilt phase closing argument. (16 RT 2484-2485; 16 RT 2495.) Besides being cumulative to prove intent, the unrelated burglary evidence was not substantially similar to the instant offense to render it also probative on that issue. The limited probative value

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[16] The court recognized that if the jury accepted appellant's admissions that he committed the unrelated burglaries, the other crimes evidence was "much stronger than the DNA." The court also noted that "the problem with scientific evidence" is that for some people it is important, yet others "don't give it a lot of weight." (2 PTRT 257-258.)

of the other crimes evidence was substantially outweighed by the highly prejudicial impact it had as evidence of propensity. As appellant has demonstrated, the only probative value of the other crimes evidence was as impermissible criminal propensity. The trial court's ruling admitting the unrelated burglary evidence was an abuse of discretion, a misapplication of Evidence Code section 352 and violated Evidence Code section 1101, subdivision (a), as well as appellant's constitutional rights to due process, a fair trial and reliable determinations of guilt and penalty. (AOB 105-109; Arg. II, AOB 80-92.)

C. The Constitutional Bases For Appellant's Claim Were Preserved.

Appellant has demonstrated that the erroneous admission of this evidence was error of a constitutional magnitude because it resulted in a "gross unfairness" amounting to a denial of federal due process. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Contrary to respondent's allegation (RB 33), appellant preserved the federal constitutional bases of his claim for appellate review. Appellant objected to admission of the evidence because it constituted impermissible propensity evidence in violation of Evidence Code section 1101, subdivision (a), and was more prejudicial than probative under Evidence Code section 352. (XXII CT 5777-5779; XXII CT 5781-5783; 8 RT 1619-1628.) This Court has recognized that any failure to cite federal constitutional grounds in support of an argument or objection does not forfeit the right to do so on appeal where, as here, the constitutional arguments do not invoke facts or legal standards different from which the trial court was itself asked to apply but instead merely assert that the court's action had the additional legal consequence of violating the state or federal constitution. (E.g., *People v. Boyer* (2006) 58 Cal.4th, 441, fn. 17, applying

People v. Partida (2005) 37 Cal.4th 428, 433-439.) Finally, the record also shows that the trial court granted appellant's motion to deem all objections as premised on state and federal grounds. (1 RT 74-75.)

D. The Use Of The Propensity Evidence Was Unduly Prejudicial To Appellant's Case

As appellant has established, admission of the unrelated burglary evidence of which the probative value was only to show appellant's propensity to commit serious crimes was highly prejudicial, and violated his constitutional rights to due process, a fair trial and reliable determinations of guilt and penalty. Respondent contends that appellant was not prejudiced as a result of the trial court's ruling admitting the other crimes evidence. Referencing the forensic evidence presented in this case, respondent alleges that "the evidence clearly established that [appellant] was responsible for the murder." (RB 32-33.) Respondent's contention is misguided.

The prosecution's case was circumstantial and largely based on DNA evidence, which even by the prosecution experts' accounts was not a conclusive match because it was based only on statistical probabilities. Other forensic evidence allegedly connecting appellant to the homicide was similarly inconclusive and without significant weight. Non DNA-analysis of the hair found at the scene at best indicated that it was inconsistent with Ms. Morris and her brother Webbie, and that it was consistent (no major discrepancies) with appellant's hair samples. The strength of the ABO/PGM evidence indicating that appellant's genetic profile was of the same type as the semen found at the scene is weakened by evidence that 19 paroled sex offenders also shared the same genetic profile as the semen sample. Juxtaposed against the circumstantial evidence of appellant's guilt was significant evidence which indicated appellant might not be the perpetrator

of the homicide. There were numerous fingerprints found at the scene, including on the edge of the sliding door frame and on one of the bedframes, and none were determined to belong to appellant. Moreover, there was evidence of a number of burglaries in the neighborhood involving other suspects, including one incident involving the rape of an elderly woman where entry and exit was through the sliding glass door and was committed by a perpetrator other than appellant. (AOB 77-78, 82; Arg. III, 110-111)

Even assuming that there was "strong evidence" of appellant's culpability in this case – the DNA analysis – the fact remains, the parties were interested in opinions jurors had on the topic of DNA and population genetics, including the fallibility/infallibility of such evidence, and it was a significant issue included in the questionnaire and discussed during voir dire. (See Questionnaire, Question Nos. 43 to 50, including multiple subpart; e.g., 5 RT 925-929 [voir dire].) Soliciting responses from jurors about this issue was no doubt the result of publicity about the problems with DNA analysis and deficiencies in the laboratories conducting it, including that regarding the O.J. Simpson case. Hair analysis comparison is likewise controversial; indeed it has been determined to be unreliable evidence without legitimate scientific basis. (Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Conviction* (2009) 95 VA. L. Rev. 1.)

The prosecutor may have had some concern whether jurors would be convinced of appellant's guilt based on the circumstantial forensic evidence connecting him to the homicide particularly given that their own experts testified that the DNA evidence was an estimated rather than a conclusive

finding. This premise is indicated by the prosecutor's desire to introduce evidence of all four unrelated burglaries, even though the denial of the severance motion had achieved the goal of securing guilty pleas on those counts. Assuming the prosecutor was concerned he might not be able to secure a first degree murder and special circumstance finding to render appellant eligible for the death penalty, it cannot be said that a conviction on the single burglary count was the only means to do so. Here, the prosecutor charged both rape and sodomy along with two additional special circumstance allegations based on those felonies. These facts and circumstances suggest that the prosecutor sought to admit each of the unrelated burglaries as back-up identity evidence.

Appellant's defense was that he was not the perpetrator of the capital murder, and he relied on the inconclusive evidence tying him to the crime as well as the other evidence suggesting he was not the perpetrator to raise reasonable doubts as to the strength of the prosecutor's case. Faced with the other crimes evidence that appellant was a serial nighttime burglar, however, eliminated any opportunity he had for the jury to credit his defense or maintain a reasonable doubt as to the prosecution's theory.

With the court's assistance, the prosecutor repeatedly used the erroneously admitted evidence to his advantage. There was no admonition regarding the limited use of the evidence prior to or after the prosecutor's opening statement, or when the extensive testimony was presented to the jury during the guilt phase. While the court eventually instructed the jury that the purpose of the evidence was to show intent to steal required for the burglary charge, it never instructed the jury that the evidence could not be considered by them for the purpose of resolving identity of the perpetrator.

Although respondent states that it must be assumed the jurors followed the court's instructions (RB 31-32), it cannot be assumed that the jury did not use the erroneously admitted evidence to resolve the most critical issue in the case – identity. Here, the defense requested limiting instructions which would have explicitly informed the jury that the other crimes evidence could not be used to show identity, but the trial court erroneously refused to give those instructions. (AOB 113-115; Arg. II, AOB 87-92.)

Respondent is correct that the prosecutor did not explicitly encourage jurors to use the evidence to prove identity during closing argument. (RB 31.)[17] Nonetheless, the prosecutor sought, and was permitted, to present evidence regarding each of the unrelated burglary counts to the jury while understanding full well that the aggregated effect of multiple admitted burglary counts would implicitly have the precise detrimental impact intended. Beyond constituting cumulative evidence of the requisite intent for the burglary charge, the jury learned that appellant was someone who committed not just one, but four, nighttime burglaries in the neighborhood where the homicide occurred. The jury was repeatedly reminded of this fact throughout the trial. They initially heard about it during the prosecutor's opening statement in the guilt phase, which was followed by extensive and

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[17] Upon further review of the record, counsel for appellant has determined that a portion of the prosecutor's closing argument was inadvertently misquoted at Argument II, AOB 85. The correct first sentence of the quotation should read: "Now when we get to the second part of our argument and we show that the person who entered the house was, in fact, Royce Scott, we have further evidence of what Mr. Scott's actual intent was when he entered that house, and the evidence is all the other burglaries he committed in the neighborhood." (16 RT 2485.) Appellant's argument regarding this portion of the prosecutor's closing argument was based on the incorrect quotation of the record.

seriatim testimony by witnesses relating to each of the unrelated burglaries, and the prosecutor's closing argument. The jury was later reminded of the unrelated burglary evidence, and presented with additional evidence they had not previously heard, during the penalty phase.

The trial court's error admitting evidence of the unrelated burglary offenses violated appellant's Fifth and Fourteenth Amendment rights under the United States Constitution to due process and a reliable determination as to guilt; his Sixth Amendment right to a fundamentally fair trial; and his Eighth Amendment right to a reliable penalty determination. The error was not harmless beyond a reasonable doubt, and reversal of the judgment of conviction and sentence is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.) (AOB 110-115; Arg. II, AOB 80-92.)

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IV

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

In his opening brief, appellant argued that the trial court erroneously and unconstitutionally instructed the jury on first degree murder. The indictment charged appellant only with second degree malice-murder. Thus, it was error to instruct the jury with the different and far more severe crime of first degree murder. (AOB 116-123.) Respondent disagrees, alleging that the jury was properly instructed on first degree felony murder. (RB 34-37.)

Appellant has acknowledged this Court's previous rejection of claims similar to appellant's, including *People v. Hughes* (2002) 27 Cal.4th 287, but has detailed why this Court should reconsider its decisions regarding instructing on crimes with increased penalties when the original charging document charged a lesser crime. (AOB 119-123.) Appellant reiterates, in reply to respondent's contention that appellant was placed "on notice of the first-degree murder charges in the indictment, as well as the special circumstances that the murder was committed in the course of a burglary, rape and sodomy"(RB 37), that appellant's claim is that the trial court *lacked jurisdiction* to try him of first degree murder under either theory of that offense, since the indictment charged only second degree malice-murder in violation of section 187 (AOB 117-118). Moreover, as appellant has previously shown, the special-circumstance allegations neither

changed the elements of the charged offense nor alleged all of the facts necessary to support a conviction for felony-murder.[18] (AOB 117, fn. 55.)

Because the jury in this case was improperly permitted to convict appellant of first degree murder, the judgment of conviction for that offense, the special circumstance findings, and the death judgment must be reversed.

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[18] To the extent respondent may be claiming that the instructions to the jury cured any notice defect (RB 37), respondent is mistaken because they are delivered near the end of trial. (See *Gautt v. Lewis* (9th Cir. (2007) 489 F.3d 993, 1010 ["an instruction . . . cannot itself serve as the requisite notice of the charged conduct, coming as it does *after* the defendant has settled on a defense strategy and put on his evidence" (original emphasis)].)

V

A SERIES OF GUILT-PHASE INSTRUCTIONS IMPERMISSIBLY AND UNCONSTITUTIONALLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

In his opening brief, appellant argued that his constitutional rights were violated by various jury instructions which, whether considered individually or when taken together, diluted the reasonable doubt standard and impermissibly lightened the prosecution's burden of proof. (AOB 124-136.) Respondent alleges that appellant's claims are either forfeited or constitute invited error and that, even if they were properly preserved for appeal, they are without merit. (RB 37-39.)

Respondent's claim of forfeiture is unpersuasive because this Court has consistently held "section 1259 permits appellate review to the extent any erroneous instruction 'affected [appellant's] substantial rights.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4,[19] quoting *People v. Prieto* (2003) 30 Cal.4th 226, 247.)[20] "Thus, to the extent any claims of

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[19]*People v. Bonilla, supra,* applied this holding in rejecting the prosecution's contention that Bonilla's claim of error in giving CALJIC No. 2.03 and "various of Bonilla's other challenges to the jury instructions . . . are forfeited because Bonilla failed to object at trial." (*Ibid.*) At least one of those instructions, CALJIC No. 2.01, was among those challenged in the instant case by appellant. (AOB 126.) (See also *People v. Hillhouse* (2002) 27 Cal.4th 469, 503 [no forfeiture if appellant was correct in arguing error in giving CALJIC No. 2.51 language that "[m]otive is not an element of the crime charged and need not be shown."]; AOB 132 [same argument made by appellant as by defendant in *Hillhouse*].)

[20] Since, as respondent contends, this Court has previously and consistently decided similar claims of instructional error adversely to appellant's position (RB 39), it would have been futile to object because

(continued...)

instructional error are meritorious and contributed to [appellant's] conviction and death sentence, they are reviewable." (*People v. Bonilla, supra*, 41 Cal.4th at p. 329, fn.4.) In this case, the instructional errors identified by appellant indisputably affected his "substantial rights" because they involved the most fundamental, "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law.'" (*In re Winship* (1970) 397 U.S. 358, 363, citation omitted.)

Notwithstanding the effect the instructions had on appellant's substantial rights, appellant is not barred from challenging the instructions on appeal under the doctrine of invited error. (See RB 38.) Here, because defense counsel did not express a "'deliberate tactical purpose'" in acceding to the instructions of which he complains, there is no procedural bar to the claim. (*People v. Wilson* (2008) 43 Cal.4th 1, 16, quoting *People v. Valdez* (2004) 32 Cal.4th 73, 115.)

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[20](...continued)
trial courts are bound by courts of superior jurisdiction. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Further, even were it assumed that defense counsel should have anticipated a favorable ruling had he objected to the various jury instructions at issue here, or at least should not have considered such objection futile, he could have had "no plausible tactical reason" (*People v. Stitely* (2005) 35 Cal.4th 514, 533, fn. 19) for permitting the jury to receive instructions which diluted the reasonable-doubt standard and lightened the prosecution's burden of proof. Thus, counsel's failure to object constituted ineffective assistance of counsel. (U.S. Const., 6th & 14th Amends.; see *Massaro v. United States* (2003) 538 U.S. 500, 508; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Therefore, the only real issue before this Court is whether appellant's "claims of instructional error are meritorious and contributed to [his] conviction and death sentence." (*People v. Bonilla, supra*, 41 Cal.4th at p. 329, fn. 4.) Appellant has acknowledged this Court's previous rejection of similar claims of instructional error, but requested that this Court reconsider its decisions in this area and provided a detailed analysis in support of that request. (AOB 133-135.) Appellant maintains that the guilt-phase instructions at issue unconstitutionally diluted the reasonable-doubt standard and that, as such, the error by the trial court in providing them requires reversal of the entire judgment.

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VI

APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY-MURDER SIMPLICITER, IS A DISPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Appellant has argued in his opening brief that his death sentence based solely on the special circumstances of felony-murder violates the Eighth Amendment because the lack of any requirement that the prosecution prove that a perpetrator had a culpable state of mind with regard to the homicide before a death sentence may be imposed violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing the use of the death penalty. (AOB 137-155.) Without any attempt to substantively refute appellant's arguments in support of this claim, respondent merely asserts that appellant has failed to demonstrate why this Court should revisit its previous rejections of this claim. (RB 40.)

Appellant has demonstrated that the United States Supreme Court assumed that the requirement under *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137 of a culpable mental state applies to the actual killer in a felony-murder. Appellant has also demonstrated that even if the United States Supreme Court's decisions do not already require a finding of intent to kill or reckless indifference to human life in order to impose the death penalty on a defendant who actually kills, the Eighth Amendment's proportionality principle would dictate the same requirement. (AOB 143-155.) In light of the showing he has made on both points, appellant respectfully requests that this Court reconsider its prior decisions on the issue. Accordingly, appellant's death sentence, predicated

on his act of killing the victim without any proof that the murder was intentional, violates both the International Covenant on Civil and Political Rights ("ICCPR") and customary international law, must be reversed.

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VII

THE ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR BARBARA CARR REQUIRES REVERSAL OF THE DEATH JUDGMENT

In his opening brief, appellant argued that the trial court erred when it granted the prosecutor's challenge for cause and excluded prospective juror Barbara Carr. Appellant has demonstrated why Ms. Carr's responses in her questionnaire and on voir dire did not provide substantial evidence to support the trial court's ruling to exclude her, and that reversal of the death judgment was required. (AOB 156-183.) Respondent contends that the court's decision to exclude Ms. Carr for cause was justified because her responses demonstrated she would be unable to set aside her personal feelings on capital punishment and vote for the death penalty. (RB 40-46.) The factual record does not support respondent's conclusion. Although Ms. Carr had doubts about the death penalty, she unambiguously stated that she could set aside those views, follow the law and render a death verdict if the evidence so warranted. Review of her questionnaire and voir dire as a whole simply show that she was hesitant to say in open court that she had voted to condemn another human being to death. (AOB 147-163.)[21]

A. Prospective Juror Carr Was Qualified To Serve On This Case

Respondent acknowledges that Ms. Carr unambiguously attested she would weigh aggravating and mitigating facts and that her views on the

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[21] Relevant portions of Ms. Carr's voir dire and questionnaire responses are set forth in appellant's opening brief. (AOB 147-163.) Additional portions of voir dire by the prosecutor directed to the group of prospective jurors that included Ms. Carr also support the conclusion that she could perform the duties required of juror in light of specific facts in this case. (3 RT 415-417.)

death penalty would not prevent her from following the law. (RB 41-42, 44.) Respondent unreasonably maintains, however, that those "comments were heavily outweighed" by (1) isolated statements Ms. Carr made concerning a preference not to be on a case involving the death penalty and that she would lean towards life without parole as well as (2) the fact that Ms. Carr indicated she was "not sure" that after voting for death, she could she could return to the courtroom and face appellant while affirming her verdict. (RB 44-45.)

1. Ms. Carr's Stated Preference Not To Serve On A Case Involving The Death Penalty Does Not Establish Substantial Impairment

This Court has recognized: "abhorrence or distaste for sitting on a jury that is trying a capital case is not sufficient" to support exclusion for cause. (*People v. Lanphear* (1980) 28 Cal.3d 463, 464.) With regard to her stated preference not to serve on a case involving the death penalty, Ms. Carr explained that her feelings on capital punishment were due to religious beliefs. Ms. Carr said those beliefs were not strong, however, and if the views of the religious group with which she was affiliated were in conflict with the law, she would follow the law. She also indicated that a preference not to serve on this case was due to an upcoming planned vacation and the length of the trial. When pressed by the trial court, Ms. Carr specifically clarified that her preference for not serving on a capital case was not so strong that she would not be able to follow the law. (AOB 157-158, 160.) As the trial court properly determined, but which respondent apparently has disregarded, Ms. Carr's statement that she did not want to serve on a death penalty case was "subject to the interpretation" and it was "just a statement that it is a tough job." (3 RT 424.)

2. Ms. Carr's Leaning Towards Life Without Possibility Of Parole Does Not Establish Substantial Impairment

Ms. Carr's statement that she would "lean towards a sentence of life without the possibility of parole" also did not indicate an inability to impose a death sentence. (*People v. Kaurish* (1990) 52 Cal.3d 648, 699; *Gray v. Mississippi* (1987) 481 U.S. 648, 658.) This Court has explicitly recognized, that "[a] prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law." (*People v. Kaurish, supra*, 52 Cal.3d at p. 699.)

To the extent that Ms. Carr's circling of "yes" to Question No. 61, which asked she "would automatically vote for life without the possibility of parole regardless of the evidence" (I CT 254) indicated her personal beliefs would prevent her from voting for death if appropriate, it must be recognized that the questionnaire was completed without the benefit of the trial court's explanation of the applicable law. As such, her "yes" answer to Question No. 61 cannot alone be used to justify exclusion for cause under *Wainwright v. Witt* (1985) 469 U.S. 412, 424. (*People v. Heard* (2003) 31 Cal.4th 946, 964; see *People v. Stewart* (2004) 33 Cal.4th 425, 448, 450-451 & fn. 14 [bare written response in juror's questionnaire or one considered in conjunction with a checked answer cannot alone provide adequate basis to support exclusion for cause under *Wainwright v. Witt*].) During subsequent voir dire, Ms. Carr's response to the prosecutor's inquiry resolved any question on this issue. When asked about her answer to Question No. 61, she unambiguously said that despite a personal preference for life she would: (1) be *open to both penalties*; (2) weigh the mitigating and aggravating factors; and (3) not automatically vote for life regardless of

the evidence. (3 RT 412-413.)[22] (AOB 176-178.)

3. Ms. Carr's Hesitancy Or Reluctance To Face Appellant And Affirm That Her Verdict Is Death Does Not Establish Substantial Impairment

The remaining factor upon which respondent relies to show substantial impairment is when Ms. Carr said she "did not know" or was "not sure" that she "could do that part" in response to the prosecutor's inquiries whether if after making the decision to impose the death penalty she could return to the courtroom, face appellant, and say she voted for death. (RB 42-43; see 3 RT 414-415, 419-420.)[23] Contrary to respondent's allegation, Ms. Carr's unease with the prospect that she would have to perform this task does not show that she could not set aside her personal feelings, consider a death sentence and impose it if appropriate. Nor do they establish that her feelings about the death penalty would prevent or substantially impair the performance of her duties as a juror. (RB 44-45.)

At best, Ms. Carr's hesitation in stating for certain that *after deciding for death* she could face appellant and state her verdict indicates that she had qualms with regard to the difficult task of looking someone in the eye and saying she was sentencing him to death. That a juror might express reluctance or discomfort at the prospect of having to do so when polled following the rendering of a death verdict does not amount to the juror being unwilling to or incapable of fulfilling the duties required of serving on a capital case. In light of the consequences of a death verdict, it is understandable that Ms. Carr would express anxiety or nervousness about

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[22] "See AOB 160-161, which sets forth the entire colloquy between the prosecutor and Ms. Carr regarding Questionnaire, Question No. 61.

[23] The relevant voir dire on this issue are set forth at AOB 161-162.

having to verbally say in open court that she voted to sentence someone to die. (*People v. Bennett* (2009) 45 Cal.4th 577, 623.) This is especially so since the inquiries by the prosecutor at issue included doing something she was not required to do – i.e., to literally look at appellant while affirming her death verdict.

This Court's recent decision in *People v. Bennett, supra,* 45 Cal.4th 577, is instructive on the point that a juror's concern about affirming a death verdict in open court is understandable, and that an expression of reluctance is not alone dispositive on the question whether or not a juror can fulfill his oath. *In People v. Bennett, supra*, after the court had been informed the jury had reached its penalty verdict, a juror submitted a note stating that it would be "very hard" and "very difficult" for him to verbally say he had voted for death when polled in open court. The juror also indicated in his note that he believed his "verdict was true and correct." (*Id.*, at p. 622.) Although defense counsel argued that the note meant the juror could not fulfill his oath, and asked that he be replaced with an alternate, the trial court examined the juror individually to ascertain what he intended to do when polled in open court. It was only after the court was satisfied that the juror's concern was only about verbally affirming his verdict in open court, and not because he was unsure of his penalty determination, that the court denied the defense motion to remove the juror. (*Id.*, at p. 623.) This Court determined that the trial court did not err in concluding that the juror could fulfill his duty and by denying the defense motion on that basis. (*Id.,* at p. 623.) In so doing, the Court stated:

> The juror's note and the court's subsequent inquiry established that the juror's concern was about having to state in open court that he felt a death sentence was appropriate. Any such anxiety was

> understandable given the consequences of his vote. However, the juror subsequently told the court that, while difficult, he could fulfill his duty by verbally affirming that he concurred in the jury's penalty determination.

(*Ibid.*) Absent any follow-up inquiry establishing that Ms. Carr would be unable to affirm for the record that she had voted for death upon being polled in open court, or that she would be unable to set aside her feelings on the death penalty and impose a death sentence if appropriate, the trial court did not have sufficient facts upon which to excuse her for cause. (AOB 170-174.)

B. Deference Should Not Be Given To The Trial Court's Determination That Ms. Carr Would Be Unable To Vote For Death

Appellant recognizes that the governing standard under *Adams v. Texas* (1980) 448 U.S. 38, 45 and *Wainwright v. Witt, supra,* 469 U.S. at p. 424, does not require that a juror's bias be proved with "unmistakable clarity" (*Wainwright v. Witt, supra*, at p. 424; RB 45), and that generally deference should be given to the trial court. However, "[t]he need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. (*Uttecht v. Brown* (2007) 551 U.S. 1, 12.)

At most, Ms. Carr's responses to the prosecutor's inquiry showed that, *after* deciding appellant should be sentenced to death, it would be difficult to state her decision in open court. As with her statements regarding her personal preferences discussed above, those responses alone do not establish substantial impairment. (See *People v. Stewart, supra,* 33

Cal.4th at p. 446 ["prospective juror who simply would find it 'very difficult' ever to impose death penalty is entitled – indeed, duty-bound – to sit on a capital jury"]; *Witherspoon v. Illinois* (1968) 391 U.S.510, 515 ["Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man."].) This was especially so in light of Ms. Carr's prior consistent and repeated assertions that she could put aside her feelings about the death penalty and follow the law, and the fact that she never disavowed those assertions.

The trial court recognized that the prosecutor's for-cause challenge of Ms. Carr was an "extremely close call." The court said that after listening to her testimony, "reading between the lines," and her body language, it believed Ms. Carr was "signaling to us is that really she couldn't vote for the death penalty in the real world." (3 RT 424-425.)[24] It is apparent from the court's comments and the transcript of Ms. Carr's voir dire that the demeanor to which the court referred was based on its observation of her responses to the prosecutor's questions about whether she could return to the courtroom, face appellant and state that her verdict was death. Throughout her voir dire, Ms. Carr stated clearly and unambiguously said that she could set aside her feelings and impose a death sentence. Her statements that she could impose a death sentence were not in response to an extreme example, such as that stated by the trial court where the defendant is Adolph Hitler. (3 RT 424.) Indeed, Ms. Carr had not displayed hesitancy or reluctance when asked if she could perform the duties which would be required of a juror in this capital case (e.g., 3 RT 367-368, 411-413), and she never disavowed her earlier statements that she

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[24] See AOB 164, where the court's ruling on the matter is set forth.

could and would impose the death penalty if appropriate.

As set forth above, a showing of hesitancy or discomfort, which is all that is established by the record, at the prospect of performing the task of telling a human being that he has been sentenced to death, is understandable. Ms. Carr's understandable reluctance to performing that difficult task did not establish that she could not impose a death judgment. (See *People v. Bennett, supra*, 45 Cal.4th at p. 623.) Moreover, although the prosecutor's inquiry was directed to the polling of the jury which would be required at the request of either counsel following the issuance of the jury's penalty verdict, it joined multiple concepts, one of which a juror is not required to do.

People v. Pinholster (1992) 1 Cal.4th 865, upon which respondent relies (RB 45), is not dispositive of this case. Although both jurors at issue in *Pinholster, supra,* expressed that it would be "hard" to vote for death, their reluctance to impose it was based on unequivocal statements they made indicating an "abstract inability to impose the death penalty in a felony-murder case" rather than basing a determination of penalty on the specific facts of the case. The first juror in *People v. Pinholster, supra*, initially equivocated about his ability to follow instructions by the court or impose the death penalty; he later unequivocally stated that he could not: (1) render a guilt verdict or impose the death penalty in a case where the defendant killed two people during the course of a burglary, (2) return a death sentence in a burglary-murder case regardless of the aggravating circumstances, and (3) under any circumstances return a death judgment in a burglary-murder case. (*People v. Pinholster, supra,* 1 Cal.4th at p. 917.) The second juror made it clear that regardless of aggravating evidence, he

could not vote for the death penalty in a burglary-murder case where there was no pre-existing intent to kill or torture; he also said he would never vote for the death penalty in a burglary-murder case unless it was premeditated. (*Ibid.*)

The second case upon which respondent relies, *People v. Roldan* (2005) 35 Cal.4th 646 (RB 41), is also distinguishable from the present matter. In that case, two jurors expressed that they would find it "hard" to vote for the death penalty. Upon further probing by the court, however, one juror confirmed she would "probably never" vote for the death penalty and the other declared she could "not ever" vote for death. (*People v. Roldan*, 35 Cal.4th at pp. 698-699.)

C. It Was The Prosecutor's Burden To Prove That Ms. Carr's Views On The Death Penalty Would Prevent Or Substantially Impair The Performance Of Her Duties; The Trial Court Was Required To Have Sufficient Facts To Make Its Determination Before Granting The Challenge For Cause.

The prosecution, as the moving party, bore the burden of proof in demonstrating that Ms. Carr's views on the death penalty would prevent or substantially impair her ability to follow the law as instructed by the court and her oath. (*People v. Stewart, supra*, 33 Cal.4th at p. 445; *Wainwright v. Witt, supra*, 469 U.S. at p. 423.) "As with any other trial situation where an adversary wishes to exclude a juror because of his bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) Because the record established that Ms. Carr was qualified to sit as a juror, and defense counsel both objected to her removal as well as argued there was no showing that she would not consider the evidence or be

able to render a death verdict (3 RT 423), there was no reason for counsel to pursue further voir dire. Indeed, in instances where a prospective juror's death penalty views appeared to impair his/her ability to sit as a juror, such as in the case of two prospective jurors who were in the same group as Ms. Carr when she was examined on voir dire, defense counsel stipulated to the prosecutor's challenge for cause. (3 RT 422.)

After the prosecutor offered his challenge for cause, it was the trial court's duty to determine if the challenge was proper. (*Gray v. Mississippi, supra*, 481 U.S. 652, fn.3.) Prior to granting the challenge for cause, however, the trial court was required to have sufficient information upon which to make a reliable determination that the standard under *Adams v. Texas, supra,* and *Wainwright v. Witt, supra*, had been met. (*People v. Stewart, supra*, 33 Cal.4th at p. 445; *People v. Heard, supra*, 31 Cal.4th at pp. 965-968.) Additional follow-up questions would not have been burdensome in this case (*People v. Heard, supra*, 31 Cal.4th at p. 968), yet without the evidence that was required to properly determine there was substantial impairment under the correct legal standard, the trial court excused Ms. Carr.

D. Conclusion

Appellant has demonstrated that the record in this case does not fairly support a determination that Ms. Carr was unable to vote for death and that her views on capital punishment would prevent or substantially impair her ability to follow the court's instructions or her oath. (See *People v. Heard, supra*, 31 Cal.4th at p. 968; *Gray v. Mississippi, supra*, 481 U.S. at p., 661, fn. 10; *Gall v. Parker* (6th Cir. 2001) 231 F.3d 265, 330-332.) The trial court's finding that she could not vote for death and excluding her

for cause on that basis is thus not entitled to deference by this Court, nor is it binding. (*People v. Heard, supra*, 31 Cal.4th at p. 965.) Accordingly, reversal of the judgment of death and remand for a new penalty trial are required. (*Ibid.*, *Gray v. Mississippi, supra*, 481 U.S. at pp. 659-667; AOB 171-183.)

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VIII

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT ADMITTED PHOTOGRAPHS OF DELLA MORRIS AND HER FAMILY MEMBERS THAT WERE OUTSIDE THE SCOPE OF PERMISSIBLE VICTIM IMPACT EVIDENCE

In his opening brief, appellant argued that the trial court erroneously admitted photographs depicting Della Morris and members of her family that were cumulative, beyond the scope of permissible victim impact evidence, and unduly prejudicial so as to render the penalty trial fundamentally unfair and the jury's penalty determination unreliable. (AOB 184-195.) Respondent alleges that appellant has forfeited his claim that photographs were admitted in error because the objection below did not specify the grounds appellant has raised on appeal and, even if adequately preserved, the claim lacks merit. (RB 46-49.)

A. Appellant's Claim Is Cognizable On Appeal

Contrary to respondent's assertion, appellant has not forfeited the claim he has made on appeal. (RB 47.) This Court has recognized that "[t]he circumstances in which an objection is made should be considered in determining its sufficiency." (*People v. Williams* (1988) 44 Cal.3d 883, 906-907.) Moreover, an objection will be deemed preserved if, despite inadequate phrasing, the record demonstrates that the court understood and considered the nature of the claim that has been presented. (*People v. Scott* (1978) 21 Cal.3d 284, 290; *People v. Brenn* (2007) 152 Cal.App.4th 166, 173-174 [no forfeiture where prosecutor addressed claim in a pretrial motion and it was addressed by the trial court when rendering its decision].)

The record establishes that the prosecutor addressed, and the trial

court considered, the relevance and scope of the proffered photographic victim impact evidence, as well as whether the evidence would violate Evidence Code section 352 because it was cumulative and on prejudice-based grounds. Included in the discussion between the court and counsel regarding appellant's objection was what each photograph depicted, what the photographs were collectively intended to prove, the fact that all but one photograph memorialized events long before the crime occurred, and whether the photographs were unduly inflammatory. Following the prosecutor's argument that each of the photographs should be presented to the jury to illustrate the impact Ms. Morris' death had on her family, the court weighed the probative value of the photographs against their potential prejudicial effect. (18 RT 2671-2673.) Accordingly, appellant's claim, that admission of the photographic evidence was erroneous because it was beyond the scope of permissible victim impact evidence and unduly prejudicial, was preserved for appellate review.

Nor has appellant forfeited the constitutional basis for his claim. This Court has recognized that any failure to cite federal constitutional grounds in support of an argument or objection does not forfeit the right to do so on appeal where, as here, the constitutional arguments do not invoke facts or legal standards different from that which the trial court applied and merely assert that the court's action had the additional legal consequence of violating the state or federal constitution. (E.g., *People v. Boyer* (2006) 58 Cal.4th, 441, fn. 17, applying *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [objection that evidence was more prejudicial than probative under section 352 preserved claim that error violated due process rights]; *People v. Stitely* (2005) 35 Cal.4th 514, 565, fn. 23.) Moreover, the trial court agreed to "adopt" defense counsel's request to base evidentiary objections,

where applicable, on both state and federal grounds. (1 RT 74-75.)

B. The Photographic Evidence In This Case Overstepped The Bounds Of Permissible Victim Impact Evidence

Respondent contends that the photographs were properly admissible as victim impact evidence because they "implied that [Della Morris'] loved ones, as testified by her nephew, Ray Abelin, suffered grief and pain over her loss." (RB 48-49.) In making this claim, however, respondent ignores important facts which demonstrate that the only point of the photographic victim impact evidence in this case was impermissible – to play on the emotions of the jury in making its "'moral assessment of . . . whether [appellant] should be put to death.'" (*People v. Edwards* (1991) 54 Cal.3d 787, 834, quoting *People v. Haskett* (1982) 20 Cal.3d 831, 863-864.)

First, the photographs in this case were not merely "ordinary pictures" (RB 48), but instead were a series of photographs that illustrated details of Ms. Morris' early family life through the time just before her death. Besides effectively representing her life history, this evidence created the intolerable risk of improper comparisons between the victim and the appellant. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 823, 825 [victim impact evidence which will not serve a legitimate purpose, rendering trial fundamentally unfair, includes evidence or argument designed to "encourage comparative judgments"].) Second, with the exception of the photograph of Ms. Morris alone that was taken within a year of her death, the proffered photographs "portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of the crime on the victim's family members." (*Kelly v. California* (2008) ___U.S. [129 S.Ct. 564, 566] (statement of Stevens, J., respecting den. of pets. for writ of cert.).) As such, the photographs ran

afoul of the dictates of *Payne v. Tennessee, supra*, 501 U.S. 808 which limited the propriety of victim impact evidence to "'a quick glimpse of the life' which a defendant 'chose to extinguish.' [citation omitted]" and evidence that "demonstrate[s] the loss to the victim's family and society which has resulted from the defendant's homicide." (*Id.*, at p. 822; see *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 337 ["punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate life and the accomplishments of a unique individual are not necessarily admissible in a criminal trial."].) Because the majority of the victim impact photographs admitted in this case shed no light on appellant's guilt or moral culpability, they served "no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason." (*Payne v. Tennessee, supra*, 501 U.S. at p. 856 (dis. opn. of Stevens, J.).)

Appellant recognizes this Court has permitted victim impact evidence consisting of photographs of the victim in life as well as of a victim's family members. However, consistent with the United States Supreme Court's holding in *Payne v. Tennessee, supra*, this Court has made clear that victim impact evidence is not without limit and "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Edwards* (1991) 54 Cal.3d 787, 835.) This Court has moreover held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim," but "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra.*, 54 Cal.3d at p. 835.) As appellant has set forth in his opening brief,

neither limit was adhered to in this case.

Ray Abelin, Ms. Morris' nephew, presented testimony at both the guilt and penalty phases describing the person Ms. Morris was and the relationship she had with him and others. Mr. Abelin's testimony conveyed to the jury that he and his family suffered grief and pain over their loss. (9 RT 1714-1724; 18 RT 2684-2705.) The admission of the series of photographs of Ms. Morris and her family was not necessary to provide the jury information about her "uniqueness as an individual human being" (*Payne v. Tennessee, supra*, 501 U.S. at p. 823), and it constituted cumulative evidence of the impact her death had on her family. The photographs were nonetheless admitted to "illustrate" Mr. Abelin's testimony. All but one of the photographs did more than that because they were a series of images of Ms. Morris and her family taken many years before the crime which: (1) effectively conveyed her life history and encouraged comparative judgments between Ms. Morris and appellant; (2) did not logically show the harm caused by appellant; and (3) had characteristics which would have encouraged the jury towards an emotional response untethered to the facts of this case. For instance, one of the photographs showed Ms. Morris with her nephews, who were approximately 10 to 11 years old when the photograph was taken. At the time of the crime, however, Ms. Morris' nephews were in their late 50's.[25] In light of Ray Abelin's testimony that his aunt was a mother-figure to him and his brothers, and helped raise them (18 RT 2689, 2692), the prejudicial effect of this photograph was substantial because the implicit suggestion to

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[25] In 1997, when the trial in this matter was heard, Ray Abelin was 62 years old. (18 RT 2685.) The crime occurred in 1992.

the jury from the image it depicted was that appellant had murdered a young woman who was responsible for the care of young children.[26] (See *Salazar v. State, supra*, 90 S.W.3d at p. 337 [prejudicial effect of childhood pictures of adult murder victim was substantial; defendant extinguished the victim's future not his past].) The photographs constituted a moving portrayal of the life of Ms. Morris, in effect a memorial service eulogy, with their primary impact rousing sympathy for her and antipathy for appellant.

The risk of unfair prejudice resulting from admission of the series of photographs far outweighed their minimal probative value. In addition to the prejudice resulting from what the images themselves which is set forth above, the prosecutor exploited the photographs during his closing argument when he focused the jury's attention on them as he projected large images of Ms. Morris on a screen. It was at this time that the prosecutor urged the jury to think of her in life as well as death. (20 RT 2830.) Although the prosecutor was entitled to provide the jury with a "quick glimpse" of Ms. Morris to establish her unique individuality, his use of the photographic images during closing argument was intended to incite the emotions of the jury and encourage them to improperly compare the life of the victim to that of appellant.

This Court's decision in *People v. Stitely, supra,* 35 Cal.4th at p. 565, does not support respondent's claim that the photographs of Ms. Morris' family members were properly admitted. (RB 48-49.) In *People v. Stitley, supra*, the prosecution sought to admit two photographs of the victim while

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[26]At the time of her death, Della Morris was 78 years old; based on Ray Abelin's testimony regarding his age, Ms. Morris was approximately in her late 20's when the photograph was taken.

she was alive – one was with her husband and the other depicted her with family members. Over the defendant's objection that the photographs were irrelevant and prejudicial because they were taken at unknown times, the trial court admitted the photograph of the victim and her husband during the husband's testimony, but excluded the group family photograph. (*Ibid.*)[27] Appellant recognizes this Court determined that the admitted photograph was not irrelevant or unduly prejudicial just because it did not depict the victim "exactly as she appeared to the defendant or because he knew nothing about her marriage." (*People v. Stitely, supra,* 35 Cal.4th at p. 565.)[28] It is nonetheless appellant's contention that the Court's ruling on this point, and the concomitant expansion of the array of evidence that is permissible as "circumstances of the crime" under section 190.3, factor (a), is inconsistent with the principles discussed by *Payne v. Tennessee, supra*, and by this Court in *People v. Edwards, supra*. In those cases, victim impact evidence was limited to those effects which were known or reasonably apparent to the defendant at the time of the crime or properly introduced at the guilt phase of the trial to prove the charges. (*Payne v. Tennessee, supra*, 501 U.S. at p. 822 [evidence closely tied to the circumstances of the crime itself and limited to a brief statement regarding

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[27] The opinion in *People v. Stitely, supra*, does not state why the second photograph was excluded; presumably, however, the trial court weighed the probative value against the prejudicial effect of admitting both photographs. In the present case, the trial court admitted all of the photographs proffered by the prosecutor.

[28] However, because the photograph in *People v. Stitely, supra.* depicted the victim when she was married, it is presumably unlikely that it portrayed her as she was many (50) years before the crime as did one of the photographs in this case.

the impact on a young child who the killer knew was present when crime was committed and was himself a victim]; *People v. Edwards, supra,* 54 Cal.3d at p. 832, 839 [photographs of victims taken the night before their murders to show their vulnerability due to their youth and prosecutor's short argument was limited and restrained].)

Moreover, appellant's claim that the photographs were not properly admissible does not merely rest on the fact that they depicted characteristics of the victim which were unknown to him. Instead, his objection is also premised on the misleading and prejudicial nature of the photographs which were taken at a time many years, indeed decades, before the crime as well as the prosecutor's argument which directed the jury's attention to large images of Ms. Morris projected in the courtroom just before they were to decide whether to sentence appellant to life or death. (*Payne v. Tennessee, supra*, 501 U.S. at p. 836 (dis. opn. of Souter, J.) ["[e]vidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation."].) The series of photographs combined with the prosecutor's argument would have evoked an arbitrary, irrational or purely subjective response from the jury untethered from the facts of the case, encouraged improper comparative judgments between Ms. Morris and appellant as well as made implicitly prejudicial and misleading suggestions – that is, the death of Ms. Morris left young children without a mother. (AOB 191-195.)

This Court's decisions in *People v. Pollack* (2002) 32 Cal.4th 1153, 1183 and *People v. Boyette* (2001) 29 Cal.4th 381, 444, upon which respondent also relies (RB 49), are not dispositive of the issue at hand. Although this Court noted that evidence of victim characteristics unknown

to the defendant is admissible, neither case indicated that the photographs of the victims were ones that were clearly taken many years before the crime or contained inflammatory characteristics of the type that exist in the present matter.

Appellant acknowledges that this Court has more recently held that victim impact evidence in the form of a videotape which includes a montage of numerous still photographs as well as video footage depicting the life of the victim and his or her family members is permissible factor (a) evidence which is not so unduly prejudicial that it renders a trial fundamentally unfair in contravention of the Due Process Clause of the Fourteenth Amendment. (*People v. Zamudio* (2008) 43 Cal.4th 327, 367; *People v. Kelley*, supra, 42 Cal.4th 763, 797.)[29] As with appellant's case, the photographic evidence in those cases: (1) depicted events that occurred long before the commission of the crimes; (2) amounted to life histories or life-spanning chronologies; (3) were not directly related to the effect of the crime on the victim's family; and (4) illustrated the limitless scope, quantity or kind of victim impact evidence the jury is permitted to consider. Such evidence, which is designed to play on the jury's emotions, interferes with the jury's ability to make a moral reasoned judgment about the appropriate penalty, injects an intolerable risk of arbitrariness into the capital sentencing

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[29] In *People v. Zamudio, supra*, 43 Cal.4th 327, the prosecution was permitted to present a 14 minute video montage containing 118 still photographs of victims at various stages of their lives including their childhood and early years of marriage. In *People v. Kelly, supra*, 42 Cal.4th 763, the jury was shown a 20 minute video consisting of a montage of dozens of still photographs and video footage documenting victim's life from infancy through time shortly before she was killed. The videotape was also both narrated by the victim's mother and set to the music of the artist, Enya.

decision, and renders the penalty trial fundamentally unfair.

C. Conclusion

The photographs in this case constituted impermissible victim impact evidence which rendered appellant's trial fundamentally unfair because they were not limited to the immediate injurious impact of the crime, and were unduly inflammatory. Their only purpose was to evoke sympathy for Ms. Morris as well as antipathy for appellant, and insure the likelihood that the jury's penalty verdict would not be a "reasoned moral response" to the question whether appellant deserved to die. The erroneous admission of this evidence, especially when combined with the prosecutor's prejudicial closing argument emphasizing the evidence, imbued the proceedings with a "legally impermissible level of emotion" (*People v. Prince* (2007) 40 Cal.4th 1179, 1289) and thus effectively precluded meaningful consideration by the jury of appellant's evidence on the subject of penalty. Because the erroneously admitted evidence violated appellant's constitutional rights, reversal of the death judgment is required.

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IX

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON LINGERING DOUBT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argued in his opening brief that the trial court erred by refusing to instruct the jury on lingering doubt, while acknowledging that this Court has held that any such instruction is not required. (AOB 196-205.)

In support of the claim that the proposed lingering doubt instructions were necessary in this case, appellant argued that neither factor (a) nor factor (k) of section 190.3, enumerated in CALJIC No. 8.85, adequately alerted the jury that it could consider residual doubt in making its penalty determination. Appellant argued that factor (a) directed the jury to be guided by the "circumstances of the crime" but did not direct the jury to consider residual doubt about the person they just convicted. Appellant further argued that factor (k) directed the jury to consider "any circumstance of the crime that extenuates the gravity of the crime," but did not direct the jury to consider residual doubt of the defendant's participation in the crime. (AOB 198-200.)

Respondent relies on this Court's prior decisions that hold an instruction on lingering doubt is generally not required, and alleges appellant has provided no reason to depart from such decisions. (RB 49-51.) Respondent's argument wholly fails to address appellant's argument that the facts of this case warranted the instruction. Although this Court has concluded that a lingering doubt instruction is not required, it has consistently held that where supported by the facts, such an instruction may be given. (*People v. Gay* (2008) 42 Cal.4th 1195, 1217,1226 [trial court's

contradictory instructions and exclusionary rulings prejudicially impaired defendant's ability to present evidence of lingering doubt].) As appellant has demonstrated (AOB 202), the facts of this case warranted the requested instruction. (*Ibid.*) Respondent also failed to respond to appellant's argument that factors (a) and (k) do not direct the jury to give effect to any residual doubt of appellant's guilt. Because respondent has provided no substantive argument refuting the claims appellant has made, no further reply to this issue is necessary.

The trial court's refusal to give the requested instructions requires reversal of judgment and sentence of death.

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THE TRIAL'S REFUSAL TO GIVE INSTRUCTIONS WHICH WOULD HAVE INFORMED THE JURY THEY COULD DISPENSE MERCY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant has argued in this opening brief that the trial court erroneously refused to give a series of instructions which would have: (1) explained the role that mercy plays in the jury's "reasoned moral response" to mitigating evidence presented and (2) made clear that the jury was permitted to exercise mercy in determining penalty. (AOB 206-222.) Respondent disagrees, alleging that other instructions and the prosecutor's closing argument conveyed that mercy was a factor the jury could consider in deciding whether to impose life or death. (RB 51-53.)

In support of the contention that appellant's proposed instructions were properly refused, respondent relies on previous decisions of this Court holding that such instructions are unnecessary where, as here, the jury is instructed in the language of section 190.3, factor (k), vis-a-vis CALJIC Nos. 8.85 and 8.88. (RB 52.) Appellant acknowledges this Court's prior rulings in his opening brief, but has explained that the absence of any clarifying language in factor (k) of section 190.3 failed to inform the jury that mercy and compassion for a defendant can be considered in their penalty assessment. Moreover, the failure to instruct the jury that they may consider mercy and compassion and to explain the relevance of mercy apart from the statutorily enumerated mitigators, including concepts stated in factor (k), was compounded by the trial court's refusal to instruct the jurors that mitigating factors were unlimited and not restricted to factors listed in the pattern instructions. Appellant respectfully requests that this Court

reconsider its prior decisions in light of the points and authorities he has presented on this issue.

Respondent's additional claim, that "neither party suggested during closing argument that mercy could not be considered" (RB 53) is similarly unpersuasive. While it is true that defense counsel made no suggestion, the record shows that this is exactly the argument the prosecutor made when he misled the jury to believe that mercy could only be dispensed in proportion to that which appellant has shown others. This improper argument not only supported the prosecutor's argument that mercy should be disregarded, but it also conveyed to the jury that any consideration of mercy was necessarily precluded by the circumstances of the crime as well as other acts of violence appellant had committed. (AOB 219-220; see *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-294 [likelihood jurors accepted prosecutor's argument which necessarily disregarded any independent concern that defendant may not deserve death sentence due to his troubled background].) Although the prosecutor made fleeting references to the requests for mercy which had been or would have been made on appellant's behalf (20 RT 2804, 2827), those comments cannot be deemed an adequate substitute for the omitted instructions (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488-489 [arguments of counsel cannot substitute for instructions by the court]). Moreover, the prosecutor's comments did not constitute an acknowledgment that the jury could properly consider mercy as a basis for imposing life.

Respondent has also failed to identify any portion of the arguments by either party which: (1) sufficiently explained the role mercy played in relation to the mitigating evidence presented; (2) specified that mercy and

compassion for appellant could be considered in the jury's penalty assessment notwithstanding the aggravating circumstances; and (3) made clear that mitigation was not restricted to specific factors enumerated in the pattern instructions provided. This omission is not surprising because there was indeed no such argument by counsel.

Without the proposed instructions, the jurors in this case were simply not informed as to their "'ultimate power . . . to impose life, no matter how egregious the crime or dangerous the defendant. . . . '" (*People v. Andrews* (1989) 40 Cal.3d 200, 237 (dis. opn. of Mosk, J.), quoting *Drake v. Kemp* (11th Cir 1985) 762 F2d 1449, 1460.) The trial court's refusal to give the instructions relating to mercy effectively precluded the jury's ability to give effect to a non-statutory mitigating factor that did not fall squarely into factor (k), in violation of appellant's right to receive a sentence that is based on consideration of all relevant mitigating evidence. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605.)

Accordingly, reversal of the penalty determination is required.

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XI

THE TRIAL COURT'S REFUSAL TO PROVIDE AN INSTRUCTION DEFINING LIFE WITHOUT POSSIBILITY OF PAROLE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant argued in his opening brief that the trial court erred by refusing to provide an instruction which would have properly defined the meaning of life without the possibility of parole, while acknowledging that this Court has held any such instruction is not required. (AOB 223-234.)

In support of the claim, appellant argued that the proposed instruction, which would have informed the jury that life without possibility of parole meant that he would never be eligible for or released on parole, was particularly necessary in this case because the prosecutor placed heavy emphasis on appellant's future dangerousness as a compelling reason – both by the aggravation evidence presented and through his closing argument – for the jury to return a death verdict. Appellant further argued that the trial court's refusal to provide the instruction resulted in the reasonable likelihood that the jurors, out of fear that appellant might be released, did not properly consider or give effect to the mitigating evidence appellant presented. (AOB 225-234.)

Respondent contends that the trial court properly refused to modify CALJIC No. 8.84 to include the instruction appellant had proposed. In so doing, respondent relies on this Court's prior decisions that hold an instruction defining life without the possibility of parole is not required, and alleges appellant has provided no reason to depart from such decisions. (RB 53-54.) Appellant's argument articulated the reasons why, in *this* case, the requested instruction was necessary and why this Court should

reconsider its prior decisions to comport with *Simmons v. South Carolina* (1994) 512 U.S. 154 and the other authorities cited in his opening brief. Respondent does not dispute that the prosecutor in this case relied on inference of future dangerousness to support a death judgment. However, respondent failed to address any of appellant's arguments which demonstrated why it was necessary that his jury be instructed with the proposed instruction. Because respondent has failed to provide any substantive claims refuting the arguments appellant has made, no further reply is necessary.

As appellant has demonstrated, the death judgment must be reversed.

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XII

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT IT WAS IMPROPER TO RELY SOLELY UPON FACTS SUPPORTING THE MURDER VERDICT AS AGGRAVATING FACTORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant has argued that the trial court erred when it refused to provide two instructions, Proposed Penalty Phase Instruction Nos. 24 and 25, which would have informed the jury that they could not consider the guilty verdicts and special circumstance findings themselves as aggravating factors.[30] In this case, the prosecutor placed heavy emphasis on the facts of the crime, as well as the felony-murder special circumstances found true and evidence of unrelated burglary counts as aggravation justifying the imposition of death. The trial court's refusal to give the proposed instructions made it impossible to determine whether the jury did not assess a death sentence by finding no more culpability than that required to find appellant guilty of first degree murder with a special circumstance. (AOB 235-244.) Without addressing appellant's argument that the facts of this case warranted the proposed instructions, respondent alleges generally that the instructions were properly rejected as they were duplicative of and/or inconsistent with the applicable CALJIC instructions submitted to the jury. (RB 55-56.)

Appellant recognizes that this Court has found no error where the trial court has refused to provide penalty instructions such as those appellant proposed. Nonetheless, appellant respectfully requests that this Court reconsider the issue in light of the decisions of the United States

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[30] Proposed Penalty Phase Instruction Nos. 24 and 25 are set forth in their entirety in Appellant's Opening Brief at p. 235.

Supreme Court which require that the jurors' discretion be guided in a constitutionally acceptable manner and the determination of penalty be neither arbitrary nor capricious.

This Court has recognized that the jury may not consider as an aggravating factor the bare fact that the defendant has suffered a conviction. (*People v. Siripongs* (1988) 45 Cal.3d 548, 582, fn. 11.) Instruction No. 24 was the only proposed instruction which addressed this principle, and it was not, as respondent alleges, duplicative of any penalty phase instruction submitted to the jury. (RB 55.) Even though the jury was given appellant's Proposed Penalty Phase Instruction No. 26, which addressed the double counting of a special circumstance when factors in aggravation are taken under consideration, that instruction did not make clear that the jury cannot consider the verdict itself as an aggravator.[31] Contrary to respondent's assertion, Instruction 24 was not inconsistent with CALJIC No. 8.85, "which allows the jurors to consider all of the evidence in the case, including the circumstances of the crime." (RB 56.) Instead, the proposed instruction would have merely informed jurors that they could not consider the findings of guilty as aggravating factors.

Instruction No. 25 was the only instruction proposed which informed

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[31]Appellant's Penalty Phase Instruction No. 26 read as follows:

> You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors.
> (22 CT 5932.)

the jury that it could not consider as aggravating any fact which was essential to their finding appellant guilty of first degree murder. This instruction did not duplicate No. 26 or the pattern CALJIC instructions submitted to the jury.

The trial court's refusal to give appellant's Proposed Penalty Instruction Nos. 24 and 25 violated the United States Supreme Court's mandate that the state "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia* (1980)446 U.S. 420, 428.) A capital-sentencing procedure must be one that "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offender before it can impose a sentence of death." (*Jurek v. Texas* (1976) 428 U.S. 262, 273-274.) That requirement is not met where, as here, the jury is permitted to consider the same act or an indivisible course of conduct to be more than one aggravating circumstance.

Because respondent has presented no substantive argument to refute appellant's claim that the facts of this case required the jury be provided the instructions he proposed, no further reply on this issue is required.

Accordingly, the judgment of death must be reversed.

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XIII

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT REFUSED TO DELIVER ADDITIONAL PENALTY PHASE INSTRUCTIONS WHICH WOULD HAVE CLARIFIED THE JURY'S TASK AND GUIDED THEIR INDIVIDUALIZED MORAL ASSESSMENT OF MITIGATING AND AGGRAVATING EVIDENCE

Appellant argued in his opening brief that the trial court erred when it refused to provide a number of specially tailored instructions which would have both clarified the jury's task at the penalty phase as well as properly guided jurors in making an individualized moral assessment of the appropriate penalty to impose. (AOB 245-275.)[32] Appellant recognizes that this Court has previously determined that penalty instructions such as the ones he proposed are not required, but argued cogently and provided substantial authority explaining that the facts in this case warranted that the proposed instructions be given.

Respondent contends that the trial court properly rejected the proposed penalty phase instructions. (RB 56-59.) In support of this contention, respondent merely asserts that this Court "has repeatedly explained that the standard jury instructions which were given in [appellant's] case are adequate to inform the jurors of their sentencing responsibilities and . . . fully comply with federal and state constitutional standards." (RB 59.) Because respondent has presented no substantive argument to refute appellant's claim that the facts of this case required the jury be provided the instructions he proposed, no further reply on the issue is necessary.

Accordingly, reversal of the judgment of death is required.

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[32] See AOB 248-252, where the requested instructions at issue are set forth in full.

XIV

THIS CASE SHOULD BE REMANDED FOR RESENTENCING

In his opening brief, appellant argued that the trial court erred when it imposed elevated, full, and consecutive sentences for the non-homicide offenses, in violation of his constitutional rights to due process and a jury trial because those sentences were based on factual determinations made by the judge, did not meet the required standard of proof and appellant did not waive his right to have a jury determine the existence of those facts beyond a reasonable doubt. (*Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296.) Appellant also argued that the trial court improperly referenced by incorporation the aggravating and mitigating circumstances enumerated in the probation report as the basis for imposing the upper term and consecutive sentences thus making it impossible to determine which of the individual factors the trial court specifically relied upon to make its sentencing decision. These errors require that the determinate sentence imposed be vacated and the presumptive lesser terms be imposed or, in the alternative, the matter be remanded for re-sentencing. (AOB 276-298.) Respondent alleges there was no sentencing error in violation of *Cunningham v. California, supra* and even assuming that there was, this case should be remanded to the trial court for resentencing under the reformed system prescribed by this Court in *People v. Sandoval* (2007) 41 Cal.4th 825, at pp. 850-852. (RB 69-64.)

Since appellant's opening brief was filed, this Court issued its decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval, supra*, 41 Cal.4th 825. Appellant recognizes that pursuant to those cases there is no constitutional violation under *Cunningham v. California, supra* or *Blakely v. Washington, supra* as long as the trial court

relied on at least one "valid" aggravating factor to impose the upper term – one which was either *Blakely*-compliant (jury finding, waiver or admission) or *Blakely*-exempt (recidivist exception). Appellant does not dispute that a single "valid" factor would have made appellant eligible for an upper term which satisfies *Blakely v. Washington, supra*, even if the court relied upon "invalid factors that were neither compliant or exempt. (*People v. Black, supra*, 41 Cal.4th at pp. 810-816; *People v. Sandoval*, *supra,* 41 Cal.4th at pp. 838-839.) Appellant also recognizes that constitutional error pursuant to *Cunningham v. California, supra*, is inapplicable to a court's decision to impose consecutive individual sentences. (*People v. Black, supra*, 41 Cal.4th at pp. 822-823.)

Even assuming that the imposition of the elevated, full, and consecutive sentences in this case does not constitute prejudicial error under *Cunningham v. California, supra*, remand for re-sentencing is nonetheless required because the trial court improperly incorporated by reference the circumstances in the probation report as the "reason(s)" for imposing the elevated, full, and consecutive terms for individual counts and the corresponding enhancements. (21 RT 2901-2908.)[33] By utilizing this procedure, the trial court failed in its duty to properly explain the basis for any of its sentencing choices. (*People v. Fernandez* (1990) 226 Cal.App. 3d 669, 678-679; see *People v. Black, supra*, 41 Cal.4th at pp. 846-847; Cal. Rules of Court, rules 4.406, 4.420; §1170, subd. (c).) It is thus impossible to tell which aggravating circumstance the court relied upon to impose individual elevated, full, and consecutive terms. Moreover, it is impossible to tell whether the trial court improperly relied on the same facts for different sentencing purposes, including the use of an enhancement as the

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[33] See AOB 277-280 which sets forth relevant facts of the sentencing proceeding relating to the non-homicide counts.

reason to impose an aggravated and/or consecutive term. (*People v. Coleman* (1989) 48 Cal.3d 112, 160-165; *People v. McFearson* (2008) 168 Cal.App.4th 388;*People v. Fernandez, supra*, 226 Cal.App.3d at pp. 678-683; Cal. Rules of Court, rule 4.420, 4.425.) Finally, the trial court failed to state expressly the reasons, specifying exactly which aggravating circumstances, it relied upon to justify its decision to impose the full term consecutive sentence for Counts 2 and 3 under section 667.6(c). (*People v. Belmontes* (1983) 34 Cal.3d 335, 348; accord, *People v. Coleman, supra*, 48 Cal.3d at pp. 161-162; Cal. Rules of Court, rule 4.426(b).)

Accordingly, this case must be remanded for resentencing on the non-homicide counts.

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XV

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In his opening brief, appellant made a multifaceted attack on the constitutionality of California's capital-sentencing scheme, including standardized instructions that are designed for its implementation. (AOB 299-319.) Respondent attempts to counter appellant's exposition of the deficiencies in California jurisprudence in this area with: (1) a pro-forma citation of this Court's decisions disagreeing with many of appellant's arguments and (2) alleging that appellant has proffered no justification to depart from those decisions. (RB 64-70.)

Appellant has acknowledged this Court's rejection of appellant's claims regarding the unconstitutionality of California's death penalty statute and the jury instructions relating to it (E.g., AOB 299-301, 303-305, 308-312, 314-315, 318-319), but provided authority and argument for reconsideration of its prior decisions. Respondent has not presented any substantive arguments in support of the constitutionality of the statute and of the challenged instructions, or in contradiction to the arguments set forth in appellant's opening brief why under the facts of this case such instructions should have been provided to his jury. No further reply by appellant is therefore necessary except to request that this Court reconsider its prior rulings in this area and, accordingly, reverse his death judgment.

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XVI

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

In his opening brief, appellant argued that even assuming, arguendo, none of the individual errors identified by appellant is deemed prejudicial in itself, the cumulative effect of such errors requires reversal of the death judgment. (AOB 320-322.) Respondent simply states that "[t]here was no error committed in either the guilt or penalty phase of trial, from which to accumulate error" and that appellant was not denied due process or a fair trial. (RB 70-71.) Accordingly, no reply is warranted and appellant reasserts his arguments in support of his cumulative-error claim. Because of the cumulative effect of all of the errors discussed in appellant's opening brief, and in this brief, *ante*, the judgments of conviction and death must be reversed.

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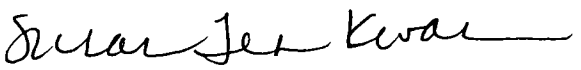
CONCLUSION

For all the reasons stated in appellant's Reply Brief, appellant's convictions and death judgment must be reversed. Remand for resentencing of appellant's non-homicide offenses is also required.

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



Susan Ten Kwan
Senior Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(2)

I, Susan Ten Kwan, am the Deputy State Public Defender assigned to represent appellant, Royce Lyn Scott, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 22,424 words in length excluding the tables and certificates.

Dated: May 19, 2009

Susan Ten Kwan

DECLARATION OF SERVICE

Re: *People v. Royce Lyn Scott* No. S064858

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

APPELLANT'S REPLY BRIEF

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

Honorable H. Morgan Dougherty
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Royce Lyn Scott
(Appellant)
(Delivered by Hand)

Each said envelope was then, on May 19, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on May 19, 2009 at San Francisco, California.

DECLARANT