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STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

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SUPREME COURT COPY

February 13, 2008

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

Hon. Frederick K. Ohlrich
Clerk of the Supreme Court
ATTN: MARY JAMESON
350 McAllister Street, First Floor
San Francisco, CA 94102

Re: *People v. Royce Lyn Scott, S0648~~48~~*

Dear Ms. Jameson:

This letter is to inform the Court of typographical errors contained in Appellant's Opening Brief which was filed on July 23, 2007.

The first error relates to the misspelling of the last name of prosecution witness Kenneth Osburn. In instances where the word "Eastbourne" is set forth, the word "Osburn" should be substituted. There are 8 pages in the Opening Brief where the correction is needed:

Page 11: lines 23, 24 and 25
Page 12: lines 1, 5 and 9
Page 16: lines 13, 14, 17, 19 and 20
Page 17: line 1
Page 98: lines 15, 19, 22, 23, 24 and 26
Page 228: line 13
Page 233: line 10
Page 297: lines 15 and 26

DEATH PENALTY

The second error relates to page designations in the Table of Authorities.

For the Court's convenience, pages to be substituted in Appellant's Opening Brief, including a corrected Table of Authorities, are attached to this letter of errata.

Respectfully submitted,

SUSAN TEN KWAN
Deputy State Public Defender
Attorney for Appellant

ATTACHMENT A

from appellant, and thus was of the belief that they could have come from him. (12 RT 2086-2087.) Although the PGM and ABO typing on blood and saliva samples of appellant were of the same "type" that was found on the victim's bed sheet, Cooksey could not say that the samples matched. (12 RT 2087-2089.)

Criminalist Donald Jones conducted RFLP DNA analysis of the stains from the bed sheet and the victim's vaginal swabs. (13 RT 2203, 2207, 2209-2210.) The semen donor profile for three stains appeared to be from a single person. (13 RT 2222, 2228.) It was Jones's opinion that the profile of samples was the same as that of appellant. (13 RT 2224-2225, 2230-2231.) The frequency of sperm fraction that matched appellant's was 1 in 130 million of Black men; 1 in 420 million of Caucasian men and 1 in 250 million in Hispanic men. (13 RT 2236.) Jones was not able to say that the fragment from the crime scene, or the number of base pairs of the fragment, were exactly the same as those of appellant. (13 RT 2271, 2275.)

A number of useable fingerprints were found at the scene, including some on Ms. Morris's bedpost, the inside upper portion of the sliding door frame and drinking glasses in the kitchen. (11 RT 1944-1946.) None of these prints matched appellant. A print recovered from one of the glasses matched Webbie, but the others were not identified as belonging to him, Ms. Morris or other family members. (11 RT 1946-1948; 1952, 2054.)

On November 4, 1992, on a matter unrelated to the Morris homicide, appellant was arrested during a burglary at the home of Kenneth Osburn ("Osburn") and Jeffrey Cole. (11 RT 2032.) This incident began in the early morning hours of November 4, when Osburn and his partner Jeffrey Cole ("Cole") were watching television in their living room. Around 12:50 a.m., someone entered the house through the unlocked

sliding door leading to the dining room. (11 RT 1900-1901.) Osburn saw a Black man, who told him and Cole to get on the floor and give him their wallets. (11 RT 1901-1902.) The man then said he needed a microwave and told them to stay on the ground while he went to get their microwave. Osburn and Cole heard the man rummaging through the kitchen drawers, and then going out the sliding glass door. The man later came back inside and again directed them to stay on the floor. (11 RT 1903-1904.) Appellant was arrested at the scene by the police; a wallet belonging to Osburn was found in his possession. (10 RT 1860-1861.)

Appellant spoke to the police after his arrest and admitted committing two additional burglaries, one that had occurred on August 3, and the other on August 9, 1992. Appellant was asked about another burglary, one that had occurred on August 25th and in which the sliding glass door at the home was broken. Appellant admitted he had committed a burglary that matched the circumstances of the third burglary the police described, but stated that he had no recollection of breaking a sliding glass door to enter the house. (10 RT 1863-1867.) After talking to appellant, the police later obtained blood samples as well as a sexual assault kit from appellant. (11 RT 2039-2040, 2047.)

The first burglary that appellant told the police he had committed occurred on August 3, 1992, around 2:30 a.m. The resident of the house, Dorothy Nancy Pruss ("Pruss"), was watching television when she heard a rustling noise near the kitchen area. (10 RT 1816-1817.) Pruss had recently finishing hanging her laundry in her backyard, and thought she had locked the sliding door when she went back inside. (10 RT 1817, 1820.) Thinking the noise was her dog, Pruss checked around. Pruss heard another noise and then saw a Black man in her house, holding her purse and fanny pack.

packet for two prior convictions (Pen. Code, §§ 664/211 and Health and Sat. Code, § 11350), Exh. No. 68. (17 RT 2609.) Palm Springs Police Department technician Roger L. Snyder compared the fingerprints of appellant, Exh. Nos. 41 and 42, to the fingerprint card contained in appellant's prior prison packet. It was his opinion that the fingerprints in Exh. Nos. 68, 41 and 42 were the same person. (17 RT 2611-2613.) The Court found true both prior conviction special allegations pursuant to Penal Code sections 667 and 667.5, subdivision (b). (17 RT 2614.)

PENALTY PHASE

Prosecution Case

In addition to the circumstances of the crime, the prosecution presented evidence of an assault and attempted robbery that occurred during the burglary at the Cole/Osburn home.[11] When appellant entered the house on the night of November 4, 1992, Osburn and his roommate Cole were having an argument. (18 RT 2654-2655.) Appellant appeared to be angry with Cole, and started yelling that what he (Cole) had done to Osburn was not right. (18 RT 2655.) Appellant screamed and acted belligerent. (18 RT 2655-2657, 2659.) Appellant forced Cole to apologize to Osburn a number of times (18 RT 2666), and after he ordered them both to lay on the floor, he kicked Osburn, then stomped on Cole's back and hit him with a fire place poker. Appellant then went to the kitchen, took the microwave and placed it outside. He returned and again stomped on Osburn's back and hit and kicked Cole. He demanded money and

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[11] The November 4, 1992, incident regarding Kenneth Osburn and Jeffrey Cole was presented by the prosecution as aggravating evidence of other criminal activity involving violence or threat of violence committed by appellant pursuant to Penal Code section 190.3, factor (b).

threatened Cole. (18 RT 2657-2658.) Osburn placed his wallet on the coffee table. Appellant had the poker in his hands when the police arrived and arrested him. (18 RT 2659.) At the time of his arrest, it was determined that appellant had cocaine in his system. (19 RT 2764-2765.)

The prosecution introduced an incident from March, 1988, involving Thomas Meyer ("Meyer") and Dan King ("King"), both of whom worked and lived at a construction site in Palm Springs.[12] One night, while asleep in their camper, Meyer heard the screen door open and then was confronted by appellant who demanded their money. (18 RT 2629-2630.) Meyer threw his jacket to appellant, who remained outside After discovering nothing was in it, appellant became angry, banged on the doorsill and threatened to shoot Meyer and King with a shotgun if they did not give him money. (18 RT 2631-2632.) King took out a gun which he kept under his pillow and fired four shots at appellant, who was still in the doorway. (18 RT 2633.) Appellant was hit and the police were summoned. Appellant did not have a shotgun. In fact, the only items found when the police arrived were a tee shirt and a piece of wood. (18 RT 2633-2636, 2638; 2652-2653.)

The prosecution also introduced victim impact evidence. Ms. Morris's nephew, Raymond Harris Abelin, testified that his aunt was a dancer and had taught dance in Los Angeles before moving to Palm

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[12] The March 26, 1988, incident regarding Thomas Meyer and Dan King (18 RT 2652-2653) was presented by the prosecution as aggravating evidence of other criminal activity involving violence or the threat of violence committed by appellant pursuant to Penal Code section 190.3, factor (b). This incident was also presented as an additional aggravating factor, a prior felony conviction, pursuant to Penal Code section 190.3, factor (c).

after receiving a report of a burglary. He took a statement from Daley and checked the house for possible points of entry and for items that had been disturbed. (10 RT 1837-1845.) It was subsequently determined that the latent prints obtained from the television matched appellant's fingerprints. (11 RT 1923-1925.)

Just after midnight on August 25, 1992, Emily Pollard was watching television in her living room when she heard a loud crash from the kitchen area. As she went towards the kitchen, Pollard saw a Black man, who said something to her. Pollard did not hear him because she was yelling for her friend who was sleeping in a bedroom. Pollard ran out the front door of her house. When she returned the next morning, she discovered that the sliding glass door adjacent to the kitchen had been shattered with a rock. Her purse and a Polaroid camera which had been on the kitchen counter were missing. (10 RT 1848-1853.)

On November 4, 1992, around 12:50 a.m., Kenneth Osburn was watching television and talking with his roommate Jeffrey Cole when a man came through the glass sliding door in their dining room. The door, which did not have a screen, was unlocked; it led to the outside pool area. The man told Osburn and Cole to get on down on the floor. After asking for their money, the man took Osburn's wallet, which he put on a coffee table. Telling the men to stay on the floor, the man went into the kitchen; Osburn heard him going through the kitchen drawers. After the man said he was going to take their microwave, Osburn heard him go outside. Eventually, the man came back inside, telling Osburn and Cole to stay on the floor. (11 RT 1899-1906.) At that point, Palm Springs Police Officer Donald Way arrived at Osburn and Cole's house in response to a call about an intruder. When he arrived, he saw the man, later identified

dangerousness to society." Apart from arguing that appellant deserved the death penalty because of his "violent nature" and "violent past" (20 RT 2817-2818), the prosecutor argued that appellant had a proclivity for entering residences in the middle of the night and committing burglaries.

In referring to appellant's 1988 prior act of violence and felony conviction for the attempted robbery incident involving Thomas Meyer and Dan King, the prosecutor argued:

> Here we have, as we have with so many people who are minding their own business, in this case, in their sleeping quarters, a camper at the construction site where they are working, and we have, again, a screen door, another factor that seems to be present when Mr. Scott strikes. . . . [¶] We have the defendant who is angry, demanding, threatening, and simulating a weapon . . . . We have a clear episode four years before the murder showing the violent nature of Mr. Scott.

(20 RT 2816-2817.) In referring to the incident involving Jeffrey Cole and Kenneth Osburn, which occurred after the Morris homicide, the prosecutor argued that appellant's conduct demonstrated a continued pattern of inflicting violence on unsuspecting victims in their own homes:

> You heard how Mr. Scott came in and, again, how he is demanding; he is angry; he is threatened. [Sic] Again, you have people minding their own business in their own house, and again we have this screen door element, Mr. Scott coming in where he does not belong; Mr. Scott bringing his violence on people that are minding their own business. . . . [¶] You get a clear indication of the anger and violence present in this incident, present in the defendant.

(20 RT 2817-2818.) The message from the prosecutor's argument is that appellant was a clear and present danger that needed to be stopped or he

subsequent to the crime for which appellant was being sentenced, coupled with the prosecutor's closing argument focusing on future dangerousness, the jurors should have been instructed that a sentence of life without the possibility of parole meant that appellant would never be eligible for parole or that to base a sentencing decision on speculation about possible future release would be a violation of the jurors' oaths.

The prosecution suggested to the jury that appellant would be dangerous, urging it to sentence appellant to die because he had committed multiple violent acts against others, and that it was "lucky" for victims Cole and Osburn that the police arrived at the scene to preclude further violence and more serious harm. (20 RT 2818.) The implicit message from the prosecutor's argument was that appellant was a danger to all people. The prosecutor's argument increased the harm inherent in failing to instruct the jury on the definition of life without the possibility parole. Without the requested instruction, there was a substantial chance that the jury would sentence appellant because it believed that he was a dangerous person who might get out of prison and harm someone.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) Had the jury been accurately instructed concerning appellant's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 536-538; *Chapman v. California*, *supra*, 386 U.S. at 24.) It cannot be established that the error was harmless beyond a reasonable doubt and therefore had "no effect" on the penalty verdict.

any worse than they would have ordinarily been, it is not likely that the jury would have found this factor applicable beyond a reasonable doubt. (*People v. Fernandez*, *supra*, 226 Cal.App.3d at p. 680, citing *People v. Young* (1883) 146 Cal.App.3d 729, 734 [aggravating factor must make offense distinctively worse than it would have been].) Similarly, it is not likely that the jury would have found applicable or given much aggravating effect to the factor that there was a taking or attempted taking or damage involving great monetary value. Finally, a jury may not have found that appellant was on probation or parole when the homicide was committed, or that appellant's prior performance on probation or parole was unsatisfactory.

Even though there were arguably two aggravating circumstances found true beyond a reasonable doubt or by appellant's admission - the use of a weapon enhancement (§ 12022, subd. (b)) during the November 1992 second degree robbery involving Jeffrey Cole and Kenneth Osburn (Count 11) and the prior prison term enhancement (§ 667.5) – neither circumstance could properly be used to aggravate the terms or impose a consecutive sentence. Appellant received a one year term for the prior prison term enhancement pursuant to section 667.5, and to rely on the same factor to impose an upper or consecutive term would constitute an improper dual use of facts. (Cal. Rules of Court, rule 4.41, subd.(c); *People v. Coleman*, *supra*, 48 Cal.3d at p. 163; *People v. Fernandez*, *supra*, 226 Cal.App.3d at p. 681.) Similarly, appellant received a one year term for the weapon use enhancement pursuant to section 12022, subdivision (b), and this factor could not be used to aggravate the counts relating to the Cole/Osburn incident due to the same prohibition of dual use of facts. (*Ibid.*) Nor could the use of a weapon circumstance be used to aggravate

ATTACHMENT B

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DECLARATION OF SERVICE

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

I, Victoria Morgan, 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 LETTER OF ERRATA

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

JENNIFER A. JADOVITZ
Deputy Attorney General
110 W. "A" Street, Suite 1100
P. O. Box 85266
San Diego, CA 92186

Royce Lyn Scott
(Appellant)
(Hand Delivered by Counsel)

Each said envelope was then, on February 15, 2008, 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 February 15, 2008, at San Francisco, California.

Victoria Morgan
DECLARANT