SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

JONATHAN KEITH JACKSON,

Defendant & Appellant.

CAPITAL CASE

Case No. S086269

Riverside County Superior Court Case No. CR69388
The Honorable EDWARD D. WEBSTER, Judge
The Honorable RUSSELL SCHOOLING, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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STATEMENT OF THE CASE

On March 30, 1999, the Riverside County District Attorney's Office filed a third amended information charging appellant Jonathan K. Jackson in count one with the deliberate, premeditated murder of Monique Cleveland (Pen. Code, § 187), and alleged the special circumstance that he committed the murder while he was engaged in the commission or attempted commission of robbery (Pen. Code, §§ 211, 190.2, subd. (a)(17)(i)). Count two charged Jackson with the deliberate and premeditated attempted murder of Robert Cleveland (Pen. Code, §§ 664/187), and alleged that Jackson inflicted great bodily injury to Robert Cleveland (Pen. Code, §§ 12022.7, subd. (a), 1192.7, subd. (c)(8)). As to both counts, it was alleged that Jackson personally used a handgun within the meaning of Penal Code sections 12022.5, subdivision (a), and 1192.7, subdivision (c)(8), and that a principal in the offense was armed with a handgun within the meaning of Penal Code section 12022, subdivision (a). Count three charged Jackson with being a felon in possession of a firearm in violation of Penal Code section 12021, subdivision (a). Further it was alleged Jackson had an October 19, 1992 conviction for robbery (Pen. Code, § 667, subd. (a)), and that he had failed to remain free of prison custody and committed another felony offense within five years (Pen. Code, § 667.5, subd. (b)). The October 19, 1992 robbery conviction was alleged to be a serious and violent felony within the meaning of Penal Code sections 667, subdivisions (c) and (e), and 1170.12, subdivision (c).[1] (2 CT 446-449.)

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[1] At various times the following individualas were listed as co-defendants with Jackson: Alejandro Ortiz, Carl Bishop, Henry Jones, and Leon West. (1 CT 231-234, 250-253.)

Jury selection commenced on April 6, 1999. (2 CT 474.) On April 19, 1999, the jury was sworn and the presentation of evidence commenced. (2 CT 482-483.) On April 28, 1999, the presentation of evidence concluded. Counsel presented closing arguments on May 3, 1999, and the jury commenced deliberations. (2 CT 493-495.) On May 6, 1999, the jury found Jackson guilty of all three counts, and found the special circumstance and all the allegations to be true. (3 CT 602-610, 623). The penalty phase trial commenced on May 12, 1999. (3 CT 650.) On May 26, 1999, the jury sent a note saying there was a hung jury. (3 CT 866-867.) On May 27, 1999, the court declared a mistrial after the jurors notified the court they were unable to reach a verdict. (3 CT 868-870.)

On September 29, 1999, pursuant to Jackson's request that Judge Webster recuse himself,[2] the penalty phase retrial was reassigned to Judge Schooling. (3 CT 874, 876.) The penalty phase retrial commenced on October 25, 1999. (3 CT 887.) On December 1, 1999, the jury returned a verdict of death. (9 CT 2747-2749.)

On February 18, 2000, Judge Webster denied Jackson's motion for new trial as to the guilt phase. (10 CT 3047.) The same day Judge Schooling denied Jackson's new trial motion as to the penalty phase. (10 CT 3048.) Judge Schooling denied Jackson's Penal Code section 190.4, subdivision (e), motion to modify the death verdict, and his motion to prohibit the death penalty based on intra-case proportionality review. (10 CT 3049-3050.)

On February 18, 2000, the trial court sentenced Jackson to death for the murder of Monique Cleveland. The trial court also sentenced Jackson

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[2] After the mistrial, when leaving the courthouse, Judge Webster encountered guilt phase jurors and spoke with them. In response to a question, the judge expressed an opinion regarding the evidence. (19 RT 2960-2962, 2969.)

to a term of life with the possibility of parole for the attempted murder of Robert Cleveland. (10 CT 3066-3067, 3069-3071.) The trial court sentenced Jackson to the following determinate sentence: three years for 12022.7, subdivision (a), enhancement to be served consecutive to the sentence on count two; the upper term of 10 years for 12022.5, subdivision (a), enhancement also consecutive to count two; the upper term of four years for count three; five years for the prior and one year for the other prior; one year for the 12022, subdivision (a), enhancement to be served consecutive to count one; and four years for the 12022.5, subdivision (a), enhancement also to be served consecutive to count one. The determinate sentences on the enhancements and count three were all stayed. (10 CT 3066-3068, 3076-3077.)

This appeal is automatic pursuant to Penal Code section 1239.

STATEMENT OF FACTS

In June 1996, Robert Cleveland and his wife, Monique Cleveland, lived in a remote area that was sparsely populated in Mead Valley.[3] (7 RT 1053, 1066-1067.) They lived in a mobile home on a large piece of property. Their landlords, the Blantons, lived in another house on the property. (7 RT 1059, 1066; 24 RT 3720-3721; 3742-3743, 3759-3760.)

Cleveland was a drug dealer. (7 RT 1053-1054.) As a drug dealer, Cleveland did business with members of the Mead Valley Gangster Crip. Cleveland had a prior conviction for drug sales and consequently was prohibited from possessing weapons. (7 RT 1071.) Generally, people

[3] To avoid confusion respondent will refer to Robert Cleveland as "Cleveland" and Monique Cleveland as "Monique." Monique was also known and referred to in testimony as Nikki; however, respondent will only refer to her as "Monique."

called ahead and made arrangements to come to Cleveland's house to purchase drugs, rather than just showing up. (7 RT 1058.)

Cleveland was introduced to Jackson by two "associates," Lil Crip and Ran Ran, about six months before the shooting. These associates asked Cleveland to help Jackson financially because Jackson had just been released from prison. (7 RT 1052-1053.) Cleveland knew Jackson by the name "Valley J." (7 RT 1052.)

The help provided by Cleveland was that he "fronted" Jackson "a quarter piece of rock cocaine" approximately every week-and-a-half to two weeks. (7 RT 1055.) In exchange, Jackson subsequently paid Cleveland $150. At the time of the shooting, Cleveland had fronted Jackson rock cocaine about nine or ten times. (7 RT 1054-1055.) However, Jackson had been to Cleveland's house only three or four times before the night of the shooting. (7 RT 1056.)

About three weeks to a month prior to the shooting, Cleveland had given Jackson drugs and Jackson owed Cleveland money for those drugs. Previously, Jackson had paid Cleveland his money within about a week of having received the drugs. (7 RT 1060.)

About a week before the shooting, Jackson was "hanging out" with fellow Mead Valley Gangster Crip member, Donald Profit, at Profit's apartment complex on Sioux Drive in Perris. Jackson was standing in front of the apartment complex "selling dope" when Cleveland drove up. Cleveland asked, "'Valley J, do you have my money?'" Jackson responded, "'I ain't going to pay you. I don't got your money. I ain't going to pay you.'" Cleveland got back in his truck and told Jackson "'You can have that because I got much (*sic*) dope that you can't ever believe of (*sic*)'" and "'You can keep the money'" and drove off. (10 RT 1756-1760.)

On the night of June 15, 1996, at about 1:00 a.m., Myesha, Mica and Michael Blanton were at home and heard multiple gunshots, from both

small and large caliber guns. (8 RT 1249-1251, 1271-1272, 1287-1291; 24 RT 3725-3726; 3762-3764.) However, they thought nothing of the gunfire due to the remote area in which they lived and because they had a neighbor who had a propensity to shoot at animals that got into the neighbor's trash or after his livestock. (8 RT 1251, 1272, 1288-1289; 24 RT 3724-3725, 3745, 3763.)

That night, the Clevelands were in bed watching television. (7 RT 1061.) Cleveland heard a car pull up the driveway to the house, so he went to the living room, picked up a .45 caliber gun, and looked out the window. It was very dark out that night. (7 RT 1062, 1067.) The Clevelands always kept their doors locked, even when they were home. (7 RT 1065-1066.) When Cleveland went to the door, Monique went into the bathroom which was across the hallway from the master bedroom. (7 RT 1062-1063.)

Cleveland went to the backdoor off of the kitchen that led to a back porch. Cleveland moved the mini-blinds and saw Jackson at his backdoor. Cleveland let Jackson into his house. There was what Cleveland thought was a minivan in the driveway. Although he could not see who they were, Cleveland saw three or four men in the minivan. Cleveland generally did not let strangers into his house, and he would not have let Jackson into his house if someone Cleveland did not know had accompanied Jackson to the door. (7 RT 1063-1065, 1068.)

Jackson went into the kitchen and Cleveland closed and locked the door behind him. Cleveland could hear voices coming from the car that Jackson had arrived in. Cleveland questioned Jackson as to why he had brought people to his house. Jackson told Cleveland that was the only way he could get a ride to his house. (7 RT 1064.) Cleveland did not see if Jackson had a weapon, but he did not expect Jackson to be armed. (7 RT 1068.)

Jackson and Cleveland remained in the kitchen talking. They stood two to three feet apart, on opposite sides of the kitchen counter. They spoke in normal voices, in conversational tones. Cleveland put his gun down on the kitchen counter and was leaning on the counter propped up by his forearms. They were discussing that Jackson owed Cleveland money for a previous drug transaction. Jackson wished to "flip" the money he owed Cleveland by obtaining additional drugs to make additional money. Jackson asked Cleveland if he could take the money that he owed, give it to Cleveland and get some additional drugs. Cleveland refused the request telling Jackson that he did not have any drugs. According to Cleveland, Jackson was leaving with the money and possibly returning the next day for additional drugs. (7 RT 1069-1070, 1074-1075.)

Jackson started to leave. He walked toward the backdoor as Cleveland remained leaning with his forearms on the kitchen counter. The door was off of Cleveland's right shoulder. As Jackson moved towards the door, and was within one to two feet of Cleveland, Jackson shot Cleveland in the right side of his face, by his right ear. Jackson fired the gun without warning. Cleveland did not see Jackson with a gun prior to being shot. (7 RT 1074-1075, 1079, 1093.)

After being shot, immediately Cleveland fell to the floor and looked at Jackson. Cleveland was in a lot of pain. (7 RT 1088.) Cleveland believed the semiautomatic gun jammed because he saw Jackson backed up against the wall near the backdoor trying to do something with the gun. Cleveland tried to get himself off the floor. He put his hand on the counter and pulled himself up. When Cleveland was about half-way up, Jackson opened the backdoor to admit some men into the kitchen. One of the men shot Cleveland in the abdomen as he walked through the door. The man demanded, "'Where's the money? Where's the drugs?'" That same man also said, "'Let's get the bitch too.'" (7 RT 1075-1078, 1090, 1214-1215.)

In response to the questions, Cleveland pointed to the recessed lights in the kitchen ceiling, where he kept his drugs.[4] Cleveland heard the light cover hit the ground. (7 RT 1096, 1099.)

When shot the second time, Cleveland fell back onto the floor, face down. Cleveland heard Jackson say, "'That's why I shot your punk ass'" for "'talking shit to me.'" At trial, Cleveland claimed he did not know what Jackson was talking about because he had not spoken badly to Jackson. (7 RT 1095-1096.) While Cleveland was lying on the floor face down he was shot a third time, however, he had no recollection of it, although he believed he heard at least two additional gunshots being fired. Cleveland believed he passed out. (7 RT 1097-1098.)

According to Kevin Jackson,[5] who testified, Jackson told him how Monique was killed. Monique was screaming and hollering and ran into the hallway when Jackson shot Cleveland. Jackson let his "homies" into the house. (9 RT 1518-1519; 25 RT 3957-3959, 3979-3980; 26 RT 3990; Exh. 214.) When Monique moved to another part of the house, one of Jackson's "homies" told Jackson to finish what he had started. Jackson went to the bathroom where Monique was hiding, grabbed her and asked her where the money was. When she said, "'What money?'" Jackson "blew her brains out." Jackson described to Kevin Jackson how he had Monique by her hair and she was down on the floor. Jackson demonstrated how he held the gun and turned his face away when he fired the gun. Jackson said he used his friend's gun, a .357, to kill Monique because his

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[4] Generally Cleveland retrieved the drugs from the kitchen ceiling area prior to a person transacting a drug deal entering his house. (7 RT 1057-1058.)

[5] Kevin Jackson is not related to Jonathan Jackson. (9 RT 1502-1504.)

gun did not have any more bullets.[6] (9 RT 1520-1521, 1524; 25 RT 3957-3959, 3979-3980; 26 RT 3980, 3990.) Jackson believed both Robert and Monique Cleveland were dead. (9 RT 1517, 1521, 1523; 26 RT 3981.)

Due to the amount of blood coming from his head and because he had been shot multiple times, Cleveland believed he was dying. He thought he needed to let someone know who had shot him, and when he saw all the blood on the floor he took his finger and wrote "Valley J," Jackson's moniker, with his blood on the kitchen floor.[7] (7 RT 1052-1053, 1102.) Cleveland wiped the blood from his face with a roll of paper towels. Cleveland made it to the telephone near the television set in the living room and called 9-1-1. (7 RT 1099-1102.) Cleveland told the 9-1-1 operator that he had been shot and that he was not sure if his wife had been shot. Although the 9-1-1 operator asked Cleveland to stay on the phone with her, he did not believe he could because he felt like he was passing out again. (7 RT 1103-1104, 1106; Exh. 7 [tape recording of Cleveland's 9-1-1 call].)

Meanwhile, Cleveland had also telephoned Michael Blanton, and asked Blanton to come help him.[8] Blanton and his daughters, Mica and Myesha, went to Cleveland's house around 1:30 a.m. (7 RT 1106; 8 RT 1254, 1274, 1287; 24 RT 3725-3728, 3737, 3744-3745, 3748-3749, 3761-

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[6] Jackson said one of his homeboys gave him a "trey five seven" referring to the .357. (9 RT 1525.)

[7] Cleveland misspelled the name, however, omitting the "e," and wrote "V-A-L-L-Y J." (10 RT 1597.)

[8] Michael Blanton was initially confused because he had just dropped off his friend also named Robert. It was not until he received a call from a 9-1-1 operator that Michael Blanton understood that it was his neighbor Robert Cleveland who needed help. Upon understanding that, Michael Blanton dropped his house phone and ran over to the Cleveland's mobile home. (8 RT 1254, 1272-1273, 1286, 1293-1294; 24 RT 3761, 3765, 3767.)

3765.) They found Cleveland on the back porch leaning against the house. (8 RT 1255, 1273-1274, 1294; 24 RT 3725-3728, 3737, 3744-3745, 3748-3749, 3761-3765.) Cleveland told the Blantons that four guys came into his house and "'Valley J'" had shot him. (8 RT 1256, 1296-1299; 24 RT 3729, 3731, 3751, 3766, 3768.)

Robert Cleveland was sighing; he had a hole in his head, and blood on his head and torso. (8 RT 1256-1257, 1275-1277, 1295; 24 RT 3725-3728, 3737, 3744-3745, 3748-3749, 3761-3765.) He tried to talk but mostly made gurgling sounds. (8 RT 1256; 24 RT 3729, 3731, 3751, 3766, 3768.) Cleveland was moving his legs, so Mica Blanton held his legs in an effort to keep him still. (8 RT 1257, 1275-1277.) Cleveland said he did not believe he was going to make it. (8 RT 1263, 1296-1297; 24 RT 3729, 3731, 3751, 3766, 3768.) Cleveland appeared as if he was about to pass out. (8 RT 1257, 1278, 1295, 1298, 1302.) The Blantons spoke with Cleveland in an effort to keep him conscious. (8 RT 1295-129624 RT 3736, 3776.)

Cleveland asked about his wife. Mica and Myesha Blanton went into the Cleveland home and found Monique in the hallway. There was blood on Monique's hair and on the wall. Monique was dead. (8 RT 1257, 1278, 1302; 24 RT 3732-3734, 3752-3754, 3770.) The women returned to the porch and in an effort not to upset Cleveland they told him Monique was okay. (8 RT 1257, 1279, 1302; 24 RT 3732-3734, 3752-3754, 3770, 3735.) After seeing that his daughter was "speechless," Michael Blanton went into the house to check on Monique. Although from his military experience he knew she was dead when he first saw her, he checked Monique's pulse. He then went back out to the porch. (8 RT 1301-1302; 24 RT 3770-3772.)

Mrs. Blanton, who had remained over at their house, telephoned 9-1-1. The police had some trouble finding the house which caused a delay in their arrival. (8 RT 1303; 24 RT 3735.) Michael Blanton was also on

the telephone with a 9-1-1 operator at the Cleveland's house. (8 RT 1303; 24 RT 3766, 3769, 3774-3775; Exh. 7 [tape recording of 9-1-1 call in guilt phase; Exh. 136 [tape recording of 9-1-1 call in penalty phase].)

When law enforcement officers arrived, they transported Cleveland to the hospital via helicopter. (8 RT 1331-1333; 9 RT 1362-1363.) Cleveland told Deputy Hack that Valley J had tried to rob him, and shot him. (8 RT 1344-1345; 24 RT 3801.)

Robert Cleveland was treated at Riverside General Hospital. He suffered gunshot wounds to his face, upper back, and abdomen. Cleveland had immediate surgery to repair the abdominal wound, which was very serious. (10 RT 1666-1671, 1675-1676; 27 RT 4240-4251.) The bullet from the shot to the upper back fragmented, however, it did not injure any large blood vessels or penetrate the chest cavity. (10 RT 1672.) The bullet wound to Cleveland's face injured his left cheek, and passed through his sinus cavities and jaw bone. It was remarkable that the injury did not compromise Cleveland's ability to breathe, and it missed major blood vessels and his spinal cord. Subsequently, Cleveland had surgery to repair the damage from the gunshot to his face. (10 RT 1672-1675, 1677-1688.)

Monique had been shot in the face. Dr. Choi, a forensic pathologist who performed an autopsy on Monique, explained that the bullet entered her left cheek and exited on the right side of her neck. The trajectory of the bullet was downward. (9 RT 1464-1465, 1467; 25 RT 3834-3835.) The entrance wound was a round hole with gunpowder tattooing and powder burns on Monique's left eyelid, below her left eye, and on the tip of her nose and upper lip. Dr. Choi opined that the gun was two to four inches from Monique's face when the fatal shot was fired. (9 RT 1467-1471; 25 RT 3825-3829, 3832-3833.) There was a red burn mark and gunpowder

on her left eyeball, which indicated that her eyes were open when she was shot.[9] (25 RT 3831-3832; Exh. 128 [penalty phase photograph].) The bullet severed Monique's jugular vein and carotid artery. (9 RT 1473-1474; 25 RT 3836.) Dr. Choi opined that the bullet was likely a .38 caliber, but could have been a .22 or .32 caliber. The bullet was unjacketed. (9 RT 1472-1473, 1475.) Monique Cleveland's death was caused by blood loss. As Monique aspirated blood into her lungs, it was determined she was breathing after being shot, thus her death was immediate, but not instantaneous. (9 RT 1475; 25 RT 3836-3837.) There was a good possibility that her injuries were consistent with Monique lying prone on the floor, face down, and her head being lifted up by her hair when she was shot.[10] (9 RT 1476.)

Elissa Mayo, senior criminalist from the California Department of Justice Crime Laboratory, analyzed the blood spatter at the Cleveland home crime scene. (10 RT 1588-1594; 28 RT 4467, 4479-4488, 4490-4499.) She photographed a large pool of blood in the kitchen that had the word "V-A-L-L-Y J" written in it. (10 RT 1597, 1599.) In the hallway adjacent to where Monique was laying, there was a very large pool of blood. (10 RT 1600.) There was significant blood spatter on the doorjamb which indicated that the blood had been deposited with some force. (10 RT 1601.) The blood spatter on the wall and doorjamb was no higher than two

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[9] The guilt phase jury did not learn Monique Cleveland's eyes were open when she was shot, nor was that jury shown Exhibit 128 a photograph showing Monique Cleveland with her eyes open. That testimony and exhibit was presented to the penalty phase retrial jury.

[10] In the penalty phase retrial, Dr. Choi also testified that Monique was approximately one month pregnant when she was murdered. Her embryo was ten millimeters. (25 RT 3840-3841; Exh. 211A [penalty phase photograph showing embryo].) The guilt phase jury did not hear this evidence or see this exhibit.

feet off the ground, which indicated the point of origin was no more than two feet off the ground. (10 RT 1602-1604; 28 RT 4501-4505.) While Criminalist Mayo could not determine Monique's exact position when she was shot, based on Monique's prone position, the blood spatter being no higher than two feet off the ground, and the lack of a blood trail, it appeared Monique was lying on the floor when she was shot. (10 RT 1605-1606.)

Kevin Jackson had known Jackson for approximately seven years. They grew up in the same Mead Valley neighborhood. At the time he testified, Kevin Jackson was 25 years old. Kevin Jackson's younger brother, Donald Profit, was a Mead Valley Gangster Crip member, as were some of his Kevin Jackson's associates, but he was not a member of the gang. (9 RT 1501-1504; 25 RT 3949-3950; 26 RT 3963-3964, 3972.) Kevin Jackson dealt drugs and Robert Cleveland was his drug supplier. Cleveland and Kevin Jackson had met every other week for the previous six to seven months. (9 RT 1507; 26 RT 3965-3966.)

A day or two after the shooting, Kevin Jackson received a telephone call from his friend Melvin who told him that Robert and Monique Cleveland had been killed. (9 RT 1510; 25 RT 3951-3952, 3975-3976.) Thereafter, Kevin Jackson went to the house of his friend, Kevin Simmons, where Jackson also resided. (9 RT 1506, 1509-1510; 1512; 25 RT 3949-3952, 3963, 3975-3976.) Jackson was dating Kevin Simmons's sister, Karyon. (9 RT 1511-1512; 25 RT 3949-3950; 26 RT 3963.) Kevin Simmons was not home, but Jackson was there with Alejandro Ortiz. (9 RT 1513, 1516.) Jackson, Ortiz and Kevin Jackson went into a bedroom, sat on the two beds and talked while they smoked marijuana. Kevin Jackson could tell that Jackson and Ortiz had already smoked marijuana before he arrived because he smelled it and Jackson's eyes were "low and red." (9 RT 1514-1515; 25 RT 3953-3955, 3976-3979.)

As they smoked, Kevin Jackson told them that he had heard Cleveland and Monique were shot and killed. Jackson said, "'Yeah. So what?'" (9 RT 1516; 25 RT 3953-3955, 3976-3979.) As they continued to smoke, Jackson said, "'Don't trip, but I did that.'" (9 RT 1517; 25 RT 3953-3955, 3976-3979.) Kevin Jackson was shocked and did not know whether to believe Jackson, so he asked what happened. Jackson explained that he owed Cleveland some money and went to the house to purchase some drugs from Cleveland. Jackson said he and Cleveland had a conflict about the money. Jackson left the Cleveland's house and went to the car where his friends were waiting and told them everything about his conversation with Cleveland. (9 RT 1517-1518; 25 RT 3953-3955, 3976-3979.)

Jackson believed Cleveland had disrespected him because Cleveland had called him a "bitch-ass nigger" and said, "'You punk-ass nigger, you been owing me this money all this time and you even — you ain't even come back with my first $150.'" (9 RT 1550-1551; 25 RT 3956-3957.) Jackson said he was going to go back in and "jack" Cleveland. Jackson went back to the door and Cleveland answered it with a gun in his hand. Jackson went inside and they talked about Jackson getting drugs and paying Cleveland later. Cleveland put the gun down on the counter. Jackson said he surprised Cleveland and pulled out a gun. Cleveland looked shocked and jumped at Jackson in an effort to take the gun away from Jackson. Jackson claimed that because he was a little guy who had just gotten out of the hospital and could not afford to have Cleveland grab him, Jackson shot Cleveland. Cleveland fell to the ground and one of his legs was kicking. Jackson described how Cleveland's wife was screaming and hollering and

ran in the hallway, and how he killed her.[11] (9 RT 1520; 25 RT 3953-3958; 26 RT 3976-3981.) Jackson opened a drawer of the nightstand between the two beds and showed Kevin Jackson the gun he used to shoot Cleveland. (9 RT 1520-1521, 1524; 25 RT 3956-3956.)

Kevin Jackson had seen the gun Jackson showed him before, and recognized it as Jackson's gun. Kevin Jackson identified Exhibit 29 in the guilt phase as Jackson's gun that he saw that day. Kevin Jackson also described how "We all owned guns." (9 RT 1522.) This was not the gun Jackson used to kill Monique; Jackson used one of his homie's .357 to kill Monique. Jackson never used the names of who was with him that night; he merely referred to them as "homies." Kevin Jackson assumed Ortiz was with Jackson at Cleveland's house that night because of the way Ortiz was reacting to Jackson describing the events. However, neither Ortiz nor Jackson said Ortiz was there. (9 RT 1523-1525; 26 RT 3986-3987.)

A day or two after the shooting, Jackson went to Donald Profit's apartment. As they played Super Nintendo and "smoked dope," Jackson told Profit that he had gone to Cleveland's house and shot Cleveland and his wife. Jackson said he took eight ounces of dope. (11 RT 1755, 1762.) Jackson described how he shot Cleveland on the right side of his head and once more in the chest. Jackson said he shot Monique in the head. Jackson said he had other people with him, but never said their names. Profit was shocked by what Jackson told him and did not ask the identity of the others. Jackson said he used a .22 semiautomatic gun. Profit had seen Jackson carry a .22 semiautomatic gun in his pants. Jackson thought Cleveland and

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[11] In the penalty phase retrial, Kevin Jackson testified that Jackson said it was not his intention to shoot or kill Cleveland, but just to make a drug transaction with him. (25 RT 3953-3955, 3976-3979.)

Monique were both dead. (11 RT 1762-1766.) In the guilt phase, Profit identified Exhibit 29 as Jackson's gun. (11 RT 1770.)

When he was initially contacted by law enforcement during a gang sweep, after the murder and attempted murder, Profit was 14 or 15 years old. (11 RT 1750.) Riverside County Sheriff Investigator Sheldon Gill interviewed Profit, but Profit told him he did not know anything and was released. (11 RT 1870.) However, on July 29, 1996, Tanisha Taylor, Kevin Jackson's wife, called Investigator Gill and said her brother-in-law, Donald Profit, wanted to come in and talk to him. After Profit had spoken to Investigator Gill in connection with the gang sweep, Profit was beat up by Mead Valley Gangster Crip members. They claimed they beat up Profit because he had snitched on Jackson. (11 RT 1777-1780, 1871-1875.)

Riverside County Sheriff Detective Kenneth Gregory found a phone book in the Cleveland bedroom with a phone number next to the name Valley J. Detective Gregory and Investigator Sheldon Gill learned the phone number belonged Merlin Simmons, at 21410 Orange Avenue, in Perris. (9 RT 1487-1489; 26 RT 4033-4036, 4066-4069, 4080-4083.)

On June 18, 1996, the detectives executed a search warrant of the house of Jackson's grandmother, Ora Rice, at 14509 Cholla in Moreno Valley. Jackson was not there, but they were able to retrieve a green folder with the name Jonathan Jackson on it and papers containing the names Mista Valley Jay, MVGC Crips and Mr. Valley Jay, and Valley Jaysta, MVGC. (9 RT 1483-1484; 26 RT 4033-4037, 4066-4069, 4080-4083.) Detective Gregory also found gang membership photographs at the Perris Police Department depicting Valley J. (9 RT 1490-1491; 26 RT 4038-4-4040.)

In an effort to apprehend Jackson and to find another Mead Valley Gangster Crip member, Lil Crip, who had been involved in another shooting, law enforcement officials executed search warrants on 15 houses

in Mead Valley and Perris on July 24, 1996. During the gang sweep, a search warrant was executed on the Sioux Drive apartment where Donald Profit lived with his mother. (11 RT 1859, 1869; 26 RT 4083-4086.)

On July 25, 1996, Los Angeles Police Officer Damon Aoki, a member of the department's gang suppression unit, encountered members of the Eight Trey Gangsta Crip drinking alcohol in public. One of them was Jackson. (9 RT 1449, 1452; 26 RT 4097-4101.) The officer planned to cite and release the men if they could provide valid identification and did not have any outstanding warrants. (9 RT 1454-1555.) Jackson gave the officer a false name. The record check did not return a valid identification for the name and birthdate Jackson had provided. In an effort to learn Jackson's true identify, the officer took Jackson to the police station. At the station, Jackson provided the officer with another false name. Finally, the officer rolled Jackson's fingerprints and had a fingerprint analysis performed. (9 RT 1454-1457; 26 RT 4102-4106.)

Officer Aoki learned Jackson's true identity and learned there was an outstanding felony murder warrant for Jackson's arrest.[12] (9 RT 1458-1459.) On July 26, 1996, Detective Gregory and Investigator Gill went to Los Angeles and transported Jackson back to Riverside County. (9 RT 1495; 26 RT 4042-4043, 4086-4087.)

While Robert Cleveland was still in the hospital, Michael Blanton visited him. Cleveland asked Blanton to go to his house and retrieve a package from a hidden area inside the second bedroom closet and give it to someone who would come for it. Blanton found a package wrapped in brown paper and tape in the hiding place. He gave the package to someone

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[12] During the penalty phase retrial, evidence was admitted that Jackson told the officers, while handcuffed, that if he had a gun when they stopped him he would have shot them because he had two strikes. (26 RT 4102-4106.)

who stopped by for it. Blanton did not look inside the package. The package had drugs in it. Blanton did not find all of the drugs because some were still in the hiding place when Cleveland got out of the hospital. (8 RT 1210-1211, 1310-1311; 24 RT 3778.)

Cleveland could not account for what happened to his .45 caliber handgun, but he did not believe any money or drugs were taken from him. The .45 caliber handgun that Cleveland had set down on the kitchen counter was not there when Michael Blanton entered the house to check on Monique pursuant to Cleveland's request the Blantons check on her. (8 RT 1212, 1315.) The only gun Deputy Hack saw in the Cleveland's house was a lever-action rifle near the kitchen door. (25 RT 3815.)

A. Defense

Jackson did not present defense evidence.

B. Aggravating Evidence

In addition to evidence of the crime, as detailed above, the penalty phase jury on retrial heard victim impact evidence from Monique Cleveland's cousin, and other criminal activity Jackson had been involved in.

C. Victim Impact Testimony

Monique Cleveland's cousin, Jeanette Burns, described the lost felt as a result of Monique being murdered. Monique was the only daughter of a close family. Monique was a good student who enjoyed school. Monique was pregnant and it would have been her parents' first grandchild. (28 RT 4271-4287.)

D. Other Criminal Activity

On July 15, 1991, Joseph Canada took a break from his job and stopped on the side of the road in some shade for lunch. Canada was in his 1987 black Nissan Pulsar. After eating, Canada dozed off with the car windows down. (27 RT 4167-4169.) Canada awoke to see Jackson standing outside the driver's side door pointing a shotgun about two to three feet from his face. Canada looked to the side and saw three additional young males in a Jeep Cherokee pointing shotguns at him. Jackson told Canada to get out of his car, leave his wallet, drop the keys to the ground and walk to the rear of the car. When Canada realized what was happening, he was terrified, and did exactly as he was told. Still pointing the shotgun at Canada, Jackson told him to lay on the ground, face down in the dirt. Jackson stood over Canada as he lay on the ground pointing the shotgun at Canada's head. (27 RT 4169-4172, 4176-4177, 4254-4255.)

As he lay there, Canada thought about his daughter who was to be born that week, and how horrible for her that she was going to be raised without a father. Next Canada heard his car door open, then close. The car started, made a U-turn, and both it and the Jeep drove down the street. Doing as he was told, Canada did not look up from the ground. (27 RT 4173.)

After the cars drove away, Canada ran to a house and asked the occupants to call 9-1-1. Canada told the 9-1-1 operator, and later police officers, what had happened. Jackson was caught shortly after he took Canada's car. (27 RT 4179-4180, 4192-4194, 4227-4290.) Canada was able to get his wallet and car back that day. When Canada got home, he lifted out some new pillows he had purchased and underneath was a shotgun. Canada called the police who came and retrieved the shotgun. (27 RT 4182-4184.)

The crime impacted Canada's life such that when he found out shortly thereafter that everyone had been released, he started carrying a gun on his person. Canada was concerned for his safety. He still gets upset when he talks about the incident with his daughter. Canada lost his job because of his reaction to the crime. The crime still impacted Canada and he remained fearful. He described how a friend approached him from behind in a supermarket and grabbed him, and Canada reacted by hitting the friend in the face. (27 RT 4179, 4185-4187.)

On July 29, 1992, Jackson and his cousin, Derrick Palmer, went into Empire Drugs in South Central Los Angeles with gun. Kenny Johnson, Jr., Daila Llamas, Martha Barron, store manager Mel Nakashima, and a cashier named Cara were working at Empire Drugs that day. (28 RT 4366-4369, 4385, 4389, 4394, 4420, 4423, 4427.) Jackson approached Johnson and Llamas in the break room and put a gun in Johnson's face. After ordering the store employees to the floor, Jackson had his knee on Johnson's back and the gun on Johnson's neck. Jackson asked if there were any cameras, and was told by Johnson and Llamas that there were no cameras. Jackson said, "'If you don't give me the cameras, I'm going to blow your fucking brains out.'" "'When I count to three, if you don't tell me you're dead.'" Jackson only counted to two, then stopped and ran out of the break room. (28 RT 4370-4375, 4377-43784396-4399.) Palmer had grabbed the cash from the register and yelled for Jackson, and they ran out the door with about $2,700. (28 RT 4430-4433.) Johnson was afraid, and Llamas was crying. (28 RT 4376, 4379-4380.) The store manager got a gun and chased after Jackson and Palmer, and fired the gun at them as they ran. (28 RT 4392-4393.)

On September 7, 1994, Riverside Police Officer Miera worked in the gang suppression unit with his partner Gary Toussaint. That night the officers were targeting drug sales at an apartment complex. The officers

saw two Cadillacs accelerate away. The officers were able to catch up to one of the Cadillacs and stopped it. Jackson was in the front passenger seat. Officer Toussaint obtained permission to search the vehicle for illegal drugs or weapons. When Jackson stepped out of the car, there was a small blue steel .25 caliber handgun lying on the seat directly under where he had been sitting. Jackson was arrested. (27 RT 4257-4262, 4265-4267.)

In June 1995, correctional officer James Ghan was working at Mule Creek State Prison. In the prison there were factions based on race. There were northern Mexicans, southern Mexicans, Crips, Bloods, and "415s." (28 RT 4292-4303.) The "415s," whose name was based on a Bay Area area code, was a race-based group. On June 29, 1995, there was tension brewing between the "415s" and the Crips. (28 RT 4304-4306.) In the exercise yard, the Hispanics and whites moved away from an area between buildings 2 and 4. This was unusual behavior. Next Officer Ghan noticed a group of "415s" running between buildings 4 and 3 towards a group of Crips, including Jackson. The officer announced over the public address system for the inmates to "Get down," "Get down," "Stop," "Get down on the ground," and "Cease all movement." When officers yell these commands, inmates are required to lie on the ground. (28 RT 4307-4309.) A fight broke out between the 415s and Crips. Two weapons were found after the melee. (28 RT 4311-4317, 4327-4328.)

In August 1995, correctional officer Vern Nichols worked at Mule Creek State Prison. On August 8, 1995, Officer Nichols was working in the administrative segregation facility when a fight broke out on the yard. Officer Nichols ordered the inmates to get down. Jackson was one of three inmates who did not obey the "get down" order. One of the three inmates said, "'Fuck you. We don't have to get down.'" All three inmates were written up for disobeying the correctional officer's order. (28 RT 4357-4365.)

In November 1995, correctional officer Floyd Haynes was working at Mule Creek State Prison as a yard officer. On November 11, 1995, Officer Haynes saw Jackson and another inmate fighting on the basketball courts. (28 RT 4336-4341.)

Jackson was held at the Southwest Detention Center after he was arrested by Officer Aoki in 1996. The detention center was configured in pods with two large and two small day rooms. The two larger day rooms housed 64 inmates and the smaller day rooms housed 32 inmates. The inmates were in two-man cells. At certain times during the day and evening, the inmates could use the day room, use the phone, or take a shower. The cell doors were opened to permit the inmates out and then locked again. Once out of the cell, the inmate had to go to the day room. Inmates had a choice of staying in their cell or using the day room. (25 RT 3918-3920.)

There were usually two deputies assigned to a pod. A primary deputy remained in a control center that had clear glass walls, and a runner deputy escorted inmates to and from programs or court. The primary deputy could see into the cells. (25 RT 3920-3921.)

Each night there was a night count performed between about 11:00 p.m. and midnight which entailed confirming the number and identity of the inmates in the jail. Each inmate wore an identification wristband. (25 RT 2922-2924.) When Deputy Rose performed the night count he went to the cell, called the inmate's last name and expected the inmate to approach him so he could see him. The inmate showed the deputy his wristband so the deputy could confirm his identity. (25 RT 3925.)

On September 7, 1996, Deputy Rose was performing the night count of the inmates assigned to B-4, where Jackson was housed. When the deputy got to Jackson's cell and called Jackson's name, there was no response initially. Deputy Rose called Jackson's name again. Jackson

refused to get out of bed and show the deputy his wristband. The deputy called into the cell again. This caused a disturbance among the inmates and prevented the deputy from completing the night count. (25 RT 3918, 3922, 3924-3926.) Deputy Gruwell, who was performing the night count on the tier above had to come down and assist Deputy Rose. Deputy Gruwell decided to remove Jackson from his cell and place him in a holding cell away from these inmates so Jackson could not incite them. Deputy Rose asked Jackson to step out of his cell and Jackson complied. However, Jackson was using profanity. As Deputy Gruwell placed Jackson in handcuffs, Jackson began to turn around. Deputy Gruwell grabbed Jackson and turned him back around so Deputy Rose could handcuff him. Jackson asked the deputies to take the handcuffs off and essentially challenged each of them to a fight. Jackson was agitated and very angry. (25 RT 3926-3927.)

In June 1997, Jerry Baker worked as a correctional officer at the Robert Presley Detention Center in housing unit 3A, where Jackson was housed. Robert Mayo, who was in jail for possession for sale of rock cocaine was also housed in unit 3A. On June 11, 1997, Mayo and Jackson had an altercation in the recreational area. Both inmates were let back into their cells, and the doors were left open so the inmates could go take a shower. Mayo went into Jackson's cell and asked if he could borrow some soap. Jackson "sucker punched" Mayo with a closed fist. Thereafter Mayo and Jackson wrestled. Officer Baker had to break up the altercation. (27 RT 4157-4161; 28 RT 4455-4458.)

E. Mitigating Evidence

Jackson's mother, Paula Rice, brother, Antione Jackson, and grandparents, Walter and Ora Rice, all testified on his behalf. Ora and Walter Rice had three children, Paula (Jackson's mother), Myron and

Kendel. Ora and Walter separated when Paula was 11 years old. Walter lived in other places in Los Angeles, but he still helped out.

Paula dropped out of school in the tenth grade and had her first child, Antione, when she was 16 years old. Sixteen months later, when she was 17 years old, she had Jackson. Antione and Jackson's father was John Jackson. (29 RT 4520-4524, 4545-4546, 4609-4610, 4570-4573.) John Jackson did not have much of a role in raising his children. He did not contribute to their financial or emotional support. (29 RT 4525-4526, 4547-4549, 4611-4612.)

As a baby, Jackson was often hospitalized for bronchitis. Jackson screamed and yelled when Paula left him in the hospital, so the hospital staff told her to stay away until it was time to take him home. In the hospital, Jackson stayed in a baby bed with rails pulled up and a net over the top. Paula described it as a "cage." (29 RT 4612-4613.)

When Jackson was a young child his living situation was not consistent for he lived at various times with his mother and/or his grandmother. Jackson and Antione stayed with Ora when Paula met Alonzo Stewart and moved in with him. (29 RT 4525-4526, 4547-4549, 4611-4612.) Paula met Alonzo Stewart while he was in prison and they moved in together upon his release. Antione and Jackson remained living with their grandmother. Eventually Paula became afraid and upset because of Alonzo, but she stayed with him. Ora agreed to have Antione stay at her house, but did not want to babysit Jackson. So Paula took Jackson with her to parties and would put him in the bedroom with other little kids. When Jackson was about four, he and Paula would drive with Alonzo to his job and then sit in Alonzo's car while Alonzo worked an eight-hour shift. (29 RT 4615-4621.)

Eventually, Antione and Jackson moved into a one bedroom apartment with Paula and Alonzo. They all slept in the one bedroom.

There were no toys in the apartment. (29 RT 4624-4627.) Alonzo no longer made Paula and Jackson sit in the car at his work all day. Instead when he went to work, Alonzo took Antione to elementary school and locked Paula and Jackson in the apartment. (29 RT 4621-4623.) Paula became more and more nervous living with Alonzo. (29 RT 4624-4627.)

Alonzo beat Paula all the time. Jackson and Antione witnessed the beatings and sexual abuse. Antione would go to the corner and scream. Jackson would try to help Paula. One time when Jackson attemped to intercede, Alonzo threw Jackson across the room and continued beating Paula. The beatings continued until Paula stabbed Alonzo with a pair of scissors. Alonzo was choking Paula so she grabbed a pair of scissors and stabbed him in his arm. Thereafter, Paula moved back in with her mother and her boys. (29 RT 4570-4573, 4628-4632.) However, she continued to see Alonzo.

Shortly after Paula moved out of the home with Alonzo, he was set on fire and suffered third degree burns all over his body. He walked into Ora's house and pulled the last layer of skin off his arm. Jackson and Antione saw Alonzo with third degree burns all over his body. Antione described that Alonzo looked like his was melting. About three weeks later Alonzo died. Although Alonzo apologized to Paula, he never apologized to Jackson or Antione for the way he treated them. (29 RT 4574-4576, 4633-4634.)

Paula, Antione and Jackson lived with their grandmother, Ora Rice. Their uncle Kendel, who was a Seven Trey Gangster Crip member, also lived with Ora. (29 RT 4577.) Ora, Paula, Jackson, and Antione moved to 111th Place in Inglewood and the boys attended Worthington Elementary. That school was connected with the Center Park Blood gang. The boys suffered difficulties because they had moved from a Crip to a Blood neighborhood and kids picked fights with them. Antione joined a Blood

gang and remained in it until he was 17 or 18 years old. (29 RT 4578-4579, 4635-4639.)

When Antione was 15 years old, he received a four year term and was sent to Camp Scudder for assault and battery. Probation counselor Bill Tan talked to Antione weekly and gave him motivational tapes and books to occupy his mind with things other than gang activity. Antione continued his relationship with Mr. Tan after he got out of custody. Another positive influence in Antione's life was his math teacher, Ms. Finny. Although Antione had trouble staying away from gang activity, with the help of Mr. Tan and Ms. Finny, Antione stayed out of trouble. When he testified, Antione was married and had three children. Antione had difficulties in his marriage, and job difficulties. Antione attributed some of his problems to built up anger from the years of torture he experienced at the hands of Alonzo. (29 RT 4580-4583.) Antione was in the United States Army when he testified. Although he had met his father, he did not have a relationship with him. (29 RT 4567-4569.)

Ora Rice moved to Moreno Valley and Jackson lived with his grandmother in Moreno Valley. Ora Rice loved Jackson and Jackson loved her. (29 RT 4527-4528, 4551.) Jackson was "really messed up" as a result of a motorcycle accident suffered months prior to the murder. (29 RT 4552-4553.)

After Alonzo died, Paula took up with Robert Fields, and they had two daughters, Tamara and Tierra. Although Paula never lived with him, Robert Fields played a role in Jackson's upbringing. He took the children to amusement parks and did many things that they had never before experienced.

After she broke up with Robert Fields, Paula and her children moved in with James Ferrell. Ferrell was an alcoholic and the children did not like

him. Ferrell tried to be abusive towards Paula, but Jackson defended her. Jackson was between 12 and 14 years old at the time. (29 RT 4639-4640.)

Paula learned Jackson and his cousin Derrick committed a robbery at a drug store. Paula went to the police station and told them her son had committed a robbery. Paula went to Empire Drugs, apologized and told them that she did not raise her son like that. Another time Paula called the police when Antione and Jackson came home after they had been drinking. (29 RT 4641-4643.)

ARGUMENT

I. JACKSON'S RIGHTS WERE NOT ABRIDGED BY THE TRIAL COURT'S ORDER HE WEAR A PHYSICAL RESTRAINT DURING TRIAL

Jackson contends the trial court committed reversible error and violated his constitutional rights because it allegedly (1) used an inappropriate and unconstitutional process to determine the degree of security necessary during trial; (2) ordered the use of a REACT stun belt without determining a manifest need; (3) erroneously believed a stun belt was a less restrictive alternative to shackling, and failed to consider other less drastic alternatives; and (4) failed to inquire or consider potential adverse medical consequences and psychological effects of using a REACT belt. (AOB 43-77.) The record demonstrates the trial court properly exercised its discretion for the use of restraints, and Jackson's right to a fair trial was not impacted by the security precaution utilized by the trial court.

A "'trial court has broad power to maintain courtroom security and orderly proceedings. [Citations.]'" (*People v. Stevens* (2009) 47 Cal.4th 625, 632, quoting *People v. Hayes* (1999) 21 Cal.4th 1211, 1269.) Penal Code section 688 provides that "[n]o person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary

for his detention to answer the charge." Both the state and federal constitutions foreclose a criminal defendant from being subjected to physical restraints of any kind in a courtroom in the presence of a jury absent a showing of manifest need for such restraints. (*People v. Mar* (2002) 28 Cal.4th 1201, 1216; *People v. Duran* (1976) 16 Cal.3d 282, 290-291.) If physical restraints are used, "'those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances.'" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217, quoting *People v. Duran*, *supra*, 16 Cal.3d at pp. 290-291.) The trial court's determination regarding restraints will not be overturned on appeal absent showing "a manifest abuse of discretion." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217, quoting *People v. Duran*, *supra*, 16 Cal.3d at pp. 293, fn. 12.)

Pre-trial Jackson was restrained with leg shackles and handcuffs. (3 RT 302.) The defense objected to Jackson being shackled during court appearances and requested that he be unrestrained for trial. (2 CT 333-346.) The prosecution maintained Jackson should be restrained utilizing a stun belt. (2 CT 439-442.) Relying on the case of *People v. Garcia* (1997) 56 Cal.App.4th 1349, overruled by *People v. Mar*, *supra*, 28 Cal.4th at 1219, the prosecutor maintained a REACT stun belt did not constitute a physical restraint within the meaning of *Duran*. (3 RT 301-302; 2 CT 439.) It is clear from comments made by the trial court pre-trial and prior to the penalty phase retrial, based on the then existing case law (*People v. Garcia*), the trial court did not consider the REACT belt a physical restraint on par with shackling and handcuffs. (See 3 RT 304; 20 RT 3004.)

In 2002, this Court established in *Mar* that the *Duran* standard, that a defendant may not be physically restrained while in the jury's presence without a showing of "manifest need for such restraints," applied to a trial court's decision to compel a defendant to wear a stun belt at trial. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1219-1220, 1223; *People v. Duran*, *supra*,

16 Cal.3d at pp. 290-291.) The showing of "manifest need" is required because the possible effects the belt may have on the defendant, including psychological effects, the defendant's demeanor, his ability to focus on the court proceedings and confer with counsel, or otherwise assist in the defense at trial. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1219-1220.)

"Manifest need" for physical restraints exists upon a showing of violence or a threat of violence or other nonconforming conduct, not mere rumor or innuendo. (P*eople v. Combs* (2004) 34 Cal.4th 821, 837, citing *People v. Anderson* (2001) 25 Cal.4th 543, 595; *People v. Hill* (1998) 17 Cal.4th 800, 841; *People v. Cox* (1991) 53 Cal.3d 618, 651; *People v. Duran*, *supra*, 16 Cal.3d at p. 292, fn. 11.) The justified use of restraints is not limited to situations involving courtroom disruption or attempted escape. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944.) No formal hearing is mandated to fulfill the required findings under *Duran*, but the need for restraints must appear as a matter of record. (*People v. Cox*, *supra*, at pp. 649-652; *People v. Duran*, *supra*, at pp. 291.)

A defendant's prior violent criminal record or the fact the he or she is a capital defendant cannot alone justify physical restraints. (*People v. Cunningham* (2001) 25 Cal.4th 926, 987.) The decision of a trial court to restrain a defendant will be reviewed for an abuse of discretion on a case-by-case basis. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218; *People v. Cunningham*, *supra*, at p. 987; *People v. Medina* (1995) 11 Cal.4th 694, 731; *People v. Pride* (1992) 3 Cal.4th 195, 231-232.)

In ordering Jackson restrained pre-trial the trial court cited security concerns involving Jackson's case, without specifically describing the concerns on the record. (2 RT 102-103; 3 RT 299-311.) Jackson was restrained with leg shackles and handcuffs. (3 RT 302.) On March 12, 1999, Jackson filed a motion objecting to shackling and requesting that he not have physical restraints during any court appearances. (2 CT 333-346.)

On March 26, 1999, the prosecution filed responsive papers (3 CT 439-442), and maintained that "[u]nder no circumstances should this defendant be left unrestrained during the jury trial." (3 CT 442.) In addition to violent behavior while previously incarcerated, Jackson was a Mead Valley Gangster Crip gang member. When arrested, Jackson told the arresting officer that if he had a gun he would have shot the officer because he had two strikes. (26 RT 4106.)

The trial court addressed the issue of physical restraints for trial on March 30, 1999. (3 RT 299-310.) In addition to the parties' briefing regarding shackling, the trial court relied upon the threat of violence and Jackson's violent behavior evidenced in the Statement of Aggravation. Jackson had two prior convictions for armed robbery. While incarcerated Jackson had multiple incidents of fights, challenges to fight, and threats, in addition to assaulting and resisting an officer, challenging an officer to a fight, and an assault on an inmate. (3 RT 299-300; see also 25 RT 3926-2927; 27 RT 4169-4172; 28 RT 4357-4365, 4336-4341.)

The trial court expressed its first inclination was not to shackle Jackson using handcuffs and leg shackles for trial, but instead to use a REACT belt. (3 RT 299.) Defense counsel's position was that Jackson had demonstrated an ability to be responsible in the courtroom and therefore no restraints were necessary. (3 RT 299.) After a discussion that included input from the bailiff, it was agreed that the security solution was to have an additional deputy sheriff assigned to the courtroom. (3 RT 299-301.) This was a solution not inherently prejudicial and did not need to be justified by manifest need. (See *People v. Stevens*, *supra*, 47 Cal.4th 625.) The bailiff was confident security could be maintained if he had another deputy in the courtroom with him. (3 RT 299-300, 302-303.) The trial court informed the parties that if a second deputy was unavailable, then it would order Jackson to wear a REACT belt. (3 RT 299-301.) This would

assure the presence of a second deputy because a deputy is required to maintain the REACT controls, and it would alleviate the security concerns expressed by the bailiff, the prosecutor, and the trial court. (3 RT 300.)

At the next court appearance, on April 6, 1999, the trial court noted that it could not be assured of the presences of a second officer without using the REACT belt. (4 RT 335) At the April 6 hearing, Jackson was wearing the REACT belt and a deputy trained in how to use it was present. (4 RT 335-336.) Contrary to his earlier position, defense counsel asked the trial court to consider in lieu of the REACT belt a leg brace. This was based on defense counsel's assertion that Jackson could not lean back in his seat, and defense counsel's belief such an inability to lean back would render Jackson uncomfortable. (4 RT 336) The trial court inquired of the deputy if the belt could be readjusted, which it was, and a pillow was placed behind Jackson to support his back and alleviate any discomfort he might feel. (4 RT 336-338.) Jackson acknowledged this solution made it better. (4 RT 339.)

Prior to the penalty retrial before another trial court, again the REACT belt was discussed. (20 RT 3000-3004.) After objecting to the belt as unnecessary and uncomfortable for Jackson, defense counsel requested a leg brace. (20 RT 3000.) The trial court was unaware of any discomfort to Jackson caused by the belt, and added that based on its observation of other defendants, the court had not noticed physical discomfort to defendants caused by the REACT belt. (20 RT 3002.) After reading the parties' points and authorities and having discussions with the courtroom deputy sheriff, the trial court found Jackson was sufficiently violent to warrant ordering him to wear the REACT belt. When defense counsel suggested a leg brace as an alternative, the trial court acknowledged that would provide a solution regarding escape, but the concern regarding Jackson was his violent

behavior and a leg brace would not protect against that. (20 RT 3001-3004.)

Here, the trial courts properly exercised their discretion in ordering Jackson be physically restrained during trial based on Jackson's violent behavior and his threats of violence. In addition to his violent past, Jackson had many rules violations and fights while incarcerated, both in prison and while he was awaiting trial. He had disobeyed correctional staff's orders (25 RT 3918, 3922, 3924-3926; 28 RT 4307-4309, 4357-4365), been involved in four fights against other inmates (27 RT 4157-4161; 28 RT 4311-4317, 4327-4328, 4336-4341, 4455-4458), and challenged jail deputies to fights (25 RT 3926-3927). This evidence was sufficient to support the trial court's decision to restrain Jackson. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1050 [trial court did not abuse its discretion in restraining defendant where he had been cited for many rules violations, including five jailhouse fights and possession of illegal razors].) Additionally, the trial court did take into consideration the potential psychological impact wearing the REACT belt might have on Jackson. The trial court expressly noted that there may be some adverse psychological effect on Jackson from wearing the REACT belt. (3 RT 305-306.) However, no psychological impact was expressed by Jackson or defense counsel in the trial record. The potential impact in the abstract does not correlate that wearing the REACT belt had in fact an adverse psychological impact on Jackson. The same is true regarding Jackson's claim the trial court failed to consider the adverse medical impacts to Jackson from wearing the REACT belt because Jackson had been in, and had scars from, a motorcycle accident. (AOB 62-65.) Here, the record is void that the wearing of the REACT belt had any adverse impact, either psychologically or medically, on Jackson.

Even assuming arguendo the trial court abused its discretion, the use of the REACT belt was harmless. "When the record does not reflect 'violence or a threat of violence or other nonconforming conduct' by the defendant, a trial court's order imposing physical restraints will be deemed to constitute an abuse of discretion." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 987, quoting *People v. Duran*, *supra*, 16 Cal.3d at p. 291; *People v. Jenkins* (2000) 22 Cal.4th 900, 995.) This Court in *Mar* declined to decide whether, in determining if the use of a stun belt was prejudicial, the *Watson* or *Chapman* standard of harmless error applied. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1225, fn. 7; *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 818, 836.) In any event, under either standard, any error in this case was harmless.

In *Mar*, this Court found the trial court's order that the defendant wear a stun belt was prejudicial, because: (1) the evidence in the case was close; (2) the defendant's demeanor while testifying was crucial because the case turned on the jury's determination of the credibility of the witnesses; and (3) there was an indication in the record that the stun belt might have had some effect on the defendant's demeanor while testifying. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1224-1225.) Jackson's case is distinguishable from *Mar* on each of these points.

Here, there was compelling evidence of Jackson's guilt, and the evidence was not close. Robert Cleveland identified Jackson has the shooter. In the middle of the night, Jackson entered the Cleveland house in an alleged effort to obtain rock cocaine for sale, not personal use. When refused, depending on the version, Jackson either shot Cleveland on the way out the door, or Jackson went to the car he had come in with his "homies." Jackson went back to the door, knocked, and Cleveland let him in for a second time. During this second conversation, after Cleveland had

set his gun on the counter, Jackson pulled out his gun and shot Cleveland in the face. Jackson bragged to different individuals immediately after Monique Cleveland's murder that he had blown her brains out with a gunshot to her face. While there was evidence other individuals were in the Cleveland home with Jackson when he shot Monique Cleveland, there was no evidence that any of these other individuals fired the gunshot that killed Monique Cleveland. Uncontested and overwhelming evidence shows Jackson murdered Monique Cleveland.

The belt did not have an adverse impact on Jackson either physically or psychologically. Initially, the belt caused some discomfort to Jackson, which was allievated. (4 RT 336-339.) Later that same day, the belt was too tight and pursuant to defense counsel's request the belt was adjusted. (4 RT 479-480.) The record is void Jackson had any additional problems or discomfort because of the belt. While defense counsel sought to have the belt removed, it was solely because of physical discomfort to Jackson caused by his inability to comfortably lean back in his chair. The belt was adjusted and a pillow was put behind Jackson's back and this resolved the discomfort. In urging the belt to be removed, neither Jackson nor defense counsel ever stated wearing the belt impacted Jackson psychologically or prevented Jackson from participating in his defense or communicating with his lawyer.

In *Mar*, the defendant expressed on the record numerous times that he was nervous due to the belt, the device made it difficult for him to think clearly and it caused him anxiety. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1210-1213, 1224-1225.) The record in this case is completely void that the belt had any similar type of impact on Jackson.

Since the record is void that the belt had any adverse impact on Jackson, it cannot be said that but for the belt it is reasonably probable Jackson would have had a more favorable outcome. (See *People v.*

Wallace, *supra*, 44 Cal.4th at p. 1051 [because record contained no indication the jurors knew defendant was restrained, that he suffered any psychological affects or that it affected his determination whether to testify, he was not prejudiced].) Moreover, Jackson's argument that he was prejudiced by being restrained in the penalty phase retrial (AOB 74-77) is even more untenable. "The risk of substantial prejudice to a shackled defendant is diminished once his guilt has been determined." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1214.) The penalty phase retrial jury knew Jackson had been convicted of murder and attempted murder. As to both juries, based on the substantial evidence of Jackson's guilt, the lack of prejudice caused by the belt, and the void in the record that the belt adversely impacted Jackson, the error was harmless beyond a reasonable doubt. The judgment should therefore be affirmed.

II. SUFFICIENT EVIDENCE SUPPORTS THE SPECIAL CIRCUMSTANCE FINDING

Jackson claims there is insufficient evidence to support the special circumstance finding because the prosecutor's special instruction and special finding regarding the robbery special circumstance omitted the reference to attempted robbery, and there was insufficient evidence that Jackson actually took any property from the Clevelands. (AOB 78-91.) Jackson's claim is based on a faulty premise – that the jury did not find Jackson committed the crime during an attempted robbery. It was clear from the trial court's instructions, the parties' arguments, and the special finding, that the special finding included that of robbery and attempted robbery. There was sufficient evidence that Jackson attempted to rob the Clevelands. Even if Jackson is correct that the jury did not find the special circumstance that Jackson committed an attempted robbery, there is sufficient evidence of robbery.

The parties proceeded from the beginning of this case until the end under the premise that the special circumstance was that the murder was committed during the commission of attempted robbery or robbery. The jury was told in jury selection that the special circumstance was that the murder was committed while Jackson was engaged in the commission of the crime of attempted robbery or robbery. (4 RT 350, 395, 443, 494.). During opening statement, the prosecutor explained that Jackson went to the Cleveland's home with the intent to take drugs and money, and kill both Clevelands so that there were no witnesses to his crimes. (7 RT 1036-1038.) The information was read to the jury, and explained that Jackson was charged with committing the murder of Monique Cleveland while "engaged in the commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime of robbery." (12 RT 1959.) During closing argument, the prosecutor argued that the motive for the shooting of Robert Cleveland and the murder of Monique Cleveland was to "take dope" and money from the Clevelands. (12 RT 1986-1990.) Defense counsel argued that robbery was not the motive for the shooting, instead that Robert Cleveland set Jackson up because of the drug money Jackson owed him and Jackson was just fortunate enough to get the first shot off. (12 RT 2045-2052.)

The jury was properly instructed pursuant to CALJIC No. 8.21 on felony murder that "[t]he unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of or attempted commission of the crime or as a direct causal result of a robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit a robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." (12 RT 1964-1965; CALJIC No. 8.21; 2 CT 544.)

CALJIC No. 8.21.1 instructed the jury when the robbery "or attempted commission of a robbery" was completed. (12 RT 1965-1966; CALJIC No. 8.21.1; 2 CT 545.) The jury was informed of the elements of robbery (12 RT 1967-1968; CALJIC No. 9.40; 2 CT 552.) All relevant instructions included language that the killing of Monique Cleveland occurred during the commission of attempted robbery or robbery. The jury was also instructed with CALJIC No. 6.00 on attempt, as follows:

> An attempt to commit a crime consists of two elements, namely a specific intent to commit the crime and a direct but ineffectual act done toward its commission. [¶] In determining whether such an act was done it is necessary to distinguish between mere preparation on the one hand and the actual commencement of the doing of the criminal deed on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. [¶] However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicates (*sic*) a certain, unambiguous intent to commit that specific crime. These acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

(12 RT 1963; 2 CT 541.)

The jury was instructed pursuant to CALJIC No. 8.81.17 that "[t]o find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved: Number one, that the murder was committed while the defendant was engaged in the commission or attempted commission of a robbery...." (12 RT 2015; 2 CT 549.)

The prosecutor requested a special instruction explaining to the jury the various verdict forms and clarifying the procedure for making their determinations as follows:

> You are instructed that if you find the defendant, Jonathan Keith Jackson, guilty of murder of the first degree, as charged under count 1 of the information, then you shall also make a finding in one of the following forms as to whether the murder was committed while the defendant, Jonathan Keith Jackson, was engaged in the commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime of robbery, in violation of section 211 of the Penal Code, within the meaning of Penal Code section 190.2, subdivision (a), subsection - - subdivision (17), subsection (i).
>
> We, the jury in the above-entitled action, find that the murder of Monique Cleveland, as charged under count 1 of the information, was committed while the defendant, Jonathan Keith Jackson, was engaged in the commission of the crime of robbery, in violation of section 211 of the Penal Code as alleged in the allegation of special circumstance, within the meaning of Penal Code section 190.2, subdivision (a), subsection — subdivision 17, ... subsection (i), ...
>
> Or: We, the jury in the above-entitled action, find that the murder of Monique Cleveland, as charged under count 1 of the information, was not committed while the defendant, Jonathan Keith Jackson, was engaged in the commission of the crime of robbery in violation of Section 211 of the Penal Code as alleged in the allegation of special circumstance within the meaning of Penal Code section 190.2, subdivision (a), subsection 17, subsection (i).

(12 RT 2069-2070; 2 CT 588; 3 CT 609, 621.)

Of the two choices — whether Jackson did or did not commit the murder during a robbery — the jury found he did. (3 CT 609, 621.)

Although the language of the finding was that Jackson was engaged in the commission of the crime of robbery, the instructions and arguments made it clear that the finding was for that of robbery and attempted robbery. The first paragraph of the instruction explained that the jury must determine "in one of the following forms" whether the murder was committed while Jackson was engaged in the "commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime

of robbery." (2 CT 588.) The two forms that the first paragraph referenced gave two options: that the murder was committed while Jackson was engaged in the commission of robbery or not. The jury was not given an option for attempted robbery. Given that the explanation that the jury must find in one of the forms whether the murder was committed during an attempted robbery or robbery, the only logical conclusion of the jurors would to be to answer "yes" to that question if they indeed found Jackson committed or attempted to commit robbery.

> A verdict should be read in light of the charging instrument and the plea entered by the defendant. *People v. Tilley* (1901) 135 Cal. 61, 72 []; *People v. Mercado* (1922) 59 Cal.App.69, 74 [] .... In addition, the form of the verdict generally is immaterial, so long as the intention of the jury to convict clearly may be seen. [*People v. Tilley*, *supra*, 135 Cal. at p. 62]; ... see also *People v. Jones* (1997) 58 Cal.App.4th 693, 710 [the verdict is to be construed in light of the instruction of the court]; *People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1256; 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Judgment and Attack in Trial Court, § 3052, pp. 3762-3763.)

(*People v. Paul* (1998) 18 Cal.4th 698, 706.)

In addition, "technical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The instructions of the court made clear the special circumstance finding was based on Jackson's commission of robbery or attempted robbery. The issue submitted to the jury was whether Jackson committed robbery or attempted robbery. The verdict form had a technical defect in that the choices it gave the jury were that Jackson committed the murder during the commission of robbery or he did not. Thus, it is clear the jury intended to find the special circumstance true, in that it believed Jackson committed the murder during a robbery or attempted robbery.

Moreover, even if the verdict form was determined to be error, it is harmless. In *People v. Marshall* (1996) 13 Cal.4th 799, 849-852, the defendant was charged with the special circumstance that he committed multiple murders. The trial court refused to submit instructions and to allow the jury to make a finding. Because Penal Code section 190.4 provides that the jury shall make a special finding on the truth of the special circumstances, the trial court erred. (*Id.* at p. 850.) This Court held that it was not a structural defect, however, and was instead subject to harmless error analysis. (*Id.* at p. 851.) In *Marshall*, the trial court's error was harmless. "The factual issue posed by the omitted instruction necessarily was resolved adversely to defendant under other properly given instructions." (*Id.* at p. 852.) As in *People v. Marshall*, here the jury was properly instructed. The defect was in the finding forms. Thus, the error does not rise to the level it did in *Marshall*.

Here, like in *Marshall*, any error was harmless because the jury clearly resolved the factual issues against Jackson. The jury found him guilty of first degree murder on a felony murder theory. The jury was instructed that to find him guilty of first degree murder, it must find that he unlawfully killed a human being during the commission of or attempted commission of robbery. (12 RT 1964-1965; CALJIC No. 8.21; 2 CT 544.) Thus, the jury necessarily must have found Jackson committed or attempted to commit robbery. (See *People v. Hughes* (2002) 27 Cal.4th 287, 368 [jury found special circumstance true for robbery; therefore, inference is that jury must have found defendant guilty on theory of first degree murder based on felony murder committed during commission of robbery].) "There is no doubt that the jury understood that the same elements of [attempted] robbery were applicable to the special circumstance allegation." (*People v. Miranda* (1987) 44 Cal.3d 57, 92 [no prejudice to defendant for failing to instruct on attempted robbery for special circumstances because

the elements of attempted robbery were before the jury under other properly given instructions].)

Moreover, if the jury found Jackson committed robbery, it necessarily must have found all of the elements of attempted robbery. Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear." (*People v. Lindberg* (2008) 45 Cal.4th 1, 24.) "An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) towards its commission." (*Ibid.*) Attempted robbery is a lesser included offense of robbery. (*People v. Webster* (1991) 54 Cal.3d 411, 443.) The robbery necessarily subsumed all the elements of the attempted robbery. "[A]s an abstract proposition, every completed crime necessarily involves an attempt to commit it." (*People v. Vanderbilt* (1926) 199 Cal. 461, 463.) This concept is codified by Penal Code section 1159, which provides, "[t]he jury, or the judge if a jury is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that which he is charged, or of an attempt to commit the offense." Thus, as the jury's finding was that Jackson committed the murder in the course of a robbery, it necessarily found that Jackson attempted to commit a robbery. Common sense and logic dictate such a result. There was sufficient evidence that Jackson committed an attempted robbery. Jackson does not contend otherwise. Instead, he contends the jury only found the special circumstance that he committed the murder while engaged in a completed robbery, and challenges that conviction on the basis that he did not actually succeed in obtaining the victim's property. Such an argument, based on the instructions and jury findings, defies common sense.

Jackson argues, however, that robbery and attempted robbery at not the same crimes. (AOB 80.) In support of his position, he relies on *People*

v. Cooper (1991) 53 Cal.3d 1158, 1164-1165 and *People v. Bigelow* (1984) 37 Cal.3d 731, 754. (AOB 80.) Those cases both discuss when a robbery ends, and do not draw a distinction that is useful in this context. While Jackson is correct that robbery and attempted robbery are different crimes, an attempted robbery is necessarily included in a robbery, and if successful, an attempted robbery becomes a robbery. When the robbery ends does not change that analysis.

Even if this Court were to find that the jury's finding was that Jackson only committed the murder while engaged in a robbery, the evidence was sufficient. The law governing "sufficiency of the evidence" claims is well established, and applies to special circumstance findings as well as guilty verdicts. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.) When reviewing a claim of insufficient evidence, this Court, like all appellate courts, must view the evidence in the light most favorable to the judgment of conviction and presume in support of that judgment the existence of every fact the jury could have reasonably deduced from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) The oft-repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it. When two or more inferences are reasonably deducible from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. It is of no consequence that the reviewing court, believing other evidence, or drawing different inferences, might have reached a conclusion contrary to the one reached by the trier of fact. (*Ibid.*)

To the extent the prosecution relied upon circumstantial evidence, the standard of review is the same. (*People v. Bean* (1988) 46 Cal.3d 919, 932;

People v. Towler (1982) 31 Cal.3d 105, 118.) Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, "it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean*, *supra*, 46 Cal.3d at pp. 932-933.) Indeed, if the circumstances reasonably justify the trier of fact's findings, "'the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*Id.*, at p. 933, quoting *People v. Hillery* (1965) 62 Cal.2d 692, 702.)

The standard of review mandated by the federal Constitution is the same as the state standard articulated above. That is, the critical inquiry is to determine whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. The reviewing court does not determine whether it believes that the evidence at trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

Here, there was evidence that Jackson took money and drugs in connection with shooting the Clevelands. Jackson's intent was clear; in the middle of the night he went to steal drugs and money from Robert Cleveland. Prior to executing Monique, Jackson demanded to know where the money was located. After Jackson shot Cleveland, he or one of his homies wanted to know where the "dope" was and Robert pointed to the recessed lighting in the kitchen. Jackson or one of his homies searched the recessed lighting area knocking down the light cover in the process. Later, Donald Profit saw Jackson with eight ounces of rock cocaine. While Profit

was unclear of the exact timing of when he saw Jackson with the eight ounces of rock cocaine, the jury was entitled to credit his testimony that it was after the shooting of Monique Cleveland and not before at the barbeque when Jackson was released from the hospital. Moreover, Jackson told Profit that he took drugs from Cleveland while at the house during the shooting and murder. Contrary to Jackson's current urging, a reviewing court neither reweighs evidence nor reevaluates a witness's credibility. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

There is sufficient evidence to support the jury finding a completed robbery. Therefore the felony-murder judgment and the murder-robbery special circumstance true finding should be affirmed.

III. THE TRIAL COURT PROPERLY READ THE PENALTY PHASE RETRIAL JURY THE VERDICTS, INCLUDING THE TRUE FINDING THAT JACKSON PERSONALLY USED A FIREARM IN THE MURDER OF MONIQUE CLEVELAND

Jackson claims the trial court committed reversible error when it read to the penalty phase retrial jury the guilt phase verdict forms and findings without sua sponte instructing as to the meaning of "personal use" of a firearm, as defined in CALJIC No. 17.19. Isolating the "intent to kill" language from CALJIC Nos. 8.27 (aiding and abetting first degree felony-murder) and 8.80.1 (first degree murder – special circumstances), Jackson argues it was constitutional error to read the verdicts and findings to the jury without also reading CALJIC No. 17.19. CALJIC No. 17.19 would have informed the penalty phase retrial jury that personally used a firearm encompasses displaying a firearm in a menacing manner, intentionally firing it, or intentionally striking or hitting someone with it. Jackson contends the absence of CALJIC No. 17.19 misinformed the penalty phase retrial jury that the guilty phase jury had found Jackson personally fired the shot that killed Monique Cleveland when it could have found Jackson

guilty of first degree murder on a theory of aider and abettor liability. (AOB 92-116.) The penalty phase retrial jury was not determining the truth of the personal use of a firearm sentencing enhancement. Rather, that jury was determining the appropriate penalty to impose for the murder and special circumstance verdicts based on the aggravating and mitigating evidence presented. Accordingly, the trial court properly read the guilt phase verdicts and findings to the penalty phase retrial jury, and was not obligated to sua sponte instruct the jury with CALJIC No. 17.19.

At no time did Jackson request the trial court instruct the penalty phase retrial jury with CALJIC No. 17.19. Penal Code section 1093, subdivision (f), provides, in relevant part, "[t]he judge may ... charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; ...." The failure to request an instruction or clarification of the instructions given ordinarily constitutes a forfeiture of the right to challenge the trial court's charge. (*People v. Cox*, *supra*, 53 Cal.3d at p. 669.) Here, because there was no abridgement of a substantial right, Jackson has forfeited this claim. (*People v. Burney* (2009) 47 Cal.4th 203, 265-266.) Moreover, CALJIC No. 17.19 was not mandated because the penalty phase retrial jury was determining the appropriate penalty for Jackson, not whether he personally used a firearm as a sentence enhancement.

Even if the claim is considered, it is without merit. CALJIC No. 17.19 defines "personally used a firearm" as having "intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it." (2 CT 573; see Pen. Code, § 1203.06.) It is clear the prosecution's theory of the case in the guilt phase, penalty phase and penalty phase retrial was that Jackson fired the shot that killed Monique Cleveland. There was no evidence introduced that Jackson displayed a firearm in a menacing manner or struck someone with

a firearm. Instead, the only evidence heard by the penalty phase retrial jury was that Jackson intentionally fired a gun when he shot Robert Cleveland and when Jackson fired the weapon that killed Monique Cleveland.

At the commencement of the penalty phase retrial, the trial court read the guilt-phase verdicts and findings to the jury. (24 RT 3672-3673.) Evidence regarding Jackson's guilt of the underlying crimes was presented. This included the testimony of Kevin Jackson who described Jackson telling, and demonstrating, how he killed Monique Cleveland. (25 RT 3953, 3957-3959, 3979-3980; 26 RT 3990.) Jackson told of getting a .357 handgun from his "homie" and using it to shoot Monique. (26 RT 3980.) Jackson described how he held Monique's hair in his hand as he shot her in the head. Jackson demonstrated the killing by showing how he pointed the gun downward in his right hand, held Monique's hair with his left hand, and turned his head away as he fired the gunshot that killed her. (25 RT 3979-3980.) Jackson thought both Robert and Monique Cleveland were dead when he left their mobile home. (26 RT 3981.)

In an apparent attempt to show Jackson did not personally use a firearm, on appeal Jackson attempts to pick apart Kevin Jackson's testimony to discredit and discount it. (AOB 105-109.) However, it was the penalty phase retrial jury who observed Kevin Jackson and heard his testimony that was entitled to credit or discredit the witness. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1129.) In addition, Jackson selects portions of the expert witnesses' testimony in an attempt to discredit Kevin Jackson's testimony, and attempt to show Jackson did not fire the shot that killed Monique Cleveland. (AOB 108-112.) Such parsing of the evidence to impugn the credibility of a witness is not appropriate on appellate review.

Jackson's reliance on federal statute 18 U.S.C. § 924(c)(1), and the cases of *People v. Wims* (1995) 10 Cal.4th 293, overruled by *People v.*

Sengpadychith (2001) 26 Cal.4th 316, and *People v. Johnson* (1995) 38 Cal.App.4th 1315 (AOB 98-101), is misplaced. The statute and cases address a jury actually making a finding as to a penalty enhancement for personal use of a firearm. That liability had been already determined by the guilt phase jury, so these cases and the statute are inapplicable. The penalty phase retrial jury was not charged with determining the truthfulness of a sentencing enhancement. Therefore, the statute is not analogous and the cases are not applicable to the situation in this case.

The trial court had no sua sponte duty to instruct the penalty phase retrial jury with CALJIC No. 17.19. Moreover, the trial court properly read to the penalty phase retrial jury the verdicts and findings rendered by the guilt phase jury. Therefore, the claim should be denied.

Assuming arguendo the trial court should have instructed the penalty phase retrial jury with CALJIC No. 17.19, its omission was harmless. As to Jackson's claim the trial court had a sua sponte duty to instruct the jury with the definition of personal use of a firearm so that the penalty phase retrial jury would understand the guilt phase jury's finding, this is, at most, a state law error subject to the *Watson* error analysis. However, Jackson also advocates the failure to instruct sua sponte with CALJIC No. 17.19 caused the penalty phase retrial jury to be misled as to his culpability in the killing of Monique Cleveland. As such it would be a state law error that infringed on his constitutional rights and reviewed as whether there is a "reasonable possibility" that Jackson would have obtained a more favorable result in the absence of the error. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448; *People v. Mickey* (1991) 54 Cal.3d 612; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 ["reasonable possibility" standard same test in substance and effect to "reasonable doubt" standard articulated in *Chapman v. California, supra*, 386 U.S. at p. 24, overruled on other grounds by

People v. Yeoman (2003) 31 Cal.4th 93, 117.) Here regardless of the standard utilized, the error was harmless.

The penalty phase retrial jury heard evidence that Jackson was the actual shooter who killed Monique Cleveland. While Jackson's counsel vigorously cross-examined the prosecution witnesses, there was no evidence presented to counter the fact Jackson fired the gunshot that killed Monique Cleveland. Since there was no contrary evidence for the jury to consider, the penalty phase retrial jury could rightfully believe and consider Jackson was the actual killer of Monique Cleveland. As the jury heard the evidence regarding Jackson's culpability, it could not have been misled to the extent of his culpability.

Citing the prior penalty phase jury's question regarding the use of lingering doubt, subsequent instruction on lingering doubt given to that jury in response to its question, and speculating this lingering doubt instruction somehow caused that jury to hang, Jackson claims the failure to instruct on CALJIC No. 17.19, defining personal use of a firearm, prevented the penalty phase retrial jury from considering lingering doubt. (AOB 115-116.) This is nothing more than sheer speculation on Jackson's part as to what caused the penalty phase jury to hang. Here, as previously, the penalty phase retrial jury heard defense counsel's argument regarding lingering doubt. (31 RT 4784-4791.) Essentially in making this appellate argument, Jackson reiterates the lingering doubt argument defense counsel made to the penalty phase retrial jury. That jury was free to, and did, reject the lingering doubt argument. The rejection was not because there was no instruction defining personal use of a firearm. Instead it was due to the overwhelming evidence that showed Jackson intentionally fired a gun shooting both Robert and Monique Cleveland. The omission of CALJIC No. 17.19 from the penalty phase retrial was harmless beyond a reasonable doubt. (*People v. Griffin* (2004) 33 Cal.4th 536, 589.)

IV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY A COMMENT IN THE PENALTY PHASE RETRIAL VOIR DIRE THAT JACKSON WAS FOUND GUILTY OF MURDER

Jackson claims reversible constitutional error because during the penalty phase retrial voir dire the prosecutor stated to a panel that included three jurors that Jackson had been found guilty of having murdered Monique Cleveland "himself." Jackson contends this was improper voir dire, an intentionally false "statement of fact not in evidence," and that it was deceptive and reprehensible. Jackson alleges it was also a Sixth Amendment violation because the prosecutor's statement rendered her an unsworn witness beyond the reach of cross-examination so as to violate Jackson's right to confrontation. Also, Jackson claims the trial court "ratif[ied] the prosecutor's misrepresentation" by overruling defense counsel's objection. (AOB 117-152.) The isolated comment by the prosecutor during voir dire to a panel with only three jurors present was consistent with the guilt phase jury's verdicts and findings. No misconduct occurred.

In an attempt to show the comment violated his federal constitutional due process rights, Jackson cites six other statements by the prosecutor he claims were a "pattern of misconduct." (AOB 135-140.) Jackson forfeited any claim of misconduct as to these "six other examples" because he failed to object or seek a curative admonition. (*People v. Turner* (2004) 34 Cal.4th 406, 430, citing *People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) As to the comment in voir dire that is the subject of this claim, while defense counsel objected to the comment as improper voir dire, he did not object on the grounds now asserted by Jackson. A defendant cannot complain on appeal of prosecutorial error unless he made an assignment of error on the same ground in a timely fashion in the trial court. (*People v. Stanley* (2006) 39 Cal.4th 913, 952; *People v. Jones* (2003) 29 Cal.4th

1229, 1262.) Moreover, Jackson made no request for any admonition to the jury regarding the comment. In addition to a timely specific objection on the same grounds in trial as appeal, a defendant must also request the jury be admonished to disregard the impropriety. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 952; *People v. Jones*, *supra*, 29 Cal.4th at p. 1262.) Accordingly, Jackson has forfeited this claim by failing to object on the ground of misconduct at trial. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 952; *People v. Cook* (2006) 39 Cal.4th 566, 607; *People v. Crew* (2003) 31 Cal.4th 822, 839.)

Even if the claim is considered, it is without merit. Prosecutorial misconduct implies the use of deception or reprehensible methods to persuade the court or jury. (*People v. Jones* (1997) 15 Cal.4th 119, 187.) "'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the *federal* Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; see *People v. Cash* (2002) 28 Cal.4th 703, 733 [122 Cal.Rptr.2d 545, 50 P.3d 332].) Under *state law*, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.]'" (*People v. Salcido* (2008) 44 Cal.4th 93, 152, italics in original, quoting *People v. Cook*, *supra*, 39 Cal.4th at p. 606.)

A reviewing court considers whether there is a reasonable likelihood the jury construed or applied any of a prosecutor's improper remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 284.) Reversal of a judgment of conviction based on prosecutorial misconduct is called for only when, after reviewing the totality of the evidence, a reviewing court can determine it is reasonably probable that a result more

favorable to the defendant would have occurred absent the misconduct. (*People v. Bell* (1989) 49 Cal.3d 502, 534; *People v. Beivelman* (1968) 70 Cal.2d 60, 75; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Here the prosecutor's remark was not improper and did not constitute misconduct. During general voir dire with Jurors Nos. 2, 3, and 8 present (22 RT 3230-3231, 3239),[13] the prosecutor said, in part, Jackson sat before the prospective jurors "convicted of taking the life of another human being himself. That is a verdict that was rendered by a jury, and you must accept it as true." (22 RT 3289.) Defense counsel objected as improper voir dire, and the trial court noted the objection and overruled it. (22 RT 3289.) The prosecutor continued, "That murder occurred, as found by the jury, during the course of a robbery, and the defendant was found to have used a gun. [¶] Now, there will be some evidence of that crime presented in this courtroom; however, I do not have to prove that crime beyond a reasonable doubt anymore, because that has been done and decided upon. [¶] Anyone here have a problem with that, sitting in judgment on the life or death of a person when another jury already made the decision that he is guilty of that crime? Anybody have any reservations about that?" (22 RT 3289.)

The prosecutor's statement was an accurate, factual portrayal of the guilt phase evidence and guilt phase jury's verdicts and findings. The prosecutor was not attempting to precondition the prospective jurors, improperly influence them or sneak in information outside the record. Throughout, it was the prosecution's position the evidence showed Jackson fired the gun that killed Monique Cleveland. The evidence presented in the guilt and penalty phases supported this position. (See, *e.g.*, 26 RT 3979-3981.) The guilt phase jury made a true finding that Jackson personally used a firearm in the commission of the murder of Monique Cleveland.

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[13] Alternate Juror No. 2 was also present. (22 RT 3237.)

The jury was instructed that there were three ways a person could be found to have personally used a firearm, namely intentionally, (1) fired it, (2) displayed it in a menacing manner, or (3) hit a person with it. (2 CT 573; CALJIC No. 17.19; Pen. Code, § 1203.06.) In this case, there was no evidence that Jackson displayed a firearm in a menacing manner or struck someone with a firearm. The only evidence presented to the guilt phase jury, and subsequently the penalty phase retrial jury, was that Jackson intentionally fired a gun and the shot killed Monique Cleveland.

The crux of the prosecutor's inquiry of the prospective jurors in the penalty phase retrial was merely to weed out individuals who could not accept the verdicts as rendered and then base a sentencing decision on them. The brief comment complained about by Jackson came at the beginning of the prosecutor's voir dire of that panel. (22 RT 3288-3309.) The prosecutor's comment during voir dire was neither deceptive nor reprehensible and did not amount to misconduct. Nor did it infect the penalty phase retrial with unfairness.

Moreover, Jackson's attempt to show a federal constitutional violation fails on all fronts. Jackson claims the prosecutor became an unsworn witness by making the statement, and he was therefore denied his Sixth Amendment right to confrontation. Jackson also claims this infringed upon his Eighth Amendment right to a fair penalty phase determination. (AOB 135.) This position ignores the reality of litigation. The jury was expressly instructed that the lawyers' statements were not evidence. (31 RT 4705; CALJIC No. 1.02.) The prosecutor was entitled to learn whether prospective jurors could accept that another jury had already determined that Jackson was guilty of the first degree murder of Monique Cleveland, that the murder was committed during the commission or attempted commission of robbery, and that Jackson personally used a firearm in the commission of the murder. As such, the statement was a fair comment on

the verdicts and findings rendered by the guilt phase jury. There is simply no way the penalty phase retrial jury misunderstood or mistook the prosecutor's comment to be evidence from an unsworn witness, or construed it "in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Jackson's attempt to equate the prosecutor's brief comment to the situation that occurred in the case of *Miller v. Pate* (1974) 386 U.S. 1 [87 S.Ct. 785, 17 L.Ed.2d 690], is grossly misplaced. That case involved the death of an eight-year-old girl who died as a result of a sexual attack, and Miller was charged with her murder. Central to the prosecution's case was a "pair of men's underwear shorts covered with a large, dark, reddish-brown stains." (*Id.* at p. 3.) In *Miller*, the prosecutor repeatedly described the shorts as "bloody shorts" when the prosecutor knew the stains were paint. (*Id.* at pp. 3-6.) This case is nothing like the dramatic false representation that occurred in *Miller*. Here, it was a brief comment during voir dire with only a few jurors present. Moreover, the penalty phase retrial jury heard fairly presented accurate evidence that substantiated the prosecutor's comment.

Assuming arguendo the comment was improper, it was harmless. Read in context, the comment was not as characterized by Jackson an intentional misrepresentation of fact that was reprehensible and deceptive. The prosecutor expanded upon her comment explicitly stating that the guilt phase jury found Jackson guilty of the first degree murder of Monique Cleveland, the murder occurred during a robbery, and Jackson personally used a firearm in the commission of the murder. (22 RT 3289-3309.) Thereafter, the prosecution presented evidence that supported the guilt phase jury's verdicts and findings. Specifically, the penalty phase retrial jury heard evidence that Jackson obtained a .357 magnum from one of his "homies" and he shot Monique Cleveland in the head while holding her

head up by her hair. The totality of the guilt phase and penalty phase retrial evidence shows that it is not reasonably probable that a result more favorable to Jackson would have occurred absent the prosecutor's comment that Jackson had been convicted of taking the life of another human being himself. Even assuming arguendo the constitutional violation as alleged by Jackson occurred, the evidence supports the prosecutor's comment. (See *People v. Brown* (2003) 31 Cal.4th 518, 553-554 [a reviewing court does "not 'lightly infer' that the jury drew the most damaging, rather than the least damaging meaning" of a prosecutor's allegedly improper statement which was "brief and fleeting"].) Therefore, any error was harmless beyond a reasonable doubt.

V. THE PROSECUTOR, IN QUESTIONING A WITNESS ABOUT WHAT WAS SAID DURING AN INTERVIEW WITH DEFENSE COUNSEL, DID NOT IMPUGN COUNSEL'S INTEGRITY, AND THE TRIAL COURT PROPERLY DENIED THE MISTRIAL MOTION BASED ON THE QUESTIONING

Jackson claims the prosecutor committed misconduct in questioning Kevin Jackson on redirect examination during the penalty phase retrial about his interview with defense counsel. Jackson alleges the prosecutor attempted to portray defense counsel as dishonest in questioning Kevin Jackson during a pretrial interview with defense counsel. Jackson asserts this conduct unfairly "fortified the otherwise-shaky credibility of Kevin Jackson." Jackson contends that the trial court abused its discretion in denying his request for a mistrial based on the prosecutor's questions. Jackson asserts his constitutional rights were violated by both the prosecutor's questions and the trial court's denial of his mistrial motion. (AOB 152-168.) The prosecutor did not commit misconduct in questioning Kevin Jackson, and the trial court properly exercised its discretion in denying the mistrial motion.

On Wednesday, November 10, 1999, Kevin Jackson testified during the penalty phase retrial and on direct examination described how he and Robert Cleveland were business partners because Cleveland sold rock cocaine and Kevin Jackson purchased rock cocaine from him. (26 RT 3964-3968.) Kevin Jackson spoke with Jackson shortly after the shooting and Jackson described how he shot Robert and killed Monique. (26 RT 3976-3981.)

On cross-examination, defense counsel diligently tried to portray Kevin Jackson as mistaken and untruthful in his testimony. In that endeavor, defense counsel insinuated that the district attorney's office generally, and the prosecutor specifically, had provided Kevin Jackson with favorable treatment in an effort to obtain testimony positive to the prosecution. (26 RT 3992-3999, 4005, 4026.) In response to defense counsel's attempt to impeach him with his prior guilt phase testimony, Kevin Jackson explained to defense counsel, "I was allowing you to put words in my mouth then." (26 RT 4026.) At the end of cross-examination, Kevin Jackson responded, "No" to defense counsel's question "Did the district attorney put any words into your mouth?" (26 RT 4026.)

On redirect examination, the prosecutor asked Kevin Jackson if in a November 6, 1999 interview with defense counsel, counsel had said anything to him "to try and influence your testimony here?" Kevin Jackson said defense counsel "just asked me a few questions about testimony I give (*sic*) today." The prosecutor followed up "I'm not asking you what he said. I'm just asking you if you felt he was trying to influence your testimony." Kevin Jackson answered in the affirmative. When asked if defense counsel succeeded in influencing his testimony, Kevin Jackson said, "No." (26 RT 4028.)

On recross-examination, defense counsel continued this line of questioning. He asked Kevin Jackson what had been said "to try to

influence your testimony?" Kevin Jackson responded, "You asked me if — if I say (*sic*) anything nice about Jonathan would the D.A. pull back the deal that they have for me. And you asked me was there anything nice that I could say about Jonathan. You told me that — that Jonathan's co-defendant had confessed to the murder but the D.A. just wanted to put Jonathan away for the murder." (26 RT 4029.) Kevin Jackson confirmed that defense counsel had asked if Kevin Jackson was "concerned that it might affect your deal with the district attorney" if Kevin Jackson changed his testimony. Defense counsel asked if Kevin Jackson believed he was putting words into his mouth that day, and Kevin Jackson said, "No." Next, when asked whether there was any other way "[defense counsel] tried to influence [his] testimony?" Kevin Jackson responded, "Not that [he] could remember." (26 RT 4029-4030.)

On further redirect examination, the prosecutor confirmed that defense counsel had told Kevin Jackson that someone other than Jackson had confessed to the murder. When asked whether he had any way of knowing if it was a lie that someone other than the defendant had confessed to Monique's murder, Kevin Jackson said no. Next the prosecutor asked if he thought the comment was intended to influence his testimony against Jackson, and Kevin Jackson said yes. Kevin Jackson also answered affirmatively to the prosecutor's question whether he believed defense counsel telling him Jackson was facing the death penalty was an effort to influence him against testifying at the penalty phase retrial. (26 RT 4030.)

On further recross-examination, defense counsel asked if Kevin Jackson believed counsel was trying to stop him from testifying, and Kevin Jackson answered, "I don't want to say stop me from testifying." (26 RT 4030.) After confirming that Kevin Jackson had previously testified, defense counsel asked, "And are you saying that now I was trying to get you to not say those things that you had said prior?" Kevin Jackson

responded, "I believe you was (*sic*) trying to get me to try to change my story a little bit." When asked to be specific, Kevin Jackson could not provide anything specific. Defense counsel attempted to clarify that he had asked Kevin Jackson "whether or not you knew positive things about Jonathan. Right?" Kevin Jackson disagreed and said, "No. You asked me did — was there anything good I could say about Jonathan." Defense counsel reiterated, "I did ask you, are there good things you know about Jonathan?" and Kevin Jackson confirmed this. Defense counsel then asked, "Your answer was yeah, you know good things about Jonathan?" Kevin Jackson responded, "My answer was no." (26 RT 4031.) Kevin Jackson was then excused. (26 RT 4031.)

After the jury heard brief testimony from another witness and was dismissed for lunch, defense counsel moved for a mistrial based on the prosecutor's redirect-examination of Kevin Jackson. Defense counsel argued that his credibility and character had been impugned by the questioning. Defense counsel explained many aspects of his interview with Kevin Jackson. (26 RT 4051-4055.) However, absent from defense counsel's description was any mention of him telling Kevin Jackson that someone else had confessed to killing Monique Cleveland. In opposing the mistrial motion, the prosecutor reiterated the longstanding rule that what attorneys say was not evidence and that the credibility of defense counsel was never at issue. She was attempting to correct the insinuation left by defense counsel's questions that there was a relationship between Kevin Jackson and the district attorney's office. Moreover, the questioning brought out truthful information that defense counsel had in the recent meeting with Kevin Jackson lied to him and told him that someone other than Jackson had confessed to the murder of Monique Cleveland. (26 RT 4055-4058.) The trial court again heard argument from defense counsel

who reiterated that the prosecutor's tactic was a "personal credibility attack on the defense lawyer." (26 RT 4058-4059.)

Here the trial court properly exercised its discretion in denying the mistrial motion. The trial court found the prosecution's inquiry about defense counsel's recent conversation with Kevin Jackson was relevant. The trial court found, "That the motivation for the questioning of the witness was raised by the prosecution, that is something that it is a legitimate area of inquiry to determine whether there has been an attempt to or any success in changing any of the testimony of a witness by virtue of a visit to the prosecution witness in jail." (26 RT 4060.) The trial court found that the character, ethics, and credibility of defense counsel had not been impugned. (26 RT 4060.) The trial court refused to grant a mistrial "simply because the question was raised whether there was any attempt to change his testimony." (26 RT 4061.)

The trial court stated that if defense counsel felt his credibility was in any way impugned, the trial court was willing to instruct the jury that the credibility "of counsel for either side was not an issue, that counsel have a duty to represent their respective positions to the best of their ability and in any manner ethically proper for them to do, that there has been, in the opinion of the Court, no indication of any improper tactic or activity on the part of either counsel, and it shall not and must not enter into their deliberations by reason of questions which have been asked which the — the answers to which have indicated that there has been no activity of that nature which has occurred." (26 RT 4061.)

The trial court reiterated that it was a proper curative instruction, not that one was required. The trial court went on to state, "But if counsel feels that there is a necessity for it by reason of the questions and the state of the record, simply to assure the defendant's rights so that there can be no lingering doubt in the mind of the jury as to the propriety of counsel's

further inquiring as to the totality of the testimony of a prosecution witness which was completely within his rights and perhaps duty should not enter into their deliberations — that subject should not enter into their deliberations in any way, I'm certainly willing to do so." (26 RT 4061.)

The trial court asked defense counsel if he wished "any curative instruction regarding counsel's credibility and character and ethicality." (26 RT 4061-4062.) Defense counsel asked the trial court not to provide any curative instruction at that time. (26 RT 4062.) No admonishment or curative instruction was requested by defense counsel, and none was given.

Jackson did not interpose a timely objection to the prosecutor's line of questioning Kevin Jackson regarding defense counsel's interview, and did not request an admonition. "In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328; *People v. Earp* (1999) 20 Cal.4th 826, 858.) This claim is therefore forfeited. (*People v. Prince* (2007) 40 Cal.4th 1179, 1275.)

Even if the merits of the claim are examined, there was no misconduct. The prosecutor's questions sought evidence to rebut the insinuation of defense counsel that the district attorney's office and the prosecutor had coached Kevin Jackson into providing false testimony. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gray* (2005) 37 Cal.4th 168, 215; *Darden v. Wainwright*, *supra*, 477 U.S. at p. 181 ; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) "'Although it is misconduct for a prosecutor intentionally to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.'" (*People v. Chatman* (2006)

38 Cal.4th 344, 379-380.) "Personal attacks on opposing counsel are improper and irrelevant to the issues." (*People v. Sandoval* (1992) 4 Cal.4th 155, 183-184.) A prosecutor may ask a witness questions which are based on the evidence or reasonable interpretations which may be drawn from the evidence. (*People v. Stewart* (2004) 33 RT 425, 491-492.) Here, "[t]he prosecutor did not engage in such forbidden tactics as accusing defense counsel of fabricating a defense or factually deceiving the jury." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Kevin Jackson was a prosecution witness who provided damning testimony against Jackson. Since Jackson bragged to him that he had shot Robert Cleveland and described in detail how Jackson had killed Monique Cleveland, the defense attempted to discredit Kevin Jackson and his testimony in the eyes of the jury. The challenged questioning merely made the jury aware that Kevin Jackson believed defense counsel sought to influence his testimony in the penalty phase retrial based on their conversation that had occurred days prior to his testimony.[14] It occurred only after defense counsel had inferred through his cross-examination of Kevin Jackson that his testimony was a story influenced, if not contrived by the district attorney's office and the prosecutor. (26 RT 3992-3996, 4026, 4055-4057.)

The prosecutor's questions were designed, and likely were interpreted by the jury, to bolster the credibility of Kevin Jackson in light of the

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[14] While Jackson says the challenged questioning pertained to a pretrial interview by defense counsel (AOB 152-153, citing 26 RT 4005), the record shows this is inaccurate. The record makes clear that Kevin Jackson felt defense counsel attempted to influence his penalty phase retrial testimony in an interview that occurred days before he testified. (26 RT 4028-4031.)

obvious defense effort to damage his credibility. The questions were not to suggest that defense counsel would seek to deceive the jury. (See *People v. Cummings*, *supra*, 4 Cal.4th at p. 1302.) Rather, the prosecutor was challenging the defense effort to discredit Kevin Jackson, not defense counsel's integrity. Accordingly, no misconduct occurred.

Jackson claims the trial court abused its discretion in denying his mistrial motion because the alleged misconduct was prejudicial. (AOB 164-168.) It was a proper exercise of the trial court's discretion to deny the defense motion for mistrial because there was no prosecutorial misconduct.

This Court reviews a ruling on a motion for mistrial for an abuse of discretion. (*People v. Ayala*, *supra*, 23 Cal.4th at p. 282.) A motion for mistrial should be granted when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Avila* (2006) 38 Cal.4th 491, 573; *People v. Ayala*, *supra*, 23 Cal.4th at p. 282.) As shown, there was no irreparable damage and Jackson received a fair trial.

The trial court properly exercised its discretion in denying the mistrial motion. It correctly found that the questioning by both sides was nothing more than good advocacy by diligent lawyers acting within the appropriate ethical boundaries to obtain evidence.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMISSION IN THE PENALTY-PHASE RETRIAL OF JACKSON'S THREAT TO OFFICER AOKI

Jackson claims the trial court committed reversible error because the penalty phase retrial jury was allowed to hear from Los Angeles Police Department Officer Damon Aoki regarding a statement Jackson made to the officer. When handcuffed at the police station, Jackson told Officer Aoki that Jackson would have shot the officer and his partner if he had gun when confronted by them. Jackson contends his statement was not

admissible as aggravating evidence under Penal Code section 190.3. (AOB 169-175.) Jackson's statement to Officer Aoki demonstrated his state of mind when he murdered Monique Cleveland, and a consciousness of his guilt for that crime. Accordingly, Jackson's statement to Officer Aoki was properly admitted.

In the penalty phase, Penal Code section 190.3 "permits introduction of evidence *relevant* to aggravation, mitigation and sentencing." (*People v. Boyd* (1985) 38 Cal.3d 762, 772, emphasis in original.) The factors listed in Penal Code section 190.3 provide relevant criteria for the trier of fact to consider in making its penalty determination. "The prosecution may only present aggravating evidence that relates to statutory factors enumerated in section 190.3." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 92, citing *People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-776.) Under factor (a), the trier of fact shall take into consideration, "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232 ["factor (a) of section 190.3 allows the sentencer to evaluate all aggravating and mitigating aspects of the capital crime itself."].) Under factor (a)'s "circumstances of the crime" the jury may consider a defendant's culpable state of mind. (*People v. Dykes* (2009) 46 Cal.4th 731, 802, fn. 18.) Here, the evidence of Jackson's statement to Officer Aoki was properly admitted under factor (a) because the statement was circumstantial evidence which confirmed that Jackson's motive for killing Monique Cleveland was to eliminate her as a witness and showed his consciousness of guilt.

Jackson murdered Monique Cleveland on June 15, 1996, in her home in Riverside County. Jackson believed he had killed her and her husband, Robert Cleveland. (9 RT 1517-1518; 26 RT 3981.) A little over a month later, on July 25, 1996, Los Angeles Police Officer Damon Aoki was in

uniform performing gang-suppression work on the streets of Los Angeles. (9 RT 1449.) Officer Aoki came upon members of the Eight Trey Gangsta Crips who were drinking in public. The officer intended to cite and release them provided they possessed a valid California or another type of identification and had no warrants. When asked to identify himself, Jackson told the officer his name was Kevin Mays and that he had a valid California identification, apparently under that name. When the officer called in that name with the birthdate Jackson provided, there was no matching identification found. Unable to confirm his identity, Officer Aoki took Jackson into custody and transported him to the 77th Street Station. (9 RT 1452-1456.)

At the police station, Jackson told the officer he had not been truthful and said his name was really Antoine Jackson and that he had a valid identification. Jackson also told the officer he had a juvenile arrest for fighting with police. The officer ran the name Antoine Jackson with the birthdate provided by Jackson. Again no record was on file for that name and birthdate. The officer told Jackson there was no match for the name and birthdate he provided. Officer Aoki took Jackson to Parker Center and fingerprinted Jackson to learn Jackson's identity. (9 RT 1456-1457.)

The prosecution sought to have Jackson's statement to Officer Aoki admitted to show lack of remorse for killing Monique Cleveland. (3 CT 625-628.) Jackson moved to exclude it. (3 CT 629, 645-640.) The trial court held a *Phillips*[15] hearing to determine whether the statement was

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[15] *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 55 ["in many cases it may be advisible for the trial court to conduct a preliminary inquiry before penalty phase to determine whether there is substantial evidence to prove each element" of other violent crimes the prosecution intends to introduce in aggravation under Penal Code section 190.3, factor (b)].

admissible as aggravating evidence. (9 RT 1437-1446.) Jackson was handcuffed and in the police station when Officer Aoki informed him that they had learned Jackson's true identity and there was a felony warrant for his arrest. (9 RT 1440-1441.) Jackson told Officer Aoki that if he had a gun when approached by the officers on the street, he would have had to shoot the officers because he had two strikes. (9 RT 1442.) The trial court found Officer Aoki's testimony sufficiently credible to allow the matter to go to the jury to decide, however, the trial court initially excluded Jackson's statement because the prosecutor's theory of admissibility was to show Jackson's lack of remorse, which was not admissible under Penal Code section 190.3 and caselaw. The trial court's ruling was without prejudice. (14 RT 2129-2130.)

At the penalty phase retrial, the prosecution again sought to admit Jackson's statement into evidence. Jackson reasserted his motion to exclude his statement to Officer Aoki. (24 RT 3617.) The trial court read the briefing and heard argument. (24 RT 3617-3626.) The penalty phase retrial court found the statement was admissible under *People v. Washington* [16] because it showed Jackson's consciousness of guilt, his lack of remorse and was indicative of Jackson's state of mind during the murder of Monique Cleveland. (24 RT 3626.)

While the statement was not admissible to show lack of remorse (*People v. Bonilla* (2007) 41 Cal.4th 313, 356), the penalty phase retrial court was correct that the statement was admissible to show Jackson's state of mind and consciousness of guilt for the murder of Monique Cleveland. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1009-1010; *People v. Gurule* (2002) 28 Cal.4th 557, 65.) Jackson's statement to Officer Aoki

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[16] *People v. Washington* (1969) 71 Cal.2d 1061, overruled on other grounds, *People v. Green* (1980) 27 Cal.3d 1, 33 fn. 16.

showed his consciousness of guilt in that he knew he would be going to prison for a long time based on his robbery and murder of Monique, and his belief that he murdered Cleveland. In addition, it showed that he would shoot at police officers to avoid going back to prison. This is circumstantial evidence of Jackson's state of mind when he shot Monique Cleveland. It reflects Jacksons's intent to eliminate a witness in order to avoid returning to prison after having, Jackson believed, killed her husband. As a circumstance of the crime the penalty phase jury was entitled to learn of the extraordinary measure Jackson would go to in an effort to avoid going back to prison. Accordingly, Jackson's statement to Officer Aoki was relevant and admissible under factor (a).

Jackson argues the admission of the statement amounted to constitutional error because the statement was not relevant. (AOB 173-175.) The crux of Jackson's prejudice argument is that the statement was not admissible to show lack of remorse. Although the trial court mentioned this as a basis for admitting the statement, it also cited the evidence was relevant to show Jackson's state of mind and his consciousness of guilt. The trial court's decision is upheld if it was correct on any ground. (*People v. Horning* (2004) 34 Cal.4th 871, 898; *People v. Zapien* (1993) 4 Cal.4th 929, 976 ["a ruling or decision, itself correct in law will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case it must be sustained regardless of the considerations which may have moved the trial court to its conclusion"].) Moreover, the "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*People v. Brown*, *supra*, 31 Cal.4th at pp. 545, 538, fn. 6.)

The admission of Jackson's statement to Officer Aoki was not prejudicial. The circumstances of the crime evidence heard by the penalty phase retrial jury included Monique Cleveland's reaction to Jackson

shooting her husband (running down the hallway screaming), the brutality of Jackson killing Monique, and Jackson's boasting to Kevin Jackson. (25 RT 3957-3959, 3979-3980; 26 RT 3990.) Absent Officer Aoki's testimony regarding Jackson's statement, Jackson's murder of Monique Cleveland was senseless and brutal. The jury could have logically figured out that Jackson demonstrated a consciousness of guilt and that he killed Monique in an effort to eliminate a witness without Jackson's statement to the officer. Any error in admitting it was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. 18.)

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE THAT MONIQUE WAS PREGNANT WHEN SHE WAS MURDERED AND AN AUTOPSY PHOTOGRAPH OF THE EMBRYO IN THE PENALTY-PHASE RETRIAL

Jackson argues the trial court erred in allowing testimony that Monique Cleveland was approximately four weeks' pregnant when Jackson murdered her. Jackson claims the evidence was not admissible under *Payne v. Tennessee* and *People v. Edwards*. Jackson further argues the trial court erred in admitting into evidence a photograph of the embryo. Jackson claims this photograph was admitted solely to inflame the jury and its admission rendered his trial fundamentally unfair. (AOB 176-188.) Jackson is incorrect, because the fact Monique Cleveland was pregnant was relevant and admissible as victim impact evidence under Penal Code section 190.3, factor (a), circumstances of the crime. Likewise, the redacted photograph showing the embryo was admissible to show the Monique Cleveland was pregnant when Jackson murdered her. The trial court properly admitted into evidence her pregnancy and the photograph of the embryo.

Victim impact evidence is admissible as a circumstance of the crime under Penal Code section 190.3, factor (a). (*People v. Edwards* (1991)

54 Cal.3d 787, 835.) The United States Supreme Court has held that the State has a legitimate interest to have the sentencer consider the victim as "an individual whose death represents a unique loss to society and in particular to [her] family." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) "The 'circumstances' of the crime under section 190.3, factor (a) are not merely the immediate temporal and spatial circumstances of the crime, but extend to that which surrounds the crime materially, morally, or logically." (*People v. Hamilton* (2009) 45 Cal.4th 863, 927, citing *People v. Edwards*, *supra*, 54 Cal.3d at p. 835.)

Here, both parties submitted pleadings on the admissibility of the evidence of Monique Cleveland's pregnancy. (9 CT 2595-2599 [prosecution], 2600-2605, 2623-2629 [defense].) On November 4, 1999, prior to the penalty phase retrial, the trial court heard argument from the parties regarding the admissibility of the evidence. (24 RT 3626-3638; 9 CT 2637.) The trial court expressly conducted an Evidence Code section 352 analysis.[17] (24 RT 3631-3632, 3637-3638.) The trial court acknowledged that the evidence that Monique Cleveland was pregnant was "highly prejudicial." (24 RT 3633.) However, the trial court saw the evidence as permissible as an impact upon Monique's family that was deprived of the grandchild as part and parcel of the loss of Monique. (24 RT 3632-3633.) The court ruled the pregnancy was relevant victim impact evidence admissible under factor (a), as was the photograph of the embryo. (24 RT 3633, 3636, 3638.)

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[17] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury."

This Court in *People v. Jurado* (2006) 38 Cal.4th 72, 129-131, found evidence that the victim was 17 weeks pregnant when the defendant murdered her was relevant and admissible as victim impact evidence under Penal Code section 190.3, factor (a). Jackson attempts to distinguish his case from *Jurado* arguing there was no substantial evidence anyone, including Jackson, knew Monique Cleveland was pregnant at the time of her death. (AOB 179.) Jackson's attempt is unavailing and simply wrong. The fact there was no substantial evidence Jackson knew about Monique Cleveland's pregnancy was rejected by this Court in *Jurado*. "[F]acts concerning the victim that are admissible at the penalty phase of a capital trial as circumstances of the crime are not limited to those known to or reasonably foreseeable by the defendant at the time of the murder." (*People v. Jurado*, *supra*, 38 Cal.4th at p. 131 citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.)

Jackson's attempt to support his argument citing the lack of evidence the pregnancy was "wanted," the percentage of pregnancies that end in miscarriages and abortions, and that Monique Cleveland may have miscarried or made the decision to terminate her pregnancy, is unavailing. (AOB 180-183.) While this could have been argued to the jury to minimize the impact of the aggravating evidence, this course speculation does not render the evidence inadmissible or irrelevant. Moreover, Jackson took away from Monique Cleveland the ability to make any of these decisions by his cold blooded execution of her. He therefore should not benefit from his own actions of extinguishing her life and thereby depriving her of the decisions that should only have been hers to make.[18]

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[18] Contrary to Jackson's claim no one knew about the pregnancy (AOB 179), "someone" knew Monique Cleveland was pregnant: she did. Monique Cleveland's cousin, Jeannette Burns, testified to how close she

(continued...)

Jackson claims the way the evidence of Monique Cleveland's pregnancy was presented, via a photograph of the fetus during the testimony of Dr. Choi, was inflammatory and prejudicial. (AOB 184-188.) The prosecutor voluntarily redacted the photograph to limit it merely to the embryo, no surrounding tissue. (24 RT 3634-3635; Exh. 211A.) The trial court performed an analysis under Evidence Code section 352 before admitting the relevant evidence of Monique Cleveland's pregnancy as demonstrated by the photograph of the embryo taken by the medical examiner. (24 RT 3637-3638.) The pregnancy and the photograph of the embryo assisted the jury to know the full extent of the specific harm caused by Jackson and to meaningfully assess Jackson's "moral culpability and blameworthiness." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

Victim impact evidence is barred by the federal Constitution only if it is "so unduly prejudicial" it renders the trial "fundamentally unfair." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; *People v. Lewis* (2006) 39 Cal.4th 970, 1056.) State law bars victim impact evidence under Penal Code section 190.3, factor (a) if it "'diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 927, quoting *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) The photograph of the embryo did not invite a "purely

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(...continued)
was to Monique. (28 RT 4271-4272.) Burns and Monique worked together. (28 RT 4282.) While at work, Burns figured out Monique was pregnant. (28 RT 4285.) Jackson puts much stock in the fact Monique did not expressly confirm it to her cousin. (AOB 179-180.) However, Monique did confirm the fact to her cousin with non-verbal behavior. After Burns figured out Monique was pregnant because of Monique's behavior and obvious queasiness, Burns offered to get some potato chips or crackers for Monique. Monique responded by laughing and smiling. (28 RT 4285-4286.) This was confirmation between these close cousins of the fact Monique was pregnant.

irrational response from the jury" to the relevant and admissible evidence of Monique Cleveland's pregnancy. (See *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1056-1057.) The photograph could have helped the jury understand that the pregnancy was merely an embryo, not a full term fetus. Accordingly, the redacted photograph of the embryo which showed the jury the actual extent of Monique Cleveland's pregnancy was not inflammatory or prejudicial.

Even assuming the trial court erred in admitting the photograph of the embryo and the fact Monique was pregnant, any error was harmless. To support his prejudice argument, Jackson cites solely to five snippets of the prosecutor's argument to the penalty phase retrial jury. (AOB 186-188, citing 31 RT 4726, 4728, 4736, 4748, 4769-4770.) The prosecutor's argument does not support Jackson's prejudice argument.

The prosecutor's argument takes up 45 pages of the reporter's transcript. (31 RT 4725-4770.) Initially, the prosecutor mentioned to the jurors that it was their responsibility to impose justice on Jackson not only for his crimes against Monique, Rob, "their unborn child," but for all the other victims of Jackson's violent crimes. (31 RT 4726.) The prosecutor subsequently stated, "While I know you will take your task of deciding his fate much more seriously than he took the task of deciding the fate of Rob and [Monique] and their unborn child, I hope that you can impose justice on him because of the choices and the decisions that he made." (31 RT 4728.) Later, describing the crime as more than a "simple unaggravated homicide," the prosecutor argued it was a situation where an armed gang member went to the home of a drug dealer, decided to rob him, and as a result shot the drug dealer "multiple times, definitely intending and hoping to kill him, seeking out his helpless vulnerable 5 foot 3 inch wife, shooting at her, ultimately executing her, also resulting in the death of her unborn child. This is three lives we're talking about here." (31 RT 4736.) After a

break, the prosecutor continued with argument that Monique "was a person whose life mattered to people. And I think that if her mother had had the opportunity to set two more places at her Thanksgiving table for [Monique] and for her what would be now 2½-year-old grandchild, then the day might have been a little bit happier for Rose and for [Monique's] grandmother." (31 RT 4748.) Finally, near the end of argument, the prosecutor noted the position of Monique's arms as shown in a photograph after she had been turned over from her prone face-down position. Her arms were clasped across her abdomen. The prosecutor argued, "To her — you look at this picture of this little tiny fetus here, and you think, well, you know, she wasn't that far along. Just a month pregnant. You can see the little head and the little arms and stuff. You know, to a mother, when you're pregnant, from the minute you find out you're pregnant, that's your child. She's 28, and this is her first pregnancy, her first marriage. And, you know, I think she wanted to live. And I think that she wanted that baby to live." (31 RT 4769-4770.)

The victim impact evidence here, Monique Cleveland's pregnancy and the photograph of the embryo, is the type of evidence that assists a jury in assessing evidence of the results of Jackson's homicide. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 822, 825.) To assist jurors to consider how a murder affected the victim's relatives, a prosecutor may ask jurors to put themselves in the place of the victim's family. (*People v. Zamudio* (2008) 43 Cal.4th 327, 364; *People v. Fierro* (1991) 1 Cal.4th 173, 235.) As this Court has recognized, "emotion cannot reign over reason," it "need not, indeed, cannot, be entirely excluded from the jury's moral assessment." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1418-1419.)

The pregnancy and the photograph of the embryo were properly admitted as relevant victim-impact evidence and the prosecutor's argument did not transform it into improperly admitted evidence. The prosecutor's

mention of the photograph of the embryo was brief, fleeting, and nonprejudical. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 836.) The prosecutor's use of the fact Monique was pregnant during argument was proper comments on the evidence and the impact on the various victims of Jackson's violent crimes. The pregnancy and the single photograph of an embryo was no more prejudicial than Jackson brutally killing Monique Cleveland at close range with a shot to her face while she lay on the ground after she heard Jackson fire a gunshot at her husband. The victim-impact evidence "properly may form a basis – along with the prosecutor's related argument – for the jury's decision in favor of the death penalty." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 786.) Any error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

VIII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING AN AUTOPSY PHOTOGRAPH OF MONIQUE CLEVELAND WITH HER EYES OPEN IN THE PENALTY PHASE RETRIAL

Jackson claims the trial court erred in denying his motion to exclude an autopsy photograph of Monique Cleveland's face that showed her eyes open, because it was more prejudicial than probative under Evidence Code section 352. Jackson contends the "only purpose of the evidence was to incite the jury." Jackson complains the admission of the photograph violated the Sixth, Eighth, and Fourteenth Amendments to the Constitution and Article I, sections 7, 15, 17 and 24 of the California Constitution. (AOB 189-193.) The trial court properly exercised its discretion in determining the probative value of the photograph outweighed any potential prejudice. The photograph was properly admitted and its admission did not infringe upon any constitutional rights.

A trial court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will

(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) A trial court has wide discretion to admit autopsy photographs. (*People v. Riel* (2000) 22 Cal.4th 1153, 1193; *People v. Ochoa* (1998) 19 Cal.4th 353, 415.) Although photographs of murder victims are often graphic and disturbing, the photograph here was not "so gruesome as to have impermissibly swayed the jury." (*People v. Smithey* (1999) 20 Cal.4th 936, 974.) A court may admit even "gruesome" photographs if the evidence is highly relevant to the issues raised by the facts, or if the photographs would clarify the testimony of the medical examiner. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453; *People v. Heard* (2003) 31 Cal.4th 946, 973.) A reviewing court must determine whether the photograph was relevant, and whether the trial court abused its discretion in determining that the probative value of the photograph outweighed its prejudicial effect. (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 453; *People v. Carter* (2005) 36 Cal.4th 1114, 1166.)

At the penalty phase retrial, the prosecution sought to admit three autopsy photographs depicting Monique Cleveland. Jackson sought to exclude Exhibit 218, a photograph of Monique Cleveland's face that showed a bullet hole on her left cheek. Defense counsel argued the photograph should be excluded under Evidence Code section 352 because it showed Monique with her eyes open, she was staring, and it was a close-up picture. (25 RT 3809.) The prosecutor sought to admit the photograph because at the bottom of the photograph there was a bloody area, which Dr. Choi explained was evidence that Monique's eyes were open when she was shot. Her left eye was burned by the muzzle blast when Jackson shot her in the face. (25 RT 3810.)

The trial court found the photograph had "some relevance to the fact that she was aware perhaps of her impending death at the hands of the

defendant." (25 RT 3810-3811.) The court found this was a factor that was relevant for the jury to determine the penalty to be imposed. Under the Evidence Code section 352 analysis, the trial court found that the admission of the photograph would not necessitate any undue consumption of time, create any substantial danger of undue prejudice, confuse any issues, nor mislead the jury. (25 RT 3811.)

Dr. Choi, the pathologist who performed the autopsy on Monique Cleveland, found two holes on her head; an entrance wound on her left cheek and an exit wound on her neck below her right ear. (25 RT 3821, 3825.) The gun was fired about three inches from Monique Cleveland's face, give or take an inch. (25 RT 3833.) Using Exhibit 218, Dr. Choi explained there was a powder burn on her left eye that caused it to hemorrhage. This indicated that Monique Cleveland's eyes were open when she was shot. (25 RT 3831-3832.)

The photograph was highly relevant to show the circumstances of the crime under Penal Code section 190.3, factor (a). Monique Cleveland had her eyes open as Jackson stuck the gun inches from her face and fired it. The powder burn suffered by Monique Cleveland in her left eye was relevant to the jury's penalty determination. Along with the fact Jackson lifted Monique Cleveland's head from the ground by a fist full of her hair, she saw her fate prior to Jackson executing her. The photograph of Monique Cleveland's face simply showed what had been done to her by Jackson, and any revulsion induced by the photograph was attributable to Jackson's acts, not the photograph. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1054.) This Court has consistently found that "[m]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant." (*People v. Moon* (2005) 37 Cal.4th 1, 35, internal citations & internal quotation marks omitted.)

Autopsy photographs are part of the circumstances of the crime and are not barred by either the Eighth or Fourteenth Amendment. (*People v. Hart* (1999) 20 Cal.4th 546, 648; *People v. Clair* (1992) 2 Cal.4th 629, 682.) Here, the photograph of Monique Cleveland showing the damage to her eye was a circumstance of the crime. Jackson chose to shoot her in the face at close range, and she happened to have her eyes open when the fatal shot was fired. The photograph merely demonstrated the real life consequence of Jackson's crimes. (See *People v. Moon*, *supra*, 37 Cal.4th at pp. 34-35.)

Jackson cites a law review article and several other articles on studies regarding the emotional impact of "graphic" photographic evidence on jurors to support his position that the admission of the photograph was inflammatory and unduly prejudicial. (AOB 191-193.) None of the studies or the articles regarding the studies were presented to the trial court for consideration, and therefore, should not be considered on appeal. (See *People v. St. Martin* (1970) 1 Cal.3d 524, 537.) Moreover, there is nothing in this record to support Jackson's conclusion based on these studies that the jury here rendered the penalty decision it did based solely on the photograph of Monique Cleveland showing the powder burn to her left eye in Exhibit 218.

Jackson tacitly acknowledges the evidence he shot Monique Cleveland was relevant and admissible through the testimony of Dr. Choi. Jackson maintains this should have been the only way for the jury to learn of the evidence. (AOB 190.) This position ignores this Court's long held position that photographs of a victim may be properly admitted to corroborate the testimony of expert witnesses. (*People v. Stanley* (1995) 10 Cal.4th 764, 838; *People v. Kaurish* (1990) 52 Cal.3d 648, 684.) "The prosecution has wide latitude at the penalty phase to illustrate the crime through photographs." (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1055.)

Moreover, the jury is entitled to have a complete picture of the brutal manner in which the victim was killed in evaluating the defendant's moral culpability for a capital crime. (*Id.*) The trial court properly exercised its discretion, and no constitutional violation occurred, in the admission of Exhibit 218, the photograph depicting the gunshot to Monique Cleveland's face and resulting damage to her left eye because it was open when Jackson fired the fatal shot.

Jackson's execution of Monique Cleveland was brutal, and the photograph was not unduly prejudicial merely because her eyes were open in it. What was prejudicial was the underlying facts, that Jackson in cold-blood executed this petite vulnerable woman in her own home in the middle of the night. The jury knew from Dr. Choi's testimony that her eyes were open and she would have known the terror she faced immediately prior to Jackson executing her. Since the jury heard the same evidence depicted in the photograph through the testimony of Dr. Choi, any error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING VICTIM IMPACT EVIDENCE AS TO JACKSON'S OTHER CRIMES IN THE PENALTY-PHASE RETRIAL

Jackson contends the trial court erroneously denied his motion to exclude victim impact evidence relating to his other crimes: the armed robbery of the employees of Empire Drugstore, and the armed robbery and carjacking of Joseph Canada. Jackson claims the evidence was not admissible under Penal Code section 190.3, factor (b). Jackson avers the impact on the victims of his other crimes is not relevant to the capital jury's determination of the appropriate penalty. Jackson maintains the admission of this evidence violated his constitutional rights. (AOB 194-202.) This

Court has held the circumstances of a defendant's other violent criminal conduct, including its impact upon the victims, is admissible under factor (b). Jackson presents no valid reason to revisit these holdings or overrule them.

Jackson filed a "Motion to Limit Victim Impact Evidence" in the penalty phase to exclude victim impact evidence from Jackson's other crimes, specifically the robbery at the Empire Drugstore and the robbery of Joseph Canada. (3 CT 629-649.) The prosecution opposed the motion. (9 CT 2630-2633.) Prior to the penalty phase retrial, the trial court heard Jackson's motion. (24 RT 3644-3648.) Jackson acknowledged the prosecution could present evidence as to his other crimes, however, Jackson argued the impact of the crimes upon the victims was not admissible under *People v. Edwards*, *supra*, 54 Cal.3d at pp. 832-837 [prosecution is entitled to present testimonial evidence of a defendant's violent criminal activity under Penal Code section 190.3, factor (b)]. (24 RT 3645.) The prosecution reiterated its position that the victims of Jackson's other crimes may describe how they felt as a result of Jackson's criminal conduct and the impact of the offenses on them. (24 RT 3646.) The trial court found limited inquiry as to the impact of Jackson's other crimes on the victims was permissible, and denied Jackson's motion. (24 RT 3647-3648.) The trial court cautioned that it would not allow evidence to be "overly long and protracted and apparently belaboring of the subject." (24 RT 3648.) Thereafter Joseph Canada testified about the fear he felt while Jackson robbed him, and the fear that remained with him as a result of the robbery. (27 RT 4171, 4185-4187.) Daila Llamas described the fear she felt when being robbed by Jackson, and a fear that stayed with her as a result of Jackson's criminal conduct. (28 RT 4398, 4400.)

Jackson has forfeited the instant claim by his failure to object below on the same grounds as proffered in the trial court. On appeal, Jackson

complains about Joseph Canada's testimony about the fear he felt during the robbery and the lasting effect of the offense. The same is true for the Empire Drugstore robbery victim, Daila Llamas. (AOB 201.) During the penalty phase retrial, Jackson did not object on the grounds that such testimony constituted inadmissible victim impact or was otherwise impermissible under Penal Code section 190.3, factor (b). Jackson has forfeited his challenges on appeal to the evidence to which he failed to object at trial. (*People v. Robinson* (2005) 37 Cal.4th 592, 652; Evid. Code, § 353.)

This Court's prior decisions on the admissibility of evidence showing the impact on victims of a defendant's prior crimes is correct and need not be revised. Contrary to Jackson's suggestion, other states' decisions do not offer cause to modify California law. (AOB 198-201.) The trial court properly admitted the victim impact evidence regarding Jackson's prior criminal conduct. No abuse of discretion occurred. (*People v. Lewis*, *supra*, 39 Cal.4th at pp. 1055-1056.)

Assuming Jackson has preserved his claim on appeal, it fails nonetheless. A trial court has broad discretion to admit evidence during the penalty phase of a capital trial, and its ruling on such issues will not be disturbed absent an abuse of discretion. Such abuse is demonstrated when a trial court has acted in an arbitrary or capricious manner. (*People v. Lewis*, *supra*, 39 Cal.4th at pp. 1055-1056.) Moreover, a trial court has only limited discretion to exclude evidence pertaining to a defendant's prior violent crimes in the penalty phase of a capital trial. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 834; *People v. Karis* (1998) 46 Cal.3d 612, 641-642.)

The very premise of Jackson's claim, that evidence regarding the impact a defendant's prior criminal acts had upon the victims of those offenses is inadmissible during the penalty phase of a capital trial, is

mistaken. This Court has explained that "[a]t the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts." (*People v. Price* (1991) 1 Cal.4th 324, 479; see also *People v. Holloway* (2004) 33 Cal.4th 96, 143-144 [victim of prior violent assault may testify to effect of assault on her life in penalty phase of defendant's capital trial for an unrelated murder].) This Court has held "the impact of a capital defendant's past crimes on the victims of those crimes is relevant to the penalty decision." (*People v. Mendoza* (2000) 24 Cal.4th 130, 186.) Nothing in the federal Constitution prohibits the introduction of evidence demonstrating the lasting effect of a defendant's prior crime on his victim during the penalty phase of a capital trial. (*People v. Garceau* (1993) 6 Cal.4th 140, 201-202.)

Jackson argues it was prejudicial to admit victim impact from his other criminal activity because Joseph Canada and Daila Llamas testified to the fear they felt while and after Jackson robbed them at gunpoint. (AOB 201-202.) To the extent robbery victims Canada and Llamas testified to their fear of Jackson during the offense, such testimony was proper because fear is an element of the crime of robbery. (See Pen. Code, § 211; *People v. Huggins* (2006) 38 Cal.4th 175, 214; *People v. Davis* (2005) 36 Cal.4th 510, 562.) Additionally, the residual fear and anxiety these victims suffered as a result of Jackson's armed robberies was properly admitted. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 10, 39-40 [trial court properly admitted testimony of victim that following defendant's prior offense he could no longer live independently, that he lost the ability to walk or speak, and that he had to be fed by a caretaker]; *People v. Holloway*, *supra*, 33 Cal.4th at pp. 143-144 [trial court properly admitted testimony of victim that following defendant's prior offense she sought psychological counseling and purchased a firearm for her safety which she slept with because she "could not rest"].) The victims' residual fear and

anxiety caused by Jackson's prior criminal conduct was relevant to the jury's penalty phase determination and was not unduly prejudicial. (*People v. Smith* (2005) 35 Cal.4th 334, 368; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 186.)

Jackson acknowledges this Court's decisions in *People v. Demetrulias*, *supra*, 39 Cal.4th at pages 39-40, *People v. Holloway*, *supra*, 33 Cal.4th at page 143, and *People v. Mendoza*, *supra*, 24 Cal.4th at pages 185-186, holding "'the circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, are admissible under factor (b).'" (AOB 195, quoting *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 39-40.) However, he urges this Court to overrule this precedent as erroneous and hold victim impact evidence of crimes in aggravation is not admissible under Penal Code section 190.3, subdivision (b). (AOB 194-202.) Jackson presents no valid reason for this Court to revisit, or reverse, its prior holdings on the issue.

Jackson's assertion that the prosecutor's closing argument exacerbated the prejudicial effect of the evidence at issue is irrelevant to the trial court's decision to admit such evidence, as the prosecutor's closing argument had not yet occurred when the trial court determined the admissibility of the evidence. (AOB 201.) Moreover, Jackson failed to object to the portion of the prosecutor's closing argument which he now challenges. Given Jackson's failure to object, he may not rely on the prosecutor's closing argument in making the instant claim. (*People v. Brown* (2004) 33 Cal.4th 382, 398-399.) In any event, given the propriety of the admission of evidence concerning the effect of Jackson's prior crimes of armed robbery on his victims, the prosecutor's closing argument was entirely proper. (See *People v. Mendoza*, *supra*, 24 Cal.4th at p. 186.)

Assuming the trial court abused its discretion when it allowed the victims of Jackson's armed robbery offenses to testify to the effect of those

offenses upon them, there is no reasonable possibility that the jury would have reached a different verdict in the penalty phase given the gravity of Jackson's offense in killing Monique Cleveland and the properly admitted evidence demonstrating he attempted to murder Robert Cleveland. (*People v. Harris* (2005) 37 Cal.4th 310, 352; *People v. Jackson* (1996) 13 Cal.4th 1164, 1236-1237.) Joseph Canada's and Daila Llamas's testimony regarding the lasting effects of the crimes upon them was brief and innocuous. (See 27 RT 4185-4187; 28 RT 4400.) Brief and fleeting references such as these were nonprejudicial. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 836.) Given the gravity of the aggravating evidence presented, and the absence of any significant mitigating circumstances, there is no reasonable possibility that any error affected the verdict. (See *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

X. THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR J. C. AFTER THE PROSECUTION'S CHALLENGE FOR CAUSE IN THE PENALTY PHASE RETRIAL

Jackson claims the trial court improperly granted the prosecution's challenge for cause of prospective juror J. C. during jury selection for the penalty phase retrial. Jackson contends that prospective juror J. C.'s "views on capital punishment were insufficient to disqualify her on a for-cause challenge." Jackson argues the excusal of J. C. amounted to reversible error. (AOB 203-210.) Given prospective juror J. C.'s aversion to death due to her life circumstances, and the personal hardship she would have suffered were she to sit as a juror for the penalty phase retrial, the trial court properly exercised its discretion in granting the prosecution's challenge for cause to excuse prospective juror J. C.

In her questionnaire, prospective juror J. C. claimed she had no opinion about the death penalty because she "never gave it that much

consideration." (7 CT 2011.) In the same questionnaire, J. C. articulated her view that the death penalty was imposed too often against African-American males.[19] (7 CT 2013.) While not acknowledging sufficient grounds to challenge prospective juror J. C. for cause, Jackson claims the questionnaire revealed that J. C. was "potentially problematic" for the prosecution because in response to the question of whether she would automatically disregard the testimony of a person if she disapproved of his or her lifestyle, J. C. wrote, "If they are known criminales (*sic*) looking to get out of jail/trouble I would find their testimony hard to believe." (AOB 205 citing 7 CT 2014.) However, Jackson's position fails to fully consider prospective juror J. C.'s questionnaire and her comments during voir dire which demonstrate that there was sufficient cause to challenge and excuse prospective juror J.C.

Prospective juror J. C. was one of several prospective jurors who were questioned more extensively regarding responses in their questionnaires. (23 RT 3474-3475, 3487-3490.) The trial court sought clarification of prospective juror J. C.'s responses regarding drug use by her brother and her views expressed regarding the death penalty. (23 RT 3487-3490.) Later, before the full panel of prospective jurors, defense counsel questioned J. C. to clarify her comment that "too little blame is placed on parents and social settings" in response to question 45.[20] J. C.'s perspective was based on her personal experience of coming from a broken home and having a mother who did not provide care, such that J. C. basically raised herself and helped with raising her two younger brothers and sisters. J. C.

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[19] Jackson is African-American. (5 RT 585.)

[20] Question 45 asked: "Some people think that too much blame for a person's wrongdoing is placed on his or her parents or the social setting. Other people think that too little blame is placed on parents and the social setting. What do you think?" (7 CT 2013.)

added, "And I think I turned out great" due to the fact that she believed in herself. J. C. said, "I believed in me that when I was little that I could do whatever I wanted to do, and really nobody cared about me, and I had to care." J. C. also told defense counsel, "I don't feel you need to blame anybody. You need to care about yourself. That's my belief." (23 RT 3537.)

When the prosecutor questioned the prospective jurors, the prosecutor asked a general question, "Now, is there anybody here, having heard all the questions of the judge, of defense, myself, who has really thought about it, who does not feel that they could in fact be a person who could participate in a verdict that will result in the death of Mr. Jackson?" [¶] Okay. There's a hand in the front row. That's [J. C.]. Your questionnaire itself expressed some severe reservations about capital punishment. Right?" Prospective juror J. C. responded affirmatively. The prosecutor went on, "Now that you've thought about it, can you try to express for me in your own words what your feelings are about your ability to be a juror in this case and to actually impose capital punishment?" Prospective juror J. C. stated, "I'm a widow. I'm a recent widow. 17 months ago I buried my husband. My husband died in my arms. I just can't deal with death that well. No disrespect. I don't want anything to do with this." The prosecutor asked if it would be a personal hardship on prospective juror J. C. and she said, "Very much so." (24 RT 3555-3556.) The prosecutor inquired if J. C.'s inability to serve in a death penalty case was similar to another juror[21] who said it would be very difficult for him to be fair and open-minded because his close relative was a homicide victim, and J. C. repeated, "Very much so." (24 RT 3552, 3556.)

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[21] Just prior to the prosecutor questioning J. C., it was stipulated by the parties to excuse that prospective juror, Mr. M. (23 RT 3554.)

After the prospective jurors left the courtroom, the trial court "assumed" there would be some motions for cause by the prosecutor, but first heard from the defense. Defense counsel challenged for cause a juror who was described as a "close call" by the prosecutor and trial court, which the trial court granted. Thereafter, the prosecutor asked the trial court to excuse for cause prospective juror J. C. Defense counsel merely "submitted." The trial court granted the challenge for cause as to prospective juror J. C. (24 RT 3570-3571.)

Code of Civil Procedure sections 225 through 230 govern challenges for cause. The bases for disqualifying a prospective juror for cause under these provisions are "[g]eneral disqualification," "[i]mplied bias," and "[a]ctual bias." (Code Civ. Proc., § 225, subd. (b)(1).) Among the grounds for general disqualification is "[t]he existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party." (*Id.*, § 228, subd. (b).)

"'[T]o achieve the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause only if his or her views in favor of or against capital punishment "would 'prevent or substantially impair the performance of his duties as a juror'" in accordance with instructions and the juror's oath.'" (*People v. Blair* (2005) 36 Cal.4th 686, 741, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424, [105 S.Ct. 844, 83 L.Ed.2d 841].) "On review of a trial court's ruling, if the prospective juror's statements are equivocal or conflicting, that court's determination of the person's state of mind is binding. If there is no inconsistency, the reviewing court will uphold the court's ruling if substantial evidence supports it." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488; *People v. Abilez* (2007) 41 Cal.4th 472, 497-498.) The trial court's determination of a challenge for cause is reviewed for abuse of

discretion. (*People v. Abilez, supra*, 41 Cal.4th at pp. 497-498.) "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014.) Even when "[t]he precise wording of the question asked of [the prospective juror], and the answer [s]he gave, do not by themselves compel the conclusion that [s]he could not under any circumstance recommend the death penalty,' the need to defer to the trial court remains because so much may turn on a potential juror's demeanor." (*Id.* at p. 8.)

At trial, defense counsel "submitted" without comment to the prosecutor's challenge for cause of prospective juror J. C. Accordingly, Jackson has forfeited this claim on appeal. (*People v. Cook* (2007) 40 Cal.4th 1334, 1343.) However, it reveals that at the time of the challenge, based on his observations of prospective juror J. C., defense counsel had no objection, opposition, or comment to the prosecutor's challenge for cause of this prospective juror. Most likely because, in addition to expressing an inability to serve as a capital juror, prospective juror J. C. expressed opinions that seemingly would have made her an unfavorable juror for the defense given the mitigation evidence presented by Jackson.

Prospective juror J. C. confirmed that she could not approach her task as a juror in this capital case with an open-mind, nor be fair. This provided a for cause basis to challenge and excuse J. C. as a juror. In her questionnaire J. C. had no opinion about the death penalty because she had never thought about it. When provided with an opportunity to think about it, J. C. articulated an inability to be a fair and open-minded juror because she could not deal with death given her husband's recent death.

The trial court was able to observe prospective juror J. C.'s demeanor during voir dire. J. C. raised her hand in response to the prosecutor's question as to whether there was anyone who felt they could not participate in a verdict that could result in Jackson's death. Due to J. C.'s recent life experience involving the death of her husband, who died in her arms, J. C. did not believe she could be a juror in a death penalty case. The trial court's comment that the prosecutor surely had challenges for cause insinuates that the trial court believed based on its observations of prospective juror J. C. that a challenge for cause was warranted. The trial court properly exercised its discretion in excusing prospective juror J. C. because of her expressed inability to sit as a penalty phase juror.

XI. THE TRIAL COURT PROPERLY DENIED JACKSON'S MOTION TO MODIFY THE DEATH VERDICT, AND EVEN ASSUMING ERROR, THERE WAS NO PREJUDICE

Jackson contends the trial court erred and denied his rights under the Eighth and Fourteenth Amendments to a reliable penalty verdict and due process in ruling on his motion to modify the death verdict. Specifically, he contends the trial court (1) was under the misimpression that he had been found guilty of deliberate and premeditated murder; (2) improperly considered violent acts as aggravating after finding those acts had not been proven beyond a reasonable doubt; and (3) improperly considered the absence of a mental impairment (factor h) as aggravating. (AOB 211-214.) The trial court properly denied the motion to modify, and even assuming error, Jackson was not prejudiced.

Jackson first complains that when the trial court considered his motion to modify following the penalty phase retrial, it did not appreciate that his murder conviction was based on a felony-murder theory, and that he had not been found guilty of premeditated and deliberate murder. (AOB

211 citing 32 RT 4879.) One of the findings made by the trial court was, "In reviewing all of the evidence admitted at the guilt phase, the Court is satisfied beyond all doubt that the defendant, Jonathan Keith Jackson, is guilty of one count of murder and one count of attempted murder. The Court further finds that the evidence supports, by proof beyond a reasonable doubt, the conclusion that the murder was of the first degree in that there was overwhelming evidence of premeditation and deliberation." (32 RT 4879.) Jackson was charged with the deliberate and premeditated murder of Monique Cleveland. (2 CT 446.)

The trial court also stated, "'The Court further finds that the evidence supports, by proof beyond a reasonable doubt, the conclusion that the murder was committed under a special circumstance, pursuant to Penal Code section 190.2, to wit, that the murder occurred while the defendant was engaged in the commission and immediate flight after committing and attempting to commit the crime of robbery in violation of Penal Code section 211, in that there was overwhelming evidence of the commission and attempted commission.'" (32 RT 4879.)

The trial court's comments, read in context, show the trial court found in its review of the guilt phase evidence, sufficient evidence beyond a reasonable doubt supported a felony murder theory of first degree murder. The challenged statement showed the trial court also found overwhelming evidence of premeditation and deliberation. The trial court next found the evidence supported beyond a reasonable doubt that the murder of Monique Cleveland occurred while Jackson was engaged in the commission, immediate flight after committing and attempting to commit the crime of robbery in violation of Penal Code section 211. (32 RT 4879.) When the challenged statement is not parsed, but considered with the whole of the trial court's findings, it is clear the trial court found sufficient evidence of first degree murder and the special circumstance the murder occurred while

Jackson was engaged in the commission or attempted commission of robbery or immediate flight thereafter.

Pursuant to Penal Code section 190.4, subdivision (e), in every case where a death verdict is rendered, the defendant is deemed to have made an application for modification of the verdict. "In ruling on the application, the trial court reweighs the evidence, considers the aggravating and mitigating circumstances, and determines whether, in its independent judgment, the weight of the evidence supports the jury's verdict." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1139.) Section 190.4, subdivision (e), mandates the trial court state on the record the reasons for its findings. The trial court's ruling on an automatic application to modify a death verdict must be "sufficiently articulated to assure meaningful appellate review." (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1064.) Here, the trial court provided sufficient reasons to support its denial of the motion to modify.

Jackson has forfeited his claim that the trial court improperly articulated the wrong theory of first degree murder by failing to make a contemporaneous objection and provide the trial court with an opportunity to clarify or correct its ruling. "If a defendant fails to make a specific objection to the court's ruling at the modification hearing, the claim is forfeited." (*People v. Mungia*, *supra*, 44 Cal.4th at p. 1140; *People v. Riel* (2000) 22 Cal.4th 1153, 1220.)

Even if the claim is considered, it is without merit. The trial judge's function in ruling on a motion to modify under Penal Code section 190.4, subdivision (e), is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence and determine whether, in the judge's independent judgment, the weight of the evidence supports the jury's verdict. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1039; *People v. Jones*, *supra*, 15 Cal.4th at pp. 190-191.) Here, the trial court performed this function. The prosecution's theory of

Jackson's liability for first degree murder is not the proper focus. Rather, it is the trial court considering and reweighing the evidence. The trial court found overwhelming evidence beyond a reasonable doubt supported the murder and the underlying felony and special circumstance of robbery. Moreover, the trial court articulated the correct standard under which it was required to assess the motion to modify. (32 RT 4877-4878.)

Jackson next contends that the trial court considered prior uncharged violent acts as aggravating evidence in denying the motion to modify notwithstanding concluding that those crimes had not been proven beyond a reasonable doubt. (AOB 211 citing 32 RT 4882.) Jackson forfeited this claim by failing to make a contemporaneous objection at trial. (*People v. Mungia*, *supra*, 44 Cal.4th at p. 1140; *People v. Riel*, *supra*, 22 Cal.4th at p. 1220.)

Even if considered, the claim fails. The trial court properly found "the circumstances in aggravation substantially outweigh the circumstances in mitigation as to the defendant, warranting the penalty of death as to Mr. Jonathan Keith Jackson." (32 RT 4878.) The trial court noted that the prosecution had presented evidence of multiple acts of violence by Jackson while he was in prison or jail. As to just these, "[t]he Court is not convinced that the evidence as to these acts rises to the level of proof beyond a reasonable doubt." (32 RT 4882.) The trial court added that Jackson was "certainly a ready and willing participant in violent confrontations in custodial settings and tended to be very much in the 'thick of things' in such activities. Specifically, reference is made to: the melee on the yard of Mule Creek State Prison, where defendant ran with others of his prison gang to attack another prison gang group; the refusal to obey lawful prison guard orders in an exercise yard at Mule Creek State Prison; and the incident in a local jail where he, seemingly without provocation, 'sucker-punched' another inmate in his cell." (32 RT 4882-4883.) In

addition to these incidents, evidence was presented of two violent activities by Jackson-- the prior armed robbery convictions involving Joseph Canada and the Empire Drugstore employees. (32 RT 4881-4882.)

Jackson erroneously takes the trial court's comment and assumes that the jurors considered these violent acts without finding beyond a reasonable doubt they occurred. (32 RT 211-212.) This assumption is speculative. Without a contemporaneous objection the trial court was not provided with an opportunity to clarify its comment. Moreover, the jury had two prior convictions that involved violent acts by Jackson to consider. It is nothing but rank speculation as to whether the jury considered the uncharged violent acts by Jackson while he was incarcerated. Ample other violent acts by Jackson were established beyond a reasonable doubt.

Jackson also claims the trial court committed *Davenport* error in ruling on his motion to modify by considering factor (h) as evidence in aggravation when that factor can only serve to mitigate an offense. (AOB 212 citing *People v. Davenport* (1985) 41 Cal.3d 247, 289 and 32 RT 4884.) Jackson also forfeited this claim by failing to make a contemporaneous objection at trial. (*People v. Mungia, supra*, 44 Cal.4th at p. 1140; *People v. Riel, supra*, 22 Cal.4th at p. 1220.)

In any event, Jackson misconstrues the trial court's ruling. The trial court found there was no evidence Jackson was unable to appreciate the criminality of his conduct under factor (h). To confirm the lack of evidence, the trial court noted that Jackson bragged to Kevin Jackson that he had killed the Clevelands the previous day. (32 RT 4884.) This does not demonstrate that the trial court converted the mitigating factor into an aggravating factor. The trial court's comment merely confirms the nonexistence of any evidence to support the mitigating factor. While a trial court cannot consider the absence of evidence of mental impairment as a factor in aggravation, the trial court was "entitled to consider defendant's

ability to appreciate the criminality of his conduct as yet another circumstance of his crime." (*People v. Nakahara* (2003) 30 Cal.4th 705, 725.)

Jackson argues that the prejudicial nature of the trial court's errors is evident from the trial court's preamble. (AOB 213 citing 32 RT 4880.) However, Jackson parses the trial court's comments. The entire preamble provided, "'It is not the Court's intention to list every item of evidence and all arguments presented. For the purpose of clarifying the Court's reasoning, this will be a recital of the principle factors which most powerfully inform and influence the Court in ruling on the automatic motion to modify the sentence of death reached by the jury." (32 RT 4880.) The trial court's preamble does not alter the fact that the factors in aggravation identified by the court in support of denying the motion are such that there is no reasonable possibility that the outcome would have been different even assuming the trial court misapprehended the basis for his first degree murder conviction, or reliance on uncharged violent acts without also finding those acts had been proven beyond a reasonable doubt, or reliance on Jackson's lack of mental impairment as an aggravating factor. Moreover, in light of the other evidence of aggravation, there is no reasonable possibility that the motion would have been granted absent any error regarding consideration of factor (h). (*People v. Crittenden* (1994) 9 Cal.4th 83, 151-152.) The factors in aggravation properly considered by the trial court, combined with the minimal evidence in mitigation, rendered any *Davenport* error non-prejudicial. (See *People v. Kaurish*, *supra*, 52 Cal.3d at p. 717 [where "two substantial aggravating factors – the aggravated circumstances of the crime and prior felony convictions – and little was presented in mitigation" no reasonable possibility ruling on motion to modify would have been different absent *Davenport* error by court].) There is no reasonable possibility that any errors or assumed

errors, singularly or in combination, affected the trial court's ruling on the motion to modify. Thus, any related claimed federal constitutional error would be harmless beyond a reasonable doubt. (See *People v. Rogers* (2009) 39 Cal.4th 826, 911.)

XII. JACKSON'S DEATH SENTENCE IS NOT DISPROPORTIONATE TO HIS CULPABILITY FOR THE CRIMES HE COMMITTED

Jackson complains that the trial court erred in denying him relief on the basis of intra-case proportionality because both the circumstances of the offense and nature of the offender evidence that a death sentence is disproportionate to his culpability. (AOB 215-221.) To the contrary, it is clear that Jackson's death sentence is proportionate to his culpability for the murder of Monique Cleveland and other crimes he committed.

The "cruel and unusual punishment" provisions of both the federal and California Constitutions preclude punishment that is disproportionate to the crime committed. (*Solem v. Helm* (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637]; *Edmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140]; *People v. Young* (2005) 34 Cal.4th 1149, 1231; *People v. Dillon* (1983) 34 Cal.3d 441, 477-482; *In re Lynch* (1972) 8 Cal.3d 410, 424.) "To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment """"shocks the conscience and offends fundamental notions of human dignity"""

[citation], the court must invalidate the sentence as unconstitutional.' [Citation.]" (*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1426-1427, quoting *People v. Hines* (1997) 15 Cal.4th 997, 1078; *Solem v. Helm*, *supra*, 463 U.S. at pp. 290-292; *People v. Tafoya* (2007) 42 Cal.4th 147, 198; *People v. Rogers*, *supra*, 39 Cal.4th at p. 895.)

At trial, Jackson contended that he had been "singled out" of the individuals who were at the Cleveland house the night of Monique Cleveland's murder. (32 RT 4872.) The other individuals were alleged to be Carl Bishop, Henry Jones and Leon West. Bishop and Jones had been arrested and provided statements to law enforcement. West was still at large. Jackson's intra-case proportionality motion relied on the hearsay statements of accomplices Bishop and Jones made during the law enforcement interviews. (10 CT 2801-3221.) At the time of Jackson's sentencing, Carl Bishop and Henry Jones were on trial in connection with the shootings and robbery of the Clevelands. (32 RT 4874.) However, neither Bishop nor Jones provided testimony nor were they subjected to cross-examination in Jackson's case.

On appeal, Jackson's claim is predicated on the untenable assumption that he was not the actual killer based on Bishop's unsworn statement. (AOB 215.) However, Bishop stated he observed Leon West fire a shot in the hallway of the Cleveland's home, not that he saw West shoot Monique Cleveland. The evidence showed that there were two shots fired in that hallway, one at Monique Cleveland while she was locked in the bathroom, and one when she was executed on the hallway floor next to the bathroom doorway. (32 RT 4874.) The evidence admitted at trial shows Jackson was the person who shot Monique Cleveland. There was no evidence introduced at trial that was contrary to this fact. The hearsay statements of Bishop and Jones are insufficient to counter the weight of the trial evidence that Jackson fired the shot that killed Monique Cleveland.

Jackson complains the trial court refused to credit Bishop's statements as fact and instead the trial court found Bishop was not credible based on the contents of the law enforcement interview. (AOB 217-218 citing 32 RT 4875-4876.) Jackson argues the court could not refuse to credit Bishop's statements because Bishop was "remarkably consistent" over a series of continuous interviews and therefore the trial court was wrong in observing that Bishop had taken so many different positions at different times during the interviews.[22] (AOB 219.) According to Jackson, Bishop's consistency in laying blame on a conveniently at large Leon West for shooting Monique Cleveland and never blaming anyone else is sufficient to demonstrate that Jackson was not the actual killer and thus his death sentence is constitutionally disproportionate to his culpability. (AOB 219-220.) This position ignores the fact that Bishop described West as firing a gun in the Cleveland's hallway, not firing the shot that killed Monique Cleveland, and further ignores the evidence presented during Jackson's trial. While Jackson urges easy dismissal of Kevin Jackson's and Donald Profit's testimony because of their criminal conduct and gang associations, Jackson contradicts this position in urging acceptance of Bishop's unsworn statement. Bishop and Jones also had gang ties and were facing criminal charges for their involvement in the robbery and shooting of the Clevelands. (32 RT 4874-4875; 10 CT 2832-2834.) More importantly, the jury observed Kevin Jackson and Profit during their testimony and was able to make a credibility determination regarding these witnesses. Neither the trial court nor the jury had the benefit of Bishop's sworn testimony tested by cross-examination.

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[22] There were a series of law enforcement interviews with Bishop and the transcripts of which were attached to Jackson's motion for intra-case proportionality review. The trial court read the "voluminous" transcripts. (32 RT 4872.)

Jackson also relies on the prosecution's decision not to seek the death penalty as to either Jones or Bishop. (AOB 216.) It is not disproportionate punishment that some codefendants are charged with capital offenses, and others are not, or that some receive other dispositions through plea bargaining. (*People v. Ledesma* (2006) 39 Cal.4th 641, 744; *People v. Box* (2000) 23 Cal.4th 1153, 1219; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Williams* (1997) 16 Cal.4th 153, 279-280.) "'Unless the state's capital punishment system is shown by the defendant to operate in an arbitrary and capricious manner, the fact that such defendant has been sentenced to death and others who may be similarly situated have not does not establish disproportionality violative of constitutional principles. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 306-312 [107 S.Ct. 1756, 1774-1777, 95 L.Ed.2d 262, 287-291]).'" (*People v. Visciotti* (1992) 2 Cal.4th 1, 77, quoting *People v. McLain* (1998) 46 Cal.3d 97, 121.) Moreover, this is not a factor to be considered in proportionality review because it does not assist in determining a defendant's "personal responsibility and moral guilt." (*People v. Marshall* (1990) 50 Cal.3d 907, 938; *People v. Tafoya*, *supra*, 42 Cal.4th at p. 198-199.) Here, the evidence showed Jackson was the individual who fired the shot that killed Monique Cleveland, Jackson shot Robert Cleveland in the face, and Jackson planned the middle of the night robbery of the Clevelands. Jackson's death sentence is not disproportionate to his culpability of the crime for which he was convicted. (*People v. Bennett* (2009) 45 Cal.4th 577, 629.)

In considering whether a punishment is disproportionate to culpability, the court must consider the defendant's personal characteristics, including age, prior criminality and mental capabilities. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 198.) Jackson complains that the record fails to show the trial court ever considered his personal characteristics in denying his proportionality motion. (AOB 220 citing 32 CT 4875-4876.) Jackson

is incorrect. The trial court read and considered Jackson's "voluminous" motion (32 RT 4872), which included information regarding Jackson's personal characteristics (10 CT 2806). Moreover, a fuller consideration of these criteria does not assist Jackson. Jackson was 22 years old when he murdered Monique Cleveland. While he had a difficult early childhood, those events occurred nearly 17 years prior to when Jackson murdered the victim. Jackson's past criminality included violent offenses committed while Jackson was armed with a gun. Given the current crimes, and the nature of Jackson's prior criminal conduct, Jackson's sentence is not disproportionate to his personal culpability.

XIII. THE TRIAL COURT PROPERLY ADMITTED UNADJUDICATED CRIMINAL ACTIVITY BY JACKSON UNDER PENAL CODE SECTION 190.3 FACTOR B IN THE PENALTY PHASE RETRIAL

Jackson claims the trial court erroneously admitted four incidents in the penalty phase retrial pursuant to Penal Code section 190.3, subdivision (b). Jackson argues the four incidents do not amount to criminal conduct so their admission into evidence violated his constitutional right to due process under the Fourteenth Amendment. (AOB 222-224.) Each of the four complained of instances was criminal activity that involved express or implied use or threat of use of force or violence, and therefore, each was properly admitted. Even if error, it was harmless.

The four instances Jackson complains of are three incidents that occurred at Mule Creek State Prison on June 29, 1995, August 8, 1995, and November 11, 1995, and the fourth is Jackson's arrest for being a felon in possession of a firearm on September 7, 1994. (AOB 222-223.) Jackson did not object at trial to the introduction of this evidence on the basis he now raises, and therefore, he has forfeited his appellate claims under both statutory and constitutional law. (*People v. Lewis*, *supra*, 39 Cal.4th at

p. 1052, citing *People v. Partida* (2005) 37 Cal.4th 428, 434-436, and *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588; Evid. Code, § 353.)

The evidence was properly admitted under Penal Code section 190.3, factor (b), which provides that the jury may consider in making their sentencing determination, "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." As used in factor (b), the term "criminal activity" includes only conduct that violates a penal statute. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1133-1134.) Whether a particular instance of criminal activity involved the express or implied threat to use force or violence "can only be determined by looking at the facts of the individual incident." (*People v. Mason* (1991) 52 Cal.3d 909, 955.)

All three of the incidents at Mule Creek State Prison concerned fights involving Jackson and other inmates. On June 29, 1995, Jackson fought with the Crips in a fight with their rival gang, the 415s. (28 RT 4311-4317, 4327-4328.) On August 8, 1995, there was a fight in the prison yard, and when the officer tried to break it up, he ordered inmates to the ground and Jackson refused the "get down" order. (28 RT 4357-4365.) On November 11, 1995, Jackson fought with another inmate on the basketball courts. (28 RT 4336-4341.) In the fourth incident, a Riverside police officer stopped the car Jackson was riding in, and when Jackson exited the car there was a loaded gun on the seat where Jackson had been sitting. Jackson was arrested for being a felon in possession of a firearm. (27 RT 4257-4262, 4265-4267.)

The penalty phase retrial jury was instructed with CALJIC No. 8.87:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: fighting while in custody, resisting or delaying a peace officer in the performance of his duties, armed robbery and felon in

> possession of a firearm, which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance. [¶] It is not necessary for all jurors to agree. If any juror is convicted beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(31 RT 4719-4720; 9 CT 2704.)

Fighting, resisting or delaying a peace officer in his or her duties, and being a felon in possession of a firearm individually amount to criminal activity. Depending on the severity, fighting can be a violation of Penal Code sections 240, 242, or 415. Resisting, delaying or obstructing a peace officer can be a violation of Penal Code section 148. Possession of a firearm by a felon is a violation of Penal Code section 12021. Therefore, all of the incidents about which Jackson complains are in fact criminal activity. Moreover, they are each criminal activity that involves "the express or implied use of force or violence or the threat of force of violence." (See, *e.g.*, *People v. Wallace*, *supra*, 44 Cal.4th 1032 [uncharged criminal activity a fight among jail inmates]; *People v. Monterroso* (2004) 34 Cal.4th 743, 793 [fight among rival gangs]; *People v. Michaels* (2002) 28 Cal.4th 486, 536 [illegal possession of a weapon maybe an implied threat of violence]; *People v. Stanley*, *supra*, 10 Cal.4th at p. 824 [car arson viewed as an implied threat of violence].) Given the evidence presented as to each of the incidents challenged by Jackson, a rational trier of fact could have found the existence or potential of violent criminal activity by Jackson beyond a reasonable doubt. (See *People v. Griffin*, *supra*, 33 Cal.4th 536, 584-585.)

Even assuming some error in admitting one or all four of the incidents, there is no reasonable possibility the penalty verdict would have been different absent evidence of these incidents individually or collectively. (*People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 591; *People v. Lewis* (2008) 43 Cal.4th 415, 527.) The jury rightly heard the circumstances of the murder of Monique Cleveland, the attempt to kill Robert Cleveland and how Jackson inflicted great bodily injury upon him, the armed robbery of the employees of the Empire Drugstore, and the armed robbery of Joseph Canada. The jury was provided with ample evidence of Jackson's violent criminal behavior without the four incidents about which he complains. Any error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIV. THE PENALTY-PHASE RETRIAL JURY WAS ADEQUATELY INSTRUCTED AND THE TRIAL COURT CORRECTLY REFUSED JACKSON'S PROPOSED INSTRUCTIONS

Jackson claims the trial court erred in refusing his proposed penalty phase instruction numbers 1, 4, 5, 6, 7, 8, 10, and 12. Jackson contends CALJIC Nos. 8.84.1, 8.85, and 8.88 are insufficient to convey the law as to how to access mitigating evidence and the decision of which punishment to impose. While Jackson acknowledges this Court has previously decided these matters adverse to his position, he claims this Court should revisit its prior holdings. (AOB 225-254.) The trial court properly refused to instruct the jury with Jackson's proposed instructions because they were argumentative, duplicative, incomplete, or erroneous. Moreover, Jackson provides no persuasive reason for this Court to revisit settled issues of law.

Jackson submitted twenty proposed penalty phase instructions. (9 CT 2724-2745.) Proposed penalty phase instruction nos. 9 and 20 were given

to the jury, and no. 16 was withdrawn. (9 CT 2710, 2716, 2741.) The remaining proposed instructions were refused by the trial court. (30 RT 4691-4697.) On appeal, Jackson claims it was error to refuse to give eight of the proposed penalty phase instructions.

The prosecutor objected to the proposed penalty phase instructions because they were duplicative of the standard jury instructions, misstatements of law or argumentative. (30 RT 4689-4690.) The trial court refused proposed instruction no. 1[23] because it improperly included language such as "moral determination." (30 RT 4692.) As Jackson acknowledged at trial, proposed penalty phase instruction no. 1 was duplicative of CALJIC No. 1.00 (9 CT 2725), which the jury did receive (31 RT 4704-4705; 9 CT 2670). On appeal, Jackson claims the failure to give proposed penalty phase instruction no. 1 deprived the jury of instruction that the guilt and penalty phase tasks are different, and deprived the jury of knowing the weight and importance of their sentencing decision. (AOB 229-236.) This position ignores the other properly given instructions.

CALJIC No. 8.84 instructed the jury that there were two penalties options and their decision must be between death and life without the possibility of parole. (31 RT 4714-4715; 9 CT 2699.) CALJIC No. 8.84.1 informed the jurors of their duty in determining a penalty. (31 RT 4715; 9 CT 4715.) CALJIC No. 8.85 informed the jury of the factors to be considered in making its sentencing decision. (31 RT 4715-4717; 9 CT 2701-2702.) CALJIC No. 8.88 directed the jury as to how to consider

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[23] Proposed Penalty Instruction No. 1 provided, "Your responsibility in the penalty phase is not merely to find facts, but also – and most important – to render an individualized moral determination about the penalty appropriate for the particular defendant – that is, whether he should live or die." (9 CT 2724.)

mitigating and aggravating factors. (31 RT 4720-4721; 9 CT 2705-2706.) This Court has repeatedly held "CALJIC jury penalty phase instructions '"are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards."'" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 226, quoting *People v. Gurule*, *supra*, 28 Cal.4th at p. 659, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177.) Jackson provides no logical reason for this Court to revisit this established principle of law.

Jackson argues Proposed Penalty Phase Instruction No. 4 should have been given to inform the jury that death is not a less severe punishment than life without the possibility of parole.[24] (AOB 226-228; 9 CT 2729.) In *People v. Cook*, *supra*, 40 Cal.4th at p. 1363, this Court rejected this contention and found that "the jurors' own common sense" coupled with CALJIC No. 8.88 "clearly indicated that death was always the ultimate punishment."

Jackson claims Proposed Penalty Phase Instruction No. 5 was necessary to avoid double counting of aggravating facts.[25] (AOB 228-229.)

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[24] Proposed Penalty Phase Instruction No. 4 provides, "Some of you expressed the view during jury selection that the punishment of life in prison without the possibility of parole was actually worse than the death penalty. [¶] You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without the possibility of parole. [¶] It would be a violation of your duty as jurors if you were to fix the penalty at death with a view that you were thereby imposing the less severe of the two available penalties." (9 CT 2729.)

[25] Proposed Penalty Phase Instruction No. 5 stated, "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 (continued...)

This Court has rejected this proposed instruction as inconsistent with CALJIC No. 8.85 "which allows the jurors to consider all the evidence in the case, including the existence of any special circumstances found true." (*People v. Cook*, *supra*, 40 Cal.4th at p. 1363, citing *People v. Siripongs* (1988) 45 Cal.3d 548, 581, fn. 11; *People v. Burney*, *supra*, 47 Cal.4th at p. 261.)

In *Cook*, this Court also rejected proposed penalty phase instructions such as Jackson's Nos. 6,[26] 7,[27] 8,[28] and 10[29] defining mitigation. (*People*

(...continued)
other words, do not consider the same factors more than once in determining the presence of aggravating factors." (9 CT 2730.)

[26] Proposed Penalty Phase Instruction No. 6 provided, "Evidence has been produced concerning that following: defendant's deprived childhood; the fact that he was subjected to the physical abuse of his mother and cruelty during his formative years; his incarceration in juvenile institutions and prisons from age 16 on; and the lack of treatment for identified problems concerning aggression. Any or all of the above may be considered as mitigating factors." (9 CT 2731.)

[27] Proposed Penalty Phase Instruction No. 7 stated, "A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offense or the defendant which, in fairness, sympathy, compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense." (9 CT 2732.)

[28] Proposed Penalty Phase Instruction No. 8 provided, "Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without the possibility of parole." (9 CT 2733.)

[29] Proposed Penalty Phase Instruction No. 10 stated, "Mitigating factors are not necessarily limited to those adduced from specific evidence offered at the sentencing hearing such as character testimony. A juror
(continued...)

v. Cook, *supra*, 40 Cal.4th at p. 1363-1364.) As this Court has noted, these proposed instructions "were not legitimate pinpoint instructions focusing on the defense's legal theories," but instead were "improper attempts to highlight particular items of evidence." (*People v. Cook*, *supra*, 40 Cal.4th at p. 1364; *People v. Catlin* (2001) 26 Cal.4th 81, 172-174; *People v. Earp*, *supra*, 20 Cal.4th at p. 886.)

This Court has also refused instructions such as proposed penalty phase instruction No. 12[30] as duplicative of CALJIC No. 8.85, factor (k). (*People v. San Nicolas* (2004) 34 Cal.4th 614; *People v. Smithey*, *supra*, 20 Cal.4th at p. 1007 ["catchall 190.3, factor (k) instruction 'allows the jury to consider a virtually unlimited range of mitigating circumstances.'"]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1192.)

The penalty phase retrial jury was properly instructed on the law regarding the penalty determination within the United States and California Constitutions. Therefore, the trial court properly declined to instruct the jurors with any of Jackson's proposed penalty phase instructions challenged on appeal.

XV. THE TRIAL COURT PROPERLY REFUSED THE DEFENSE INSTRUCTION DEFINING LIFE WITHOUT THE POSSIBILITY OF PAROLE

Jackson complains that his state and federal constitutional rights to present a defense, a fair and reliable penalty determination, and to due

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(...continued)
might be disposed to grant mercy based on other factors, such as a humane perception of the defendant developed during the trial." (9 CT 2735.)

[30] Proposed Penalty Phase Instruction No. 12 stated, "You need not find any mitigating circumstances in order to return a sentence of life imprisonment without the possibility of parole. A life sentence may be returned regardless of the evidence." (9 CT 2737.)

process were violated because the trial court refused his proffered instruction defining: "life without possibility of parole." (AOB 255-264.) The proposed defense instruction was an incorrect statement of the law in light of gubernatorial powers of pardon and commutation and the possibility the death penalty could be invalidated in the future. The trial court properly refused the defense instruction because CALJIC No. 8.84 given below adequately described "life without possibility of parole."

The defense proposed penalty phase instruction no. 3 stated: "You are instructed that life without possibility of parole means exactly what it says: The defendant will be imprisoned for the rest of his life. [¶] You are instructed that the death penalty means exactly what it says: That the defendant will be executed. [¶] For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors." (9 CT 2728.) Relying on *People v. Roybal* (1998) 19 Cal.4th 481, 524-525, the trial court refused the proposed defense instruction. (30 RT 4692.)

As this Court noted in *People v. Watson* (2008) 43 Cal.4th 652, 700, it is an incorrect statement of the law to instruct a jury that a defendant sentenced to life without the possibility of parole will be imprisoned for the rest of his life or that a defendant sentenced to death will be executed. Moreover, CALJIC No. 8.84 adequately informed the jury that a defendant sentenced to a term of life without the possibility of parole will be ineligible for a pardon. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1091.)

Relying on *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169 [114 S.Ct. 2187, 129 L.Ed.2d 133], Jackson claims the instruction was necessary because the term "life without possibility of parole" is widely misunderstood. (AOB 256-263.) Jackson acknowledges this Court has concluded that *Simmons* has no application to California because, unlike South Carolina, a California penalty jury is instructed that one of the

sentencing choices is "life without parole," and the phrase is commonly understood and requires no further definition. (AOB 257 citing *People v. Wilson* (2005) 36 Cal.4th 309, 352-353.) Jackson argues that in *Wilson* this Court erroneously required a defendant to demonstrate widespread misunderstanding of a term before a court must instruct on its definition. (AOB 259.) Jackson contends this is contrary to *Simmons* where an instruction was required if it was "reasonably" possible the jury might believe the defendant would be released on parole. (AOB 261, citing *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 161.) This Court has already considered the impact of the high court's decision in *Simmons* in rejecting this argument and Jackson offers no persuasive reason for this Court to revisit its prior decisions. (See *People v. Lindberg*, *supra*, 45 Cal.4th at p. 53.)

Jackson argues that he was prejudiced by the failure to instruct with his proposed penalty phase instruction no. 3 because there is a substantial likelihood that at least one of his jurors concluded the non-death option failed to provide a sufficiently severe penalty, or feared that absent choosing death, Jackson would someday be released into society. (AOB 263-264.) Jackson fails to present any basis for his speculative assertion of prejudice. Accordingly, he has shown neither error not prejudice.

XVI. THE JURY WAS ADEQUATELY INSTRUCTED ON HOW TO REACH AN APPROPRIATE SENTENCE IN THE PENALTY PHASE RETRIAL, THEREFORE, AN ADDITIONAL DEFENSE INSTRUCTION ON MERCY WAS UNNECESSARY

Jackson contends that his sentence of death must be reversed because the trial court refused his instructions on mercy thereby denying his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitutions and the parallel provisions of California's Constitution. (AOB 265-273.) The trial court did not err, and Jackson's constitutional

rights were not implicated because the jury was adequately instructed with the applicable standard jury instruction.

Jackson requested five penalty phase instructions addressing consideration of mercy (Proposed Penalty Phase Instruction numbers 2,[31] 7,[32] 11,[33] 13,[34] and 14[35]). (9 RT 2726-2727, 2732, 2736, 2738, 2739.)

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[31] Proposed Penalty Phase Instruction No. 2 stated, "[I]n this part of the trial the law permits you to be influenced by mercy, sympathy, compassion or pity for the defendant or his family in arriving at a proper penalty in this case." (9 CT 2726.)

[32] Proposed Penalty Phase Instruction No. 7 provided, "A mitigating circumstance is a fact about the offense or the defendant which, in fairness, sympathy, compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense." (9 CT 2723.)

[33] Propose Penalty Phase Instruction No. 11 stated, "If a mitigating circumstance or an aspect of the defendant's background or his character called to the attention of the jury by the evidence arouses mercy, sympathy, empathy or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and impose a sentence of life without the possibility of parole." (9 CT 2736.)

[34] Proposed Penalty Phase Instruction No. 13 provided, "In determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant." (9 CT 2738.)

[35] Proposed Penalty Phase Instruction No. 14 provided, "An appeal to the sympathy or passions of a jury is inappropriate at the guilt phase of a trial. However, at the penalty phase, you may consider sympathy, pity, compassion, or mercy for the defendant that has been raised by any aspect of the offense or of the defendant's background or character in determining the appropriate punishment. You are not to be governed by conjecture, prejudice, public opinion, or public feeling. You may decide that a sentence of life without the possibility of parole is appropriate for the

(continued...)

Jackson contends the trial court erred by failing to give these instructions because the jurors were not provided with a vehicle to evaluate all mitigating evidence relevant to mercy, such that the jury was denied the basis for making a "reasoned moral response" to the sentencing decision. (AOB 269-270.) This Court has repeatedly rejected this exact same claim in other capital cases. (See, *e.g.*, *People v. Boyer* (2006) 38 Cal.4th 412, 487 [court properly declined mercy instruction]; *People v. Griffin* , *supra*, 33 Cal.4th at p. 591 [same]; *People v. Lewis* (2001) 26 Cal.4th 334, 393 [same]; *People v. Benson* (1990) 52 Cal.3d 754, 808 [same].)

As this Court has explained, a capital defendant is not entitled to an instruction on mercy because it "implies an unguided or arbitrary discretion in the jury to render a greater or lesser penalty at its whim ....." (*People v. McPeters*, *supra*, 2 Cal.4th at p. 1195, superseded by Prop. 115 on other grounds.) Defense counsel appropriately argued for the jury to show Jackson mercy. (31 RT 4818.) The standard instructions given to the jury "focusing on sympathy and compassion in relation to the circumstances more precisely and adequately cover the area." (*People v. McPeters*, *supra*, 2 Cal.4th at p. 1195.)

Jackson's jury was instructed with CALJIC No. 8.85 regarding factor (k) that they shall consider: "[a]ny other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (31 RT 4717; 9 CT 2702; see also CALJIC No. 8.88, 31 RT 4720; 9 CT 2705-2706

(...continued)
defendant based upon the sympathy, pity, compassion, and mercy you felt as a result of the evidence adduced during the penalty phase." (9 CT 2739.)

["You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider."].) CALJIC No. 8.85 "adequately instructs the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy." (*People v. Burney*, *supra*, 47 Cal.4th at p. 261.)

Jackson acknowledges this Court has concluded that CALJIC No. 8.85 adequately instructs a penalty phase jury regarding mitigation, including sympathy and mercy, but asks this Court to reconsider its decisions. (AOB 270.) The use of the word "sympathetic" in the standard jury instruction given below did not mislead the jury as to its responsibility to consider sympathy, mercy, and any other aspect of Jackson's character and record in mitigation. (*People v. DePriest* (2007)42 Cal.4th 1, 59.) Jackson does not provide a basis for this Court to revisit its repeated holdings that CALJIC No. 8.85 adequately instructs a penalty phase jury regarding mercy. Accordingly, it was not error for the trial court to refuse to instruct on mercy as requested by the defense. Jackson's contrary contention must be rejected.

XVII. THERE WAS NO FACTUAL BASIS, NOR A STATUTORY OR CONSTITUTIONAL RIGHT FOR THE TRIAL COURT TO INSTRUCT ON LINGERING DOUBT; THEREFORE, IT PROPERLY REFUSED THE PROPOSED INSTRUCTION IN THE PENALTY PHASE RETRIAL

Jackson claims the trial court abridged his rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and California Constitution, article I, sections 7, 15, and 17 to due process, equal protection, to present a defense, to have a fair trial and a reliable penalty determination, by failing to instruct the jury with a proposed defense instruction on lingering doubt. (AOB 274-278.) Since there was

no legitimate basis to instruct the jury on lingering doubt, the trial court properly declined to do so.

During discussions on the penalty phase retrial instructions, Jackson's counsel requested, among other instructions, that the trial court give the jury a lingering doubt instruction that stated:

> Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for the imposition of the death penalty. The adjudication of guilt is not infallible, and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not been discovered.

(9 CT 2740.) The trial court refused the defense requested lingering doubt instruction. (30 RT 4696.)

A defendant "clearly has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about defendant's guilt." (*People v. Rodrigues* (1994) 8 Cal.4th 1060 1187, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1253 and *People v. Fauber* (1992) 2 Cal.4th 792, 864; *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 [108 S.Ct. 2320, 101 L.Ed.2d 155]; *People v. Cox*, *supra*, 53 Cal.3d at pp. 677-678.) A "defendant may urge his possible innocence to the jury as a factor in mitigation." (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1252; Pen. Code, § 190.3, factors (a), (k).) "[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*People v. Brown*, *supra*, 31 Cal.4th at p. 567, citing *People v. Slaughter*, *supra*, 27 Cal.4th at p. 1219.)

To support his claim that a lingering doubt instruction was needed, Jackson argues that the guilt phase jury that heard the first penalty phase and was unable reach a unanimous penalty verdict. (AOB 277-278.) That jury sent a note questioning the role lingering doubt should be considered in

determining punishment.[36] (18 RT 2931-2932; 3 CT 872.) In response to the jury's note in the first penalty phase, defense counsel proposed, and the prosecutor agreed, the jury should be read a lingering doubt instruction. (18 RT 2932.) The trial court did instruct the jury regarding lingering or residual doubt.[37] The trial court also reinstructed with CALJIC No. 8.88. (18 RT 2933-2935.)

Jackson's proposed instruction at issue on appeal went further than merely addressing lingering doubt. The proposed instruction urged the jury to speculate about what, if anything, might be found in the future concerning the case. It was also argumentative. It implied that the jurors' weighing of aggravating and mitigating circumstances required a particular degree of proof. No such burden of proof exists in the penalty phase. (*Tuilaepa v. California* (1994) 512 U.S. 967, 978-980 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Sanders* (1995) 11 Cal.4th 475, 564; *People v. Medina*, *supra*, 11 Cal.4th at p. 752.) The trial court is not obligated to give argumentative or legally incorrect instructions. (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 1004.) There was no evidence or legal basis for the proposed instruction and the trial court properly refused it.

Moreover, the jury was instructed it "shall consider, take into account and be guided by the following factors, if applicable: [¶] (a) The circumstances of the crime of which the defendant was convicted in the

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[36] The jury note provided: "'What weight, if any, should lingering doubt or any doubt pertaining to this case in the guilt phase and the penalty phase be considered in determining the punishment.'" (18 RT 2931-2932; 3 CT 872.)

[37] The trial court instructed, "'It is appropriate for the jury to consider in mitigation any lingering doubt it may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of the mind between a reasonable doubt and beyond all possible doubt." (18 RT 2933.)

present proceeding and the existence of any special circumstance found to be true." (31 RT 4715-4716; 9 CT 2701-2702; CALJIC No. 8.85; Penal Code, § 190.3, factor (a).) The jury was further instructed to consider "Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. . . ." (31 RT 4717; 9 CT 2702; CALJIC No. 8.85(k); Penal Code, § 190.3, factor (k).) These instructions sufficiently encompassed the concept of lingering doubt and the trial court was under no duty to give a more specific instruction. (*People v. Gray*, *supra*, 37 Cal.4th at p. 232; *People v. Hines*, *supra*, 15 Cal.4th at p. 1068; *People v. Osband* (1996) 13 Cal.4th 622, 716.) No error occurred concerning the trial court's refusal to instruct the jury with the proposed lingering doubt instruction.

An instruction on lingering doubt in the penalty phase is not required under the United States or California Constitutions. While lingering doubt may be argued, there is no requirement that the trial court instruct the jury regarding it. The concept of lingering doubt was adequately conveyed by the other penalty phase instructions given to the jury. Accordingly, the trial court was not required to give the defense proposed instruction on lingering doubt.

XVIII. CALIFORNIA DEATH PENALTY STATUTES ARE CONSTITUTIONAL

Jackson claims the California capital sentencing statutory scheme violates the United States Constitution. (AOB 279-314.) These arguments have been repeatedly rejected by this Court. Jackson presents no compelling reason for this Court to revisit it prior decisions.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Contrary to Jackson's claim, Penal Code section 190.2 is not impermissibly broad. (AOB 281-283.) This Court has consistently rejected the claim that the California death penalty statute fails to narrow, in a constitutionally acceptable manner, the class of persons eligible for the death penalty. "California's statutory special circumstances (§ 190.2, subds. (a)(1)-(22)) are not so numerous or inclusive as to fail to narrow the class of murderers eligible for the death penalty." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 165.) "The special circumstances listed in section 190.2 adequately narrow the class of murders for which the death penalty may be imposed." (*People v. Snow* (2003) 30 Cal.4th 43, 125.) "The statute (§ 190.2) does not impose overbroad death eligibility, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits capital exposure for an unintentional felony murder." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 601; see, *e.g.*, *People v. Marks* (2003) 31 Cal.4th 197, 237; *People v. Box*, *supra*, 23 Cal.4th at p. 1217; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479.)

Jackson argues that the death penalty applies to "almost all felony-murders" and "virtually all intentional murders" in California. (AOB 282.) The defendant in *People v. Crittenden*, *supra*, 9 Cal.4th 83, made a similar argument: "In particular, defendant contends that the categories of murder subjecting a defendant to eligibility for the death penalty have been expanded to the extent that the death penalty law does not perform the mandated narrowing function. This development, defendant asserts, is reflective of an original unconstitutional purpose, harbored by the proponents of the law, to apply the death penalty in every case of murder." (*Id.* at p. 154.) This Court held in *Crittenden*, "[e]ven taking into account this statutory expansion, however, we believe the death-eligibility

component of California's capital punishment law does not exceed constitutional bounds." (*Id.* at p. 156.)

B. California's Death Penalty Statute Does Not Allow Arbitrary and Capricious Imposition of Death

Jackson argues that factor (a) of Penal Code section 190.3 has been applied in an arbitrary and capricious manner in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 283-286.) This claim should be rejected pursuant to the authority of *People v. Manriquez* (2005) 37 Cal.4th 547: "Section 190.3, factor (a), is not overbroad, nor does it allow for the arbitrary and capricious imposition of the death penalty. [Citations.]" (*Id.* at p. 589, fn. omitted.)

C. The Jury Is Not Required to Find Beyond a Reasonable Doubt That (1) Aggravating Factors Exist, (2) They Outweigh the Mitigating Factors, or (3) Death Is the Appropriate Sentence

Jackson argues that the jury must be required to find beyond a reasonable doubt that aggravating factors exist, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty. (AOB 286-297.) As this Court explained in *People v. Demetrulias*, *supra*, 39 Cal.4th 1, California's death penalty statute does not require instruction on burden of proof in the penalty phase and "is not invalid for failing to require . . . (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt. [Citation.]" (*Id.* at p. 43; accord *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Davis*, *supra*, 36 Cal.4th at p. 571; *People v. Brown* (2004) 33 Cal.4th 382, 402.) Unanimity is required only as to the appropriate

penalty. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 963; *People v. Anderson*, *supra*, 25 Cal.4th at p. 590.)

Jackson argues that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], require that the aggravating factors be found beyond a reasonable doubt by a unanimous jury. (AOB 251-259.) This claim should be rejected. *Ring* is inapplicable to the penalty phase of California's capital murder trials because "once a defendant has been convicted of first degree murder and one or more special circumstances have been found true under California's death penalty statute, the statutory maximum penalty is already set at death. [Citation.]" (*People v. Stanley*, *supra*, 39 Cal.4th at p. 964.) Thus, "any finding of aggravating factors during the penalty phase does not increase the penalty for a crime beyond the prescribed statutory maximum [citation], [and] *Ring* imposes no new constitutional requirements on California's penalty phase proceedings. [Citations.]" (*Ibid.*, internal quotations and brackets omitted.)

Similarly, in *People v. Morrison*, *supra*, 34 Cal.4th 698, this Court held that *Apprendi*, *Ring*, and *Blakely* do not "affect[] California's death penalty law or otherwise justif[y] reconsideration of the foregoing decisions. [Citations.]" (*Id.* at p. 730; accord *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Additionally, this Court held that *Cunningham* "merely extends the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to California's capital sentencing scheme. [Citation.]" (*People v. Salcido* (2008) 44 Cal.4th 93,167.)

Jackson also argues that the jury must be required to find beyond a reasonable doubt that aggravating factors outweigh the mitigating factors. (AOB 297-300.) As this Court, however, explained, "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. [Citations.]" (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Furthermore, "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase. [Citations.]" (*Ibid.*; accord *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43; *People v. Gray*, *supra*, 37 Cal.4th at p. 236; *People v. Wilson*, *supra*, 36 Cal.4th at p. 360.) Accordingly, Jackson's claim should be rejected.

Jackson argues that the jury must make written findings of aggravating factors. (AOB 300-303.) On the contrary, the jury is not required to make written findings regarding aggravating factors. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 893, *People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Davis*, *supra*, 36 Cal.4th at p. 571; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 593-594; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.)

Jackson contends that intercase proportionality review is required in capital sentencing. (AOB 303-304.) Intercase proportionality review is not required. "Comparative intercase proportionality review by the trial or appellate courts is not constitutionally required." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126; accord *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 44; *People v. Gray*, *supra*, 37 Cal.4th at p. 237; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Anderson*, *supra*, 25 Cal.4th at p. 602.)

Jackson argues that reliance on unadjudicated criminal activity violated his right to due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments rendering his death sentence unreliable. Jackson contends the jury should have been required to make a unanimous finding regarding the criminal conduct under a beyond a reasonable doubt standard before it could be considered in aggravation. (AOB 305.) On the contrary, reliance on unadjudicated criminal activity is constitutional. "In itself, introduction of evidence of unadjudicated criminal activity under section 190.3, factor (b), does not offend the federal Constitution. [Citations.]" (*People v. Maury* (2003) 30 Cal.4th 342, 439.) "The jury need not unanimously decide the truth of unadjudicated crimes. [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061.)

Jackson contends that the trial court erroneously failed to instruct the jury which factors were relevant as mitigating circumstances. (AOB 306-308.) The trial court is not required to instruct the jury which factors are relevant solely as potential mitigating circumstances and which factors are relevant as aggravating circumstances. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 360; *People v. Farnam* (2002) 28 Cal.4th 107, 191-192.) It is also not required to advise the jury which statutory factors are relevant solely as mitigating circumstances. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 192.)

D. California's Death Penalty Statute Does Not Violate Equal Protection

Jackson argues that California's death penalty statute violates equal protection because it "provides significantly fewer procedural protections" than those afforded to non-capital defendants. (AOB 309-311.) This Court has rejected the claim that procedural differences in capital and non-capital cases, including the availability of certain "safeguards" such as intercase

proportionality review, violate equal protection principles under the Fourteenth Amendment. (See *People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182; *People v. Cox*, *supra*, 53 Cal.3d at p. 691; *People v. Allen* (1986) 42 Cal.3d. 1222, 1287-1288.) As this Court has observed, capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. (*People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Danielson* (1992) 3 Cal.4th 691, 719-720, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "By parity of reasoning, the availability of procedural protections such as jury unanimity or written factual findings in noncapital cases does not signify that California's death penalty statute violates equal protection principles." (*People v. Blair*, *supra*, 36 Cal.4th at p. 754.

E. Use of the Death Penalty Does Not Violate International Law and/or the Constitution

Jackson contends that use of the death penalty as a regular form of punishment violates international law and the Eighth and Fourteenth Amendments of the United States Constitution. (AOB 312-314.) As this Court stated in *People v. Hillhouse*, *supra*, 27 Cal.4th 469, at page 511, "had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis, without recourse to international law.... [¶] ... International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (See also *People v. Loker* (2008) 44 Cal.4th 691, 756; *People v. Harris* (2008) 43 Cal.4th 1269, 1323; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 (maj. opn.); *id.* at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Vieira* (2005) 35 Cal.4th 264, 305; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1055.)

XIX. THERE IS NO REVERSIBLE CUMULATIVE ERROR

Jackson contends that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (AOB 315.) Respondent disagrees because there was no reversible error, and, to the extent there was error, Jackson has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 447, 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows Jackson received a fair trial. His claim of cumulative error should, therefore, be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 3, 2010

Respectfully submitted,

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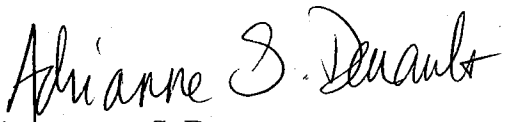

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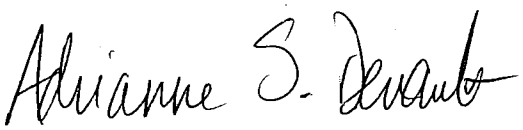
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 35,300 words.

Dated: March 3, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Jonathan K. Jackson*** No.: **S086269**

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

On March 4, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 4, 2010, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature