No. S086269

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	(Riverside Superior
	)	Court No. CR-69388)
vs.	)	
	)	
JONATHAN K. JACKSON,	)	
	)	
Defendant and Appellant.	)	
	)	

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Riverside
Hon. Edward Webster and Hon. Russell Schooling, Judges

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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INTRODUCTION

This Court needs to consider only the first issue this case. It is dispositive.

Despite respondent's arguments, there is no real question that the trial court in this case erroneously ordered appellant Jonathan Jackson to wear a REACT belt – a device designed to maintain psychological supremacy and to inflict an eight-second current of 50,000 volts on the wearer, via prongs attached to the wearer's left kidney area. Mr. Jackson was twice unconstitutionally ordered to wear the REACT belt, before his first trial, and again before the retrial of the penalty phase after the first jury could not reach a penalty verdict.

The critical legal question is whether these errors are – like the wrongful administration of antipsychotic medication – reversible without a prejudice inquiry, at either the guilt or penalty phases. Discussing the REACT belt in *People v. Mar* (2002) 28 Cal.4th 1201, 1227-1228, this Court expressly analogized its wrongful use to the wrongful use of antipsychotic medications that the Supreme Court had held reversible without a prejudice inquiry in *Riggins v. Nevada* (1992) 504 U.S. 127. Mr. Jackson, analyzing *Riggins* in his opening brief, demonstrated why this reasoning compels reversal of both the judgment of conviction and the penalty judgment in this case.

But respondent does not even mention *Riggins v. Nevada* in its brief. Respondent defaults on the question of prejudice under *Riggins*.

If the Court proceeds further with this case, it will turn to a record replete with error, particularly in the retrial of the penalty phase. Perhaps most notably, the trial court had the clerk inform the second jury that the first jury had found that Mr. Jackson had "personally used" a firearm in the commission of the felony-murder. But the first jury had made no finding that Mr. Jackson had personally used a firearm to kill the victim. Under

these circumstances the trial court was required to instruct the jury on the meaning of "personal use" of a firearm; the trial court's failure to do so prejudicially misled the second jury to believe that the first jury had found that Mr. Jackson was the actual killer, a mistaken belief that heavily weighted the scales toward death. This serious error was only exacerbated by a pattern of prosecutorial misconduct, including a deliberate misrepresentation by the prosecutor to jurors that Mr. Jackson had been found by the prior jury to have taken the victim's life "himself." These constitutional violations, and the other serious evidentiary and instructional errors with which this record is riddled, compel reversal of the judgment.[1]

[1] In this brief, Mr. Jackson does not reply to each and every one of respondent's arguments, but replies only when further discussion may, in his view, be helpful to the Court. The failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply brief are numbered to correspond to the argument numbers in appellant's opening brief.

I. MR. JACKSON'S CONVICTIONS AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY REQUIRED HIM TO WEAR A REACT BELT AT THE GUILT AND PENALTY PHASES OF HIS TRIAL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO BE FREE OF UNREASONABLE PHYSICAL RESTRAINTS, AND IMPAIRING HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, HIS RIGHT TO BE PRESENT AND TO PARTICIPATE AT TRIAL, AND HIS RIGHT TO A RELIABLE PENALTY PHASE TRIAL.

A. Introduction.

As this Court noted in *People v. Gamache* (2010) 48 Cal.4th 347, 370, "the record [must] establish a threat of violence, escape, or disruption" in order to justify physical restraints, including the 50,000-volt REACT belt. There were two orders that Mr. Jackson wear a REACT belt, made by two separate judges at two different times.

There was not a scintilla of evidence before either trial judge that Jonathan Jackson (a) planned or intended to commit any act of violence whatsoever, (b) planned or intended to attempt an escape, or (c) planned or intended to disrupt court proceedings.

There was also not a scintilla of evidence before either judge that Jonathan Jackson had ever, at any time, (d) disrupted court proceedings, (e) escaped from custody, (f) attempted to escape, (g) assaulted a correctional officer, or (h) possessed a weapon in jail.

Despite its determination that a REACT belt was not necessary, the guilt phase trial court, in mistaken deference to a sheriff's department policy requiring its use when two deputies were assigned, ordered Mr. Jackson be restrained in and controlled with a REACT belt. Remarkably,

respondent refuses to acknowledge the trial court's finding that Mr. Jackson did not pose a security threat that required imposition of the REACT belt.

The penalty phase trial court failed to follow governing law in ordering Mr. Jackson restrained with the REACT belt, ordering the REACT belt despite the complete absence of record evidence of nonconforming conduct, doing so in reliance on vague, *ex parte* claims about appellant by an unidentified bailiff, and failing to consider numerous relevant factors, including whether the obviously head-injured Mr. Jackson was even a suitable candidate for the REACT belt. Respondent ignores the trial court's express reliance on the unsworn representations of the unidentified bailiff, and misleadingly argues that the court's ruling is supported by evidence that was not before the trial court or even in the record when the trial court made its REACT belt order.

The opening brief showed that the erroneous imposition of a REACT belt on a defendant is not subject to harmless error analysis, and reversal of the judgment is required under *Riggins v. Nevada, supra,* 504 U.S. 127.

Respondent fails to address this analysis.

Additionally, the opening brief demonstrated that, even assuming *arguendo* that reversal at the guilt phase without an actual prejudice inquiry is not required, because of the unique nature of penalty phase litigation, *per se* reversal of the penalty phase verdict is required.

Respondent also ignores this showing.

Finally, respondent contends that, primarily because of the assertedly "overwhelming evidence" of guilt, the erroneous imposition of the REACT belt could not have made a difference. This argument says nothing whatsoever about penalty phase prejudice. On this record, it cannot be said beyond a reasonable doubt that the wrongful imposition of the REACT belt did not contribute to the penalty phase result.

B. At the Guilt Phase, The Trial Court, After Determining that a REACT Belt Was Not Necessary, Abdicated its Authority in Mistaken Deference to a Sheriff's Department Policy.

Respondent refuses to acknowledge what the record plainly shows:

The guilt-phase trial court, despite its determination that it was not necessary for Mr. Jackson to wear a REACT belt, and that the presence of two courtroom deputies would adequately assure courtroom security, ordered use of the REACT belt, in deference to a sheriff's department policy that two deputies would not be provided unless a REACT belt was ordered.

The opening brief showed this abdication of authority in mistaken deference to a sheriff's department policy was an abuse of discretion, a violation of this Court's clearly stated rule that trial courts should impose the least restrictive measures consistent with court security, and a violation of Mr. Jackson's Sixth, Eighth and Fourteenth Amendment rights.

Respondent chooses not to acknowledge the trial court's determination that a REACT belt was not necessary. Respondent simply ignores that the trial court at the guilt phase made an actual, on-the-record determination that to order Mr. Jackson to wear a REACT belt was not necessary or appropriate:

> THE COURT:
>
> If there is problems going on with intimidation of witnesses or something else is occurring we will deal with it at that point. But at this point, given Deputy Young's confidence that he can handle the situation with a second deputy, ***I think it would be inappropriate to have the react belt.***

3 RT 304 (emphasis added). Respondent refuses to acknowledge the trial court's express determination. Based on the evidence before it, on consultation with a deputy sheriff assigned to the courtroom, and on

arguments of counsel, the guilt phase trial court unequivocally found that the presence of two courtroom deputies would be adequate to assure courtroom security, and it was unnecessary to restrain Mr. Jackson with a REACT belt. 3 RT 306.

The guilt phase trial court never changed or rescinded its finding that security could be assured by the presence of two deputies and a REACT belt was therefore unnecessary.

However, the sheriff's department would not provide two courtroom deputies without an order for the REACT belt. 4 RT 335. The trial court in response, despite its determination that a REACT belt was not necessary, ordered Mr. Jackson restrained with the REACT belt. 4 RT 335.

Mr. Jackson showed in his opening brief that the trial court abused its discretion by abdicating its authority in deference to the sheriff's department.

This Court stated in *People v. Mar, supra,* 28 Cal.4th 1201, 1206:

> the governing precedent establishes that even when special court security measures are warranted, ***a court should impose the least restrictive measure that will satisfy the court's legitimate security concerns*** . . . .

(Emphasis added.) Accord, *People v. Duran* (1976) 16 Cal.3d 282, 290 ("physical restraints should be used as a last resort").

Here, after the trial court determined that the "least restrictive measure" that would satisfy the court's concerns was the presence of two deputies in the courtroom, the court turned around and imposed the REACT belt. This was a direct violation of the long-standing rule that

> "even when the record in an individual case establishes that it is appropriate to impose some restraint upon the defendant as a security measure, ***a trial court properly must authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purposes.*** (*Duran, supra,* 16 Cal.3d 282, 291; accord, *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712.)"

People v. Mar, supra, 28 Cal.4th at p. 1226 (emphasis added).

Respondent fails to acknowledge the significance of these facts. The trial court's finding is not just in tension with, but actually contrary to the finding of "manifest necessity" that must justify a trial court's decision to restrain a defendant under state law. For this reason as well, the trial court's order violated Mr. Jackson's federal due process and Sixth Amendment rights.

Respondent does not dispute that the trial court had the authority – under Code of Civil Procedure section 128, Penal Code section 1044, and the inherent power of trial courts to control the proceedings before them and conform them to due process – to order that Mr. Jackson not be restrained with the REACT belt while in the jury's presence.

Respondent simply does not answer Mr. Jackson's showing that the trial court abused its discretion, and violated federal and state constitutional standards, by elevating compliance with a sheriff's department policy above a capital defendant's right to be free of unnecessary physical restraint in the form of a REACT belt.

The opening brief also showed that the trial court abused its discretion and violated constitutional standards by failing to make any inquiry into Mr. Jackson's medical suitability for restraint with a REACT belt. AOB 52, 62-65. Respondent's only answer is to insist that the record does not show that Mr. Jackson in fact suffered any adverse medical impacts as a result of the REACT belt. RB 31.

Of course, this analysis is mistaken. This Court reviews rulings "for abuse of discretion *based on the facts as they appeared at the time the court ruled on the motion.*" *People v. Tafoya* (2007) 42 Cal.4th 147, 162 (emphasis added); see *People v. Avila* (2006) 38 Cal.4th 491, 575; *People v. Hardy* (1992) 2 Cal.4th 86, 167. The question therefore is whether the trial court abused its discretion when it failed to consider that Mr. Jackson,

who had a visible scar from a recent head injury, was a medically appropriate candidate for the REACT belt. This was hardly immaterial, the trial court entirely failed to consider it, and respondent offers no defense.

C. The Trial Court Abused Its Discretion in Ordering Mr. Jackson to Wear the REACT Belt at the Second Penalty Phase.

After the first jury could not reach a penalty verdict, the penalty phase was retried before a new jury. The trial judge for the retrial, Judge Schooling, was new to the case. Judge Schooling separately ordered that Mr. Jackson be restrained with the REACT belt at trial.

As noted above, respondent's brief conflates its discussion of the guilt phase trial court's order with its discussion of the penalty phase trial court's order.

1. The Trial Court Failed to Apply *Duran*, Erroneously Presuming the REACT Belt to be a Less Restrictive Alternative to Shackling.

In accordance with the prosecutor's arguments, the penalty phase trial court erroneously presumed that the REACT belt was a less "offensive" restraint than shackling and did not require the same degree of justification. 20 RT 3001-3004. Respondent essentially admits this, writing: "It is clear from comments made by the trial court . . . prior to the penalty phase retrial . . . the trial court did not consider the REACT belt a physical restraint on par with shackling and handcuffs." RB 27. Thus, the trial court approached the issue with fundamental misconceptions about the law.

2. The Trial Court Ordered the REACT Belt Despite the Absence of Record Evidence of Nonconforming Behavior, and in Reliance on the Undisclosed, Out-of-Court Statements of An Unidentified Bailiff.

Appellant showed that, in making its decision that he be restrained with the REACT belt at the retrial, the penalty phase trial court materially and inappropriately relied on the out-of-court, unreliable and conclusory statements of an unidentified bailiff. The bailiff, according to the trial court, reputedly "knew something" about the background of appellant, although the bailiff was absent at the hearing on the REACT belt, and the trial court "didn't ask him to go into any detail" even though the deputy had "informed [the court] that there was a need for such [the REACT belt]." 20 RT 3001, 3000. Appellant argued that the trial court's material reliance on this undisclosed, non-sworn oral representation by a person not subject to examination to impose the REACT belt violated his Sixth and Eighth Amendment rights. AOB 58.

Apart from an oblique reference to the trial court "having discussions with the courtroom deputy sheriff" (RB 30), respondent does not mention the trial court's express reliance on this unsworn representation. Respondent does not dispute that the trial court materially relied on this unreliable hearsay representation, or that it was improper to do so.[2]

It is vital that in making a decision as critical to a capital defendant's penalty phase trial as an order to wear a REACT belt, the trial court rely only on evidence that is reliable. See *People v. Mar, supra*, 28 Cal.4th at p. 1221 ("sufficient evidence" of nonconforming conduct must be presented). This hearsay representation of a bailiff who was not present, which was

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[2] See pages 13-14, footnote 3, *infra*.

recalled and relied upon by the trial court, was neither reliable nor even "evidence."

> a trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision.

People v. Sandoval (2007) 41 Cal.4th 825, 847.

For this reason alone the trial court must be held to have abused its discretion in ordering Mr. Jackson restrained with a REACT belt.

Respondent also argues – misleadingly and incorrectly – that the penalty phase trial court's ruling is supported because:

> Jackson had many rules violations and fights while incarcerated, both in prison and while he was awaiting trial. He had disobeyed correctional staffs 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).

RB 31. Even if this could be considered – and, as will be demonstrated *infra*, it cannot be – respondent's summary is grossly misleading and misstates the evidence.

The evidence cited by respondent shows that, at most, appellant was a participant in two fights, not four as respondent claims. Respondent cites to 28 RT 4311-4317 and 4327-4328, regarding a melee at Mule Creek state prison in June 1995. The evidence showed that appellant was present at the scene of a prison yard melee, and was involved in the melee in the sense of being present at the scene, but the evidence did not suggest that he ever acted as an aggressor, or even defended himself. 28 RT 4322, 4331.

Similarly, there was no evidence that appellant was an aggressor, or even a participant, in the fight in the yard at Mule Creek prison in August 1995. 28 RT 4362.

That leaves two fights. And as to the Mule Creek prison incident of November 1995, the correctional officer who was the only witness to testify

about it had no idea whether appellant was the aggressor, or was merely defending himself from the aggressions of another inmate. 28 RT 4349.

The final jailhouse incident involved another inmate, one Robert Mayo, who had got into a dispute with Mr. Jackson on the basketball court and described himself as "angry," and who went into Mr. Jackson's cell, in violation of jail rules and with an "attitude." 29 RT 4455-4462. Mayo testified that he was the initial aggressor: after he barged into Mr. Jackson's cell, Mr. Jackson "said something I [Mayo] didn't like, and I pushed him." 29 RT 4457.

Thus, respondent grossly overstates the evidence that appellant had a history that could justify, not just some restraint, but the extreme remedy of a REACT belt.

As this Court reaffirmed in *People v. Gamache, supra,* 48 Cal.4th 347, 370, "the record [must] establish a threat of violence, escape, or disruption" in order to justify security measures "consistent with the requirement that [the court] choose the least obtrusive restraints necessary."

The penalty phase trial court made the subject of its concern plain.

> THE COURT: The leg brace . . . would solve the problem of escape, which is not really – it is a concern also, of course. But here ***we're concerned about the violent nature of his responses to people in authority***. And that is just not sufficiently addressed by a leg brace . . . It will not keep him from attacking members of the public or the attaches or his own counsel . . . .

20 RT 3003 (emphasis added). Thus, the penalty phase trial court's primary concern in ordering the REACT belt was the supposed danger of violence directed at persons in authority by Mr. Jackson.

Here, ***nothing in the record establishes that Jonathan Jackson had ever responded with violence to a person in authority, either in court or elsewhere***. Over thirty-seven court appearances in the course of three years and three months of pre-trial proceedings, appellant's in-court behavior had

been completely violence-free. AOB 59-60. Outside of court, he had never assaulted a correctional officer or other person in authority.

At the most, the evidence cited by respondent shows that appellant had, on a single occasion, challenged two correctional officers to a fight. But this verbal transgression was nothing more than that -- no fight had actually taken place. This could not have justified the trial court's assumption, and conclusion, that Mr. Jackson's record demonstrated "the violent nature of his responses to people in authority" (20 RT 3003) sufficient to warrant the drastic restraint of a REACT belt.

There is, as noted above, no evidence that Mr. Jackson ever escaped or planned to escape, or threatened to disrupt courtroom proceedings, or planned to do so.

But there is an even more fundamental problem with respondent's assertion: all the evidence it relies on came in after the trial court made its decision to order Mr. Jackson to wear the REACT belt. 20 RT 3004. And as discussed above, review of trial court rulings for abuse of discretion is "based on the facts as they appeared at the time the court ruled on the motion." *People v. Tafoya, supra,* 42 Cal.4th 147, 162. The trial court's ruling cannot be upheld based on the evidence cited by respondent, not just because that evidence is inadequate to justify the REACT belt, but because the evidence was not before the trial court when it made its decision.

Respondent does not contend that that the trial court's ruling could be upheld based on the prosecutor's assertions, nor could it persuasively do so. This Court has made clear that "when the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, sufficient *evidence* of that conduct must be presented." *People v. Mar, supra,* 28 Cal.4th at p. 1221 (emphasis added); *People v. Gamache, supra*, 48 Cal.4th at pp. 367-368 ("The imposition of restraints [including a REACT belt] without *evidence in the record* establishing a threat of

violence, escape, or nonconforming conduct is an abuse of discretion") (emphasis added). This is also the only course consistent with the federal constitutional due process guarantee. *Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897, 902 (following *Mar*); *State v. Cruz* (Ariz. 2008) 181 P.3d 196, 215 (hearing required).

This case demonstrates the wisdom and utility of the rule requiring actual evidence. At the hearing on the REACT belt before the second penalty phase, the prosecutor referred generally to her points and authorities submitted before the first trial (though she did not refer to any alleged specific incidents). 20 RT 3001.

The prosecution points and authorities alleged that while in jail awaiting trial, Mr. Jackson was

"found to be in possession of a weapon while in custody."

2 CT 440-441.

But prior to ruling on the REACT belt issue, the guilt phase trial court had determined that there needed to be a hearing on this very serious allegation. 3 RT 294. Thereafter, the prosecution never went forward on this allegation – it never presented any evidence that Mr. Jackson had, in fact, possessed a weapon while in custody for the present offense (or any other). Thus, it is clear that the guilt phase trial court did not rely on this allegation.

The course of the hearing shows the penalty phase trial court did not rely on the specific references to alleged conduct by appellant set forth in the prosecution's papers, but relied instead on the bailiff's conclusory representations.[3] But if it's assumed that the penalty phase trial court did

[3] The case had recently been reassigned, and aside from an initial hearing at which scheduling matters only were discussed (20 RT 2990-2995), this was the trial judge's first hearing in the case. At the hearing, the prosecutor stated, "Your Honor, I know that there's so many motions in the

rely on the prosecution's allegations in its points and authorities, then the penalty phase trial court was *materially misled* into believing that Mr. Jackson had been found to possess a weapon while awaiting trial for the present capital offense. This very serious assertion is of a type that, if considered, is highly likely to impact a trial court's determination of the appropriate security measures. But there was an absence of evidence. An order that a defendant be subjected to a drastic security measure such as the REACT belt cannot, consistent with due process and the Eighth Amendment, be based on an allegation that the defendant possessed a weapon in jail while awaiting trial for the present offense when there is no evidence supporting that allegation.

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file, I'm sure you haven't had a chance to review all of them" (20 RT 3001), and then referred to her points and authorities in connection with her incorrect contention that the same level of justification was not required for the REACT belt as compared to shackling. 20 RT 3001-3002. She did not mention any alleged misconduct by appellant. Thereafter, the trial judge said, "But I found your points and authorities finally." 20 RT 3002. Later, the trial court stated that "the Court now has the points and authorities, . . ." 20 RT 3004. But the court at no time made any reference to their specific contents, or stated it had read the papers.

However, *before* the trial court stated it had "finally" found the prosecutor's papers, the trial court stated that

> "[i]t's my understanding that . . . there has been sufficient issues out of the courtroom that give rise to considerable concern for the safety of the public and the safety of the deputies . . . . Unfortunately, my bailiff who brought the subject to me originally is not with us this morning."

20 RT 3001. The trial court explained that the bailiff "knew something of the background of the defendant, and I didn't ask him to go into any detail when he broached the subject the day before yesterday." 20 RT 3001.

The course of the hearing demonstrates that the trial court, in determining that Mr. Jackson needed to be restrained with a REACT belt because of the supposedly "violent nature of his responses to people in authority" (20 RT 3003), did not rely on allegations in the prosecution's points and authorities, but relied on the conclusory, *ex parte* representations of the unidentified bailiff.

Thus, if it's assumed (without any basis in the record) that the trial court relied upon the allegations regarding appellant's conduct contained in the prosecution's points and authorities, it must be concluded that the trial court was materially misled by the prosecution's assertion that Mr. Jackson was found in possession of a weapon while awaiting trial. This itself renders the process fundamentally unfair and unreliable, in violation of the Sixth and Eighth Amendments and federal and state due process guarantees, and demonstrates an abuse of discretion under state law. *People v. Sandoval, supra,* 41 Cal.4th 825, 847 (trial court abuses its discretion when it relies on an improper basis for decision).

3. The Trial Court Failed to Consider the Absence of Evidence of Escape Attempts or Threats, and Mr. Jackson's Unbroken Record of Courtroom Cooperation Over More than Three Years of Proceedings.

As shown in the opening brief, the penalty phase trial court failed to consider factors that indicated Mr. Jackson posed no likely or serious threat of disrupting proceedings at all, much less one justifying the use of the REACT belt.

Appellant attended at least 37 courtroom proceedings in this case before he was ordered to wear the REACT belt. He did not create any disturbance whatsoever. He made no threats. His conduct over 39 months of proceedings was blameless. AOB 59-60.

The guilt phase trial court noted Mr. Jackson's record of cooperation in court, and found it significant in coming to a determination that a REACT belt was not warranted. 3 RT 305. Respondent ignores the penalty phase trial court's failure to mention Mr. Jackson's record of good conduct.

Similarly, Mr. Jackson had a compelling incentive to continue his record of good behavior. AOB 60. Respondent ignores the trial court's failure to consider it.

4. The Trial Court Failed to Consider Less Drastic Alternatives.

The guilt phase trial court found that the REACT belt was not necessary, and that courtroom security would be assured by the presence of two deputies. 3 RT 304.

Respondent does not answer appellant's argument (at AOB 61-62) that the penalty phase trial court abused its discretion and violated constitutional standards by failing to consider less drastic alternatives, specifically including the two-deputy solution found viable (but not used) at the guilt phase, in combination with a leg brace.

5. The Trial Court Failed to Inquire About or Consider Potential Adverse Medical Consequences of the REACT Belt to Mr. Jackson, Who Had Been Hospitalized for a Recent Head Injury.

At the time of trial, Jackson had a large, visible scar on his forehead resulting from a recent motorcycle accident. 11 RT 1831.

Jonathan Jackson's head injury from his recent motorcycle accident rendered him a medically unsuitable candidate for the 50,000-volt REACT belt. Head injuries put the injured at heightened risk for development of epileptic seizures, and the REACT belt is associated with a heightened risk of death for persons with epilepsy. AOB 64-65.

Yet the penalty phase trial judge entirely neglected to inquire into Mr. Jackson's medical suitability for the REACT belt.

Respondent's only answer is to insist that nothing in the record shows that the wearing of the REACT belt had any adverse medical consequences for Mr. Jackson. RB 31.

As discussed above in connection with the guilt phase, this reasoning is unavailing. Review on appeal is "based on the facts as they appeared at the time the court ruled on the motion." *People v. Tafoya, supra,* 42 Cal.4th 147, 162. Even if, in a worst-case scenario, the REACT belt had accidentally activated during trial, seriously injuring Mr. Jackson and precipitating an epileptic seizure or worse, this would not make it any more or less an abuse of discretion to order the belt – because the decision is reviewed on the facts as of the time the court ruled. The opening brief's showing, that the penalty phase trial court abused its discretion by failing to consider that Mr. Jackson, with his visible scar from a recent head injury, was a medically inappropriate candidate for the REACT belt, is uncontested.

In *People v. Mar*, this Court stated that "because the stun belt poses serious medical risks for persons who have heart problems or a variety of other medical conditions, we conclude that a trial court, before approving the use of such a device, should require assurance that a defendant's medical status and history has been adequately reviewed and that the defendant has been found to be free of any medical condition that would render the use of the device unduly dangerous," and further declared that "use of a stun belt without adequate medical precautions is clearly unacceptable." *People v. Mar, supra*, at pp. 1205-1206 & 1229. The Court noted that its instructions to trial courts to take medical precautions were offered for guidance in future trials. *Id.* at p. 1206.

The argument that the penalty phase trial court abused its discretion by failing to inquire about or consider potential medical consequences from use of the REACT belt for Mr. Jackson does not depend on *Mar*, however.

That precedent requires medical review in the *routine* case, to assure that the defendant has no medical conditions that would contraindicate the REACT belt. *People v. Mar, supra*, at pp. 1205-1206. In this case, it was obvious from Mr. Jackson's appearance in the courtroom with a plainly visible scar on his head, easily identified (11 RT 1831), that Mr. Jackson had suffered a significant head injury. This is uncontested. Under these non-routine circumstances, there is no question that, even prior to and without the benefit of *Mar*, a reasonable trial court, considering using a 50,000-volt device on a defendant with a visible scar from a head injury, should have inquired into the matter of that defendant's medical suitability for this dangerous, potentially lethal device.[4] The failure to do so in the specific context of this case should be found, even without reference to this Court's statements regarding medical screening in *Mar*, to be an abuse of discretion.

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[4] It is instructive to compare this Court's most recent case involving a REACT belt, *People v. Lomax* (2010) 49 Cal.4th 530, with this one.

In *Lomax*, the trial court, also ruling on the issue before this Court decided *Mar*, "twice ordered a medical examination to ensure that defendant was not susceptible to physical harm from wearing the device," and, "[a]lthough not required to do so, . . . gave defendant the option of wearing a waist chain and leg shackles instead of the REACT belt." *People v. Lomax, supra*, 49 Cal.4th at p. 562. As the actions of the trial court in *Lomax* show, even prior to *Mar*, trial courts reasonably took into account a defendant's medical suitability before deciding to order a REACT belt, proceeding with appropriate caution.

When, as in this case, a defendant has a visible, significant head injury – a large scar down the middle of his forehead (11 RT 1831) -- it is, with all due respect to the trial court, astonishing that a REACT belt would be ordered without any court inquiry into the risks to the defendant. Even before *Mar*, it was not reasonable for a trial court to overlook signs of head injury that would plausibly render a defendant a medically-unfit subject for a potentially lethal 50,000-volt restraint and control apparatus. A trial court should *always* act with due caution and appropriate regard for the life and health of defendants appearing before it and subject to its control.

6. The Trial Court Failed to Consider the Psychological Effects of the REACT Belt, or to Make Findings Regarding its Use or Visibility.

Similarly, the opening brief showed that the penalty phase trial court failed to take into account the psychological effects of the REACT belt, or to make findings regarding its use or visibility. Respondent misleadingly asserts the trial court did take psychological impacts into account – see RB 31 -- but cites only to the guilt phase trial court. The guilt phase court was concerned about the psychological impacts, and in part for that reason determined the REACT belt was not necessary. 3 RT 306, 309. The penalty phase trial court, on the other hand, never considered the psychological impacts of this high-powered, painful device.

Respondent also repeats its argument that the trial court did not abuse its discretion because the record does not demonstrate that the REACT belt had an adverse psychological impact in this case. RB 31. This argument suffers from the same defect noted above – the trial court's ruling is reviewed "based on the facts as they appeared at the time the court ruled on the motion," and not on the basis of what did or didn't happen after the trial court ruled on the motion. *Tafoya, supra*, 42 Cal.4th at p. 162. Respondent's attempt at retrospective justification must be disregarded.

7. Conclusion

As shown in the opening brief and *supra*, in multiple ways the penalty phase trial court failed to follow governing law in ordering Mr. Jackson restrained with the REACT belt. The court failed to apply the correct legal standard, ordered the REACT belt despite the absence of record evidence of nonconforming conduct, did so in reliance on vague, conclusory and *ex parte* claims about appellant by an unidentified bailiff,

failed to consider Mr. Jackson's three-year record of courtroom good behavior, failed to consider the absence of evidence of threats or escape attempts, failed to consider the considerable psychological impacts of the REACT belt, and failed to consider whether the head-injured Mr. Jackson was even a suitable candidate for the REACT belt. Any of these defaults should lead to the conclusion the penalty phase trial court abused its discretion and transgressed constitutional boundaries in ordering the REACT belt.

D. The Judgment Must Be Reversed Because Mr. Jackson Was Prejudiced By Being Forced To Wear A REACT Belt During The Guilt Phase and Second Penalty Phase.

1. Respondent Fails To Answer Appellant's Argument that The Erroneous Imposition of a REACT Belt on a Defendant is Not Subject to Harmless Error Analysis, and Reversal is Required Under *Riggins v. Nevada.*

In the opening brief, appellant discussed the concept of structural error, and showed that, according to the Supreme Court, the "conclusion of structural error [is based] upon the difficulty of assessing the error," and not on any *a priori* categories delineating "structural" error, which requires *per se* reversal, from "trial" error, which requires a case-specific prejudice inquiry. *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 148 & fn.4; see discussion at AOB 68-73.

In *Riggins v. Nevada, supra,* 504 U.S. 127, the Supreme Court applied the concept of structural error to the erroneous involuntary administration of anti-psychotic medication to a defendant at trial. The Court found that because "efforts to prove or disprove actual prejudice from the record would be futile," and yet "an unacceptable risk of prejudice

remained" from the involuntary administration of antipsychotic medication, the judgment had to be reversed.

In *People v. Mar*, this Court expressly analogized the erroneous administration of a REACT belt to the wrongful administration of antipsychotic medication:

> a court order compelling a defendant to wear a stun belt at trial over objection bears at least some similarity to the forced administration of antipsychotic medication to a criminal defendant in advance of, and during, trial.

People v. Mar, supra, 28 Cal.4th at pp. 1227-1228.

Neither the Supreme Court nor this Court has ever addressed the question whether the erroneous imposition of a REACT belt, like the erroneous administration of antipsychotic medication, requires reversal without a showing of actual prejudice.

The opening brief set forth the reasons why this Court should conclude that the error at issue here is structural. AOB 68-73. That discussion will not be repeated here.

Respondent simply ignores the issue.

2. Respondent Fails To Answer Appellant's Argument that In Any Event, Reversal Is Required at the Penalty Phase Without A Prejudice Inquiry.

Assuming only for purposes of analysis that the wrongful imposition of a REACT belt is not structural error that requires reversal without a prejudice analysis at the guilt phase, appellant showed in the opening brief that, in any event, *per se* reversal is required at the penalty phase. AOB 74-77. This is so for all the reasons that apply at the guilt phase and for an additional, and critical, reason that is particular to the penalty phase.

For a jury deciding the fate of a capital defendant, "assessments of character and remorse may carry great weight and, perhaps, be

determinative of whether the offender lives or dies." *Riggins v. Nevada, supra*, 504 U.S. at pp. 143-144 (conc. opn. of Kennedy, J.), quoted in *People v. Gurule* (2002) 28 Cal.4th 557, 598 fn. 8. The REACT belt presents an unacceptable risk that it will, as a result of the "total psychological supremacy" it is specifically designed to achieve (*Mar, supra*, 28 Cal.4th at p. 1226), place the penalty phase defendant in a state of psychological domination so that he is unable to react and interact normally, including in a way that the jury might find reflective of remorse, or of otherwise positive character traits. See *Riggins v. Nevada, supra*, 504 U.S. at pp. 143-144 (conc. opn. of Kennedy, J.). The argument regarding this special, constitutionally unacceptable risk is fully set forth at AOB 74-76.

Respondent fails to answer this argument.

3. Even Assuming the Erroneous Use of a REACT Belt Is Subject to Harmless Error Review, Reversal Is Required Under Both the *Chapman* and the *Brown* Standards

Assuming, despite the absence of any argument by respondent to the contrary, that wrongful imposition of a REACT belt does not require reversal as structural error without an actual prejudice inquiry, then the prejudice standard for federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 23-24, comes into play. Under *Chapman*, the burden is, of course, on respondent to demonstrate beyond a reasonable doubt that the constitutional violations did not affect the verdict. The state law penalty phase prejudice standard is the same in substance and effect.

Respondent makes three arguments: (1) there was "compelling evidence of Jackson's guilt" (RB 32); (2) the risk of penalty phase prejudice is diminished because the jury knew Jackson had been convicted of murder and attempted murder (RB 34); and (3) the record does not show

that the REACT belt had an adverse impact on Mr. Jackson "either physically or psychologically" (RB 33).

None of these arguments has merit.

First, respondent's "compelling evidence of guilt" argument looks to guilt phase prejudice. The argument simply does not address penalty phase prejudice.

Tellingly, respondent ignores one critical element of the prosecution's penalty phase case about which there was far less than "compelling evidence" – whether or not Jonathan Jackson was the actual killer. The first jury, when deliberating at the penalty phase asked a question regarding whether the jurors could consider lingering doubt. When the court instructed them they could, the jury was unable to reach a verdict. The only evidence the second jury heard that indicated that Jonathan Jackson was the actual killer was the testimony of (the unrelated) Kevin Jackson that Jonathan Jackson had confessed to him. But Kevin Jackson's account was highly problematic, to say the least: he was an informant for consideration, he admitted he had falsely identified another man, Alejandro Ortiz, to law enforcement as present at the scene, and his account of the shooting Jonathan Jackson supposedly committed conflicted in critical details with the physical evidence as presented and interpreted by prosecution experts. The evidence presented at the penalty phase that Mr. Jackson was the actual killer was far from "compelling." See discussions at AOB 104-112 and *infra* at pp. 38-42 (incorporated herein by reference).

Second, respondent contends that the risk of penalty phase prejudice is diminished because the penalty phase jury knew Jackson had been convicted of murder and attempted murder. RB 34. This too is unavailing.

Respondent relies on *People v. Slaughter* (2002) 27 Cal.4th 1187, 1214. Respondent fails to note that *Slaughter* was a case involving

shackles, not a REACT belt, and the opinion considered only the prejudice that might arise from the jury seeing the shackles.

Moreover, *People v. Slaughter* can no longer be considered good law on this point after *Deck v. Missouri* (2005) 544 U.S. 622. There, the Supreme Court made crystal-clear its views, which are the very opposite of respondent's:

> The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community -- often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. Cf. Brief for Respondent 25-27. It also almost inevitably affects adversely the jury's perception of the character of the defendant.

Deck v. Missouri, supra, 544 U.S. at p. 633.

In the case of a REACT belt, there is not only the ever-present risk the jurors will see the restraining device, but additional prejudice of a different nature. As this Court stated in *Mar*:

> [With] the improper use of a stun belt, . . . *the greatest danger of prejudice arises frsom the potential adverse psychological effect of the device upon the defendant* . . . .

People v. Mar, *supra*, 28 Cal.4th at p. 1225 fn. 7 (emphasis added)..

This leads to respondent's third and final argument to defeat the presumption of prejudice; respondent asserts that the record does not show that the REACT belt had an adverse impact on Mr. Jackson "either physically or psychologically." RB 33.

Respondent is simply incorrect. As set forth in the opening brief, the record shows that at the first trial, immediately after the REACT belt was placed on him, Mr. Jackson made his physical discomfort known to the court. The REACT belt was protruding into his kidney area, as it was designed to do, causing pain and rendering him unable to lean back or move. Even the trial court recognized that Mr. Jackson was in discomfort,

stating "it [the REACT belt] certainly can be uncomfortable." 4 RT 479. Thereafter, trial counsel noted that the pillow offered to alleviate the discomfort at the first trial did not do so to a significant degree. 20 RT 3002. Respondent simply ignores the record.

Similarly, respondent ignores the record as to the second trial as well. Counsel specifically stated that the REACT belt was "extremely uncomfortable" for Mr. Jackson, 20 RT 3000, and made it difficult for him to sit back. Trial counsel, who had the experience of the first trial, stated that he was "worried about any unconscious grimacing or exhibitions of discomfort that Mr. Jackson might make that might be misconstrued by the jury as a reaction to witness testimony." 20 RT 3002. But the trial court was unconcerned, observing that it had not "noticed that much physical discomfort" in other instances of REACT belt use in the judge's courtroom. 20 RT 3002.

The REACT belt is always uncomfortable. It is designed to be worn tightly, and "designed . . . to protrude" into the subject's kidney. 4 RT 336-337. It did so here, protruding into Mr. Jackson's kidney, restricting his movement, and causing Mr. Jackson to be "extremely uncomfortable." 20 RT 3000.

In addition to the considerable physical discomfort, there are the inevitable psychological effects, of a type extremely unlikely to be shown on the record.

The REACT belt is specifically intended to produce a particular psychological result: a state of enhanced anxiety experienced by the subject. As set forth in a law journal article that was quoted and discussed with approval by this Court in *People v. Mar, supra*, 28 Cal.4th at pp. 1215 & fn.1, 1226:

> [The manufacturer's] literature promotes the belt to law enforcement officials as necessary "for *total psychological supremacy*... of

> potentially troublesome prisoners." According to Jim Kronke, a distributor and trainer for [the manufacturer], the belt's effect on prisoners is, in fact, primarily psychological. Furthermore, *[the manufacturer] argues that the belt acts more as a deterrent . . . because of the* ***tremendous amount of anxiety*** *that results* from wearing a belt that packs a 50,000-volt punch.

Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions* (1998) 30 St. Mary's L.J. 239, 252 (emphases added) (footnotes omitted).

Even assuming *arguendo* that the psychological effects of the REACT belt do not lead to a conclusion that its erroneous imposition is reversible per se at all phases, or reversible per se at least as to penalty phase error, the virtually inevitable effect of the REACT belt, designed to create a state of extreme anxiety, on a capital defendant at the penalty phase cannot be ignored.

> it is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the state shows that the defect was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. (*People v. Gordon, supra*, 50 Cal. 3d at p. 1267.)

People v. Alvarez (1996) 14 Cal.4th 155, 216 fn. 21.

In this case, a sentence of death was not a foregone conclusion. The first penalty phase jury had questioned whether jurors could consider lingering doubt, and had hung thereafter. 3 CT 872, 869. In view of the extreme physical discomfort and restriction experienced by Mr. Jackson while wearing the belt, it cannot be said with assurance that it had no effect on his demeanor at trial – a factor which can make the difference between life and death. Imposition of a REACT belt also has inevitable psychological effects, working as designed to produce a heightened state of anxiety in defendants subjected to it. In view of the inevitable state of anxiety produced by the REACT belt and its likely effects on juror's

perceptions, the extreme discomfort experienced by Mr. Jackson and its likely effects on his demeanor at the penalty phase, and the question of lingering doubt that had troubled the first jury, which had thereafter been unable to reach a verdict, it cannot be said that respondent has overcome the presumption of prejudice and shown, beyond a reasonable doubt, that the erroneous imposition of the REACT belt on Mr. Jackson at the penalty phase retrial did not affect the verdict.

II. BECAUSE THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE JURY'S EXPRESS FINDING THAT THE MURDER WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY, THE FELONY-MURDER CONVICTION, SPECIAL CIRCUMSTANCE FINDING, AND JUDGMENT OF DEATH MUST BE REVERSED.

As shown in the opening brief, this case was submitted to the guilt-phase jury on two theories: murder in the commission of a robbery, and murder in the commission of an attempted robbery. But the special verdict form requested by the prosecutor specified robbery only, and made no mention of attempted robbery. The jury did not request an amended verdict form, but *expressly* found that Mr. Jackson had committed the crime while engaged in the commission of a robbery. The opening brief showed the evidence is constitutionally insufficient to support the finding of a competed robbery. AOB 78-91.

Respondent contends that the evidence was sufficient to show a completed robbery. RB 34, 42-43. But the evidence respondent cites to show appellant was guilty of a completed robbery, rather than a mere attempt, is telling: it consists entirely of the testimony of Donald Profit, who claimed that appellant told him he took drugs from Robert Cleveland, and claimed that he had seen appellant with drugs. RB 42-43.

Yet, as shown in the opening brief at pages 87-89, in light of purported robbery victim Robert Cleveland's testimony that nothing was actually taken from him (7 RT 1142, 8 RT 1212), the corroborative testimony of Investigator Sheldon Gill and neighbor Michael Blanton that no drugs were missing or not accounted-for, and the fact that Donald Profit could not keep his story straight and freely contradicted himself, Donald

Profit's testimony simply was not "evidence that is reasonable, credible and of solid value." *People v. Tafoya, supra,* 42 Cal.4th at p. 170.

Respondent makes no effort to demonstrate the contrary. Donald Profit's testimony speaks for itself. As notes in the opening brief, Profit both admitted and denied he was testifying in order to help his brother, in-custody informant Kevin Jackson. Profit both admitted and denied having conversations with the case investigator about his brother. Profit testified that he felt whether he would be able to speak with his family depended on how he testified, and also that it didn't depend on how he testified. Profit testified that appellant had confessed to the shootings *two months before they occurred.* And Profit testified that he saw appellant with the drugs he had supposedly taken from Cleveland some two weeks before the shooting. AOB 87-88. The conclusion Donald Profit's testimony is insufficient to support a finding of completed robbery is unavoidable.

This case was submitted to the jury on two theories: murder during the commission of completed robbery, and murder during the commission of attempted robbery. 12 RT 1966; 2015; 2 CT 549. Only one of these was a factually sufficient ground. This Court has made clear that when a jury considers both a factually sufficient theory and a factually insufficient theory, it will reverse when there is "an affirmative indication that the jury relied on the invalid ground." *People v. Marks* (2003) 31 Cal.4th 197, 233.

Here – as shown in the opening brief, and unanswered by respondent – there is such an affirmative indication. The jury expressly found that Mr. Jackson was engaged in the commission of a robbery, not an attempted robbery. 3 CT 609.

Accordingly, the judgment of conviction of felony-murder, which is based on the factually insufficient theory of completed robbery, must be reversed.

instruct on the meaning of "personal use of a firearm" engendered a reasonable likelihood that the jury applied the instructions "in a way that prevents the consideration of constitutionally relevant evidence."

More specifically there is a reasonable likelihood – more than a mere possibility – that the jurors interpreted the instructions they were given, and the finding that Mr. Jackson had been found to have "personally used" a firearm in commission of the offense of murder, as meaning that the first jury had found that Mr. Jackson personally killed the victim. This precluded the penalty phase jury from considering evidence of the circumstances of the crime that cast considerable doubt on the prosecution's evidence purporting to show Mr. Jackson was the actual killer.[6]

The opening brief pointed out that the penalty phase jury almost certainly based its death verdict on the determination that Mr. Jackson had personally executed the victim. Respondent appears to agree. RB 45.

The opening brief explained that the penalty phase jury could have come to that determination via either of two paths.

> (1) The jury could have based the its conclusion on the reasonable belief that, since the first jury had decided that Mr. Jackson had personally used a firearm in the murder of Monique Cleveland, the matter had already been determined by the first jury – Mr. Jackson had personally executed the victim, as the first jury had found, and the penalty phase jurors could not reexamine that finding.

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[6] In *Tuilaepa v. Calfornia* (1994) 512 U.S. 967, 972, the Court stated that the Eighth Amendment requirement of individualized determination "is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime. [Citation.]" Thus, relevant mitigating evidence includes evidence of the circumstances of the crime that could lessen defendant's culpability or bring into question the prosecution's theory of greater culpability.

or

(2) The jury could have determined that Mr. Jackson personally used a firearm to kill the victim based on the evidence adduced at the penalty phase retrial.

The opening brief demonstrated that the second theory – that the penalty phase jury was convinced by the evidence to conclude that appellant personally executed the victim – was unlikely not just because it requires that the significance of the guilt phase jury's finding that Mr. Jackson personally used a firearm be ignored, but also because the evidence supporting that conclusion – the penalty phase testimony of informant Kevin Jackson – was highly suspect, and conflicted with the physical evidence as presented by prosecution experts, and it was extremely doubtful that the penalty phase jurors credited it. AOB 104-112.

Respondent's answer to this analysis is to insist that no analysis is permissible:

> "Such parsing of the evidence to impugn the credibility of a witness is not appropriate on appellate review." RB 45.

Respondent is quite mistaken. The Supreme Court and this Court have made clear that reviewing courts must consider a challenged instruction within the context of the other instructions and the entire record. *Estelle v. McGuire* (1991) 502 U.S. 62, 72. This Court recently reiterated:

> To determine whether the trial court erred in instructing the jury, '*we examine the entire record*, including the instructions and arguments, to determine whether the jury was misled to the prejudice of the defendant about the scope of its sentencing discretion. [Citation.]

People v. Dykes (2009) 46 Cal.4th 731, 795 (emphasis added).

The "entire record" that is subject to examination in this case includes the only penalty phase evidence indicating that Mr. Jackson was

the actual killer – the testimony of Kevin Jackson. It is not only appropriate, but necessary, to examine that testimony.

If the evidence that Jonathan Jackson had personally executed the victim with a handgun truly was "overwhelming," as respondent claims (RB 47), this would tend to weigh in favor of the conclusion that it is not reasonably likely the failure to instruct prejudicially prevented the consideration of constitutionally relevant evidence. But the evidence was weak, and highly suspect. As noted in the opening brief (AOB 106-107):

> **(1)** Kevin Jackson was an informant for consideration who would not receive his reduced-sentence "deal" unless he testified against Jonathan Jackson. 26 RT 3999.
>
> **(2)** Kevin Jackson was a convicted felon. 26 RT 3989.
>
> **(3)** Kevin Jackson was in jail during the trial. 26 RT 3988-3989.
>
> **(4)** Kevin Jackson *changed his story* between the first and second trials, making it even more prosecution-friendly. Kevin Jackson testified in the first trial that Cleveland locked Jonathan Jackson in the house, and was holding a loaded .45 gun. 9 RT 1518-1519. In the second penalty phase trial, Kevin Jackson denied that Mr. Jackson told him that Cleveland had locked him in the house and was armed with a loaded .45. 26 RT 4025-4026.
>
> **(5)** Kevin Jackson *admitted a gross fabrication* in connection with his account to law enforcement about this case. He conceded at trial that, in a tape-recorded pre-trial interview, he had *knowingly and falsely identified a third man – Alejandro Ortiz – as a participant in the felony-murder*. 26 RT 4001; 26 RT 3986-3987.

These devastating factors would make any reasonable jury highly reluctant to place ultimate faith in the tale of this seriously compromised witness.

Remarkably, all of these factors are *unmentioned* in respondent's brief.[7]

Tellingly, Kevin Jackson's account of the killing directly conflicted with the crime-scene physical evidence as interpreted by prosecution experts on three critical points:

1. The room in which the killing occurred. In Kevin Jackson's account, Jonathan Jackson, "ran in the bathroom to get Monique," and shot and killed her while they were both in the bathroom. 26 RT 3979-3980. But the testimony of prosecution expert Elissa Mayo, a criminalist and blood-spatter expert, established that the victim was shot while the shooter was in the master bedroom, and she was in the hallway and doorframe leading to the master bedroom. 29 RT 4501; see 29 RT 4502 (Mayo testified that the shot was "directed . . . in from inside the bedroom towards the corner of the right door frame."); see Exhibit 77; see Exhibits 70-76; AOB 107-108.

This remains unanswered by respondent.

2. The position of the victim. Kevin Jackson's account of the killing placed Monique Cleveland "on her knees on the floor" when she was shot. 25 RT 3958. But the photographs of the crime scene show the victim's body prone on the floor in the hallway. Exhibits 70-77. Prosecution expert Mayo testified that the body did not appear to have moved after the victim

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[7] Nor does respondent acknowledge that Kevin Jackson's claim that Jonathan Jackson shot Robert Cleveland five or six times is contradicted by the testimony of prosecution witness Dr. Frank Rogers that Robert Cleveland had only three gunshot wounds. AOB 107 fn. 19.

Respondent does allude to one of the other factors enumerated in the AOB, that Kevin Jackson was an "associate" of the Mead Valley Gangster Crips. RB 12. 26 RT 4001-4002.

Respondent mentions Alejandro Ortiz (RB 14), but neglects to observe that Kevin Jackson falsely named him as a participant in the felony-murder.

was shot. 29 RT 4505. The victim's head was no higher than 2 feet from the ground when she was shot. 29 RT 4504. Mayo further testified that the evidence was consistent only with the victim laying on the ground when she was shot. 29 RT 4505. AOB 108-109.

This also is unanswered by respondent.

3. The murder weapon. According to Kevin Jackson's account, Mr. Jackson had confessed to him that he had killed the victim with a .357 revolver. 26 RT 3980. But Kevin Jackson's story conflicted with the testimony of prosecution witness Dr. Joseph Choi, the forensic pathologist who performed the autopsy. .38 caliber bullets, such as those fired from a .357 revolver, are .357 of an inch in diameter. 26 RT 4143. Dr. Choi testified that the entrance wound was an oval (due to the angle of entry) that measured three-eighths of an inch by one-quarter of an inch. 25 RT 3829. The bullet would have made a round hold of one-quarter of an inch if it had entered the victim's face straight and not at an angle. Because a "larger bullet cannot make a smaller hole," (25 RT 3839), Dr. Choi testified that it is indeed "not likely" that the victim was shot with a .357 handgun (25 RT 3840), as Kevin Jackson claimed (26 RT 3980). AOB 109-110.

Similarly, this analysis is not answered by respondent.[8]

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[8] Although respondent never alludes to Dr. Choi's penalty phase testimony regarding the caliber of the bullet, respondent does discuss Dr. Choi's guilt phase testimony.

However, respondent seriously misstates the record. Respondent asserts that

"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.)" RB 11.

This misrepresents Dr. Choi's guilt phase testimony, which was very much to the contrary. As the following shows, Dr. Choi's guilt phase testimony was that the bullet was not likely a .38 caliber, and was more likely a smaller caliber such as a .22.

"Q. Can you, based upon your examination of the injuries

Thus, it is uncontroverted that Kevin Jackson's penalty phase testimony conflicted with the physical evidence and the interpretation of that evidence by prosecution experts as to (1) the room in which the killing occurred, (2) the position of the victim when she was shot, and (3) the caliber of the bullet and type of handgun that were used to kill her.

In view of the fact that the seriously compromised testimony of Kevin Jackson was also contradicted by the prosecution's own experts on critical points, and in view of the fact that the penalty phase jurors were also told that the guilt phase jurors had found that Mr. Jackson had "personally used a firearm" in the commission of the robbery-murder, it is not likely that the penalty phase jurors determined, based on Kevin Jackson's testimony alone, that Jonathan Jackson had personally shot the murder victim.

Considering the "entire record," including the testimony of Kevin Jackson -- which is the only penalty phase evidence that supports the

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> to Monique Cleveland, give the jury any information about the caliber of the bullet that she was shot with?
>
> " A. Well, I cannot tell exact caliber, because there is no bullet, but the hole gives -- see, longitudinal dimension looks .38 -- I mean, it could be .38 because of longitudinal, but side -- *narrowest portion is only one quarter. So it's more like a .22 caliber* could have done that because just the angle was turned that maybe looks like one side is long, one side is narrow.
>
> "Then we should take the narrow one more seriously than longer one, so it could be somewhere between -- it cannot be beyond .38, but it could be medium caliber or less. So -- which would be either .22 or .32 caliber, and usually .25 caliber is completely jacketed and there is no cup or jacket at all.
>
> "So this gun doesn't belong to -- it doesn't look like .25 caliber. So -- *it comes down to very close to .22 than .32*."

9 RT 1475 (emphasis added).

prosecution's factual theory that Jonathan Jackson personally shot the victim – it is highly implausible that the jury actually credited the testimony of this convicted felon, who admitted falsely inculpating another man in the murder, and whose testimony about the bathroom location of the murder, the kneeling position of the victim, and the large-caliber handgun assertedly used all conflicted with the physical evidence and the testimony of the prosecution's own experts.

Under the Supreme Court's standard, there must be more than a mere possibility, but a defendant "need *not* establish that the jury was more likely than not to have been impermissibly inhibited by the instruction" to show error. *Boyde v. California* (1990) 494 U.S. 370, 380 (emphasis added). Under this standard, it is more than reasonably likely that the penalty phase jurors concluded, based on the information that the prior jury had found Jonathan Jackson guilty of murder, and guilty of "personally using a firearm" in the murder, that the guilt phase jury had determined that Mr. Jackson personally used a firearm to kill Monique Cleveland.

C. Reversal is Required.

The opening brief pointed out that reversal was required, without any further prejudice analysis, under well-settled Eighth Amendment case-law, because the failure to instruct on the meaning of personal use of a firearm had the effect of misleading jurors as to what the prior jury had determined, and thus as to what evidence the jurors could consider at the penalty phase. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340-341; *People v. Milner* (1988) 45 Cal.3d 227, 257 ("we conclude that the jury in this case was misled as to its discretion and its responsibility in reaching its sentencing verdict and that reversal is therefore mandated."). AOB 113.

Respondent does not address this Eighth Amendment analysis.

In addition, the opening brief demonstrated that, under the general nonstructural federal constitutional test for prejudice set forth in *Chapman v. California*, and under the state standard for penalty phase error, which is the same in substance and effect, the penalty phase judgment also had to be reversed. AOB 113-116.

Respondent's answer to the showing of prejudice is to assert that there was "overwhelming [penalty phase] evidence that showed Jackson intentionally fired a gun shooting . . . Monique Cleveland." RB 47.

But, as demonstrated in the opening brief at AOB 105-112, and *supra* at pages 38-42, this is far from the truth. The penalty phase evidence that Mr. Jackson personally shot and killed the victim was comprised entirely of the testimony of Kevin Jackson, and any reasonable jury would treat the testimony of this convicted felon, an incarcerated witness-for-consideration who had admitted falsely "fingering" a third man as a participant in the robbery-murder, with an extremely high degree of skepticism. That degree of skepticism would be ratcheted even higher because Kevin Jackson's story conflicted with the testimony of the prosecution's own expert pathologist and criminalist.

Respondent next argues that since there was no evidence presented that Mr. Jackson did <u>not</u> shoot the victim, the jury "could not have been misled to the extent of his culpability." RB 47.

The argument is incorrect, for two reasons.

First, respondent's argument ignores the misleading effect of the trial court's reading of the prior jury's verdict, which informed the penalty phase jurors that the guilt phase jurors had found Mr. Jackson to have "personally used a firearm" in the commission of the murder, without making clear the meaning of "personal use." This misled the jurors regarding the prior jury's findings on Mr. Jackson's culpability.

Second, it is not, in our system of justice, the obligation of a defendant to present evidence that he did not commit a crime. Nor was it Mr. Jackson's obligation to present evidence that he did not personally shoot the victim. But he did have the right to have the jury consider the evidence of all the circumstances of the crime, including evidence that cast doubt on the prosecution's penalty-phase hypothesis that he was the actual killer.[9] If the jury considered itself bound by the guilt phase jury's supposed determination that Mr. Jackson personally used a firearm to kill the victim, then the jury would never have the occasion to consider that evidence, including the testimony of prosecution experts that conflicted with Kevin Jackson's story.

Respondent argues that "[t]here was no evidence 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." RT 44-45.

The argument is misconceived. As respondent itself has pointed out, the penalty phase jury was not deciding the truth of a firearms enhancement. RB 44. It was not called upon to find whether or not there was evidence that Mr. Jackson had displayed a firearm or struck someone with it. As far as the penalty phase jury's decision was concerned, these factors were not material. What it *was* called upon to determine was whether the circumstances of the crime showed Mr. Jackson to be the actual killer, or cast doubt on that theory. And it was reasonably likely the penalty

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[9] As noted in the opening brief and *supra*, at the guilt phase the prosecutor told the jury it did not need to decide whether Mr. Jackson was the actual killer, because he could be found guilty as a felony-murder accomplice even if not the shooter. 12 RT 1988-1989.

phase jury was precluded from making this determination by the misunderstanding that was engendered when the trial court instructed that the previous jury had found Mr. Jackson to have personally used a firearm, and did not explain that this did not mean that the jury found Mr. Jackson had personally killed the victim.[10]

The opening brief showed that the likelihood of prejudice was enhanced by prosecutor's misconduct in voir dire, in which she falsely informed prospective jurors that the previous jury had found Mr. Jackson

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[10] Respondent does ***not*** argue that the guilt phase jury necessarily found Mr. Jackson had personally shot the murder victim, nor could it do so. The prosecutor argued to the guilt phase jury

> "[Y]ou don't need to decide actually in your verdict whether he is the one who actually shot her or not."

12 RT 1988-1989. Nor was the guilt phase jury's finding of personal use of a firearm legally contingent on a determination that Mr. Jackson was the actual shooter. It is settled law that "[o]ne who commits an act which renders him or her criminally liable, whether directly or vicariously, is subject to the enhancement if he or she personally uses a firearm during that act." *In re Antonio R.* (1990) 226 Cal.App.3d 476, 479 (affirming a judgment of murder based on vicarious liability with a personal use enhancement when defendant used a firearm, but did not fire the fatal shot); *In re Londale H.* (1992) 5 Cal.App.4th 1464, 1468; (same); see *People v. Calhoun* (2007) 40 Cal.4th 398, 403-404 ("None of the cases [defendant] cites require that in addition to personally engaging in the conduct warranting an enhanced punishment, the person also be a direct perpetrator of the underlying crime. . . . Logic and the law are otherwise."); *People v. Wilson* (2008) 44 Cal.4th 758, 807 ("Nor must the firearm 'use' be strictly contemporaneous with the base felony. 'In considering whether a gun use occurred, the jury may consider a "video" of the entire encounter; it is not limited to a "snapshot" of the moments immediately preceding [the] offense.'"). The jury likely found Mr. Jackson guilty of felony murder based on aiding and abetting liability, found the special circumstance true on the theory he was a major participant in the robbery, and found that he personally used a firearm during the underlying felony-murder by shooting Robert Cleveland (7 RT 1118), or by displaying his weapon to him (7 RT 1088-1089, 8 RT 1225, 1243). In view of the many strong reasons not to credit Kevin Jackson's dubious testimony, and the absence of any necessity to do so, it cannot be assumed that the guilt phase jury did so.

guilty of "taking the life of another human being himself," and by the trial court's overruling of appellant's objection, which effectively ratified and reinforced the prosecutor's false statement. 22 RT 3289. AOB 115.

Respondent makes no attempt to show this misconduct and the trial court's reaction to it did not reinforce and enhance the probability of prejudice arising from the trial court's failure to instruct on the meaning of "personal use."

Respondent asserts that appellant "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." RB 47.

This too is incorrect. The concept of "lingering doubt" at the penalty phase refers to residual doubt as to crimes or elements of crimes that have already been adjudicated and proven beyond a reasonable doubt. See *People v. Gay* (2008) 42 Cal.4th 1195, 1221. Here, the penalty phase jury was precluded from considering evidence regarding whether Mr. Jackson was the actual killer, an issue that was not previously decided by the guilt phase jury.

In fairness, it should be noted that defense counsel also referred inaccurately to evidence of the circumstances of the crime as "lingering doubt" evidence in his jury argument. 31 RT 4784, 4790.

However, even if mislabeled as "lingering doubt" or "residual doubt," the strategy of casting doubt on the prosecution's theory the Mr. Jackson was the actual killer was a sound one; if not precluded by misleading instructions, it could well have been effective. The defense of "residual doubt has been recognized as an extremely effective argument for defendants in capital cases." *Lockhart v. McCree* (1986) 476 U.S. 162, 181. A "comprehensive study" concluded that "[t]he best thing a capital defendant can do to improve his chances of receiving a life sentence ... is to raise doubt about his guilt." *Cox v. Ayers* (9th Cir. 2009) 588 F.3d 1038,

1051, quoting Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L.Rev. 1538, 1563 (1998).

Doubt as to Mr. Jackson's culpability for personally killing the victim was critical to the defense argument for life. In his penalty phase closing argument in this case, Mr. Jackson's counsel stressed that Kevin Jackson's testimony was the only evidence "that Jonathan supposedly killed Monique" (31 RT 4779), and that "[t]he People's theory as presented to you in this trial does not match with the physical evidence. If you have any doubt as to exactly what Jonathan did there, if you have any doubt as to what his participation was . . . [y]ou may vote to spare the life of Jonathan based simply on lingering doubt." 31 RT 4790.

It is notable that the first jury, deliberating after the first penalty phase trial, asked whether the jurors could consider lingering doubt (3 CT 872) -- and, after the trial court instructed that consideration of lingering doubt was permissible (18 RT 2933), the jury hung. Respondent asserts that it is speculation as to what caused the jury to hang (RB 47), but the question as to lingering doubt and the fact the jury hung later that day, without any further substantive questions, are significant. The first jury deliberated three full days and part of a fourth before it hung. 18 RT 2950. These facts indicate that -- for a jury not laboring under the misconception that the question of whether Mr. Jackson was the actual killer had already been decided against Mr. Jackson -- the question of penalty was far from a foregone conclusion.

The central theme of the prosecutor's closing argument at the penalty phase retrial was that Mr. Jackson deserved the death penalty because he had personally executed the pregnant victim. 31 RT 4726-4727, 4731, 4732, 4733, 4736, 4745.

The opening brief showed the effect of the trial court's failure to make clear that the guilt phase jury had not determined that Mr. Jackson

had personally used a firearm to kill the murder victim was likely prejudicial under any standard. It directly supported the prosecutor's theme that Mr. Jackson deserved death because he had personally executed the victim. AOB 114-115.

Respondent does not answer this argument.

On this record, there is more than a reasonable possibility – indeed, there is a likelihood – that the trial court's failure to instruct the penalty phase jury regarding the meaning of personal use of a firearm misled the jury to conclude that the guilt phase jury had already determined Mr. Jackson had personally shot the murder victim.

This serious error requires that the penalty phase judgment be reversed.

IV. BECAUSE THE PROSECUTOR FALSELY INFORMED JURORS, DURING PENALTY PHASE VOIR DIRE, THAT THE GUILT PHASE JURY HAD CONVICTED MR. JACKSON OF TAKING THE LIFE OF ANOTHER PERSON "HIMSELF," THE PENALTY PHASE JUDGMENT MUST BE REVERSED.

A. The Prosecutor's Representation that Mr. Jackson Had Been Convicted By the Guilt Phase Jury of Taking the Life of the Victim "Himself" Was False.

During jury selection for the retrial of the penalty phase after the first jury could not reach a verdict, the prosecutor informed a panel of prospective jurors – which included three jurors who actually served on the penalty phase jury – that Mr. Jackson

> "sits here having been *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 (emphasis added).

This was an egregious falsehood. The prosecutor's false representation, which was part of a pattern of penalty phase misconduct, supported directly the central theme of the prosecution's closing argument for a death verdict to the penalty phase jury – that Mr. Jackson deserved death because he was the "single-handed executioner" of the victim. 31 RT 4627.

Respondent argues that

> "The prosecutor' statement was an accurate, factual portrayal of the guilt phase evidence and guilt phase jury's verdicts and findings." RB 50.

This is untrue. Mr. Jackson had not been convicted of taking the life of the victim "himself." Mr. Jackson was convicted of murder on a felony-murder theory only, and the guilt phase jury was instructed, at the People's urging, on aiding-and-abetting liability. 2 CT 546. That jury was also

instructed that it could find the special circumstance to be true even if "you find that . . . defendant was not the actual killer of a human being, or if you are unable to decide" whether or not he was the actual killer. 12 RT 1966-1967. The jury was further instructed it could find personal use of a firearm if Mr. Jackson intentionally displayed a firearm in a menacing manner, fired it, or struck someone with it. 12 RT 1978, 2 CT 0573. Nothing in the guilt phase jury's verdicts and findings reveals a legal determination by the guilt phase jury that Mr. Jackson killed the victim "himself."

Respondent further claims:

> "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." RB 51.

Respondent plainly means to suggest, without actually saying so, that the guilt phase jury could only have made a true finding on the personal use of a firearm enhancement by determining that Mr. Jackson personally shot and killed the victim.

But this is incorrect.

There was guilt phase evidence that Mr. Jackson displayed a firearm to Robert Cleveland (7 RT 1088-1089, 8 RT 1225, 1243), and that he shot Robert Cleveland (7 RT 1118). Either act is, quite plausibly, the basis for the guilt phase jury's personal use finding.

The enhancement statute does not require that "in addition to personally engaging in the conduct warranting an enhanced punishment, the person also be a direct perpetrator of the underlying crime." *People v. Calhoun* (2007) 40 Cal.4th 398, 404. A personal-use finding in a case of vicarious liability homicide can be based on the use of a firearm other than to fire the fatal shot.

In re Antonio R., supra, 226 Cal.App.3d 476, 479, illustrates this concept. There, the defendant shot into a crowd, and someone shot back, killing his companion. The defendant was held vicariously liable for the death of his companion, and although defendant did not personally kill the victim, the firearm use allegation was affirmed.

In re Londale H., supra, 5 Cal.App.4th 1464, 1468, is also similar. In that case, the defendant and a codefendant each fired shotguns into a crowd; the codefendant's shot killed the victim. Quoting *Antonio R.*, the court held:

> "The obvious purpose of section 12022.5 is to discourage the use of firearms in criminal activity. Had the Legislature meant to exclude from its provisions one who is only vicariously liable, it could easily have done so. ... As we read the statute, one who commits an act which renders him criminally liable, whether directly or vicariously, is subject to the section 12022.5 enhancement if he personally uses a firearm during that act."

In re Londale H., supra, 5 Cal.App.4th at p. 1468, quoting *Antonio R., supra*, 226 Cal.App.3d at p. 479.

This Court discussed *In re Antonio R.* approvingly in *People v. Calhoun, supra*, 40 Cal.4th at pp. 403-404, involving an enhancement for flight. The Court went on to explain why enhancement liability is not limited to direct perpetrators of the underlying crimes:

> An example from a different context illustrates the point. Two robbers enter a bank. The gunman holds everyone at bay while the other empties the cash drawers. Both are guilty of robbery. Under Calhoun's analysis, however, the gunman would not be subject to a firearm use enhancement because he did not personally take the money, but only aided and abetted the taking. Logic and the law are otherwise.

People v. Calhoun, supra, 40 Cal.4th at p. 404. The same logic applies here. If, in the Court's hypothetical, the robber who emptied the cash drawers shot and killed a cashier in the process, both robbers would be guilty of felony-murder. Under this Court's analysis, the gunman who did

not fire a shot, but did display his weapon, would be subject to a firearm use enhancement even though he did not personally shoot the murder victim.

More recently, in *People v. Wilson, supra*, 44 Cal.4th 758, 807, this Court explained:

> Nor must the firearm "use" be strictly contemporaneous with the base felony. 'In considering whether a gun use occurred, the jury may consider a "video" of the entire encounter; it is not limited to a "snapshot" of the moments immediately preceding [the] offense.

As noted above, there was evidence presented at the guilt phase that, during the "video" of "the entire encounter," Mr. Jackson intentionally shot Robert Cleveland, and evidence that he displayed a firearm to Robert Cleveland, all as part of the underlying robbery-murder. Either act would subject Mr. Jackson to the Penal Code section 12022.5 enhancement. The jury was not required to specify which act of Mr. Jackson's constituted "personal use of a firearm," and it did not do so.[11]

Thus, the guilt phase jury did not find that Mr. Jackson killed the victim "himself." The prosecutor's representation was false. Because the prosecutor, who was also the prosecutor at the guilt phase, must be charged

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[11] That there was "evidence presented in the guilt . . . phase[] [that] supported [the prosecution's] position" (RB 50) is irrelevant. There was also evidence presented in the guilt phase that undercut the prosecution's position that Mr. Jackson was the actual killer. See AOB 104-111. But what is significant in determining prosecutorial misconduct is that the guilt phase jury was not required to make any finding, express or implied, as to whether or not Mr. Jackson was the actual killer, and did not do so.

Indeed, respondent's position in its brief conflicts with the position taken by the prosecutor at trial. The prosecutor argued to the guilt phase jury:

> "[Y]ou don't need to decide actually in your verdict whether he is the one who actually shot her or not."

12 RT 1988-1989.

with knowledge of what the guilt phase jury actually decided, it can only be concluded that the prosecutor's representation was, contrary to fundamental standards of professional conduct, intentionally false.

B. The Prosecutor's Misrepresentation Violated State and Federal Law.

Respondent attempts to minimize the prosecutor's intentional misrepresentation as to what the prior jury had actually found as an "isolated comment . . . with only three jurors present." RB 48. Again, respondent is mistaken.

The fact that "only" three of the jurors who ultimately served on the jury that sentenced Mr. Jackson to death were the specific targets of this misconduct does not, in any sense, sanitize it. The act of intentional misconduct in this death penalty case would be a grave matter even if only one juror was likely prejudiced. The presence on the final jury of even a single penalty phase juror who, it is reasonably probable, wrongly believed, based on the prosecutor's misrepresentation, that the guilt phase jury had already "convicted [Mr. Jackson] of taking the life of another human being himself" (22 RT 3289) would render the penalty phase verdict invalid under the Eighth Amendment, because that juror would therefore be precluded from considering constitutionally relevant evidence that would tend to throw doubt on the prosecution's key theory that Mr. Jackson deserved death because he killed the victim "himself." *Tuilaepa v. California, supra,* 512 U.S. 967, 972-973.

Moreover, the prosecutor's misrepresentation was not an "isolated comment," as respondent insists (RB 48), but part of a larger project of prosecutorial misconduct designed to assure a death verdict in the second trial that the same prosecutor was unable to achieve in the first penalty phase trial.

Of course, a brief, isolated incident does not a pattern make. But seven incidents do. As shown in the opening brief, there were no less than six *other* instances of serious penalty phase misconduct by this prosecutor:

First, in closing argument the prosecutor misrepresented the testimony of star prosecution witness Kevin Jackson, so as to make it seem consistent with the testimony of prosecution blood-spatter expert Elissa Mayo (29 RT 4501) that the victim was killed in the bedroom – not in the bathroom, as Kevin Jackson had actually testified. AOB 136-137; compare 26 RT 3980 (Kevin Jackson testimony) with 31 RT 4741 (prosecutor's argument).

Second, the prosecutor committed further egregious misconduct in closing argument, referring to the pregnant victim's one-month fetus as a "baby," and – most egregiously – telling the jury "I think she wanted that baby to live." 31 RT 4770. AOB 137-138.

Third, the prosecutor deliberately misled the jury as to the consequences of a life verdict and the supposed unavailability of punishment in prison, arguing falsely that if Mr. Jackson received a life sentence, he could "do whatever he wants in prison to anybody he wants to do it *with no punishment*." 31 RT 4759 (emphasis added). AOB 138.

Fourth, the prosecutor repeatedly misled the jury on the law in voir dire and in closing argument, stating that one special circumstance "can in and of itself justify the imposition of the death penalty." 31 RT 4729; AOB 139.

Fifth, the prosecutor impugned the credibility and character of Mr. Jackson's defense counsel, conveying to the jury that he had lied to a witness and attempted to suborn perjury. 26 RT 4027-4030; 9 CT 2648-2650; AOB 139.

Sixth, the prosecutor improperly argued to the jury that it should consider Mr. Jackson's supposed lack of remorse. 24 RT 3700 (opening

statement); 31 RT 4728 (closing argument); AOB 139-140.

The fifth of the six enumerated additional acts of misconduct is also raised separately in Argument V (AOB 152-168). Respondent fails to address the substance of *any* of the other five acts of misconduct.

Respondent asserts that the Court should not consider these acts of misconduct because Mr. Jackson failed to object or seek admonitions. RB 48.

Respondent is mistaken. In order to determine whether an act of prosecutorial misconduct comprises a federal due process violation, or a violation of state law, it is necessary to consider whether the misconduct "constituted an isolated instance in a lengthy and otherwise well-conducted trial" or, on the contrary, was "part of an egregious pattern of conduct" that rendered the trial fundamentally unfair. *People v. Smithey* (1999) 20 Cal.4th 936, 961. The court must

> "consider whether such remarks, *in the context of the entire trial*, were sufficiently prejudicial to violate respondent's due process rights."

Donnelly v. DeChristoforo (1974) 416 U.S. 637, 639 (emphasis added). Notably, the Supreme Court has never reformulated this principle to state that the reviewing court must consider misconduct "in the context of the entire trial, excluding acts of unobjected-to misconduct."

The six enumerated instances of misconduct are not raised in this context as discrete claims of error; rather, they are raised because they demonstrate that the prosecutor's voir dire misconduct was not isolated, but part of a larger pattern.

Notably, respondent offers no substantive defense of five of the six instances of prosecutorial misconduct; it simply insists the Court should ignore them.

In support of its argument that the Court should ignore the other instances of prosecutorial misconduct that show this misconduct was not "isolated," respondent relies on *People v. Turner* (2004) 34 Cal.4th 406, 430, citing *People v. Cummings* (1993) 4 Cal.4th 1233, 1302. RB 48. Neither case assists respondent, however, because each discussed the waiver of *singular* claims of prosecutorial misconduct; neither discussed federal due process in this context, much less drew into question the Supreme Court's rule that, in measuring the effect of prosecutorial misconduct, the court must consider the record of "the entire trial" to determine whether the misconduct was isolated or part of a larger pattern. *Donnelly v. DeChristoforo, supra,* 416 U.S. at p. 639.

When the prosecutor's misrepresentation regarding the guilt phase jury's non-finding that Mr. Jackson had killed the victim "himself" is considered in the context of the entire trial, including the six specified instances of other misconduct, as federal due process principles require, a pattern of prosecutorial misconduct unmistakably emerges. Respondent does not contest this.

The opening brief demonstrated (at AOB 140-142) that, by incorrectly leading jurors to believe the prior jury had made a legal determination that Mr. Jackson had killed the victim "himself," the prosecutor had had "affirmatively misled" jurors as to their role in the sentencing process, leading them to believe they could not consider whether the evidence really supported the prosecution's theory, because it had already been decided, "and you must accept it as true." 22 RT 3289. As explained in the opening brief, this violated the Eighth Amendment doctrine of *Caldwell v. Mississippi, supra,* 472 U.S. 320, 328-329. See *Romano v. Oklahoma* (1994) 512 U.S. 1, 8-9; *People v. Ledesma* (2006) 39 Cal.4th 641, 733.

Respondent simply ignores *Caldwell,* and appellant's argument based on it. Respondent's only answer to the demonstration that the prosecutor's misconduct violated his Eighth Amendment rights is the bare assertion that there was no Eighth Amendment violation because "[t]he jury was expressly instructed that the lawyers' statements were not evidence." RB 51.

The problem here, however, was not that the fact that Mr. Jackson assertedly killed another person "himself" was communicated to the penalty phase jury as *evidence*; it wasn't. The problem was that the prosecutor communicated to the jurors *that the prior jury had found Mr. Jackson guilty of taking the victim's life himself.* This was a fact about the adjudication itself. It would not be understood by a reasonable juror to come within the judge's admonition that the lawyers' statements are not evidence, because it's not evidence about the crime, or a substitute for evidence about the crime (such as a lawyer's opinion about the evidence), but a "fact," false though it was, about the prior jury's adjudication of Mr. Jackson's culpability. This is exactly the type of fact of which the jurors would correctly presume the prosecutor had personal knowledge, and the judge's overruling of the defense objection to that supposed "fact" would only ratify that what the prosecutor had said must be correct.[12]

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[12] Respondent also complains that the opening brief's discussion of *Miller v. Pate* (1967) 386 U.S. 1 is "grossly misplaced." RB 52. Not so. In this case, just as in *Miller v. Pate*, the prosecutor "deliberately misrepresented the truth." 386 U.S. at p. 6. In *Miller v. Pate*, the prosecutor misrepresented a "fact" about the crime – that the stains on a pair of men's shorts were bloodstains, though he knew this was not true. In this case, the prosecutor misrepresented a "fact" not about the crime, but about the prior jury's adjudication – that the prior jury had found Mr. Jackson guilt of taking the life of the victim "himself," though she knew this was not true. This was no less false than the misrepresentation in *Miller v. Pate*.

C. The Issue Was Not Waived

In the opening brief, appellant demonstrated that the underlying claim of prosecutorial misconduct during voir dire arising from the prosecutor's misrepresentation of the first jury's findings, which was the subject of a timely objection that was promptly overruled, was not waived. AOB 142-144. Without acknowledging this discussion, respondent argues defense counsel "did not object on the grounds now asserted," and as a consequence, the issue is waived. RB 48-49.

Again, respondent is mistaken.

> The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.

People v. Williams (1997) 16 Cal.4th 153, 254.

Here, the objection – that the prosecutor's statement that the prior jury had convicted Mr. Jackson of taking the life of the victim "himself" was improper – was enough to apprise the trial judge that the defense objected to the prosecutor's statement as comprising misconduct. As demonstrated by the trial court's *immediate* overruling of the objection, without further inquiring into its basis, the trial court thought it understood the objection, and thought it did not need further argument or explication before it ruled. Any further objection would have been futile. For that reason, the futility exception clearly applies. *People v. Hill* (1998) 17 Cal.4th 800, 820.

Moreover, as shown in the opening brief, the objection was sufficient to preserve the federal constitutional issues, which arise as additional legal consequences of state law misconduct. AOB 144.

Respondent also argues the issue is waived because Mr. Jackson's trial counsel failed to request an admonition. RB 49. This argument,

answered in the opening brief (AOB 143), is meritless – the trial court immediately responded to the objection by stating "Overruled. Noted." (22 RT 3289), unmistakably indicating that it regarded the issue as settled and any further input from counsel superfluous. A request for an admonition would have been futile, and was not required. *People v. Hill, supra,* 17 Cal.4th at p. 820.

Regarding the Eighth Amendment *Caldwell* violation identified in the opening brief (AOB 140-142), no objection was even necessary. See *People v. Moon* (2005) 37 Cal.4th 1, 17-18; AOB 144.

D. Reversal is Required.

The opening brief showed that, because the prosecutor affirmatively misled jurors as to their role in the sentencing process -- leading jurors to believe, incorrectly, that the prior jury had already decided that Mr. Jackson had killed the victim "himself," and thus that this was a determination they could not revisit – reversal was required without more. AOB 144-145, citing *Caldwell, supra*, 472 U.S. at pp. 340-341 and *People v. Milner* (1988) 45 Cal.3d 227, 257-258.

Respondent fails to address this showing.

Mr. Jackson's opening brief also showed that reversal was required under *Chapman v. California, supra*, 386 U.S. at p. 24 and *People v. Brown* (1988) 46 Cal.3d 432, 448. AOB 145- 151.

Respondent argues 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." RB 53.

This, of course, is the wrong standard of prejudice. Under federal law, *Chapman v. California* requires the prosecution to demonstrate that the misconduct was harmless beyond a reasonable doubt. The state law

standard for penalty phase error of *People v. Brown, supra*, is substantively the same.

The opening brief discussed in detail the factors leading to the conclusion the prosecutor's penalty phase voir dire misconduct was prejudicial:

- The prosecutor's misconduct directly reinforced the central theme of the prosecutor's argument for death. AOB 145-149.
- The previous jury had hung, after sending a note regarding whether they could consider "lingering doubt" about Mr. Jackson's guilt. AOB 149.
- The evidence that Jonathan Jackson had taken the life of the victim "himself" was weak.
- The objection to the prosecutor's misrepresentation was overruled, thereby ratifying the misconduct.
- The trial judge gave no instructions indicating the prosecutor was incorrect.
- The prior verdicts the clerk read to the jury seemingly substantiated the prosecutor's misrepresentation.

Respondent addresses *none* of these factors. See RB 52-53. Respondent's only argument is that "the penalty phase retrial jury heard evidence that Jackson obtained a .357 magnum from one of his 'homies' and he shot Monique Cleveland . . . ." RB 52.

This is, though respondent does not say so, a reference to the penalty phase retrial testimony of Kevin Jackson. Yet, as shown in appellant's opening brief at pages 106-112, Kevin Jackson was a witness who had every reason to lie. Moreover, his testimony regarding appellant's alleged confession to him conflicted with the prosecution's own physical evidence and expert testimony, as also discussed at AOB 106-112 and elsewhere. Respondent's refusal to engage the issue – or even to *acknowledge* that

there was evidence presented at trial that conflicted with the prosecution's theory -- could not be more telling.

Under the standards of *Caldwell*, *Chapman* and *Brown*, reversal is required.

V. THE PENALTY JUDGMENT MUST BE REVERSED BECAUSE THE PROSECUTOR COMMITTED EGREGIOUS MISCONDUCT BY ELICITING TESTIMONY FROM A PROSECUTION WITNESS THAT MR. JACKSON'S DEFENSE COUNSEL HAD IMPROPERLY ATTEMPTED TO INFLUENCE HIS TESTIMONY, AND CONVEYING TO THE JURY THAT DEFENSE COUNSEL HAD LIED TO THE WITNESS ABOUT A THIRD PARTY'S SUPPOSED CONFESSION.

In the trial of a capital case, at the penalty phase, the role of defense counsel is unique. It is that lawyer's professional mission to obtain the more favorable verdict, and to do so he or she must not merely persuade the jury to believe or doubt a given set of facts, as is the case in all trials, but persuade the jury to make an essentially normative, and finally subjective, qualitative judgment -- that the defendant should live, not die. In order to accomplish this, the defendant's lawyer must, if possible, establish a bond of trust with the jurors.

Here, the prosecutor destroyed any possibility that Jonathan Jackson's lawyer would ever be trusted by the penalty phase jurors, because the prosecutor, through her questioning of her own chief witness, informant Kevin Jackson, conveyed to the jurors that defense counsel Christopher Chaney had, in an interview with Kevin Jackson, lied to him about a supposed third-party confession in an effort to get this witness to change his story.

In accomplishing the destruction of defense counsel's credibility, the prosecutor also destroyed the possibility of an effective penalty defense, and of a fair penalty phase trial, in violation of the Sixth, Eighth and Fourteenth Amendments.

A. The Prosecutor Committed Egregious Misconduct.

At the penalty phase retrial, the prosecutor questioned star prosecution witness and informant Kevin Jackson as follows:

> *"Q This defense attorney told you that someone other than Jonathan Jackson confessed to this murder?*
> *"A Yes.*
> *"Q Do you have any way of knowing if that's a lie?*
> *"A No.*
> *"Q Did you think that was intended to influence your testimony against Jonathan Jackson?*
> *"A Yes."*

26 RT 4030 (emphasis added). As shown in the opening brief, this was egregious misconduct. AOB 157-164.

Respondent's answer to this demonstration of serious misconduct consists of a lengthy and superfluous recitation of events at trial, and a few unsupported assertions. Notably, however, respondent writes:

> "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, 1054, disapproved on another other ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)"

RB 59 (emphasis added).

Respondent's assertion conflicts directly with the record – here, the prosecutor did engage in "forbidden tactics" of the type condemned by this Court.

The record clearly shows that the prosecutor elicited from Kevin Jackson that defense counsel had told him "that someone other than Jonathan Jackson confessed to this murder." 26 RT 4030.

There was not an iota of evidence that a third party had confessed to the crime. The jurors could only understand this as an accusation – and evidence -- that defense counsel attempted to deceive the prosecution's key witness on a vital matter. The prosecutor's questions (including, "Do you have any way of knowing if that's a lie?") unmistakably insinuated that

defense counsel had lied to Kevin Jackson about a third party's supposed confession.

This accusation that defense counsel had attempted to deceive a critical witness was not a *direct* accusation that defense counsel had attempted to deceive the jury. But the difference is not meaningful. An attempt to deceive a witness so that the witness will be influenced to testify to something other than the truth, ultimately, *is* an attempt to deceive the jury. The only reason for an attorney to lie to a witness is to improperly influence that witness's testimony – as the prosecutor's questions here clearly recognized. ("Did you think that was intended to influence your testimony against Jonathan Jackson?" 26 RT 4030.) What the prosecutor did was to accuse defense counsel of lying to Kevin Jackson about a third party's fictitious confession, in an attempt to tamper with his testimony and trick or persuade him to testify falsely.

Respondent writes:

> "[T]he defense attempted to discredit Kevin Jackson and his testimony in the eyes of the jury. The challenged questioning . . . 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." RB 59.

Respondent is correct -- the prosecutor's questions and Kevin Jackson's answers conveyed to the jury that Kevin Jackson "believed defense counsel sought to influence his testimony." RB 59. But respondent overlooks that this was irrelevant and improper.

As noted in the opening brief, Kevin Jackson unequivocally testified that defense counsel did not succeed in influencing his testimony. 26 RT 4028; AOB 158-159. Since there was no reason to believe that defense counsel actually had influenced Kevin Jackson's testimony, or his state of mind concerning his testimony, defense counsel's alleged attempt to

influence this witness, even assuming it occurred, was not relevant to Kevin Jackson's testimony, his state of mind, or any other contested issue at the penalty phase. It was *only* prejudicial.

As argued in the opening brief, the fact that defense counsel had attacked Kevin Jackson's credibility and his cooperation with the prosecutor, and suggested that his story was fabricated, did not in any sense give the prosecutor the right to retaliate by making accusations against defense counsel. At most, the prosecutor had the right to attempt rehabilitation by eliciting evidence that *she* had not attempted to tamper with this witness – she did not have the right to retaliate by leveling a charge of attempted witness-tampering against defense counsel in the jury's presence. See *People v. Perry* (1972) 7 Cal.3d 756, 790 ("[e]ven if the accusations against [defense] counsel found some support in the record, the prosecution should not have made them."); AOB 159. Respondent makes no counter-argument addressing this point.

A shown in the opening brief, because there was "a reasonable likelihood that the jury underst[oo]d the prosecutor's statements as an assertion that defense counsel sought to deceive the jury," misconduct was established. *People v. Cummings, supra,* 4 Cal.4th 1233, 1302. The parties agree that *Cummings* applies to this case. RB 60. Citing *Cummings*, respondent insists that

> "The questions were not to suggest that defense counsel would seek to deceive the jury. [Citation.] Rather, the prosecutor was challenging the defense effort to discredit Kevin Jackson, not defense counsel's integrity." RB 60.

The pattern of penalty phase misconduct by the prosecutor in this case makes any claim of the prosecutor's good faith highly suspect. But the critical issue under *People v. Cummings* is not the prosecutor's intent – it is whether it is reasonably likely the jurors understood the prosecutor as having asserted that defense counsel, in an interview with the prosecution's

most important witness, attempted to deceive or improperly influence that witness. Appellant suggests that a few lines of transcript answer that question quite clearly:

> "Q This defense attorney told you that someone other than Jonathan Jackson confessed to this murder?
> "A Yes.
> "Q Do you have any way of knowing if that's a lie?
> "A No.
> "Q Did you think that was intended to influence your testimony against Jonathan Jackson?
> "A Yes." 26 RT 4030.

The only juror who would not have understood the prosecutor to have asserted, through the unmistakable insinuation of her questions, that defense counsel had attempted to deceive this witness, and cause him to testify falsely, would be a juror who had, for whatever reason, fallen asleep.

As shown in the opening brief, the prosecutor's misconduct not only violated California law, but also transgressed federal due process guarantees. AOB 161-164. *Inter alia*, appellant demonstrated the presence of all the factors the Supreme Court looked to in assessing misconduct in *Donnelly v. DeChristoforo, supra*, 416 U.S. at pp. 645-648. Appellant showed that the misconduct infringed on a right specifically protected by the Constitution, the Sixth Amendment's guarantee of the assistance of counsel; no curative instruction was given; and the prosecutor's misconduct was not isolated, but part of a pattern of penalty phase misconduct. Respondent does not address these factors.

B. The Prosecutor's Misconduct Was Not Waived.

The opening brief demonstrated that the prosecutor committed misconduct by communicating to the penalty phase jury, during the questioning of star prosecution witness and informant-for-consideration Kevin Jackson, that Jonathan Jackson's defense lawyer had tried to mislead

this witness in an interview by stating that someone else had confessed to the killing. AOB 157-164. After this misconduct, defense counsel promptly made a motion for a mistrial, which the trial court denied. 26 RT 4061.

Respondent asserts that, because Mr. Jackson's counsel did not immediately object, the claim of prosecutorial misconduct is waived. RB 58.

Respondent is incorrect. The futility exception applies. *People v. Hill, supra,* 17 Cal.4th at p. 820 ("[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile."); *People v. Dykes, supra,* 46 Cal.4th 731, 760 ("Objection may be excused if it would have been futile or an admonition would not have cured the harm."). The futility of an objection under the circumstances is demonstrated by the fact that when, shortly after the misconduct, defense counsel made a motion for a mistrial based on the same misconduct, the trial court denied the mistrial motion. 26 RT 4061. The mistrial motion was denied on the court's view of its merits, not because it was untimely. Assuming that the objection to prosecutorial misconduct been made when the misconduct occurred late in the morning, rather than when the issue was raised in the early afternoon, there is absolutely no reason to believe that the result would have been any different. As for the absence of a request that the prosecutor be admonished, that too would have been futile, because the court saw no misconduct, concluding, mistakenly, "the character and credibility and ethicality of the defense counsel has not been impugned." 26 RT 4060. *People v. Hill, supra,* 17 Cal.4th at p. 820.

Moreover, an admonition would not have cured the harm. This is discussed at AOB 166, and respondent, again, offers no counter-argument.

C. The Trial Court Abused Its Discretion by Failing to Grant a Mistrial.

After the prosecutor's misconduct, Mr. Jackson's counsel promptly made a motion for a mistrial, which was denied. The opening brief showed that the trial court abused its discretion in denying a mistrial after the serious misconduct that occurred when the prosecutor essentially accused Mr. Jackson's lawyer of lying to the star prosecution witness in an attempt to improperly influence his testimony. AOB 164-166.

Respondent's argument on this point consists of one-sentence summary of Mr. Jackson's argument, a recitation of the standard of review, and a conclusion, restated three times in slightly different language. RB 60. Respondent's brief is devoid of analysis on this issue, and rests on one point: "It was a proper exercise of the trial court's discretion to deny the defense motion for mistrial because there was no prosecutorial misconduct." RB 60.

As shown in the opening brief and *supra*, respondent is wrong. The prosecutor's misconduct in suggesting defense counsel had lied about a material matter to the most important prosecution witness was serious misconduct.

Respondent makes no argument that the curative instruction the trial court offered to give would have been adequate.

D. Mr. Jackson Suffered Prejudice.

The opening brief showed that, under the "reasonable possibility" standard of *People v. Brown, supra*, 46 Cal.3d 432, 448, and the "beyond a reasonable doubt" standard of *Chapman v. California, supra*, 386 U.S. 18, 24, the judgment of death must be reversed. AOB 166-168.

Respondent makes no counter-argument.

VI. THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING A POST-ARREST STATEMENT BY MR. JACKSON TO L.A.P.D. OFFICER AOKI THAT, THE PROSECUTOR CLAIMED, DEMONSTRATED A LACK OF REMORSE.

One month and eleven days after the Riverside County crimes at issue, Mr. Jackson was arrested in Los Angeles for drinking in public. Officer Aoki of the Los Angeles Police Department took Mr. Jackson downtown for booking and, according to Officer Aoki, while Mr. Jackson was in handcuffs, hours after his arrest, and before he had been informed there was a murder warrant outstanding for him, allegedly told Aoki that "if he had had a gun at the time that he stopped us [sic], he would have had to shoot it out with us due to the fact that he had two strikes." 26 RT 4106. The trial court at the first penalty phase excluded this evidence. Based on the same legal theory, the prosecutor sought to have the statement admitted at the penalty phase retrial before a different trial judge. The trial court at the second penalty phase admitted the statement because, in the trial court's view, it demonstrated lack of remorse. AOB 169-170.

The opening brief demonstrated that the statement was inadmissible under state law, and additionally violated federal due process and Eighth Amendment guarantees.

In its argument heading, respondent mischaracterizes Mr. Jackson's alleged statement as a "threat." RB 6. Notably, however, respondent makes no attempt to show the statement was admissible as a threat under Penal Code section 71. See *People v. Tuilaepa* (1994) 4 Cal.4th 569, 590. Instead, the statement, if credited, was nothing more than a hypothetical, conditional observation about the hypothetical past. It did not "threaten" anything.

A. The Trial Court Erroneously Admitted the Statement.

1. Respondent admits that the statement was inadmissible to show lack of remorse.

Respondent admits that "the statement was not admissible to show lack of remorse (*People v. Bonilla* (2007) 41 Cal.4th 313, 356)". RB 63.

2. The statement was not admitted for any purpose other than to show lack of remorse.

Respondent mistakenly argues:

> "The penalty phase retrial court found the statement was admissible under *People v. Washington* 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.)" RB 63 (emphasis added).

The record refutes respondent's claim that the trial court admitted the statement because it showed consciousness of guilt; the record clearly shows that the penalty phase trial court admitted the alleged statement to Officer Aoki on the basis it showed "the defendant had a *lack* of consciousness of guilt; he had a lack of remorse." 24 RT 3626 (emphasis added). What the trial court plainly meant by a "lack of consciousness of guilt" is simply a lack of remorse; the court inartfully phrased the thought, and then immediately rephrased it to clarify its meaning. A lack of consciousness of guilt is not the same thing as a consciousness of guilt; it is a lack of remorse.

Respondent's claim that the trial court admitted the statement as "indicative of Jackson's state of mind during the murder" (RB 63) is also untrue. The trial court explained the basis for its ruling on the record, and the theory that the statement showed Mr. Jackson's state of mind during the crime is not present in the trial court's explanation; it is respondent's

invention. The trial court admitted the statement on the basis that it showed a lack of remorse for the crime.[13]

3. The statement was not admissible to show state of mind at the time of the crime and consciousness of guilt.

Respondent's contention that the alleged statement of Mr. Jackson to Officer Aoki was admissible "to show his state of mind and consciousness of guilt" (RB 63) is unsustainable. The notion that the statement illuminated "Jackson's state of mind during the murder" (RB 63) is dispelled by simply considering the statement. Officer Aoki testified that Mr. Jackson told him that

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[13] The trial court explained its ruling as follows:

> "THE COURT: I heard your objection, Counsel. But it appears groundless in that either it is of such little significance, the killings -- then thought perhaps to be two, maybe only one -- the killing or killings are of so little consequence that they never even entered his mind, which *he is absolutely without any ability to feel or express any remorse*, and this is a matter of absolutely no consequence to him, which makes one's blood run cold, or it is indicative of just what the prosecutor indicates, that he knows about it, but *he has no apparent remorse about it* and is, more importantly, ready, willing, and able to kill again at the drop of a hat, so to speak, for an almost insignificant traffic citation, especially insignificant in light of his previous criminal record.
>
> "I can't see a way in the world that the Court can justify its position in keeping this testimony from the jury, and it will be allowed. And the motion in support of the admissibility of the testimony of Officer Aoki is granted.
>
> "MR. CHANEY: Just so I'm clear, is the Court ruling that this comes in under Factor A as a circumstance of the crime?
>
> "THE COURT: I'm indicating that it is admissible, and it is admissible indicating -- as in Washington, indicating that the defendant had a lack of consciousness of guilt; *he had a lack of remorse*. And I will not further justify or explain or rationalize my rulings to you or anyone else, Counsel."

24 RT 3625-3626 (emphasis added).

"if he had had a gun at the time that he stopped us [sic], he would have had to shoot it out with us due to the fact that he had two strikes." 26 RT 4106.

On its face, this statement is not evidence of Jackson's state of mind at the time of the crimes. The statement does not even *refer* to the killing of Monique Cleveland and the shooting of Robert Cleveland, much less illuminate the speaker's state of mind at the time of those events, forty-one days earlier.

Mr. Jackson was arrested for drinking in public. Notably, as pointed out in the opening brief, Officer Aoki admitted that when Mr. Jackson made the statement, Aoki had probably not told him there was a murder warrant outstanding for him. 9 RT 1446-1447. There is no evidence that Mr. Jackson, a resident of Los Angeles County who was arrested in Los Angeles, even knew there was a Riverside County murder warrant out for him when he made the alleged statement. Officer Aoki testified that there was also another arrest warrant for a parole violation out for Mr. Jackson at the time he was taken into custody. 9 RT 1458.

Thus, the question is whether it is reasonable to infer the alleged statement provided any evidence about Mr. Jackson's supposed state of mind during the crimes when:

- the statement was made one month and ten days after the crimes at issue;
- neither the statement itself nor anything leading up to it refer to the underlying crimes in any way;
- the statement was made after Mr. Jackson had been arrested for drinking in public, not for murder;
- the statement was made at a time when Mr. Jackson had not yet been informed there was a murder warrant;

- there was no evidence that Mr. Jackson, a Los Angeles County resident arrested in Los Angeles, was aware at the time of the existence of the Riverside County murder warrant; and
- there was a *different* warrant out for his arrest at the time.

Under these circumstances, it is simply not reasonable to infer anything about Mr. Jackson's supposed state of mind during the crimes and his consciousness of guilt. The ruling cannot be upheld on that basis, or any other.

B. Mr. Jackson Was Prejudiced.

As shown in the opening brief and elsewhere in this brief, a verdict of death in this case was far from a foregone conclusion. The testimony of the prosecution's most important penalty phase witness, informant Kevin Jackson, was highly suspect for a number of reasons, and conflicted with the physical evidence and the testimony of the prosecution's own experts on several critical points. Additionally, in the opening brief, Mr. Jackson invited the Court's attention to four further factors showing prejudice:

First, the prosecutor highlighted Officer Aoki's testimony that Mr. Jackson had told him "that if he had a gun, he would have shot him" in her opening statement to the penalty phase jury, thus focusing attention on this testimony when it was presented. 24 RT 3700. The inference that Mr. Jackson had a further willingness to use homicidal force was unmistakable.

Respondent ignores this.

Second, in her closing argument for death, the prosecutor expressly asked the jury to consider Mr. Jackson's "lack of remorse." 31 RT 4728.

Respondent does not mention the prosecutor's argument on lack of remorse.

Third, the trial court, in ruling on the new trial motion that alleged error in the admission of the statement, found on the record that "the testimony of Officer Aoki was extremely important" at trial. 23 RT 4870.

Respondent does not mention the trial court's finding.

Fourth, in the first penalty phase trial, at which the alleged statement to Officer Aoki had been excluded, the jury that did *not* hear this "extremely important" evidence was unable to reach a verdict. 3 CT 869.

Respondent similarly fails to address this factor.

In place of any answer to appellant's demonstration of prejudice, respondent supplies a single, perfunctory paragraph. RB 64-65. The gist of respondent's counter-argument is that there was other evidence showing that Mr. Jackson killed the victim, and thus the error could not have been prejudicial. *Id.*

Respondent's analysis is legally flawed. The prejudice inquiry does not ask whether, absent the improperly admitted evidence, there was still enough evidence to support the jury's verdict; under the applicable standard for federal constitutional error, the court asks whether the error was "unimportant in relation to everything else the jury considered on the issue in question." *Yates v. Evatt* (1991) 500 U.S. 391, 403. Here, as the trial court expressly found, the testimony of Officer Aoki was "extremely important," and the error in admitting the contested statement – which is inflammatory on its face – could not have been harmless.

VII. THE TRIAL COURT PREJUDICIALLY ERRED IN RULING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND EVIDENCE CODE SECTION 352, THAT TESTIMONY THAT THE VICTIM WAS PREGNANT, AND AN AUTOPSY PHOTOGRAPH OF THE EMBRYO, WERE ADMISSIBLE AT THE SECOND PENALTY PHASE.

A. The Trial Court Erroneously Admitted Testimony that Monique Cleveland was One Month Pregnant at the Time of Her Death.

There was no evidence that appellant, Monique Cleveland, her husband Robert Cleveland, or anyone else actually knew that she was pregnant when she was killed. Nevertheless, over defense objection, the trial court allowed the prosecution to introduce evidence that victim Monique Cleveland was about one month pregnant at the time of her death. The opening brief demonstrated that the trial court prejudicially erred in doing so. AOB 176-183, 186-188.

Respondent does not contest that there was no evidence that either appellant or Robert Cleveland knew of the one-month pregnancy. But, respondent contends in a footnote, "'someone' knew Monique Cleveland was pregnant: she did." RB 67 fn. 18. Respondent cites in support of this assertion the testimony of Monique Cleveland's cousin, Jeannette Burns. *Id.*

Respondent is incorrect. Jeannette Burns never testified that Monique Cleveland told her she was pregnant. Respondent does not dispute this, but insists that "Monique did confirm the fact [of her pregnancy] to her cousin with non-verbal behavior." RB 68 fn. 18.

This is untrue. The testimony of Jeannette Burns is as follows:

"Q Did you know that Nikki was pregnant?
"A I kind of figured it a little bit because when we

was in there too long. I said, "Nikki, what you in there doing?" Then I heard her like gagging a little bit. I said, "You pregnant, huh?" She just started smiling. Then I didn't say anything. I said, "You want me to go get you some potato chips or crackers?" And she started laughing and smiling. I think she wanted to just tell everyone at one time or something. But I kind of thought a little bit that she was, because, you know, the things that women go through when they get pregnant. I thought that she was a little bit, but *she didn't confirm it.* So I didn't say anything.

"Q She just smiled?

"A Yeah, she just smiled. She always smiled."

28 RT 4285-4286 (emphasis added).

The testimony is notable for what it does not say. Jeannette Burns did not testify that Monique Cleveland told her she was pregnant. Nor did Jeannette Burns testify that Monique Cleveland "confirmed the fact [of her pregnancy] . . . with non-verbal behavior," as respondent claims. There are some clear signs of non-verbal assent, such as nodding "yes." But there was no such unequivocal sign of assent here. Monique Cleveland laughed at the question and smiled, but then, as Burns testified, "[s]he always smiled." 28 RT 4286.

Nor did Jeanette Burns even claim that she understood Monique Cleveland to be telling her, in some unmistakable non-verbal way, that she was pregnant. Jeannette Burns' repeated choice of language in response to the prosecutor's unequivocal question, "Did you know that Nikki was pregnant?" is telling: she "kind of figured it a little bit," and "kind of thought a little bit that she was," and "thought that she was a little bit." What Jeannette Burns communicated by this repeated qualifier is that, based on non-verbal behavior, Burns *speculated* that Monique Cleveland was pregnant. Burns thought she *might* be pregnant. But, Jeannette Burns testified, ***"she didn't confirm it."*** 28 RT 4285 (emphasis added).

The unqualified statement of Jeannette Burns means what it says: Monique Cleveland "didn't confirm it," verbally or non-verbally.

Speculation, plus a refusal to confirm a fact, does not equal proof of that fact.

It bears emphasis that despite the prosecution's introduction of extensive evidence of the contents of the Cleveland trailer and details of Monique Cleveland's life, there was no evidence introduced to show that she had received any maternity care, or made any appointments to do so, or had self-tested for pregnancy, or had even planned or desired to have a child with Robert Cleveland. And there was no evidence her husband knew she was pregnant.

Thus, there was no evidence that anyone, including Monique Cleveland, actually knew at the time of her death that she was one month pregnant.[14]

Appellant demonstrated in the opening brief that the admission of evidence of the pregnancy under these circumstances was an abuse of discretion under Evidence Code section 352, and was fundamentally unfair, in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. AOB 181-183.

Respondent answers an argument that has not been made, devoting its discussion to the theory that the evidence was "admissible as victim

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[14] Moreover, there is no evidence in this record that Monique Cleveland, had she known, would have carried the pregnancy to term. Contrary to respondent's accusation (at RB 67), appellant has not engaged in "course speculation" [sic] that Monique Cleveland would not have carried the pregnancy to term – appellant has simply pointed out that the majority of first trimester pregnancies do not result in live births, due to the combined incidence of miscarriage and voluntary termination. AOB 182-183.

impact evidence under section 190.3, factor (a), circumstances of the crime." RB 65.

Of course, the fact that evidence might theoretically be admissible as a circumstance of the crime under factor (a) does not mean that it is therefore, automatically admissible. Evidence admissible under factor (a) is nevertheless subject to exclusion if its admission would violate independent rules of evidence – such as the rule against hearsay, or Evidence Code section 352 – or transgress constitutional boundaries, such as the due process clause and the Eighth Amendment. *People v. Edwards* (1991) 54 Cal.3d 787, 836.

Appellant's showing that the admission of evidence of Monique Cleveland's pregnancy was an abuse of discretion under Evidence Code section 352 because the evidence was highly prejudicial, and the probative value of the evidence rested on speculation, remains uncontested by respondent, as do the constitutional arguments.

B. The Trial Court Erroneously Admitted a Photograph of Monique Cleveland's Embryo.

Appellant showed in the opening brief that the trial court erred in admitting over defense objection a photograph of the one-month embryo, because the only purpose of this evidence was to inflame the jury. AOB 184-185. Respondent argues there was another reason the photograph was admissible:

> "[t]he photograph could have helped the jury understand that the pregnancy was merely an embryo, not a full term fetus." RB 69.

This is unpersuasive, and borders on the absurd. Jurors are not brain-dead. Any sitting juror – indeed, any adult, functioning member of society – understands that a one-month old embryo is not a "full term

fetus." No photographs are necessary to "help the jury understand" this concept.

Respondent asserts that 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.'" RB 69. But once the jury was informed of the victim's one-month pregnancy, the photograph added nothing of substance. And since there was no evidence that Mr. Jackson even knew of the pregnancy at the time, the fact of the pregnancy could tell the jury nothing about Mr. Jackson's "moral culpability and blameworthiness."

C. Prejudice Resulted.

When, as here, federal constitutional errors have been shown, it is respondent's burden to demonstrate beyond a reasonable doubt that the errors did not contribute to the verdict. *Chapman v. California, supra*, 386 U.S. at p. 24. Respondent has failed to do so.

The prejudice resulting from the erroneous admission of evidence of the pregnancy, and the photograph of the embryo, are really quite obvious. Few facts about a homicide victim could be more likely to incite a strong emotional response from a typical jury than the fact that the childless female victim was pregnant. The photograph – as to which, the prosecutor pointed out to the jury, "you can see the little head and the little arms and stuff" (31 RT 4769) – exacerbated that prejudice, and was independently prejudicial as well. As noted in the opening brief, the trial court itself recognized that testimony about the pregnancy would be "extremely prejudicial." 24 RT 3631; AOB 186.

Respondent ignores the trial court's statement.

In the final words of her opening statement to the penalty phase jury, before any evidence had been presented, the prosecutor informed the jury of the fact that the victim had been pregnant. 24 RT 3700; AOB 186.

Respondent ignores this as well.

Respondent characterizes the prosecutor's repeated invocation of Monique Cleveland's pregnancy in her closing argument as mere "snippets." RB 65. But this is incorrect. The opening brief showed that the "central thrust" of the prosecution's argument to the jury was that Jonathan Jackson deserved the death penalty because he had executed a pregnant woman. AOB 186-188.

Respondent offers no alternative way of reading the prosecutor's closing argument, no other explanation for the prosecutor's repeated references to the victim's "unborn child," and no defense of the prosecutor's divination of the will of the victim: "And I think she wanted that baby to live." 31 RT 4770. The prosecutor's extreme argument regarding the pregnancy and the photograph of the embryo assured that prejudice would result.

The evidence of the victim's pregnancy, and the photograph of the embryo, were highly inflammatory evidence that, especially in light of the prosecutor's closing argument, certainly contributed to the verdict of death. The penalty judgment must be reversed.

X. BECAUSE THE TRIAL COURT IMPROPERLY GRANTED THE PROSECUTION'S FOR-CAUSE CHALLENGE OF PROSPECTIVE JUROR JACQUÉ CARTER DESPITE THE ABSENCE OF EVIDENCE THAT HER VIEWS ON THE DEATH PENALTY WOULD PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO FOLLOW THE COURT'S INSTRUCTIONS, THE JUDGMENT OF DEATH MUST BE REVERSED.

Appellant showed in the opening brief that the trial court improperly granted the prosecutor's for-cause challenge of prospective juror Jacqué Carter, despite the absence of any indication that her views on the death penalty would impair her ability to follow the court's instructions, in violation of the *Witherspoon/Witt* doctrine (*Witherspoon v. Illinois* (1968) 391 U.S. 510, *Wainwright v. Witt* (1985) 469 U.S. 412). AOB 203-210.

Respondent asserts that, by failing to object, appellant has forfeited the claim on appeal. RB 84, citing *People v. Cook* (2007) 40 Cal.4th 1334, 1343.

The argument is meritless. This Court has repeatedly made clear that "failure to object does not forfeit a *Witt/Witherspoon* claim on appeal." *People v. Hoyos* (2007) 41 Cal. 4th 872, 904 fn. 16, citing *People v. Schmeck* (2005) 37 Cal.4th 240, 262 and *People v. Velasquez* (1980) 26 Cal.3d 425, 443.

Respondent's reliance on *People v. Cook, supra,* 40 Cal.4th 1334, is unavailing. *Cook* was a case in which "both parties, through their counsel, agreed to submit challenges for cause on the basis of the questionnaire responses" and on that ground, this Court found "that defendant has forfeited his right to complain of the court's failure to interrogate [a prospective juror] further on voir dire." *Id.* at p. 1342. There was no such agreement here, and the unusual situation the Court addressed in *Cook* does

not operate to change the general rule this Court subsequently restated in *Hoyos, supra.*

As to the substance of the issue, respondent recognizes the rule: that "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 [or her] duties as a juror"' in accordance with the court's instructions and the juror's oath.'" RB 83, quoting *People v. Blair* (2006) 36 Cal.4th 686, 741, quoting in turn *Wainwright v. Witt, supra,* 469 U.S. at p. 424.

But respondent's application of the rule is defective. Respondent states, of prospective juror Carter:

> "In her questionnaire [Carter] had no opinion about the death penalty because she had never thought about it. When provided with an opportunity to think about it, [Carter] articulated an inability to be a fair and open-minded juror because she could not deal with death given her husband's recent death." RB 84.

This is not correct. Long after she became aware this was a death penalty case, and after she filled out and returned her questionnaire, Carter decided she did not want to serve. But her reasons had nothing to do with her views on the death penalty. Carter made perfectly clear that the reason she did not wish to serve was that her husband had died almost a year and a half earlier, and "I just can't deal with death that well. No disrespect. I don't want anything to do with this." 23 RT 3556. As shown in the opening brief, the death of a family member – a common experience across humanity -- may make it more difficult for a juror to serve on a death penalty case, but that is not sufficient to justify the exclusion of a juror under the *Witherspoon/Witt* doctrine.

Accordingly, the judgment must be reversed.

CONCLUSION.

For the foregoing reasons, as well as those set forth in appellant's opening brief, the Court should reverse appellant Jonathan K. Jackson's judgment of conviction, true finding of a special circumstance, and sentence of death.

DATE: October 28, 2010

Respectfully submitted,

GILBERT GAYNOR
Attorney for Appellant
Jonathan K. Jackson

CERTIFICATE OF WORD COUNT

I certify that the forgoing Appellant's Reply Brief contains 23,802 words, exclusive of tables, according to the word-count feature of Microsoft Word.

DATE: October 28, 2010

GILBERT GAYNOR
Attorney for Appellant
Jonathan K. Jackson

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SANTA BARBARA)

I, Gilbert Gaynor, am an attorney, over the age of 18 years and not a party to the within action. My business address is P.O. Box 41159, Santa Barbara, CA 93140-1159.

On October __, 2010, I served the document entitled **APPELLANT'S REPLY BRIEF** by placing a true and correct copy of the document in an envelope addressed as indicated on the attached Service List.

X (BY US MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Barbara, California, in the ordinary course of business.

__ (BY FEDERAL EXPRESS) I placed such envelope in the federal express drop off on October 28, 2010 for delivery the next business day.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October __, 2008 at Santa Barbara, California.

_____
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