IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FRED LEWIS WEATHERTON, Defendant and Appellant.	No. S106489 (Riverside County Superior Court Case No. INF-030802)

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF RIVERSIDE

The Honorable James S. Hawkins, Presiding

APPELLANT'S OPENING BRIEF

MICHAEL R. SNEDEKER, SBN 62842
SNEDEKER, SMITH & SHORT
PMB 422
4110 SE Hawthorne Blvd.
Portland, OR 97214
Telephone: 503-234-3584
Facsimile: 503-232-3215

Attorney for Appellant
FRED LEWIS WEATHERTON

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FRED LEWIS WEATHERTON, Defendant and Appellant.	No. S106489 (Riverside County Superior Court Case No. INF-030802)

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF RIVERSIDE

The Honorable James S. Hawkins, Presiding

APPELLANT'S OPENING BRIEF

MICHAEL R. SNEDEKER, SBN 62842
SNEDEKER, SMITH & SHORT
PMB 422
4110 SE Hawthorne Blvd.
Portland, OR 97214
Telephone: 503-234-3584
Facsimile: 503-232-3215

Attorney for Appellant
FRED LEWIS WEATHERTON

TABLE OF CONTENTS

STATEMENT OF THE CASE. 1

STATEMENT OF FACTS. 11

EXPERT TESTIMONY. 42

PENALTY PHASE. 53

ARGUMENT. 58

I. THE TRIAL COURT, BY IMPROPERLY RESTRICTING MR. WEATHERTON'S CROSS-EXAMINATION OF WITNESS VERNON NEAL AND BARRING MR. WEATHERTON FROM IMPEACHING NEAL OR PRESENTING EVIDENCE OF NEAL'S CULPABILITY FOR THE CHARGED OFFENSES AND HIS PRIOR VIOLENT ENCOUNTER WITH THE MURDER VICTIMS, DENIED MR WEATHERTON HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM, TO PRESENT A COMPLETE DEFENSE, AND TO A RELIABLE DETERMINATION OF THE CAPITAL CHARGES AGAINST HIM. 58

A. Introduction. 58

B. Procedural Background. 59

1. Pre-Trial Motions. 59

2. Vernon Neal's 402 Hearing. 64

3. Wrongly Excluded Evidence. 73

a. Evidence impeaching Vernon's explanations as to why, in the hours preceding the homicides, he was searching for LaTonya. 73

b. Evidence concerning a prior incident, roughly a month before the homicides, when Vernon searched for LaTonya, broke into Sam's house to find her, and got into a fight with Sam and LaTonya.. 74

c. Evidence concerning Vernon's conflicting explanations at to why he had been looking for LaTonya on the night of the earlier incident 77

d. Evidence as to what's Vernon's motive was for sneaking up to Sam Ortiz's house in the early morning hours of November 1, 1998, the day of the homicides.. 78

C. Mr. Weatherton Was Entitled to Present Relevant Evidence of a Third Party's Culpability.. 79

D. The Trial Court Prejudicially Restricted Mr. Weatherton's Right to Impeach Vernon Neal.. 89

E. Testimony of LaBritta Ross and Yolanda Harmon Regarding LaTonya Roberson's Statements about Vernon Neal Were Admissible to Show LaTonya's State of Mind.. 91

F. The Improper Restrictions on Mr. Weatherton's Right to Defend Himself Separately and Cumulatively Violated His Right to Defend Himself, and Severely Prejudiced His Right to a Fair Trial.. 95

II. THE TRIAL COURT'S ORDER THAT MR. WEATHERTON BE PHYSICALLY RESTRAINED WAS BASED ON CASE LAW OVERRULED SHORTLY AFTER MR. WEATHERTON'S CONVICTIONS; THERE WAS NO MANIFEST NEED FOR ANY SUCH RESTRAINT, AND MR. WEATHERTON WAS PREJUDICED BY THE JURY'S AWARENESS OF HIS RESTRAINTS.. 98

A. Introduction. 98

B. Factual and Legal Background. 99

C. Argument. 105

D. Prejudice. 108

III. THE TRIAL COURT ERRED IN PROHIBITING MR. WEATHERTON FROM FULLY QUESTIONING NELVA BELL ABOUT HER SALES OF COCAINE AFTER THE CRIME AND BEFORE MR. WEATHERTON'S TRIAL. 111

A. Factual Background. 111

B. Prejudice. 119

IV. MR. WEATHERTON'S CONVICTIONS AND SENTENCE MUST BE SET ASIDE BECAUSE OF PREJUDICIAL JURY MISCONDUCT. 122

A. Factual Background. 122

1. February 25, 2002 – Allegation of Misconduct on the Elevator. 122

2. February 27, 2002 – Additional Misconduct Emerges. 123

a. Juror No. 3's Allegations that Other Jurors Advocated for Death Penalty During Guilt Phase Deliberations. 123

b. Allegations by Alternate Jurors No. 1 and No. 4 of Misconduct Outside the Courthouse. 128

3. February 28, 2002 – Further Testimony Regarding Juror No. 1's Misconduct; Oral Motion for New Trial Denied on Grounds That it Must Be In writing. 132

4. March 4, 2002 – Hearing on Written New Trial Motion Postponed until After Penalty Phase. 139

5. March 5, 2002 – Prosecutor Seeks and Is Granted Delay in Replying to Motion for New Trial Until After Verdict Is In and Her Office Has Opportunity to Interview All Jurors 149

6. March 6, 2002 – Motion to Disqualify Trial Judge Filed; Appearance of Mr. Vinegrad, a Third Prosecutor. 151

7. March 15 – Hearing on Motion for New Trial. 154

8. March 21, 2002. 164

9. March 26, 2002. 173

10. March 27, 2002. 179

11. March 28, 2002. 188

B. The Trial Court's Ruling – No Prejudicial Misconduct by Juror No. 1. 192

C. Juror No. 1 Committed Prejudicial Misconduct. 200

1. Juror No. 1 Formed the Opinion that Mr. Weatherton Was Guilty During Presentation of Guilt Phase Evidence, and Was Actually Biased Against Him. 204

a. Alternate Juror No. 1. 204

b. Juror No. 3. 205

c. Alternate Juror No. 4. 206

2. Juror No. 1 Expressed His Premature Opinion to Other Jurors, Arguing in Public Places that Mr. Weatherton Was Guilty Before the Case Was Turned Over to the Jury. 211

D. The Introduction of Extraneous — and False — Evidence into Deliberations by a Juror Claiming Special Expertise Was Prejudicial Misconduct. 213

1. Introduction; Trial Court's Ruling. 213

2. Factual Record. 216

3. Juror No. 11 Committed Misconduct. 220

E. Juror No. 11's Misconduct was Prejudicial. 225

V. THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION, MISTAKENLY RULED THAT MR. WEATHERTON'S MOTION FOR A NEW TRIAL COULD NOT BE MADE ORALLY, AND MISTAKENLY POSTPONED THE HEARING UNTIL AFTER THE PENALTY PHASE AND DEATH VERDICT, THEREBY PREJUDICIALLY SKEWING THE HEARING'S RESULTS AWAY FROM A FINDING THAT A NEW TRIAL WAS REQUIRED. 229

A. The Law Regarding New Trial Motions. 230

B. The Law Regarding Mistrial Motions. 232

VI. THE TRIAL COURT WRONGLY PRECLUDED MR. WEATHERTON FROM INTRODUCING EVIDENCE THAT THE JURY FOREMAN REFUSED TO ASK FOR REREADS OF TESTIMONY OR EXHIBITS ON A CRITICAL POINT REQUESTED BY JUROR NO. 3. 236

A. Factual Background. 236

B. The Foreman's Refusal Violated State Statutory Law, the Trial Court's Instructions, and Mr. Weatherton's Constitutional Rights to Due Process, Trial by Jury, and a Reliable Determination of Guilt and Sentence. 241

VII. THE TRIAL COURT WAS BIASED AGAINST MR. WEATHERTON DURING THE JURY MISCONDUCT PROCEEDINGS. 248

A. Disparate Treatment of Juror Witnesses. 250

B. The Trial Court's Biased (and Biasing) Introductory Remarks to "Favorable" Jurors. 252

C. Spoonfeeding Testimony to Juror No. 1. 253

D. Allowing "Favorable" Jurors to Hear Each Other's Testimony. 255

E. Overt Anger at Jurors Who Filed Affidavits Describing Misconduct. 256

F. Reliance on Prosecution for Guidance; Identification with Prosecutorial Side. 257

G. The Decision to Postpone the Hearing and Ruling Until After a Penalty Verdict had been Returned. 259

H. Applicable Law. 259

VIII. THE TRIAL COURT'S DISMISSAL OF JUROR NO. 8 DURING DELIBERATIONS DESPITE THE ABSENCE OF ANY REQUEST BY THE JUROR OR MEETING WITH THE JUROR VIOLATED MR. WEATHERTON'S RIGHT TO A JURY TRIAL. 262

A. Factual Background. 262

B. Legal Argument. 264

IX. THE TRIAL COURT WRONGLY PRECLUDED MR. WEATHERTON'S EXPERT FROM TESTIFYING THAT THE 28 PERSONS EXONERATED IN A DEPARTMENT OF JUSTICE STUDY WERE EXCLUDED BY DNA EVIDENCE. 271

X. THE TRIAL COURT PREJUDICIALLY USURPED THE JURY'S FUNCTIONS AND DISMISSED MR. WEATHERTON'S EXPERT TESTIMONY BY GIVING CALJIC NO. 2.92. 276

XI. POTENTIALLY EXCULPATORY EVIDENCE WITH VALUE THAT WAS APPARENT WAS DESTROYED WITHOUT NOTICE TO MR. WEATHERTON. 282

XII. THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION BY ALLOWING A JURY POLL TO DETERMINE THAT THE JURY SHOULD VISIT WHAT REMAINED OF THE CRIME SCENE. 290

A. Factual Background. 290

B. Legal Argument. 295

XIII. MR. WEATHERTON'S RIGHTS TO DISCOVERY WERE PREJUDICIALLY VIOLATED. 300

XIV. THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING OFFICER JOHNSON TO OFFER UNRELIABLE AND IRRELEVANT EVIDENCE THAT MR. WEATHERTON LEFT FOOTPRINTS RUNNING INTO A GROVE OF TREES TOWARD THE CANAL AND WALKING OUT AGAIN. 306

XV. THE TRIAL COURT ERRED IN ALLOWING A VICTIM/ WITNESS ADVOCATE AND AN ATTORNEY TO ACCOMPANY NELVA BELL WHILE SHE TESTIFIED. 311

XVI. MR. WEATHERTON WAS PREJUDICIALLY DEPRIVED OF THE OPPORTUNITY TO REVIEW MATERIALS REGARDING NELVA BELL IN THE JUVENILE COURT'S POSSESSION.. 316

A. Legal Argument. 317

B. Review by This Court. 319

XVII. THE TRIAL COURT ERRED IN DENYING MR. WEATHERTON THE OPPORTUNITY TO SHOW THAT HIS JURORS WERE SELECTED FROM AN UNREPRESENTATIVE VENIRE.. 320

XVIII. THERE WAS PLAUSIBLE JUSTIFICATION FOR THE TRIAL COURT TO HAVE GRANTED MR. WEATHERTON'S DISCOVERY REQUEST REGARDING THE PROSECUTOR'S CHARGING PRACTICES IN EASTERN RIVERSIDE COUNTY.. 326

XIX. THE PROCESS OF SELECTING "DEATH QUALIFIED" JURORS IS UNCONSTITUTIONAL... 330

A. Introduction. 330

B. Standard of Review. 332

C. Background – The Jury Selection Process in This Case. . . 332

D. An Essential Prerequisite to an Impartial Jury Is That it Be Drawn from "A Representative Cross-Section of the Community"; and the Death-Qualification Process Undermines Both Representativeness and Impartiality. . . . 335

E. Death Qualification Is a Recent Addition to the Process of Jury Selection and Undermines the Jury's Historical Role as Protector of the Citizenry. 337

F. The Constitutional Safeguards Against Cruel And/Or Unusual Punishment. 338

G. Due Process of Law. 338

H. Equal Protection of the Laws. 339

I. Cognizability of this Issue on Appeal. 340

XX. THE DEATH-QUALIFICATION PROCESS IN MR. WEATHERTON'S CASE STRIPPED THE JURY POOL OF ALL AFRICAN-AMERICANS, IN VIOLATION OF HIS RIGHTS TO A REPRESENTATIVE JURY POOL AND EQUAL PROTECTION OF THE LAWS. 342

PENALTY PHASE. 348

XXI. THE TRIAL COURT ERRED IN IMPROPERLY DISMISSING JUROR NO. 2. 348

XXII. DUE PROCESS OF LAW NOW FORBIDS THE IRREVOCABLE PENALTY OF DEATH TO BE IMPOSED UNLESS GUILT IS FOUND BEYOND ALL DOUBT. 355

A. The Constitution Forbids Imposition of Death When a System Generates an Unacceptably High Number of Wrongful Convictions. 355

B. California's Death Penalty Scheme Is Afflicted with All the Factors identified as Leading Causes of False Convictions. 366

C. Conclusion. 373

XXIII. THE VIOLATIONS OF MR. WEATHERTON'S RIGHTS CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT MR. WEATHERTON'S CONVICTIONS AND PENALTY BE SET ASIDE. 376

A. Introduction. 376

B. Background. 376

XXIV. THE RACIAL DISCRIMINATION PERMEATING CAPITAL SENTENCING THAT IS ACCEPTED BY DOMESTIC LAW VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT MR. WEATHERTON'S DEATH PENALTY BE SET ASIDE.. 383

XXV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. WEATHERTON'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION. 400

A. Failure to Narrow.. 401

B. Burden of Proof and Persuasion. 401

C. Factor (a). 403

D. Factor (b). 404

E. Factor (c). 405

F. Inapplicable, Vague, Limited and Burdenless Factors. . . . 406

G. Written Findings. 406

H. Intercase Proportionality Review.. 407

I. Disparate Sentence Review. 408

J. Cruel and Unusual Punishment. 408

K. Cumulative Deficiencies. 409

XXVI. THE ERRORS, BOTH SINGLY AND CUMULATIVELY, OBSTRUCTED A FAIR TRIAL, AND REQUIRE REVERSAL... 411

CONCLUSION. 415

TABLE OF AUTHORITIES

CASES

Adkins v. Brett
(1920) 184 Cal. 252. 93

Arizona v. Youngblood
(1988) 488 U.S. 51. . . . . 286, 287

Ashums v. California
(1992) 506 U.S. 841. 330

Atkins v. Virginia
(2002) 536 U.S. 304. . . . . 360, 366

Auto Equity Sales, Inc. v. Superior Court
(1962) 57 Cal.2d 450. 341

Ballard v. Uribe
(1986) 41 Cal.3d 564. 238

Barber v. Ponte
(1985) 772 F.2d 982. 325

Baze v. Rees
(2008) 553 U.S. 35. 336

Beck v. Alabama
(1980) 447 U.S. 625. . . . . 96, 318, 356

Benton v. Maryland
(1969) 395 U.S. 784. 265

Blakely v. Washington
(2004) 542 U.S. 296. . . . . 337, 403

Blanton v. Womancare, Inc.
(1985) 38 Cal.3d 396. 265

Brady v. Maryland
(1963) 373 U.S. 83. . . . . 302, 303

Brecht v. Abrahamson
(1993) 507 U.S. 619. 211

Byram v. Superior Court
(1977) 74 Cal.App.3d 648. 265

California v. Trombetta
(1984) 467 U.S. 479. . . . . 83, 96, 120, 282-286

Castaneda v. Partida
(1977) 430 U.S. 482. 343

Caterpillar Tractor Co. v. Boyett
(1984) 674 S.W.2d 782. 244

Chambers v. Mississippi
(1973) 410 U.S. 284. . . . . 79, 95, 274

Chapman v. California
(1967) 386 U.S. 18. . . . . 96-310 *passim*

Clemens v. Regents of University of California
(1971) 20 Cal.App.3d 356. 201

Coker v. Georgia
(1977) 433 U.S. 584. 365

County of Sacramento v. Lewis
(1998) 523 U.S. 833. 339

Coy v. Iowa
(1988) 487 U.S. 1012. 312

Crane v. Kentucky
(1986) 476 U.S. 683. . . . . 79, 83, 96, 120

Crist v. Bretz
(1979) 437 U.S. 25. . . . . 265, 266, 315

Cunningham v. California
(2007) 549 U.S. 270. 403

Davis v. Alaska
(1974) 415 U.S. 308. . . . . 89, 96, 318

Deck v. Missouri
(2005) 544 U.S. 622. . . . . 105, 110

Delaware v. Van Arsdall
(1986) 475 U.S. 673. . . . . 89, 96, 120

Duncan v. Louisiana
(1968) 391 U.S. 145. 265

Duren v. Missouri
(1979) 439 U.S. 357. . . . . 323-325, 343

Dyer v. Calderon
(9th Cir. 1998) (en banc) 151 F.3d 970. 211

Elkins v. Superior Court
(2007) 41 Cal.4th 1337. . . . . 312, 313

Enmund v. Florida
(1982) 458 U.S. 782. 365

Eye v. Robertson
(1884) 112 U.S. 580. 382

Fay v. New York
(1947) 332 U.S. 261. . . . . 339, 340

Filartiga v. Pena-Irala
(2nd Cir. 1980) 630 F.2d 876. 376

Ford v. Wainwright
(1986) 477 U.S. 399. 365

Foster v. Superior Court
(1980) 107 Cal.App.3d 218. . . . . 317, 319

Franklin v. Lynaugh
(1988) 487 U.S. 164. 374

Furman v. Georgia
(1972) 408 U.S. 238. . . . . 365, 387, 389, 398

Gardner v. Florida
(1977) 430 U.S. 349. 365

George v. Day
(1966) 420 P.2d 677. 315

Giglio v. United States
(1972) 405 U.S. 150. 303

Glasser v. United States
(1942) 315 U.S. 60. 340

Godfrey v. Georgia
(1980) 446 U.S. 420. 365

Gray v. Mississippi
(1987) 481 U.S. 648. 354

Green v. White
(9th Cir. 2000) 232 F.3d 671. 211

Gregg v. Georgia
(1976) 428 U.S. 153. . . . . 360-398 *passim*

Grobeson v. City of Los Angeles
(2010) 190 Cal.App.4th 778. 210

Hasson v. Ford Motor Co.
(1982) 32 Cal.3d 388. 202

Herrera v. Collins
(1993) 506 U.S. 390. . . . . 362-364, 366

Holloway v. California
(2005) 543 U.S. 1156. 332

Holmes v. South Carolina
(2006) 547 U.S. 319. . . . . 81-83, 95, 120

Illinois v. Allen
(1970) 397 U.S. 337. 105

In re Brown
(1998) 17 Cal.4th 873. . . . . 303, 304

In re Carpenter
(1995) 9 Cal.4th 634. . . . . 143, 226

In re Hamilton
(1999) 20 Cal.4th 273. 238

In re Hitchings
(1993) 6 Cal.4th 97. . . . . 126-210 *passim*

In re Lucas
(2004) 33 Cal.4th 682. . . . . 220, 224

In re M.S.
(1995) 10 Cal.4th 698. 397

In re Malone
(1996) 12 Cal.4th 935. 220-226

In re Martin
(1987) 44 Cal.3d 1. 260

In re Mendes
(1979) 23 Cal.3d 847. . . . . 262-270 *passim*

In re Sassounian
(1995) 9 Cal.4th 535. 397

In re Seaton
(2004) 34 Cal.4th 193. . . . . 328, 343

Irvin v. Dowd
(1961) 366 U.S. 717. 200

Joint Anti-Fascist Refugee Committee v. McGrath
(1951) 341 U.S. 123. 339

Jones v. Meyer
(9th Cir. 1990) 889 F.2d 883. 105

Jurek v. Texas
(1976) 428 U.S. 262. 365

Kadic v. Karadzic
(2nd Cir. 1995) 70 F.3d 232. 386

Kansas v. Marsh
(2006) 548 U.S. 163. 409

Kenneally v. Lungren
(9th Cir. 1992) 967 F.2d 329. 260

Kyles v. Whitley
(1995) 514 U.S. 419. . . . . 303, 304

LaRoche v. Perrin
(1st Cir.1983) 718 F.2d 500. 325

Lockett v. Ohio
(1978) 438 U.S. 586. 365

Lockhart v. McCree
(1986) 476 U.S. 162. . . . . 330, 342, 343

M.T. v. Superior Court
(2009) 178 Cal.App.4th 1170. 341

Maryland v. Craig
(1990) 497 U.S. 836. 312

McClatchy Newspapers, Inc. v. Keisha T.
(In re Keisha T.) (1995) 38 Cal.App.4th 220. 317

McCleskey v. Kemp
(1987) 481 U.S. 279. . . . . 327, 328, 392-395

Meiner v. Ford Motor Co.
(1971) 17 Cal.App.3d 127. 313

Middleton v. McNeil
(2004) 541 U.S. 433. 281

Miller v. Stagner
(9th Cir. 1985) 757 F.2d 988. 270

Morgan v. Illinois
(1992) 504 U.S. 719. 339

Murray v. The Schooner Charming Betsy
(1804) 6 U.S. (2 Cranch) 64. 377

Namba v. McCourt
(1949) 185 Or. 579, 204 P.2d 569. 385

Ohio v. Roberts
(1980) 448 U.S. 56. 312

Oyama v. California
(1948) 332 U.S. 633. . . . . 384, 385

Parker v. Dugger
(1991) 498 U.S. 308. 414

Parker v. Gladden
(1966) 385 U.S. 363. 225

Pennsylvania v. Ritchie
(1987) 480 U.S. 39. 273

Penry v. Lynaugh
(1989) 492 U.S. 302. 366

People v. Adams
(1993) 19 Cal.App.4th 412. . . . . 312, 313

People v. Ah Sam
(1871) 41 Cal. 645. 230

People v. Alexander
(2010) 49 Cal.4th 846. 310

People v. Alvarez
(1996) 14 Cal.4th 155. 397

People v. Anderson
(2001) 25 Cal.4th 543. 108

People v. Anderson
(2009) 47 Cal.4th 92. 234

People v. Arline
(1970) 13 Cal.App.3d 200. 87

People v. Ashmus
(1991) 54 Cal.3d 932. . . . . 268, 330

People v. Ayala
(2000) 23 Cal.4th 255. 321

People v. Bacigalupo
(1993) 6 Cal.4th 457. 401

People v. Barnwell
(2007) 41 Cal.4th 1038. 266

People v. Beeler
(1995) 9 Cal.4th 953. . . . . 285, 286

People v. Bennett
(2009) 45 Cal.4th 577. 266

People v. Bigelow
(1984) 37 Cal.3d 731. 234

People v. Boyette
(2002) 29 Cal.4th 381. 340

People v. Braxton
(2004) 34 Cal.4th 798. 231

People v. Breaux
(1991) 1 Cal.4th 281. 323

People v. Brown
(1976) 61 Cal.App.3d 476. 201

People v. Brown
(1988) 46 Cal.3d 432. 353

People v. Bryant
(1984) 157 Cal.App.3d 582. 260

People v. Buffum
(1953) 40 Cal.2d 709. 414

People v. Burgener
(2003) 29 Cal.4th 833. . . . . 242, 323

People v. Burnett
(1967) 251 Cal.App.2d 651. 107

People v. Burwell
(1955) 44 Cal.2d 16. 107

People v. Butler
(1975) 47 Cal.App.3d 273. 242-246

People v. Cardenas
(1982) 31 Cal.3d 897. 413

People v. Carrington
(2009) 47 Cal.4th 145. . . . . 400, 401

People v. Carter
(2005) 36 Cal.4th 1215. 287

People v. Cleveland
(2001) 25 Cal.4th 461. 150

People v. Cooper
(1991) 53 Cal.3d 771. 287

People v. Cottle
(2006) 39 Cal.4th 246. 267

People v. Cowan
(2010) 50 Cal.4th 401. 259

People v. Cox
(1991) 53 Cal.3d 618. 108

People v. Cunningham
(2001) 25 Cal.4th 926. 268

People v. Curl
(2009) 46 Cal.4th 339. 382

People v. Currie
(2001) 87 Cal.App.4th 225. 323

People v. De La Roi
(1944) 23 Cal.2d 692. . . . . 242, 243

People v. Delamora
(1996) 48 Cal.App.4th 1850. 269

People v. Demetrulias
(2006) 39 Cal.4th 1. 354

People v. Duran
(1976) 16 Cal.3d 282. . . . . 106, 107, 414

People v. Duran
(1976) 16 Cal.3d 282. 414

People v. Dykes
(2009) 46 Cal.4th 731. 225

People v. D'Arcy
(2010) 48 Cal.4th 257. . . . . 400-407 *passim*

People v. Ervine
(2009) 47 Cal.4th 745. . . . . 400-408 *passim*

People v. Fudge
(1994) 7 Cal.4th 1075. 269

People v. Gainer
(1977) 19 Cal.3d 835. 245

People v. Galloway
(1927) 202 Cal. 81. 200

People v. Garcia
(1997) 56 Cal.App.4th 1349. . . . . 98-107 *passim*

People v. Gay
(2008) 42 Cal.4th 1195 352

People v. Geier
(2007) 41 Cal.4th 555 80

People v. Green
(1995) 31 Cal.App.4th 1001 269

People v. Hall
(1986) 41 Cal.3d 826 . . . . . 60-61, 80, 86-88

People v. Hamilton
(1988) 45 Cal.3d 351 296

People v. Hamilton
(2009) 45 Cal.4th 863 381

People v. Hammon
(1997) 15 Cal.4th 1117 301

People v. Haskett
(1982) 30 Cal.3d 841 232

People v. Hawthorne
(1992) 4 Cal.4th 43 . . . . . 232, 354

People v. Henderson
(1935) 4 Cal.2d 188 . . . . . 242, 245

People v. Hernandez
(2003) 30 Cal.4th 1 266

People v. Hill
(1998) 17 Cal.4th 800 . . . . . 413, 414

People v. Hillery
(1967) 65 Cal.2d 795 107

People v. Hillhouse
(2002) 27 Cal.4th 469. . . . . 381, 383

People v. Hines
(1997) 15 Cal.4th 997. 232

People v. Holloway
(1990) 50 Cal.3d 1098. . . . . 200, 202, 226

People v. Holloway
(2004) 33 Cal.4th 96. 332

People v. Horton
(1995) 11 Cal.4th 1068. 322

People v. Howard
(1992) 1 Cal.4th 1132. 322

People v. Hutchinson
(1969) 71 Cal.2d 342. . . . . 237, 238

People v. Jacinto
(2010) 49 Cal.4th 263. 80

People v. Jenkins
(2000) 22 Cal.4th 900. . . . . 232, 381, 382

People v. Jennings
(1991) 53 Cal.3d 334. 234

People v. Johnson
(1988) 200 Cal.App.3d 1553. . . . . 61, 62

People v. Johnson
(1992) 3 Cal.4th 1183. 278

People v. Jones
(2011) 51 Cal.4th 346. 295

People v. Kaurish
(1990) 52 Cal.3d 648. 374

People v. Keenan
(1988) 46 Cal.3d 478. . . . . 238, 239

People v. Kimball
(1936) 5 Cal.2d 608. 107

People v. Kramer
(1897) 117 Cal. 647. 201

People v. Lang
(1989) 49 Cal.3d 991. 296

People v. Lewis
(2006) 39 Cal.4th 970. 405

People v. Litteral
(1978) 79 Cal.App.3d 790. 242-245

People v. Loomis
(1938) 27 Cal.App.2d 236. 107

People v. Lucas
(1995) 12 Cal.4th 415. 274

People v. Lynch
(2010) 50 Cal.4th 693. 267

People v. Majors
(1998) 18 Cal.4th 385. . . . . 93, 108, 201, 202

People v. Mar
(2000) 77 Cal.App.4th 1284. . . . . 98, 99, 103, 104

People v. Mar
(2002) 28 Cal.4th 1201. . . . . 98, 103, 110

People v. Marshall
(1990) 50 Cal.3d 912. 226

People v. Martinez
(2010) 47 Cal.4th 911. 401-408

People v. McPeters
(1992) 2 Cal.4th 1148. 327-329

People v. McWhorter
(2009) 47 Cal.4th 318. 400-408

People v. Mendez
(1924) 193 Cal. 39. . . . . 60, 86, 87

People v. Mendoza
(2000) 24 Cal.4th 130. 404

People v. Merkouris
(1959) 52 Cal.2d 672. 91

People v. Mills
(2010) 48 Cal.4th 158. . . . . 330, 400-408

People v. Mincey
(1992) 2 Cal.4th 408. 274

People v. Montiel
(1993) 5 Cal.4th 887. . . . . 396, 397

People v. Murtishaw
(1989) 48 Cal.3d 1001. 242

People v. Nesler
(1997) 16 Cal.4th 561. . . . . 142-143, 202, 220-226

People v. Orchard
(1971) 127 Cal.App.3d 568. . . . . 238, 240, 241

People v. Ortiz
(1995) 38 Cal.App.4th 377 . . . . . 93, 94

People v. Page
(2008) 44 Cal.4th 1 . . . . . 80, 83

People v. Patten
(1993) 9 Cal.App.4th 1718 312

People v. Penoli
(1996) 46 Cal.App.4th 298 296

People v. Price
(1991) 1 Cal.4th 324 . . . . . 290, 295

People v. Pride
(1992) 3 Cal.4th 195 . . . . . 60, 86, 88

People v. Prince
(2007) 40 Cal.4th 1179 80

People v. Ray
(1996) 13 Cal.4th 313 406

People v. Riel
(2000) 22 Cal.4th 1153 374

People v. Riser
(1957) 47 Cal.2d 566. 80

People v. Robinson
(2005) 37 Cal.4th 592 80

People v. Romero
(2007) 149 Cal.App.4th 29 94

People v. Roybal
(1998) 19 Cal.4th 481 287

People v. Sanders
(1990) 51 Cal.3d 471. 323

People v. Schmeck
(2005) 37 Cal.4th 240. . . . . 397, 400-409

People v. Slaughter
(2002) 27 Cal.4th 1187. . . . . 108, 110

People v. Stabler
(1962) 202 Cal.App.2d 862. 107

People v. Stansbury
(1995) 9 Cal.4th 824. 200

People v. Steele
(2002) 27 Cal.4th 1230. 238

People v. Stewart
(2004) 33 Cal.4th 425. 203

People v. Superior Court (Romero)
(1996) 13 Cal.4th 497. . . . . 233, 234

People v. Taylor
(2010) 48 Cal.4th 574 [108 Cal.Rptr.3d 87]. 400, 407

People v. Thompson
(1988) 45 Cal.3d 86. 93

People v. Tuilaepa
(1993) 4 Cal.4th 569. . . . . 106, 108

People v. von Badenthal
(1935) 8 Cal.App.2d 404. 270

People v. Von Villas
(1992) 11 Cal.App.4th 175. . . . . 158, 160

People v. Watson
(1956) 46 Cal.2d 818. . . . . 97, 110, 121, 310

People v. Weatherford
(1945) 27 Cal.2d 401. 243

People v. Welch
(1999) 20 Cal.4th 701. 233

People v. Wheeler
(1978) 22 Cal.3d 258. . . . . 346, 347

People v. Williams
(1997) 6 Cal.4th 153. 290

People v. Williams
(2009) 170 Cal.App.4th 587. 260

People v. Wright
(1988) 45 Cal.3d 1126. 280

People v. York
(1969) 272 Cal.App.2d 463. 242-246

People v. Zerillo
(1950) 36 Cal.2d 222. 414

Peters v. Kiff (1972)
407 U.S. 493. 343

Proffitt v. Florida
(1976) 428 U.S. 242. 365

Province v. Center for Women's Health & Family Birth
(1993) 20 Cal.App.4th 1673. . . . . 209, 210

Pulley v. Harris
(1984) 465 U.S. 37. . . . . 310, 409

Ring v. Arizona
(2002) 536 U.S. 584 [122 S.Ct. 2428]. 360, 402-405

Rock v. Arkansas
(1987) 483 U.S. 44. 274

Roper v. Simmons
(2005) 543 U.S. 551. . . . . 338, 365

Simmons v. South Carolina
(1994) 512 U.S. 154. 365

Smith v. Phillips
(1982) 455 U.S. 209. 225

Smith v. Texas
(1940) 311 U.S. 128. . . . . 335, 336, 340

Spencer v. Texas
(1967) 385 U.S. 554. 338

Stanford v. Kentucky
(1989) 492 U.S. 361. 365

State v. Wolf
(1965) 207 A.2d 670. 245

Taylor v. Louisiana
(1975) 419 U.S. 522. . . . . 324, 342, 343

The Paquete Habana
(1900) 175 U.S. 677. 377

Thomas v. Borg
(9th Cir.1998) 159 F.3d 1147. 325

Thompson v. Oklahoma
(1988) 487 U.S. 815. 365

Trans World Airlines, Inc. v. Franklin Mint Corp.
(1984) 466 U.S. 243. 377

Trop v. Dulles
(1958) 356 U.S. 86. . . . . 338, 365

Turner v. Louisiana
(1965) 379 U.S. 466. 225

Turner v. Murray
(1986) 476 U.S. 28. 395

Tyers v. Finner
(9th Cir. 1983) 709 F.3d 1274. 105

United States ex rel. Smith v. Fairman
(7th Cir.1985) 769 F.2d 386. 303

United States v. Agurs
(1976) 427 U.S. 97. 302

United States v. Allsup
(9th Cir. 1977) 566 F.2d 68. 211

United States v. Booker
(2005) 543 U.S. 220. 403

United States v. Frederick
(9th Cir. 1996) 78 F.3d 1370. 414

United States v. Garsson
(S.D.N.Y. 1923) 291 F. 646. 360

United States v. Jackman
(2nd Cir.1995) 46 F.3d 1240. 325

United States v. Klee
(9th Cir. 1974) 494 F.2d 384. . . . . 201, 211, 212

United States v. Quinones
(2d Cir. 2002) 313 F.3d 49. . . . . 356, 362, 363

United States v. Quinones
(S.D.N.Y. 2002) 205 F.Supp.2d 256. . . . . 361, 362, 373

Uttecht v. Brown
(2007) 551 U.S. 1. 336

Wade v. Hunter
(1949) 336 U.S. 684. 266

Wainwright v. Witt
(1985) 469 U.S. 412. 336

Walker v. Engle
(6th Cir. 1983) 703 F.2d 959. 414

Ward v. Illinois
(1977) 431 U.S. 767. 332

Washington v. Texas
(1967) 388 U.S. 14. . . . . 79, 273

Watenpaugh v. State Teachers' Retirement System
(1959) 51 Cal.2d 675. 93

Weathers v. Kaiser Foundation Hospitals
(1971) 5 Cal.3d 98. 200

Whitlow v. Durst
(1942) 20 Cal.2d 523. 93

Williams v. Florida
(1970) 399 U.S. 78. 270

Williams v. Taylor
(2000) 529 U.S. 362. 413

Winebrenner v. United States
(8th Cir. 1945) 147 F.2d 322. 211

Witherspoon v. Illinois
(1968) 391 U.S. 510. 339

Withrow v. Larkin
(1975) 421 U.S. 35. 259

Wolff v. McDonnell
(1974) 418 U.S. 539. 339

Woodson v. North Carolina
(1976) 428 U.S. 280. . . . . 318, 356, 365, 395

CONSTITUTION

California

Cal. Const., art. I, § 1. 331

Cal. Const., art. I, § 7. . . . . 225, 331

Cal. Const., art. I, § 15. . . . . 79, 225, 282, 331

Cal. Const., art. I, § 16. . . . . 200-331 *passim*

Cal. Const., art. I, § 17. 331

Cal. Const., art. I, § 24. 282

United States

U.S. Const., art. I, § 8. 382

U.S. Const., art. III, § 2, clause 3. 330

U.S. Const., art. VI, § 2. 382

U.S. Const., 4th Amend.. 352

U.S. Const., 5th Amend.. . . . . *passim*

U.S. Const., 6th Amend.. . . . . *passim*

U.S. Const., 8th Amend.. . . . . *passim*

U.S. Const., 14th Amend.. . . . . *passim*

STATUTES

Code of Civil Procedure § 233. 262

Evidence Code § 350. 80

Evidence Code § 402. . . . . 64-69, 75, 77, 271, 306

Evidence Code § 780. 89

Evidence Code § 1150. . . . . 140-309 *passim*

Evidence Code § 1150, subd. (a). 237, 238

Evidence Code § 1250. . . . . 91, 93

Penal Code § 187. 1-4

Penal Code § 190.2, subd. (a)(3). 4

Penal Code § 190.2, subd. (a)(16). 397

Penal Code § 190.2, subd. (a)(17)(A). 4

Penal Code § 190.3. 233

Penal Code § 190.3, factor (a). 403

Penal Code § 190.3, factor (b). 5

Penal Code § 190.3, factor (c). 6, 405

Penal Code § 211. . . . . 2, 4

Penal Code § 352. 88

Penal Code § 422.6. 397

Penal Code § 422.7. 397

Penal Code § 496. 267

Penal Code § 664. . . . . 2, 4, 267

Penal Code § 667, subds. (c) & (e). 2, 4

Penal Code § 868.5. 311-313

Penal Code § 995. 6

Penal Code § 1054.1. . . . . 282, 300

Penal Code § 1089. . . . . 262-270 *passim*

Penal Code § 1119. 295

Penal Code § 1122. 201

Penal Code § 1138. . . . . 237, 241-244

Penal Code § 1170.12, subd. (c). 2

Penal Code § 1181, subd. (3). 9, 137, 138, 230

Penal Code § 1182. 230

Penal Code § 1191. 230

Penal Code § 1192.7, subd. (c)(8). 2-5

Penal Code § 1202. 230

Penal Code § 1239. 10

Penal Code § 1385. 234

Penal Code § 12022.53, subd. (d). 2-5

Vehicle Code § 10851. . . . . 5, 55

Welfare and Institutions Code § 827. . . . . 316, 317

MISCELLANEOUS

American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: a Guide for Examining the Administration of the Death Penalty in the United States* (2002) Ohio St. L.J., Symposium: Addressing Capital Punishment through Statutory Reform. 367

American Declaration of the Rights and Duties of Man. . . . . 376-399 *passim*

Amsterdam, *Race and the Death Penalty* (1988) 7 Criminal Justice Ethics 2, at p. 86. 393

Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia* (1998) 83 Cornell L.Rev. 1638. 388

Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987) 40 Stan. L.Rev. 21, 22. 356

Bentham, The Rationale of Punishment (Robert Heward ed., 1830) 186. 356

Bienen, *Criminal Law: The Proportionality Review of Capital Cases by the State High Courts After Gregg: Only "The Appearance of Justice"?* (1996) 87 J. Crim. L. & Criminology 130. 330

Blume, *Twenty-five Years of Death: a Report of the Cornell Death Penalty Project on the 'Modern' Era of Capital Punishment in South Carolina* (2002) 54 S.C. L. Rev. 285..... 367

Bodenhamer, Fair Trial: Rights of the Accused in American History (1992) p. 11..... 315

Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy* (2002) 87 J. Appl. Psychol. 112..... 358

Bureau of Justice Statistics, *Criminal Victimization in the United States 2002*..... 358

Burgenthal, *International Human Rights in a Nutshell*, Vol. 14 (1988)..... 378-380

California Commission on the Fair Administration of Justice, *Final Report and Recommendations* (April 2008)..... 371

California Criminal Law Procedure and Practice, California Education of the Bar (CEB)..... 7, 146, 160, 301

CALJIC No. 0.50..... 161

CALJIC No. 2.92..... 276, 278

CALJIC No. 8.85..... 406

Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society* (1988) 28 Va. J. Int'l L..... 386

Cohen & Smith, *The Death of Death-Qualification* (2008) 59 Case W. Res. L. Rev. 87..... 337, 338

Cohen, The Wrong Men: America's Epidemic of Wrongful Death Row Convictions (2003)..... 367

Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951. 378

Cutler, ed., Expert Testimony on the Psychology of Eyewitness Identification (2009). 358

Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* (2004) Death Penalty Information Center <http://www.deathpenaltyinfo.org/node/523> [as of June 8, 2010]. 360

Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Death Penalty Information Center (June 1998). 390

Findley, *Learning from Our Mistakes: a Criminal Justice Commission to Study Wrongful Convictions* (2002) 38 Cal. Western L.Rev. 333. 367

Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England* (2000) 68 Fordham L.Rev. 1379. 369

Forst, Errors of Justice: Nature, Sources and Remedies (Cambridge Studies in Criminology) (2003). 367

Gallup Organization, *Who Supports the Death Penalty?* (Nov. 16, 2004). 345

Garvey (Ed.), Beyond Repair? America's Death Penalty (2003). 367

Gould, The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System (2009). 367

Gross et al., *Exonerations in the United States, 1989 through 2003* (2005) 95 J.Crim.L. and Criminology, No. 2, p. 530. . . . . 358, 359

Gross, *Convicting the Innocent* (2008)
4 Ann. Rev. of L. and Social Science 173. 367

Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt* (1987) 16 Journal of Legal Studies 395, 413. 359

Gross, *Lost Lives: Miscarriages of Justice in Capital Cases* (Autumn 1998) 61 Law and Contemporary Problems 123. 360

Huff et al., Convicted but Innocent (1995). 357

Innocence Lost . . . and Found: Faces of Wrongful Conviction Symposium (2006) 37 Golden Gate L.Rev. 1. 367

International Bill of Human Rights. 378

International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969. . . . . 376-399 *passim*

International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. . . . . 379, 380

International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976. . . . . 376-399 *passim*

International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976. 378

James et al., Principles of Bloodstain Pattern Analysis: Theory and Practice (2005).. 227

1 Jefferson's Cal. Evidence Benchbook (4th ed. CJA-CEB 2009).. 89

Keil and Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991* (1995) 20 Am.J.Crim.Just. 17. 390

Know the Cases: Larry Youngblood, Innocence Project <http://www.innocenceproject.org/Content/Larry_Youngblood.php> [as of Jan. 13, 2011]. 286, 287

Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt* (2001) 21 N. Ill. U. L.Rev. 41. 372

Kreimer & Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA* (Dec. 2002) 151 U. Penn. L.Rev. 547. 367

Liebman, *The Overproduction of Death* (2000) 100 Colum. L. Rev. 2030. . . . . 360, 367

Limiting the Peremptory Challenge: Representation of Groups on Petit Juries (1977) 86 Yale L.J. 1715. 347

Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study* (1988) 41 Stan. L.Rev. 121. 356

Model Penal Code § 210.6(1)(f). 372

National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward (2009). 367

Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731. . . . . 378, 381

OAS Charter. 380

Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976. 378

Perdue signs Racial Justice Act (Aug. 11, 2009) WRAL <http://www.wral.com/news/state/story/5769609/> [as of Dec. 12, 2010]. 391

Racial Disparities in Federal Death Penalty Prosecutions 1988-1994, Staff Report by the Subcomittee on Civil and Constitutional Rights, Committee on the Judiciary, 103 Cong. 2nd Sess., March 1994. 388-390

Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty, Executive Committee of the American Law Institute (April 2009). 373

Report of the Governor's Commission on Capital Punishment (Apr. 15, 2002) [Illinois Commission Report] <http://www.idoc.state.il.us/ccp/ccp/reports/ commission_report/ index.html> [as of Dec. 12, 2010]. 368-371, 375

Research Report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, U.S. Dept. of Justice (June 1996). 357, 358

Restatement Third of the Foreign Relations Law of the United States (1987). 382, 386

Robertson, Human Rights in Europe (1985). 377

Ryan, Speech at the Northwestern University School of Law (Jan. 11, 2003) <http://www.law.northwestern.edu/ wrongfulconvictions/issues/deathpenalty/clemency/ dePaulAddress.html> [as of Dec. 12, 2010]. 361, 367

Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with The Capital Punishment System in California* (2003) 44 Santa Clara L.Rev. 101. 371

Scheck et al., Actual Innocence (2000). 358, 367

Sohn and Burgenthal, *International Protection of Human Rights* (1973) pp. 506-509. 379

Steiker, *Commentary: Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty* (2002) 77 N.Y.U. L.Rev. 1475. 330

Study: Race plays role in N.C. death penalty (July 22, 2010) WRAL <http://www.wral.com/news/local/story/8017956/> [as of Dec. 12, 2010]. 392

UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945. . . . . 377-379, 385

United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) GAO/GGD-90-57. 387

Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). 376, 378

Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512. 386

Warden, *The Snitch System: How Incentivized Witnesses Put 38 Innocent Americans on Death Row* (2002) Research Report, Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern Univ. School of Law. 367

Wells & Olson, *Eyewitness Testimony* (2003) 54 Ann. Rev. Psychol. 277. 358

Yong, *Spector Trial Expert Backs Suicide Theory*, L.A. Times (June 27, 2007). 228

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **FRED LEWIS WEATHERTON,** **Defendant and Appellant.**	**No. S106489** **(Riverside County Superior Court Case No. INF-030802)**

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

On November 3, 1998, a complaint was filed in the Indio branch of the Riverside County Superior Court charging appellant, Fred Lewis Weatherton, with three offenses: Count I, the murder of Samuel Ortiz in violation of section 187,[1] together with allegations that Mr. Weatherton

[1] All statutory and section references are to the California Penal Code unless otherwise stated. The Reporter's transcript will be abbreviated as RT; the Clerk's Transcript as CT; and the supplemental transcripts will be referred to as either SCT or SRT. Pretrial reporter's transcripts will be referred to as PRT.

personally and intentionally discharged a firearm and proximately caused great bodily injury, in violation of sections 12022.53, subdivision (d), and 1192.7, subdivision (c)(8); Count II, the murder of LaTonya Roberson, together with allegations that Mr. Weatherton personally and intentionally discharged a firearm and proximately caused great bodily injury, in violation of sections 12022.53, subdivision (d), and 1192.7, subdivision (c)(8); and Count III, the attempted murder of Nelva Bell, in violation of sections 664/187, together with allegations that Mr. Weatherton personally and intentionally discharged a firearm and proximately caused great bodily injury, in violation of sections 12022.53, subdivision (d), and 1192.7, subdivision (c)(8). Special allegations were made that Mr. Weatherton had been convicted in September of 1985 of violating section 211, within the meaning of section 667, subdivisions (c) and (e), and section 1170.12, subdivision (c), and convicted in 1973 of violating section 211, within the meaning of section 667, subdivisions (c) and (e), and section 1170.12, subdivision (c). (1 CT 1-2.)

Arraignment on the complaint occurred in municipal court on November 3, 1998. Mr. Weatherton was appointed a public defender, and pleaded not guilty to all counts. (1 CT 6.) The public defender declared a conflict on November 6, 1998 (1 CT 7), and Barbara Brand was appointed

to represent Mr. Weatherton on November 10, 1998. On January 6, 1999, the district attorney's office notified Mr. Weatherton of its intention to seek capital punishment. (1 CT 17.) Shortly thereafter, Mr. Weatherton filed a motion seeking to relieve counsel. (1 CT 19-23.) His motion was granted on January 15, 1999, and John Hemmer was appointed to represent him on January 19, 1999. (1 CT 45.) Mr. Hemmer in turn was replaced on October 27, 1999, by counsel Clark Head. (1 CT 108-109.)

A preliminary hearing began on March 28, 2000, in the Riverside County Superior Court before the honorable James S. Hawkins, the same judge who ultimately tried the case. (1 CT 162 et seq.) The court found sufficient cause to bind Mr. Weatherton over on all charges, and on April 10, 2000, an information was filed against Mr. Weatherton charging three counts of criminal violations, as well as various sentencing enhancement and special circumstance allegations. (2 CT 324-327.)

Count I charged Mr. Weatherton with the murder of Samuel Ortiz in violation of section 187. It further alleged that in the commission of this offense, Mr. Weatherton personally used a firearm, in violation of sections 12022.53, subdivision (d), and 1192.7, subdivision (c)(8).

Count II charged Mr. Weatherton with the murder of LaTonya Roberson, a.k.a. Gibson, and further alleged that he personally used a

firearm to commit the offense, in violation of sections 12022.53, subdivision (d), and 1192.7, subdivision (c)(8).

Count III charged Mr. Weatherton with the attempted murder of Nelva Bell, in violation of sections 664/187, and further alleged that he personally used a firearm to commit the offense, in violation of sections 12022.53, subdivision (d), and 1192.7, subdivision (c)(8).

Mr. Weatherton was further charged with two special circumstances: section 190.2, subdivision (a)(17)(A) [murder committed in the course of a robbery], and section 190.2, subdivision (a)(3) [multiple murder]. The prosecutor also alleged that Mr. Weatherton had been convected of two or more serious and violent felonies within the meaning of section 667, subdivisions (c) and (e)(2), and listed seven priors, all violations of section 211 (robbery); five of them convictions on November 13, 1973, in Los Angeles; one other Los Angeles conviction, on December 13, 1985, and one prior conviction in Riverside on August 1, 1985. (2 CT 324-327.)

On April 11, 2000, Mr. Weatherton was arraigned in superior court. The prosecution amended the information to add a fourth count against Mr. Weatherton: the robbery of Samuel Ortiz, in violation of section 211, and the personal use of a firearm to commit the offense, in violation of

sections 12022.53, subdivision (d), and 1192.7, subdivision (c)(8). (2 CT 329-333.)

On May 11, 2000, the prosecution filed a notice of intention to introduce evidence in aggravation during penalty phase of trial. This included, pursuant to section 190.3, factor (b): (1) facts and circumstances which led to defendant's conviction of five counts of robbery, two counts of personally using a firearm, and one count of inflicting great bodily injury, as reflected in Los Angeles Case No. A182251; (2) facts and circumstances which led to Mr. Weatherton's conviction of one count of robbery and one count of personally using a firearm, as reflected in Indio Case No. ICR8784; (3) facts and circumstances which led to Mr. Weatherton's guilty plea to one count of robbery and one count of personally using a firearm, as reflected in Los Angeles Case No. A758021; (4) facts and circumstances which led to Mr. Weatherton's arrest for armed robbery as reflected in the filing of Los Angeles Case No. BA089739-01; (5) facts and circumstances of the theft of a car, ensuing high speed pursuit and resulting accident with an innocent bystander, which led to Mr. Weatherton's guilty plea to one count of violating Vehicle Code section 10851, as reflected in Los Angeles (Torrance) Case No. P35268; (6) any and all acts of violence which resulted in Mr. Weatherton receiving either a CDC 115 or CDC 128; (7) any and all

acts of violence which resulted in the loss of good time credits while incarcerated in the California Department of Corrections (CDC); and (8) any and all acts of violence that Mr. Weatherton participated in while housed in any county jail facility. The notice also listed Mr. Weatherton's six prior felony convictions, to be used as circumstances in aggravation pursuant to section 190.3, factor (c). (2 CT 363-366.)

On May 24, 2000, Mr. Weatherton filed a motion to set aside the information pursuant to section 995. (2 CT 409-417.) That motion was denied on June 2, 2000. (2 CT 452.) Mr. Weatherton moved to compel disclosure of exculpatory victim impact evidence on July 13, 2000. (2 CT 544.) On that same date, he filed several other motions in limine, including a motion to quash the jury panel, for discovery of the prosecution's jury records and investigations into prospective jurors, a motion for discovery of discriminatory charging practices in Riverside County, and a motion to transfer the case because of an unrepresentative venire. (2 CT 565 et seq.; 3 CT 763.)

Pretrial motions filed by all parties were heard and resolved in October of 2001. Mr. Weatherton's motion for development of evidence showing discriminatory charging was denied on October 17, 2001. (4 CT 1079.) His challenge to the jury panel as a whole was denied on October

24, 2001, while the prosecution's motion to impose restraints of Mr. Weatherton was granted. (4 CT 1080.)

On January 3, 2002, 12 jurors and 6 alternates were chosen. (24 RT 3805, 37 CT 10,887.) Opening statements were made on January 7, 2002. (26 RT 4027 et seq.) The next day, after the testimony of Nelva Bell, Juror No. 2 sent a letter to the court expressing concerns over the fact that the case appeared to be premised on the uncorroborated testimony of one eyewitness. After a hearing, and over objection, Juror No. 2 was discharged, and replaced with alternate Juror No. 3. (27 RT 4316, 37 CT 10,905.)

The jury retired to deliberate at 11:55 a.m. on February 14, 2002. At the end of the day, the clerk reported that Juror No. 8 called and said she needed to take more than a week off because of the death of her grandfather. (48 RT 7775.) Without speaking with the juror, the court told the clerk to dismiss her. When the court indicated as much on February 19, 2002 (the next day of deliberations), counsel objected on grounds that there was no evidentiary basis for doing so. After reading into the record the applicable section of the CEB book on criminal procedure and practice, the trial court indicated a willingness to have the juror appear. (48 RT 7777-7778.) However, when the court was unable to reach the juror by phone

before morning recess, it proceeded to replace Juror No. 8 with Alternate Juror No. 6. (48 RT 7792-7793.)

At the end of deliberations on the 14th, the jury asked for a readback of Nelva Bell's testimony and of Officer Hicks's testimony concerning footprints, and a replaying of the videotapes of Nelva Bell's hospital interview and Curtis Neal's video interview.[2] (40 CT 11,572.)

At 1:55 p.m. on the following day of deliberations (Feb. 19, 2002), after Juror No. 8 was replaced, the jury's new request for readback omitted the request for Hicks's footprint testimony. (40 CT 11,576; 46 RT 7803.) The jury was brought into the courtroom for the readback of Nelva Bell's testimony and a showing of Nelva Bell's hospital interview. (40 CT 11,574.) The readback of Nelva Bell's testimony continued on the following day. The jury returned with verdicts at 3:55 p.m. on February 20, 2002, after more than 11 hours of deliberation. Mr. Weatherton was found guilty of all charges. (40 CT 11,577 et seq.)

On February 21, 2002, Mr. Weatherton moved for dismissal of trial counsel, and asked to represent himself for the penalty phase of his trial.

---

[2] Nelva Bell was the victim of the attempted murder alleged in Count III. Curtis Neal is the brother of Vernon Neal, victim LaTonya Roberson's boyfriend and the target of Mr. Weatherton's unsuccessful effort to introduce third-party culpability evidence. (See Claim I, *post.*)

His request was denied on February 22, 2002 (40 CT 11,665), but granted three days later, on February 25, 2002. (40 CT 11,664.) Counsel Clark Head was appointed as stand-by counsel.

On February 27, 2002, deputy district attorney Dianna Carter informed the court that she and Mr. Head had been approached by an attorney, Mr. Silva, who told them that Juror No. 3 had asked for his assistance regarding instances of juror misconduct. Juror No. 3 then entered the courtroom, and told the court that she was concerned that Mr. Weatherton was not getting a fair trial with the jurors. Before she could talk about the deliberations, she was interrupted, and was asked to wait outside. (54 RT 8196-8198.)

On that day, and on the following day, all jurors and alternates were asked to testify about various allegations of misconduct. (40 CT 11,706-11,707.) Mr. Weatherton indicated on February 27, 2002, that he would be filing a motion for a new trial the following day. (54 RT 8311-8312.) On February 28, 2002, he told the court he was asking for a new trial pursuant to section 1181, subdivision (3). The court told him, "we're not there yet." (55 RT 8354) and that motions for a new trial had to be made in writing, with ten days' notice to the prosecution. (55 RT 5418.) The court stated that it would be excusing Juror No. 1 and Juror No. 3, as well as Alternate

Jurors No. 1 and No. 4. (40 CT 11,706.) On March 1, 2002, Juror No. 3, Juror No. 1, Alternate Juror No. 1, and Alternate No. 4 were excused from the jury; the seated jurors were replaced by Alternate Jurors No. 5 and No. 2. (40 CT 11,707.)

On March 4, 2002, Mr. Weatherton filed a motion for a new trial and motion for mistrial. (38 CT 11,717 et seq.) The trial court refused to hear the motions prior to the penalty phase of Mr. Weatherton's trial, which began that same morning. (56 RT 8500-8502.)

Mr. Weatherton put on no mitigating evidence, and did not cross-examine the prosecution's witnesses, who presented evidence of Mr. Weatherton's priors and alleged in-prison misconduct. On March 7, 2002, the jury returned a verdict of death. (59 RT 9009; 43 CT 12,162.)

An evidentiary hearing on Mr. Weatherton's motion for a mistrial and for a new trial began on March 15, 2002. (43 CT 12,518.) After the testimony of all jurors, alternates, and the employer of one juror's mother, these motions were denied on March 28, 2002. (43 CT 12,693-12,694.) Mr. Weatherton was sentenced to death on April 30, 2002. (44 CT 12,733.)

Pursuant to section 1239, this appeal is automatic.

STATEMENT OF FACTS

During the autumn of 1998, Mr. Weatherton slept in an inoperable Lincoln owned by his friend Ernest Hunt that was parked in front of Mr. Hunt's house. Hunt lived in a house surrounded by desert, near a row of tamarisk trees and an irrigation canal, on the edge of a small housing complex called "Burr Tract" or the "Nairobi District," in Indio, California. (26 RT 4102-4103; 38 RT 6088-6089; People's Exhs. 65-66.)[3] On October 31, 1998, Mr. Weatherton, Ernest Hunt, LaTonya Roberson, Nelva Bell, Connie Olivio, Simeon Bradford, Vernon Neal, and others gathered throughout the early evening and night at Hunt's house to smoke crack cocaine.

Ms. Olivio was Nelva Bell's roommate. (31 RT 4981.) She and Ms. Bell walked to Super Saver in the afternoon on Halloween to retrieve Ms. Bell's keys. (26 RT 4137.) Then, they walked over to Nairobi Street, where there was a Halloween party at Joanne Norris's house. There, they bought a $20 "rock" of crack cocaine on credit, and went over to Ernest

---

[3] Aerial overviews can be found at People's Exh. 65 and 66 (1 SCT 207, 209.) A particularly helpful, full-page color aerial overview, with important Burr Tract sites labeled, can be found at 1 SCT 219 (Def. Exh. J).

Hunt's house to smoke it; Norris and Hunt lived in the same neighborhood. (31 RT 4983-4986.)[4]

LaBritta Shylon Ross was a cousin of LaTonya Roberson, and also lived in the Burr Tract. She babysat for LaTonya and got rides from her; they were close. (31 RT 5098.) She saw LaTonya on October 31 sometime in the afternoon. LaTonya was outside her house in a car and they talked. LaTonya asked her to help out with a birthday party for LaTonya's son Jared on the following day, November 1. Ms. Ross agreed. (31 RT 5101.) LaTonya then went on over to Ernest Hunt's house. (26 RT 4141.)

Ms. Bell and Ms. Olivio stayed at Hunt's house, sitting outside, until 11 or 11:30 p.m. LaTonya came by, bringing her baby with her. Nelva talked to Sam Ortiz, who was outside fixing a car; she had never talked to Sam before that day. Mr. Weatherton was hanging out, too. Ms. Bell had seen him many times before, and knew him pretty well. He had come to her house, and she had seen him before at Mr. Hunt's place. She considered him a friend. (26 RT 4138-4139, 4142; 31 RT 4989.)

---

[4] Ms. Bell denied having gone to Mr. Hunt's house to celebrate Halloween and smoke cocaine; she testified that the Hunt house was the closest one when going through the desert, and they were tired. (26 RT 4140.)

When Ms. Olivio wanted to leave, she caught a ride with a man named Chris who had a truck, and rode home along with Ms. Bell and Mr. Weatherton. Mr. Bradford was also in the back of the truck; he was dropped off in the Burr Tract area. Ms. Olivio got out at La Quinta, and tried to convince Ms. Bell to come home with her, but Ms. Bell didn't want to call it a night; she wasn't through partying. (31 RT 4997, 5008.) Ms. Olivio thought that Mr. Weatherton appeared determined to get money for more crack. (31 RT 5010.)

Ms. Bell seemed comfortable around Mr. Weatherton. When she was high on crack, Ms. Bell would put on water to heat and clean up, and get paranoid; Ms. Olivio thought she got paranoid when smoking crack because she had kids. (31 RT 5013.) According to Ms. Bell, rock cocaine made her paranoid, watching for everything, watching out for somebody coming to bust her. She felt it right away, but it didn't last for more than maybe 10 minutes. (RT 26 RT 4144-4146.)

Joanne Norris testified that Ms. Bell came over to her place to buy crack cocaine three times that night. The first time she was with Ms. Olivio and the next two with Mr. Weatherton. (31 RT 5039.) The second time, Ms. Bell came back with Mr. Weatherton and asked for a rock on credit. Mr. Weatherton didn't ask for anything; they only stayed about five

minutes. (31 RT 5040.) Later, Ms. Bell returned with Mr. Weatherton, looking for another rock. Ms. Norris gave her another rock and told her that was it, and not to come back looking for more. (31 RT 5040.)

Mr. Weatherton came back later, by himself, around 10 o'clock. (31 RT 5045.) There were young men loitering outside her house, "gambling and such," and Ms. Norris talked to Mr. Weatherton about this. (31 RT 5046.) When people approached her house, the "youngsters" would harass them to try to get them to buy drugs from them rather than her. He told her he heard that she was having trouble with the men out front and that if need be, he would take care of them for her; he showed Ms. Norris what looked like a gun, in a sock in his waistband. (31 RT 5080, 5047.)

Ms. Norris told Mr. Weatherton that the problem wasn't that serious. The two of them then talked about crack cocaine. Mr. Weatherton wanted some crack but had no money. Ms. Norris gave him some on credit. She was a little uncomfortable because she thought that Mr. Weatherton didn't look like himself that night. (31 RT 5048.) He had talked to her earlier in the week about needing money.[5] Ms. Norris had never seen Mr.

---

[5] Ms. Norris had been interviewed frequently before the trial by the prosecution and defense, but had never told anyone that Mr. Weatherton spoke of needing money, or that he was not acting normally on the night of the crime. (31 RT 5088.)

Weatherton with a gun before that day. (31 RT 5082.) She told Detective Cervello, the lead officer investigating the case, that what she saw might not even be a gun. (31 RT 5080.)

Ms. Bell testified that at some point in the evening, she saw Ernest Hunt with a knife. Mr. Weatherton was outside Ernest's house and Ernest was inside with LaTonya. The door came open. She saw Ernest go to his cabinet drawer and get out a knife. He pointed it at Mr. Weatherton and said, "Didn't I tell you not to come back here? Didn't I tell you to stay away?" Mr. Weatherton said, "I bet you won't be saying that tomorrow." (26 RT 4149.)

If Mr. Weatherton said this, he was right. Mr. Hunt did not say anything like that on the following day, did not wave a knife at Mr. Weatherton, did not remember being made afraid by anything Mr. Weatherton did, and had never stopped regarding Mr. Weatherton as one of his friends. (38 RT 6093, 6102.)

Ms. Bell smoked a lot of cocaine that night, with many different people. (27 RT 4227 et seq.) She was a long-time crack user. She testified that she smoked it three or four times a week, and had been doing so for three years. (28 RT 4219.) According to prosecution witness Curtis Neal, she had been smoking it for at least eight years. (36 RT 5887.)

Ms. Bell testified that at one point during the evening, Ernest was in a bedroom with LaTonya and she was in another room with LaTonya's baby. LaTonya was combing Ernest's hair. LaTonya told her that she was going to be with Ernest because he was too scared to take a bath; he was afraid that Mr. Weatherton would harm him. (26 RT 4190.)

LaTonya then asked her how well she knew Ernest's sister, Miss Katie. Ms. Bell said, "real good." Ms. Bell testified that LaTonya asked her to stay all night with her and go with her in the morning to Miss Katie and tell her that if something happens to Ernest, Mr. Weatherton, known to her as "Boo-Boo," was going to be the one who did it. According to Ms. Bell, while at Ernest's house, LaTonya told Sam that Ms. Bell was a friend, and could she stay all night because they were both going to go talk to Miss Katie in the morning. (26 RT 4152.)

Mr. Ortiz went back to his house, which was just a couple of minutes away. LaTonya went with him, and asked Ms. Bell to watch the baby [Jared]. (26 RT 4150-4151.)

At that point, late in the evening, it was just Ms. Bell, Mr. Hunt, the baby Jared, and Mr. Weatherton, whom she knew as "Boo-Boo," who remained at Ernest's house. Mr. Hunt got very angry when he learned that LaTonya had left her baby behind. He flew into a rage. He was yelling,

"tripping and acting crazy," and told Ms. Bell to immediately go tell LaTonya to come back and get her baby. (26 RT 4191-4192.)

Ms. Bell went back to Sam's house to fetch LaTonya. The two of them returned to Ernest's house and picked up the baby. Ms. Bell testified that LaTonya picked up a bat at Sam's house and said, if Boo-Boo (not Ernest) tries something, we've got a bat. The two of them went back to get the baby. When they got back to Ernest's, Boo-Boo was sitting outside up in a tree; Ms. Bell remembered exclaiming, "Oh, you scared me. I didn't see you sitting there, Boo-Boo." (26 RT 4153.)

Ms. Bell testified that all this happened around 10:00 at night.[6] When they got back to Sam's, she went directly to bed and to sleep. She was sleeping with the baby in one bed, and Sam and LaTonya were sleeping in the other bed in the same room. She woke up around 2:00 a.m. or so to go to the bathroom. LaTonya was eating chips and dip. Ms. Bell declined her offer to share, and went back to sleep. (26 RT 4153-4154.)

After Joanne Norris gave Mr. Weatherton credit on a "rock" and he left, she went to the casino until 5 a.m. with her niece. (31 RT 5058.) Back at her house, she received a phone call from LaTonya around 5:45 a.m.

---

[6] According to Ms. Olivio, Ms. Bell still wanted to party at sometime around 11:00-11:30 p.m., and went back to Mr. Hunt's from her house. (31 RT 4997.)

(31 RT 5073.) LaTonya wanted Miss Katie's phone number. LaTonya talked to Norris's son, so Norris didn't know why she wanted that number; she thought it might be because "Ernest was acting like a fool." (31 RT 5095-5097.) She — or her son — told LaTonya that she didn't know, and referred LaTonya to Ms. Katie's daughter, Regina. (31 RT 5106.)

LaBritta Ross met LaTonya early in the morning of November 1. (31 RT 5104.) LaTonya called the house prior to coming over. LaBritta's grandmother answered. The person on the other end hung up, but when she *69'd the last number, she reached LaTonya's house and LaTonya's brother Eric Roberson. LaTonya came over and visited her for about 15-20 minutes around 5:45 a.m., and then left.[7] (31 RT 5104-5113, 5120.) Neither Ms. Norris nor Ms. Ross said that LaTonya expressed any concern about Mr. Hunt's safety, or had any concern at all about Mr. Weatherton.

Nelva Bell testified that she woke up the morning of November 1 to the sound of Mr. Weatherton saying, "Tonya, Tonya, I just found Ernest dead." The voice was outside the house. Sam and Tonya were standing by the door. She was waving at Sam to not open the door, but Sam had already opened it. He tried to force it back, but Mr. Weatherton kicked it open, and

---

[7] The two people called by LaTonya early that morning, Joann Norris and LaBritta Ross, were either a well-known drug dealer (Norris), or shared a house with a well-known drug dealer (Ross). (31 RT 6157-6158.)

said, "Where's the money at?" (26 RT 4157.) He was wearing an army jacket, fingerless gloves, and held a big black gun. (26 RT 4174-4175.)[8]

According to Ms. Bell, LaTonya said, "I don't have no money." Boo-Boo said, "Bitch, I ain't playing with you," and shot her. (26 RT 4158.) Ms. Bell's demonstrative evidence indicated that Mr. Weatherton was about six or seven feet from LaTonya when he shot her. (27 RT 4265-4266.) She testified that Sam said, "Boo-Boo you can have my money — don't shoot me." Mr. Weatherton replied, "Nigger, where is it?" Sam told him it was under his bed. Ms. Bell testified that Boo-Boo had Sam stretch out on the floor, and told him to reach for the money. (26 RT 4158-4159.)

She also said that she was positive that Boo Boo got on the floor between the beds and got the money himself. (27 RT 4250-4251.) According to Ms. Bell, Mr. Weatherton got down on his hands and knees, reached under one of the beds for the money, and then shot Sam Ortiz while still on his knees. (27 RT 4250-4252.) She tried to draw a sketch of where the beds were, and where Sam Ortiz was in relation to them, but could not do so. The trial court noted that her first effort had the beds parallel to each

---

[8] People's Exhibits 63 and 64, diagrams of the crime scene featuring furniture and evidence item locations, with measurements, can be found at 1 SCT 202 and 1 SCT 204. A photograph of the couch from the doorway, on the other side of the room from the beds, People's Exhibit 44, can be found at 1 SCT 190.

other, but then she changed the drawing to make the beds perpendicular to each other. (27 RT 4253-4254.)

Ms. Bell testified that Mr. Weatherton had the gun and put it very close to Sam's head in order to shoot him. (27 RT 4257-4258.) Mr. Weatherton got down on his knees, and looked for the money under Sam's bed. According to Ms. Bell, he found it, either under the head or the foot of the bed, and then put the gun up to Sam's head and shot him.[9] (26 RT 4156-4158.) Then he turned around and shot LaTonya again in the throat. (27 RT 4258.)

Ms. Bell testified that she said, "Boo-Boo don't shoot me. I won't tell nobody." (27 RT 4249.) He said, "Nell, put the baby down." She put the baby down, and got ready to lie down by LaTonya, and that's when he shot her from behind; he shot her in her head; the bullet went through her wrist, and out of her wrist into her mouth. (26 RT 4161.)

Ms. Bell played dead. Mr. Weatherton kicked her leg two or three times to see if she was dead, and then went on out the door. Sunlight was coming in when he left. (26 RT 4165.) She was trying to get back in bed and lay by LaTonya so she could play dead when she heard somebody

---

[9] Ms. Bell also testified that she did not see Sam get shot. (27 RT 4257.)

calling her name. This was either before or after Vernon Neal came. (26 RT 4167-4168.)

She said that she heard Vernon[10] come in through the open door, calling "LaTonya." Vernon came in and she talked to him. She had not yet made it over to the bed to be with LaTonya, and was still close to the baby, Jared. (26 RT 4169.) Vernon asked her what happened; she said "We've been shot." She denied knowing who did it, because at first she was worried because they were all together that night, and Vernon used to date LaTonya. (26 RT 4172.)

Sometime after Vernon left, Ms. Bell testified that she heard Mr. Weatherton outside saying "Nell, Nell." (26 RT 4173.) That's when she was trying to get over to lie where he left her, to play dead. When the police came, they asked her who did it, she didn't initially tell them — instead she told the police that she thought Ernest might be dead. And when they asked her again who did it, she said, "Boo-Boo." She testified that he was wearing an army jacket and gloves without fingers, and he had a long black gun. (26 RT 4174-4175.)

---

[10] In order to avoid confusion between the Neal brothers, Vernon Neal will be referred to as "Vernon," and Curtis Neal as "Curtis."

LaTonya Roberson suffered two independently fatal bullet wounds, one to the forehead and one to the neck. Both wounds showed stippling around the bullet's entry area, indicating that the wounds were from a gun fired at no more than 18-24 inches away. (30 RT 4810 et seq.; 32 RT 5213, 5269.) She had a blood alcohol measurement of .146 when she arrived at the hospital, and she tested positive for cocaine. (32 RT 5161.) Sam Ortiz died from one gunshot wound to the head. It could have been from close range, but because the bullet went through his hair, it was difficult to answer questions about how far away the weapon was when the shot was fired. (32 RT 5246-5249.)

Ms. Bell was taken to the emergency room, where she was treated by Dr. Robert Ercoli. Dr. Ercoli attended to her airway, breathing and circulation, and later sent her to surgery. Ms. Bell was not entirely cooperative and appeared to be on drugs; she tested positive for cocaine. Ms. Bell denied telling the social worker that Halloween was the first time she had ever used crack cocaine, and could not remember if the social worker told her that the first step toward recovery was telling the truth. (27 RT 4221-4222.)

According to Dr. Ercoli's notes, Ms. Bell's cousin Dee Dee Moore brought up Ms. Bell's chronic alcohol abuse and then he discussed it with

Bell in discharge planning.[11] (35 RT 5719.) Ms. Bell said that if Dee Dee told the doctors she used crack three or four times a week and used alcohol daily, Dee Dee would have been wrong because she didn't use alcohol that much — but Ms. Bell distinguished alcohol and beer; "maybe a beer." (27 RT 4222.) Dr. Ercoli arranged for drug and alcohol rehabilitation services for Bell, but did not know if they had ever occurred. (35 RT 5720.)

Ms. Bell testified that she gave up the use of cocaine after her release from the hospital. However, she was caught supplying cocaine to Teresa Cecena by Deputy Justin Anderson. According to her support person, victim witness advocate Cynthia Galvan, Nelva called her from her apartment in October of 2001. Ms. Bell was hysterical, saying the police were in her apartment, accusing her of selling drugs. She felt that Boo Boo [Mr. Weatherton] was behind it, leading the police to think she was selling drugs or using drugs. Ms. Galvan asked her if she had sold any drugs; she denied it. (25 RT 3972.)

Ms. Bell eventually acknowledged having purchased and sold cocaine on two occasions. She said that she had done so for Teresa Cecena,

---

[11] Ms. Bell denied ever being an alcoholic, saying the most she ever drank was an occasional beer. (28 RT 4222.)

and was reimbursed by Ms. Cecena.[12] (28 RT 4225.) On cross-examination, Ms. Bell was asked if her roommate Connie Olivio had brought a rock of cocaine with her when they stopped at Ernest Hunt's house. Ms. Bell answered,

> You know what? I don't know who had it. We just stopped to get high, and if you talking about — you know what I mean, I'm going to — to speak — I'm not really sure everything and I don't want nothin' to come back on me, you know what I mean? Now, time frame — I'm not — don't know the time frame and don't know the — *I do know for a fact who shot us, not anything else.*

(26 RT 4192-4193, emphasis added.)

Vernon Neal lived on Burr Street in late 1998, and was an "acquaintance" of LaTonya Roberson's. (27 RT 4371.) November 1, 1998, was the first day of his new job at the Del Webb Country Club golf course; he was to prepare carts for the golfers' use. Nonetheless, he spent much of the previous night looking for LaTonya; he looked for her at her house in the early evening, at Ernest's place later in the evening, at her house again the following morning, and then at Sam Ortiz's house, where the crimes at bench were committed.

---

[12] Ms. Bell suffered no penal consequences for either her purchases or her sales of cocaine. (See Claim III, *post.*).

He wanted to find Tonya because "She's supposed to have a birthday party for her son, whose birthday was earlier in the week. She didn't have any money so she wanted to borrow the money, you know, to get with me so she could have the party for her son, that particular weekend, on Halloween." (27 RT 4347; see also 27 RT 4375.) Vernon had previously told Detective Cervello that he wanted to find her because he knew she would be getting a check, and he wanted to stop her from blowing it all on drugs. (27 RT 4392.)

He first went to LaTonya's house, where she lived with her brother, Eric Roberson. She wasn't there. He then went to look for her at Ernest Hunt's house, where the party was going on. (28 RT 4464.) He stayed there long enough to get his questions about LaTonya answered, then gave his beer to Nelva Bell and left. (28 RT 4479.) He went home, watched a golf match on television, and went to sleep. (28 RT 4464.)

In the middle of the night, he woke up and decided to go back to Eric and LaTonya's house, probably to show Eric a new gasoline-powered drill. (28 RT 4464.)[13] He also testified, in response to leading questions, that between 1:00 a.m. and 3:00 a.m. that night, he snuck into a country club

---

[13] On November 12, 1998, he told Detective Cervello that he woke up and took a shower, intending to go look for LaTonya, but Shey Linn Ramos called, and wanted to go fishing with him. (42 RT 6797-6798.)

along with "Shey Linn" Ramos, and the two of them fished. He eventually caught 50-75 pounds of catfish. (28 RT 4465.) He got back over the fence with the fish, and went home to sleep. (28 RT 4465.) He woke up sometime between 5 and 6 a.m. (28 RT 4467-4468), not early enough to be on time for his new job. He decided that since he was already late, he would drive over to Eric and LaTonya Roberson's house; he wanted to give Eric the catfish he had caught during the night. (27 RT 4332.)

Vernon dropped off the fish. He testified that it was only when Eric told him that LaTonya had just left about 15 minutes earlier that he asked Eric about her. (28 RT 4493.) Eric told him that LaTonya had come in and made a phone call and stayed a bit and then left, about 15 minutes before Vernon arrived. (27 RT 4375, 28 RT 4493.)

Vernon then drove over towards Sam Ortiz's house, to look for LaTonya. He testified that did not know Sam Ortiz, he just knew of him; he knew that Sam and another elderly gentlemen were staying at the house. (27 RT 4350.) He didn't drive all the way up to the building, but parked somewhat back because "it's hard to park all the way up there because there's some little shrubs and other junk." (27 RT 4350.) He had been there before about a month earlier, looking for LaTonya to get money she owed him. (28 RT 4434.)

Vernon was not really worried about the fact that Sam might be in there; "just the fact that, you know, I just wanted her because I had to go to work, I didn't feel like, you know, hangin' around there. . . ." (27 RT 4351.) He didn't go all the way up to the house. Since the door was open, he stopped. He went to a kind of little opening, like a little hedge, and started yelling. He yelled out, "LaTonya." He was back aways from the door. Then he called out her name again. As he approached, he heard a lot of very loud music coming from a stereo or TV, or both. (28 RT 4484, 4485-4487.)

Vernon testified that he went up to "a kind of little opening, like a little hedge," and yelled out, "LaTonya." He was still back aways from the door. Then he called out again, maybe three or four times. He approached the front door since it was open. When he got close, he heard sounds like somebody snoring, and that's when he saw LaTonya sitting on the floor with her back up against the sofa. The door was open all the way. (27 RT 4352.) He also testified that he went back to his car after not getting an answer, sat a moment, and decided to try again. (28 RT 4448, 4483.)

As he went in the house he looked to the left and saw the baby sitting on the bed. He looked over and saw Sam on the floor between the two beds face down. At that point when he turned around he saw Nell. She raised

up, looked around and told him, "We need some help, we been shot." Vernon went back out the door and got in the car and drove back to Eric's house and yelled in that Eric should call 911 and tell them Tonya had been shot. Then, he drove back towards Sam Ortiz's house. (27 RT 4353-4356.)

He testified that on his way back, close to the Ortiz house, he saw "some kind of flash" that appeared to go through the trees, and an unidentified person moving from the house to the tamarisk trees, so he stopped. After a while, he got out, went over close to Sam Ortiz's door, and yelled out Nell's name a few times. (27 RT 4358-4361.)

Then he thought to himself that if it wasn't Nell and it was somebody else, he might be putting her in a bad situation. He sat there for a second because he didn't want to go up there and be part of that fiasco; he knew that people had been shot. Then, "something just said, well, you know, if you just back up and go through the — that little opening, there's an opening in those tamarisk trees, you can go across." So he backed up, drove through the tamarisk trees, looked to his left and didn't see anyone. Then he looked straight ahead and he saw Mr. Weatherton, who was walking back east toward McDaniel. (27 RT 4361-4362.)

Vernon pulled over and stopped. Mr. Weatherton opened the door and got in. Vernon told him that something had happened to Tonya, but

didn't tell him she had been shot; Mr. Weatherton didn't comment. Vernon made a U-turn and went back, until he saw Eric. (27 RT 4362.) Mr. Weatherton then asked him if he would give him a ride down the street to Joanne Norris's house. (27 RT 4364-4365.)

After Mr. Weatherton got out, Vernon picked up Eric and then made a right-hand turn and went back up to the Ortiz house. When he went inside, the baby kept coming towards him so he picked the baby up, looked up, saw the wound on Nell and said, "Damn, who did this to you?" and that's when she said, "Boo Boo did it." (27 RT 4365.)

He picked up the baby, intending to take it to his own mother's house on Burr Street, just two minutes away. As he was coming out of the house a policeman shot right by him going back up the street. (27 RT 4366-4367.) He flagged down a policeman, and told him what he knew. He then went on to his mother's house, where he also lived, and dropped off the baby. After going to the Del Webb Country Club and telling them he couldn't make it, he went back home. Over an hour later, he drove from home back to Eric's house, where he saw the police. They wanted to talk to him, so he went with them down to the station. (27 RT 4369-4370.)

Officer Rody Johnson of the Indio Police Department received a call around 7 a.m. on November 1, 1998, dispatching him to 80-665 Liberia

Place, the home of Samuel Ortiz. (28 RT 4539.) He was the first patrol car to arrive; a second unit stopped nearby. As he sat awaiting further instructions, he saw a black male who was "kind of just a little bit shuffling around, looking to the south and kind of to the east." A green vehicle pulled up next to him; the "male subject" got into the vehicle and they both drove off in an easterly direction, and then they turned in a north-south driveway of a residence. He gave a description of the person over the radio, and described a man wearing a blue, white and black jacket. (28 RT 4532.)

The man in the green vehicle, Vernon Neal, drove away, and then came back, flagged him down, and told him where the crime scene was. He drove there, and met Officer Studdard. When the two of them entered the Ortiz house, they saw a "bloody mess." (28 RT 4540.) There was a black female seated on the floor, her head resting on a couch, bleeding severely from a head wound. Another victim was also shot in the face, on her knees leaning forward, spitting blood. The lady who was on her knees was "Nell," or Nelva Bell. (28 RT 4541.) Officer Johnson did not recall hearing any radio or television. (34 RT 5527.)

There was a man laid out on the floor who had no life signs. Johnson or Officer Studdard called the paramedics. Johnson helped Ms. Bell get up from the ground, got her seated in a chair, and examined her for

additional injuries. (28 RT 4542.) She had a gunshot wound, an entrance/exit wound or two holes in her shoulder. (28 RT 4543.)

He cut off her shirt to look for additional injuries and asked her what had happened. (28 RT 4545-4548.) She told him that Boo Boo, or Bo Bo, did it, and there was nobody else with him. When he asked her why did he do it, she said he did it to rob us, with a very big gun. (28 RT 4547.)

Two ambulances arrived, and took Ms. Roberson and Ms. Bell to the hospital. Mr. Ortiz was dead of a gunshot wound to the head at the scene of the crime; his body remained in place for several hours as the crime scene was processed. (32 RT 5250.)

Vernon Neal described Mr. Weatherton as being a black male wearing a blue-and-white striped shirt with jeans, who had long hair and wore glasses. (28 RT 4578.) Within a few minutes, Eric Roberson came to the house. When Officer Johnson asked Eric where he could find Mr. Weatherton, Roberson directed him north of the residence along the dirt road to Ernest Hunt's house. Along the way, he met Ernest Hunt, who confirmed that Mr. Weatherton was back at the house. He and Senior Officer Gregor found Mr. Weatherton in front of Ernest Hunt's residence near a vehicle, and detained him. (29 RT 4595, 4601.)

Mr. Weatherton voluntarily accompanied the officer to the Indio Police Station, and gave a statement. (29 RT 4601.) He had no weapons on him. Extensive tests of his person, his watch and his clothing for gunshot residue were negative. (30 RT 4804, 4819.) He had no money, and no property of Sam Ortiz, either on his person or anywhere near Ernest Hunt's house. His blue, black and white jacket was taken as evidence and examined, but no army jacket or gloves like the ones described by Nelva Bell were ever found. Neither was the murder weapon, despite intensive efforts that day and the following days that included searching Ernest Hunt's house and grounds, the area between the Ortiz house and the Hunt house, searching through the row of tamarisk trees, and dragging the All-American canal, which ran just behind the tamarisk trees. (29 RT 4685-4688.)

The police searched the canal because Vernon or his brother Curtis told them that Mr. Weatherton might have been moving in that direction. The canal is protected by a six- to eight-foot-fence topped with barbed wire slanting away from the canal. (1 SCT 261, 263, 265.) There were no holes in the relevant areas of the fence. About 60 feet of sandy desert lies between the fence and the canal. The police searched about 70 to 100 yards

of the canal, without recovering any evidence. (See People's Exh. 65; 36 RT 5966; 38 RT 6080-6085.)

The lead officer, Charles Cervello, did not search Vernon Neal's residence, and did not believe that he had ever searched Mr. Neal's car. (29 RT 4686-4688, 4764; 29 RT 4985-4986.)

Property taken by Officer Sandoval from Mr. Ortiz's body included a social security card, a driver's license, a food stamp card, a dollar food stamp coupon, a selective service card, $40, various papers, and "One brown and white wallet with metal chain." Mr. Ortiz's wallet and other property was returned to his brother. (42 RT 6794.)

LaTonya Roberson suffered a bullet wound to the middle of her forehead, and to her chest; each of the gunshots was lethal. (32 RT 5283.) She tested positive for cocaine, and had a .14 blood alcohol level at the hospital. She was still breathing when she arrived, but the emergency room doctor quickly determined that her wounds were fatal, and turned his attention to Nelva Bell. (32 RT 5128.) Ms. Bell had been shot twice, and suffered serious damage to her hand, shoulder, and jaw. (32 RT 5145 et seq.) She was not entirely cooperative, and appeared to be on drugs. (35 RT 5703.) She tested positive for cocaine, in a qualitative test that could only detect the drug's presence or absence. (35 RT 5730.) After a

stay of several days, Ms. Bell was scheduled for treatment for chronic alcohol abuse, and chronic cocaine abuse. (37 RT 5719-5720.)

The prosecution attempted to corroborate Ms. Bell's story with footprint evidence. Officer Johnson had a background in "man tracking." (34 RT 5504.) He testified that he found evidence from footprints that someone with shoes similar to Mr. Weatherton's had run from somewhere near Ernest Hunt's house into the tamarisk trees separating the Hunt house from the canal, and then walked back. (34 RT 5517-5525.) Detective Cervello sent him photocopies of pictures of Mr. Weatherton's shoes. Detective Hicks had taken photographs of footprints around the crime scene. (34 RT 5505.)

Officer Hicks took numerous photographs, but only of six particular footprints. These were widely spaced apart. Hicks had done little to indicate the footprints' locations, or their relationship to each other. (35 RT 5630.) Officer Johnson could only say they were "somewhere round the crime scene." (34 RT 5540-5541.)

Johnson had seen Vernon pick up Mr. Weatherton when he first arrived, and he went back to that spot with his photocopies of Cervello's pictures of Mr. Weatherton's shoes to look for footprints. He found footprints that resembled the photocopies, and tried to follow them. His

identification of which of the numerous footprints belonged to Mr. Weatherton was done by eyeballing only. (34 RT 5507.) Footprints going from around Ernest Hunt's house became lost in the tamarisk trees. Another set of deeper footprints suggested that the subject was running, or jogging. (34 RT 5523.)

Hicks's photographs of footprints did not show or indicate the distance between impressions. The only evidence in this regard was Johnson's memory. It would have been possible to measure and photograph the distance between impressions, but this was not done. (34 RT 5533.) Johnson did not know exactly how much deeper a toe impression would have to be before it could be considered a running stride. (34 RT 5534.) There were no casts of any impressions, which would have documented the depth of stride, nor were there measurements of the distance between steps. (34 RT 5535-5536.).

Over objection, Officer Johnson presented a diagram to the jury showing shoe impressions that he had prepared from memory three years after he first tried to find and follow footprints. (People's Exh. 70.) A total of either six or possibly eight (36 RT 5639-5641) footprints had been photographed, from a variety of angles. The photographer, Officer Hicks, did little to document where his pictures were taken, which direction they

faced, or how they were positioned in relationship to each other. His note that People's Exhibit 102 was 60 feet west of a cargo container, for example, could have been 60 feet southwest or 60 feet northwest. (36 RT 5632.)

The Indio Police Department made no effort to identify any footprints in the area from anyone other than Mr. Weatherton. (34 RT 5529.)

Michelle Louise Merritt, a criminalist for the California Department of Justice, testified that she had made impressions of shoes using Hicks's photographs, and compared them to Mr. Weatherton's shoes. She found that the size, sole pattern, and wear were similar, but there was generally not enough detail in the impressions to compare individualizing characteristics. She described points of similarity between Mr. Weatherton's shoes and some of the photographs. (35 RT 5681.) All left shoe impressions could have been made by the same shoe and the same was true as to the right shoe impressions, but it's possible that more than one pair of shoes made the impressions. Casting would have been preferable, and would have enabled more precise comparisons. (35 RT 5683.) She could not tell whether the person who made the footprints was running or walking. (35 RT 5682.)

Curtis Neal was Vernon Neal's brother. In late October of 1998, he lived with Vernon and their mother in the Burr Tract. (35 RT 5763-5764.) He testified that he hung out with Mr. Weatherton, who was "some sort of cousin," regularly that month, sometimes getting high together. (35 RT 5765-5766.) He did not remember having a conversation where Mr. Weatherton said he wanted to go rob some drug dealers, or rob Craig, or kill any witnesses. He also didn't remember any conversation where Mr. Weatherton said he had a gun called Roscoe, or seeing Weatherton with a bag in which he thought there was a gun, nor ever walking down the street with Mr. Weatherton planning to rob some drug dealers. (35 RT 5767-5770.)

Curtis was videotaped in an interview by Detective Cervello and Detective Hicks on November 2, 1998, the day after the shootings. At that time there was a bench warrant for his arrest for failure to appear in court; he was in "rehab" at the time, and on probation; he missed a court date on an assault charge. (36 RT 5869-5870.) He was on probation for being an ex-felon in possession of a firearm, and had other cases pending. He had a prior strike on a child molesting case. At the time he testified, he was in state prison on four felony charges; he thought he would be there for the next eight years or so. (36 RT 5872-5873.)

The November 2, 1998, videotaped interview of Curtis was played for the jury. (36 RT 5940; the transcript can be found at 37 CT 10,965-10,989.) In that interview, Curtis did say that Mr. Weatherton was going to rob some drug dealers, and asked his help in getting Ernest Hunt out of the way so he could retrieve a gun. (37 CT 10,966.) Curtis never saw a gun, and also said that he had never seen Mr. Weatherton do a robbery, and never did one with him. (37 CT 10,966-10,967.)

When the detectives pressed Curtis to tell them where Mr. Weatherton had the gun buried, he said he didn't know; "Boo Boo" had never showed him the gun or where he buried it. (37 CT 10,968.) Curtis told the detectives that he heard Mr. Weatherton was seen headed for the canal sometime after the shootings, but couldn't tell them who he heard it from, because that person had "a lot of connection." (37 CT 10,969.) Actually, it was his brother Vernon who told the police that Curtis said that Boo Boo had a gun. The detectives spent much time urging Curtis to tell them who told him that Mr. Weatherton was seen going towards the canal. Curtis finally told them it was his mother.[14] (37 CT 10,970-10,974.)

---

[14] Both the police and Curtis knew at the time that LaTonya was Vernon's girlfriend; see 37 CT 10,977.

After attempting to find out what Curtis knew about a gun, the detectives turned to the question of robberies by Mr. Weatherton. Curtis told them that Mr. Weatherton talked about robbing some dealers down the street, and not leaving any witnesses. (37 CT 10,980.) Then, he said he thought that Weatherton was talking about robbing Craig Collins, a guy who was not a dealer but who had some money.

CC [Det. Cervello] — So he just wanted to get some cash?

CN [Curtis Neal] I think. But he never did nothing. He never would do nothing.

CC You, you, so to the best of your knowledge he never robbed anybody over on Burr, anybody over there?

CN Not, no, no. He didn't. I got to be honest. He would never rob anybody. He always says it then, so that's why my brother probably told you I'd know this. That's why I'll be totally honest with you. I don't lie. Yeah, he have said it to me and I, I'm a junkie. I wasn't, I'm gonna be honest with you. And I hate to say that but I learned it at Lost (unintelligible) it's best to be honest with yourself.

CC Right.

CN I'm an addict. So, you know, I would, me and him would, I would try to think of things with him. But I was always, Boo was always just talking, never nothing serious. I mean, never did, never, we never did. Man he never showed me a gun. I never saw a gun, but he always says we, we got to, you know, I got to take 'em out. He's always say that shit.

CC Was he always talking about Craig.

CN No.

CC Who else was he talking about?

CN Just, just all, all kind of stupid shit, man.

CC Did he, I know, and I know you don't want, really want to talk about it.

CN I can't even really, I just can't, I mean, just stupid.

CC Did he ever talk about that Mexican guy who lived over at Dell's?

CN Never. Never.

CC Did he ever talk about Tonya?

CN *No. They don't have money.*

CC And did he ever talk about Nell?

CN See I, that's why. No. *That's why it got to be for something else.*

(37 CT 10,981-10,982, emphasis added.)

Curtis then talked about how Boo wanted to go get his Roscoe (old-school term for gun) near Ernest Hunt's house, and how he got Ernest some crack to smoke to distract him about a week before the shootings. (37 CT 10,984-10,985.) Personally, he had only seen Boo smoke weed. (37 CT 10,986.) When Boo came back from Ernest's house, he talked about going to do the robbery, and not leaving any witnesses. He had a little blue bag with him, but never told Curtis what was in it. They went off, and actually,

they were just going to try to score some drugs. (37 CT 10,988-10,989.) The transcript ends with Curtis saying that Boo never told him what was in the little blue bag. (37 CT 10,989.)

When questioned before the jury, Curtis said he was clear from the beginning with Detective Cervello that he never thought Mr. Weatherton was serious about doing any robbery, and they never did one. (36 RT 5869.) He remembered when Mr. Weatherton received some money from his father, and went to the 99-cent store to buy a toy gun; he had no idea why a grown man would buy a toy gun. (36 RT 5934.)

Curtis did not remember his statements to the detectives on tape, nor did he remember an interview by D.A. investigator Rodriguez on August 28, 2001. (33 RT 5530 et seq.; 36 RT 5882.) He did remember telling some investigator that Mr. Weatherton was just "bullshitting" about doing robberies, but he can't remember who it was. (26 RT 5883.)

Jose Rodriguez testified that he was a D.A. investigator when he interviewed Curtis Neal in prison on August 28, 2001. Curtis did not say that Mr. Weatherton had threatened him, but he did say that he did not want to be a witness, and get a dangerous "snitch jacket." (39 RT 6249-6250.)

Criminalist Michelle Merritt was called by the defense to describe what she found in reviewing the evidence, and how she determined that

there was no blood on Mr. Weatherton's clothing or property. (39 RT 6233-6239.) On cross-examination, she agreed with the prosecutor that if shooters are far enough away from their victims, or wearing a large coat, they likely won't have blood traces on them. (39 RT 6240-6241.)

EXPERT TESTIMONY

Dr. Robert Shomer, a psychologist, testified for Mr. Weatherton on issues related to the significant number of mistaken eyewitness identifications in criminal cases. Dr. Shomer summarized research on the question of what leads to accurate or inaccurate eyewitness identification. (41 RT 6614-6620.) His testimony did not concern witnesses who lie, but rather honest individuals who are wrong, and the factors that mislead them. (41 RT 6620.)

Dr. Shomer testified that confidence and certainty are no measures at all of how accurate an identification is; our confidence levels about perception are unrelated to the accuracy of our perceptions. (41 RT 6621.) He described a 1996 study of 28 wrongfully convicted persons by the U.S. Department of Justice; the leading cause of these erroneous convictions was mistaken eyewitness identification. Six of the 28 exonerees had been erroneously identified by people who knew them. (41 RT 6633-6635.)

Possible reasons for a mistaken identification include a context involving a life-threatening stressful situation. If one has prior information about a person being dangerous, that adds to the likelihood of a misidentification. Other relevant factors include whether the incident is fast and unexpected, and the nature of the lighting. (41 RT 6651-6652.) In a "weapons focus" situation, one's attention narrows down to what is most important. An eye movement study showed that eyes focus on the weapon, and people are less accurately identified if they are carrying something that could be dangerous. (41 RT 6655.)

Confidence moves in an opposite direction from accuracy over time — it gets higher and higher as you repeat your convictions, but your memory of actual details decays as time passes. One's memory then becomes much more consistent and supportive of the choices you've made. (41 RT 6657-6658.)

Dr. Shomer did not have an opinion as to whether or not Nelva Bell made an accurate identification. However, after counsel presented him with a hypothetical scenario based on facts in this case, he responded, "this is an example of how once you choose someone, your memory of the event continues to grow, elaborate, and become much more consistent with the identity of the person you've now chosen. A likely source of this new

memory is the commitment of the person to the individual they've chosen as the perpetrator." (41 RT 6672-6673.)

Dr. Ebbe Ebesen was called by the prosecution to counter Dr. Shomer. He made a general critique of research done on the accuracy of eyewitness identifications, based not on methodological problems, but because they have mostly been done in academic or artificial settings rather than being based on actual eyewitnesses in the heat of a real-life situation. (44 RT 7164-7170.)

Dr. Ebbesen believed that, contrary to the studies cited by Dr. Shomer, there was a relationship between confidence and accuracy, except for people who were generally confident about everything. (44 RT 7180.) He acknowledged the research showing no relationship between confidence and accuracy, and cited other studies purporting to show that individuals who are more confident are generally more accurate.[15]

Dr. Ebbesen described the effect of stress on memory, and described a U-shape function generated by these studies, which suggested that at low levels of stress accuracy is bad, at moderate levels of stress accuracy is maximal, and at high levels of stress accuracy gets bad again. (44 RT

---

[15] The studies he cited were precisely the kind of studies he had earlier critiqued as being irrelevant to actual situations because they were based on the responses from college students or other similar subjects. (44 RT 7182.)

7200.) On balance, he believed that "really valid" research on the accuracy and reliability of eyewitness identifications was so difficult to do that nothing that had yet been done that could be of any use to a juror; ideally, neither he nor Dr. Shomer should be allowed to testify. (44 RT 7211-7212.)

Dr. Ebbesen acknowledged that his views were in the minority of those researchers who examined eyewitness identification. However, he believed that if one expanded the pool to include the thousands of researchers working on the various forms of memory in general, he would be in the majority of that group in that they would not believe that they would be able to say anything useful to a jury about eyewitness identification. (44 RT 7212-7213.) Dr. Ebbesen testified that the exoneration of innocent people who had been wrongly identified showed nothing other than something we already know: "sometimes people make mistakes." (44 RT 7205.)

Dr. Steven Pittel, a professor of psychology and expert on drug use, testified on behalf of Mr. Weatherton. Cocaine is a central nervous system stimulant, very much like adrenaline, which prepares the body for fight or flight. Cocaine has almost identical effects in that it speeds up the heart rate and respiration, slows the digestive processes, and sends blood to the large muscles. Cocaine is more powerful than adrenalin; an adrenalin "rush"

lasts a couple of minutes at most, while the strongest subjective effects from cocaine last around 20 minutes. If a person continues to take it over a period of time, or takes unusually large doses, the most commonly observed adverse or negative effect is paranoia. (42 RT 6809.)

Dr. Pittel defined paranoia as the irrational fear of others or of circumstances. Cocaine prepares you for fight and flight, but you can't sustain that state of preparedness and vigilance. A person who's constantly vigilant and alert becomes paranoid. (42 RT 6810.) The difference between drug-induced paranoia and clinical paranoia is that the former is an acute, toxic psychosis that dissipates as drugs are excreted from the system; within a couple of days and certainly by a couple of weeks the paranoia clears out. But in an indigenous psychosis, it does not clear out. The most common form of cocaine-induced violence is a seemingly motiveless or irrational crime, where a person strikes out at somebody else because they make an innocent remark or gesture which the person perceives as a threat. (42 RT 6810-6812.)

Crack cocaine is not substantially different from regular cocaine except in two ways — its impurities have been removed by changing it from cocaine hydrochloride to freebase cocaine, and because it is smoked rather than snorted through the nose, it gets into the lungs and through the

blood-brain barrier very quickly, within a matter of seconds. (42 RT 6816.) Acute effects of crack cocaine use involve the immediate high, which lasts around 20 to 30 minutes. (42 RT 6817-6818.)

The half-life of the drug (time it takes for half the drug to be excreted) is about 90 minutes. The drug will continue to act on a person for at least that 90 minutes, if not for a little bit longer, and the person may have insomnia hours after they stop using the drug. Dr. Pittel described "kindling"; if one has previously been paranoid or had an acute toxic psychosis, then even a small dose of cocaine may rekindle the paranoia. According to Dr. Pittel, there are numerous studies which show that compared to normals, chronic cocaine users, even when abstinent for many months, will still show significant cognitive impairments, primarily in attention and concentration, but also in the ability to synthesize experience and short-term memory. (42 RT 6819-6820.)

Before the trial began, Dr. Pittel reviewed police reports, and medical reports of Nelva Bell and LaTonya Roberson. (42 RT 6820.) He was presented with a hypothetical: (1) a woman has smoked crack cocaine three times a week for at least three years; (2) she has been smoking crack cocaine for part of a day, and has ingested it approximately ten times. She participated in smoking five rocks of cocaine in an environment where

several people were coming and going, also smoking crack cocaine. Smoking began at approximately 2 p.m. and lasted until approximately 10 p.m.; (3) At approximately 8:40 a.m. she was observed by a trauma surgeon where she was being treated for gunshot wounds to be "obviously under the influence of a chemical substance." Would the person show any impairment of cognitive function between 6 a.m. and 7 a.m. on the morning following the cocaine smoking episode? He testified that cocaine causes cognitive impairments primarily in perception and short-term memory and specifically in attention and concentration; there would "certainly be some cognitive impairment." (42 RT 6823.)

Dr. Pittel was then given another hypothetical: assuming these same facts, also assume that between 2 p.m. and 10 p.m. the day before, she believes she hears from another woman with whom she's been smoking crack cocaine that Mr. Weatherton has made a threat or was angry at someone else, and she feels afraid. Further assume that she perceives something the defendant says as being hostile or threatening when in fact what the defendant said or did was benign. Assume further that this same person experienced confusion in the source of information, and assume that this person hears a voice outside the door of a house in which she and two others have been shot. She hears this voice a few minutes after the

shootings and believes it to be the voice of the person who shot her, the same voice that she said had awakened her just before the shootings. She said this voice is the defendant, but in reality it was another person. (42 RT 6823-6824, 6838.)

Dr. Pittel testified that would be what is generally called "source attribution error." Because the person is unable to maintain attention or concentration, and because of paranoia, he or she might attribute to one person something which is either said or done by another. If a person has it in her head that another person is evil, anything she hears that is evil might be attributed to that person. "That's exactly the kind of error you would expect with acute use of cocaine compounded by chronic use of cocaine." (42 RT 6838-6839.)

Crack cocaine relates to a witness's possible attribution of threatening or hostile behavior to the wrong person because attention and concentration are impaired, and the witness is likely to juxtapose or substitute or confuse something which comes from one source to another. That would include confusing voices with visual perception. There's a general lack of continuity, a lack of coherence in the sequence of events, so one person might be confused with another. And paranoia stimulates a

person to interpret benign things as evil; a person could then accurately remember what she inaccurately perceived. (42 RT 6846.)

At the conclusion of the prosecution's cross-examination, Dr. Pittel was questioned about an arrest he had suffered in the parking lot of a courthouse, where he was detained for snorting cocaine. (42 RT 6926-6927.)

Dr. Ronald Siegel was called by the prosecution to counter the testimony of Dr. Pittel. (44 RT 7243.) Dr. Siegel had written a book about cocaine (*Whispers: The Voice of Paranoia*) and talked at length about freebasing cocaine. (42 RT 7261-7275.) He generally minimized the effects of "street-level"crack cocaine, saying that "a lot of people can handle it." (42 RT 7277-7278.)

The prosecutor set forth a hypothetical question involving seven $20-"rocks" of crack cocaine used by a person who used similar amounts three or four times a week. Dr. Siegel would not expect a person with this pattern and usage to be so impaired at 6 or 7 in the morning that he would not be able to correctly recognize a familiar person. (44 RT 7286.)

He was then asked to speculate about whether there would be arousal problems or recognition problems if the hypothetical person is aroused and in a fearful state while looking at a gun; he said that there would probably

be no problems, but it would depend on the dosage consumed by the witness. (44 RT 7288.)

On cross-examination, Dr. Siegel acknowledged that cocaine can make one paranoid, depending on dosage levels and experience.

> Q. Well, some people that already have problems in connection with other things, small doses, could actually make them paranoid, couldn't they?
>
> A. If they — I don't know what you mean by, have problems. But if there's a baseline paranoia to begin with, if someone is suspicious because they're in a criminal environment, and it makes sense to be suspicious about getting busted all the time, cocaine can agitate that.

(44 RT 7304.)

On redirect examination, the prosecution presented Dr. Siegel with another hypothetical based on its view of how much cocaine was contained in a $20 "rock," in which a person consumed a total of 147 milligrams of cocaine evenly spaced through a day, and asked him if such a person would be made paranoid. He answered that such an amount is a low amount for a crack cocaine user, and should not induce paranoia if taken at various times during the day, and given a chance to metabolize. (44 RT 7322.) He also testified that women react much more intensely to cocaine and methamphetamine than do men. (44 RT 7321.)

The prosecution closed its rebuttal case with the playing in open court of a taped interview of Nelva Bell made on November 13, 1998, in the Desert Hospital. (People's Exh. 71; Court's Exh. 4.) In that interview, conducted by Detective Mike Perry, Ms. Bell lay in a hospital bed while being questioned. The interview began with a reference to an earlier, unrecorded interview. Ms. Bell then described an incident at Ernest Hunt's house on Halloween where Mr. Weatherton came through a locked door, and Ernest Hunt grabbed a knife.

She then talked about Sam, who was either at Ernest's house, or back in his house asleep. She said that she and the baby went to sleep at Sam's house, maybe between 10 and 11 on Halloween night. She woke up when Boo-Boo was knocking on the door.

INTERVIEWER:	Uh huh, did he say anything?
BELL:	Yes. This is what he said: "Latanya, Tanya, Tanya, Tanya, (unintelligible) day."[16]

(Court's Exh. 4, p.6.)

She described the ensuing events in general largely as she did at trial (Mr. Weatherton shooting LaTonya from the door entrance, Sam getting on

---

[16] Although the transcriber could not understand, Ms. Bell's phrase, after several repetitions of LaTonya's name, was "Ernest dead."

his stomach to reach for money), and placed LaTonya's brother Eric at the scene shortly after Vernon Neal came by, as the one who first talked to her. When describing herself being shot, she broke down and cried. She spoke against unnamed people who may have called her crazy, or who said that Boo-Boo only helped, and insisted that she was certain that it was Boo-Boo alone who did the shooting.

PENALTY PHASE

In her opening statement, the prosecutor announced that she would put on evidence of 12 separate incidents during the penalty phase. (56 RT 8512 et seq.) Mr. Weatherton represented himself at the penalty phase, presented no witnesses or argument, and with the exception of an accomplice to a 1972 bowling alley robbery, did not cross-examine prosecution witnesses.

On September 19, 1984, Larry Richardson was working at the Circle K in Indio, when two African-Americans entered the store to purchase alcohol. While grabbing alcohol from the refrigerator, one of the two men asked if Richardson was working alone that evening, to which Richardson responded, "Sure." (56 RT 8527.) Around 10:25 p.m., the two men returned to the store, and the shorter of them produced a gun. Richardson took money from the register, placed it in a small bag, and

handed it to him. The taller man was identified by Richardson as Fred Weatherton. (56 RT 8541.)

Clifton Shuman, John Swearingen and Mark Darfknecht were Riverside County deputy sheriffs during September of 1984. They recounted the arrest of Fred Weatherton in Burr Tract. (56 RT 8562, 8572, 8574, 8586.) People's Exhibit 143 was a certified record of Mr. Weatherton's arrest and conviction for this robbery. (57 RT 8593.) The prosecution also introduced other documentary evidence establishing Mr. Weatherton's convictions for this crime and for the unlawful taking of a vehicle on November 14, 1969. (57 RT 8595.)

John Bunch, a Ventura County D.A.'s investigator, was a member of the Los Angeles Police Department (LAPD) who worked in the South Central part of Los Angeles in December of 1969. He described observing a stolen car, chasing the driver, and arresting Mr. Weatherton for being in a chase that culminated in a car flipping over that was carrying a 50-year-old woman. (57 RT 8600.)

Edward Estrada, a retired police officer, interviewed Mr. Weatherton in jail about this incident. Mr. Weatherton told him he'd gotten out of the Torrence court on another auto theft case and was returning home, but stole a car that had the keys in it when he didn't have enough money for a cab or

bus. (57 RT 8614.) People's Exhibit 146, a certified court document establishing Mr. Weatherton's conviction of violating Vehicle Code section 10851, was admitted into evidence. (57 RT 8616.)

Evidence was then presented via the reading of prior transcripts and live witnesses showing that Mr. Weatherton committed two robberies on July 5, 1972, one of them of customers at a bowling alley, and the other of the Guin brothers. The preliminary hearing testimony of Mary Burns and the trial testimony of two witnesses, Alphonse Williams and Melvin Guin, was read into the record. Mr. Williams testified about the bowling alley robbery, while Mr. Guin described being robbed and chased, and the shooting of his brother by Mr. Weatherton's partner. (57 RT 8625.)

Avan Richardson worked as a bartender on July 6, 1972, right next to the bowling alley. He testified about the robbery, and identified Mr. Weatherton as a participant. Percy Davis, Mr. Weatherton's accomplice in the bowling alley robbery in 1972, testified about both robberies. Mr. Davis described the robbery. He was the primary aggressor, and carried a sawed-off shotgun. Mr. Weatherton cross-examined him, and elicited testimony on how he — Mr. Weatherton — always tried to inhibit the use of violence. This cross-examination enabled the prosecution to introduce evidence of other robberies committed by Mr. Davis and Mr. Weatherton. (57 RT

8701.) Mr. Davis never witnessed Mr. Weatherton shoot or beat anyone. (57 RT 8705.)

John Welcher was a correctional officer at the state prison in Tehachapi. He testified that on November 29, 1990, he witnessed a fight between Mr. Weatherton and Mr. Van Alfred. (57 RT 8716.) He could not recall how the fight began. Both parties were placed in handcuffs and sent to administrative segregation. (57 RT 8726.)

The prosecution then placed into evidence preliminary hearing testimony of Shofner Miller and Amanda Hurd regarding the robbery of the Manchester Baptist Church in 1994. (57 RT 8729-8750.) Neither of these witnesses identified Mr. Weatherton as the perpetrator.

Klaus Edgell, an LAPD officer, worked in South Central L.A. in 1994, and responded to call about the church robbery. He described talking to a woman who identified Mr. Weatherton as the perpetrator shortly after the crime occurred. (58 RT 8761.)

John Ely, employed at the Riverside County Sheriff's Department, discovered and removed a razor blade from Mr. Weatherton's cell in 2000. (58 RT 8779.)

Iriqui Gilbert, a correctional deputy at the Indio jail. Gilbert described an interview with Anthony Pena, who told him Fred Weatherton punched him a few times for flushing the toilet too often. (58 RT 8786.)

Joe Ortiz, Sam Ortiz's younger brother, testified about the impact on him of the loss of Sam. (58 RT 8804.) Paulette Webb, who lived in San Bernardino at the time of the crime, testified about the impact on her of the loss of her sister, LaTonya Robertson. (58 RT 8806.) The final witness was Nelva Bell, who returned to talk about the physical and emotional impact of the crime on her life. (58 RT 8826.)

Mr. Weatherton called no witnesses on his own behalf, and made no argument.

ARGUMENT

I. THE TRIAL COURT, BY IMPROPERLY RESTRICTING MR. WEATHERTON'S CROSS-EXAMINATION OF WITNESS VERNON NEAL AND BARRING MR. WEATHERTON FROM IMPEACHING NEAL OR PRESENTING EVIDENCE OF NEAL'S CULPABILITY FOR THE CHARGED OFFENSES AND HIS PRIOR VIOLENT ENCOUNTER WITH THE MURDER VICTIMS, DENIED MR. WEATHERTON HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM, TO PRESENT A COMPLETE DEFENSE, AND TO A RELIABLE DETERMINATION OF THE CAPITAL CHARGES AGAINST HIM.

A. Introduction

Mr. Weatherton was denied the opportunity to put on evidence of Vernon Neal's culpability for the crimes at bench. Vernon, however, was not a distant or abstract suspect. He was, according to the prosecution, the man who found the bodies just moments after the crime was committed. He also indicated that he had seen someone like Mr. Weatherton "flash" across the desert near the tamarisk trees, an assertion which the prosecution built on in order to show a possible way by which Mr. Weatherton could have quickly disposed of the weapon, clothing, stolen goods, and any other physical evidence that might have linked him to the crime.

Thus, evidence of third-party culpability was also evidence impeaching the testimony of Vernon. The trial court confused the two,

holding that evidence of Vernon's bias or interest was admissible to impeach him, but then refusing to allow questions designed to elicit such evidence on grounds that it was prohibited evidence of third-party culpability. Hearsay evidence of Vernon's obsession with LaTonya Roberson was excluded, even though it was trustworthy evidence of LaTonya's state of mind that would have squarely impeached Vernon's testimony that he was looking for LaTonya on the night when the crimes were committed in order to help her put on a party for her young son. The excluded evidence would have made his efforts to find LaTonya look more like the stalking of which LaTonya had complained.

For analytical clarity, Mr. Weatherton will break down the trial court's errors in blocking him from presenting witnesses on his own behalf, and from cross-examining Vernon, into three separate arguments. The core of facts related to each argument, however, is much the same.

B. Procedural Background

1. Pre-Trial Motions

On July 14, 2000, the prosecution filed a trial brief seeking to block the defense from presenting evidence of third-party culpability. (3 CT 640, 654-658.) The primary reason proffered was the eyewitness identification of Mr. Weatherton by Nelva Bell. (3 CT 657.) The prosecution also argued

that evidence of tensions between LaTonya Roberson and Vernon Neal came from Mr. Weatherton's own interview, and should be considered inadmissable hearsay. (3 CT 658.) Mr. Weatherton filed an opposition to the prosecution trial brief on September 8, 2000. (3 CT 780, 795.)

The matter was argued extensively on December 19, 2001, the eve of trial. (21 RT 3482-3565.) The prosecutor contended that third-party culpability evidence should not be presented in this case, and discussed the cases of *People v. Hall* (1986) 41 Cal.3d 826; *People v. Mendez* (1924) 193 Cal. 39, which the prosecutor said had been "cited with approval" by this Court in *Hall* (21 RT 3484); and *People v. Pride* (1992) 3 Cal.4th 195. (21 RT 3482-3487.)

Counsel for Mr. Weatherton concentrated most of her argument on evidence implicating Vernon Neal, an obvious alternative suspect and an important prosecution witness. Vernon had a motive, because his girlfriend was sleeping with Sam Ortiz. There had recently been a fight in which Vernon broke into Ortiz's house late at night in the same manner as the perpetrator in the case at bench. Vernon had an opportunity — he was indisputably at the crime scene no later than 15 to 20 minutes after the shooting happened. Vernon had been looking for LaTonya since the previous evening. He parked down the street and approached the house by

foot. After first seeing the police he went to his mother's house, less than five minutes away, and did not come back to be interviewed by the police for over an hour. (21 RT 3489-3498; esp. 3497-3498.)

The trial court stated that both motive and opportunity were not enough under the *Hall* case; there had to have something linking the third party to the crime. (21 RT 3501.) The prosecutor agreed with this formulation (21 RT 3502) and discussed the case of *People v. Johnson* (1988) 200 Cal.App.3d 1553, in which a burglary suspect matching the perpetrator's description was found near the crime scene, "and had a lot of cash on his person when he was walking away from the victim's house. And the [*Johnson*] Court excluded it, not because the Court said, well, geese [*sic*], that's not enough to bring in third-party culpability, but because that person had been eliminated from the scene by fingerprints."[17] (21 RT 3502.)

The trial court indicated that it had been very impressed by Nelva Bell's testimony:

> THE COURT: Well we know when [Vernon] got there because he called 911. Right?

---

[17] In *Johnson*, the court explained that the burglar's fingerprints did not match those of the third-party suspect. Without such decisive evidence, it would have allowed the third-party culpability evidence to be placed before the jury. (*Id.*, 200 Cal.App.3d at p. 1564.)

MS. REED: Well, was that the first time he got there or was that the second time he got there, which is the whole issue.

THE COURT: I don't know.

MS. REED: That's the whole issue.

THE COURT: Nelva Bell's testimony was pretty compelling if you were here, though. She seemed to be pretty positive about what she saw.

(21 RT 3505-3506.)

Counsel replied that Ms. Bell was also positive about hearing Mr. Weatherton shouting, "Nell, Nell," just outside the house, when in fact it was Vernon. (21 RT 3506.) The prosecutor then developed her account of Vernon Neal's behavior on the morning in question, and concluded, that "We've heard motive, we've heard opportunity, we haven't heard any circumstantial evidence that links him . . . to the perpetration of this murder. In fact, like the fingerprints in the *Johnson* case, we have exactly the opposite. We have direct evidence that he didn't commit the murder. Ms. Bell tells us who committed the murder. She tells us Mr. Weatherton did it." (21 RT 3509.)

The trial court continued to probe both the prosecution and defense over various factual aspects of the record regarding Vernon Neal's conduct on the morning of November 1, 1998. After a brief discussion of the

evidence pointing to Ernest Hunt as a possible perpetrator (his rage at LaTonya for leaving his house to go sleep with Sam Ortiz after bathing him while leaving her baby behind, at 21 RT 3513-3514), the discussion of Vernon Neal continued.

When the court asked defense counsel to identify evidence of third-party culpability beyond Vernon's being LaTonya's boyfriend, being upset, and being in the area, counsel mentioned Vernon's having previously broken into Sam Ortiz's house at night while Sam and LaTonya were inside, along with Vernon's disappearance for over an hour after reporting the crime, and his search for LaTonya on the night in question that continued even though he was late for his new job. (21 RT 3515-3516.) Nelva Bell had initially thought that Vernon was involved with Mr. Weatherton, because of his prior relationship with LaTonya, and his break-in of Sam Ortiz's house to find LaTonya. Counsel added Vernon's parking down the street to approach the Ortiz house on the sly. (21 RT 3519.) After further argument, the court reserved its ruling on the motion, but told the defense not to mention during its opening statement any contention that Vernon was the actual perpetrator. (21 RT 3561-3563.)

2. Vernon Neal's 402 Hearing

The issue surfaced again during Mr. Weatherton's cross-examination of Vernon Neal. The trial court indicated that it was going to preclude cross-examination designed to elicit third-party culpability information until it heard all of the prosecution's case, and said the defense might have to bring Vernon back as its own witness. (27 RT 4341.) The court indicated it would not allow the defense to ask Vernon what his motive was for sneaking up to Sam Ortiz's house. (27 RT 4343.)

The trial court said that the facts provided by the defense were "not complete and for certain. So I said I have to wait and see if the actual things actually occurred that you're testifying to. You gave me a bunch of different things. I don't remember what they all were. I wrote them down." (27 RT 4345-4346.)

During Vernon's cross-examination, he was asked about a prior fight with Sam Ortiz over LaTonya. The prosecutor's objection as "beyond the scope" was sustained. (27 RT 4378-4379.) Counsel's efforts to ask Vernon about whether or not he had gotten into a fight with Sam Ortiz, and whether or not he was more than an acquaintance with LaTonya, were rejected by the trial court, who indicated that as of that moment in the trial, it had not

yet heard enough to allow questions designed to elicit third-party culpability evidence.[18] (27 RT 4385-4387.)

On the following day, Vernon testified outside the jury's presence at an Evidence Code section 402 hearing.[19] He described a previous time a month before when he went to Sam Ortiz's house because of LaTonya. He approached the house and hit the door so that it opened. He went there because LaTonya owed him money. She got so mad that she swung a golf club at him, but eventually, she wanted a ride home from him for her and her baby. (27 RT 4405-4406.) He denied being jealous, and denied wanting to be with LaTonya. (27 RT 4408.) He was evasive about whether or not he told Yolanda Harmon that he had a fight with Sam Ortiz because he was jealous of LaTonya's relationship with him. (27 RT 4409-4410.)

---

[18] The trial court at this point ignored the relevance of such questions to the issue of the witness's possible bias, whether arising from his romantic feelings for LaTonya or his need to cover up or fend off suspicions concerning his own culpability. (See Claim I.B., *post.*)

[19] Evidence Code section 402 provides as follows:

(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

When the court took over questioning, Vernon again denied being in any way jealous. He said that his relationship with LaTonya was strictly about sex, and it did not bother him at all that she was sleeping with other people. (27 RT 4411.) He testified that he wanted to find LaTonya because he did care about her baby, and he wanted to get stuff for her and help her set up the party. (27 RT 4411-4412.)

Vernon testified that he had gone to Sam's place a month or so earlier because LaTonya owed him thirty dollars. "I heard — I heard a baby in there, and everybody, and I knocked on the door, and nobody said nothing. Then I knocked on the door again, and I — you could hear them in there talking. So then nobody here but me, so I just bumped against the door." The door "came open," and that's when the altercation took place. (27 RT 4419-4420.)

Vernon described his approach to Sam's house on the night of the killings: "When I first walked in the door, I thought I heard somebody talking inside, and I stood outside and listened to see if I could hear Tonya's voice, because *usually when she's up there, I'll listen to see if I could hear her voice, people talking inside.*" (27 RT 4422, emphasis added.) The door was open and it sounded like a TV or radio was turned up real loud. That's

the only reason he "accidentally yelled out her name."[20] He denied going up there often: "I don't go up there that quite a bit, because all they do — I don't smoke rock, so I don't hang out up there." (27 RT 4423.)

After Vernon's 402 hearing testimony, the trial court stated that defense counsel could impeach Vernon regarding his prior inconsistent statements to Detective Cervello and also "probably could go into his relationship with LaTonya because of any bias, motive, or interest he might have to testify." (27 RT 4424.)

During subsequent argument regarding the issue of third-party culpability and permissible cross-examination, the parties disputed whether or not there was any evidence that Vernon was jealous. The prosecutor argued there was no evidence at all showing that he was a jealous lover, and defense counsel contended that there were additional witnesses who would say that Vernon himself had said as much. The trial court became exasperated: "We will reconsider it when we hear it. Let's bring the jury in. I can't believe we are half an hour late when we were supposed to start at 8:30.

MR. HEAD: Sorry, your honor.

---

[20] Cf. his testimony that he yelled out her name repeatedly as he approached the door, at 28 RT 4484-4488.

THE COURT: So you could impeach him, you could ask him about his relationship. You can't go into third party culpability until you establish it.

(27 RT 4428.)

Cross-examination resumed and counsel was permitted to elicit from Vernon that he had had a sexual relationship with LaTonya. (27 RT 4432.) Vernon denied any jealousy concerning LaTonya. (27 RT 4433.) When counsel tried to question Vernon about whether or not he got into a fight with Sam Ortiz on a prior effort to find LaTonya at Sam's house, the court sustained the prosecutor's objection, and became angry at counsel.

Counsel's efforts to probe the question of Vernon's jealousy, which the court had said was relevant to show Vernon's bias or interest (see 27 RT 4424, 4428), were treated by the court as an inexplicable and unjustified violation of its ruling prohibiting evidence of third-party culpability. (28 RT 4435-4436.)

Counsel replied that because Vernon insisted he was not jealous, the defense should have been allowed to ask him about the prior incident at Sam's house and to then impeach him with his prior inconsistent statements about the incident, which showed that he was jealous. But the court now considered such evidence to be third-party culpability evidence of the sort it had not yet allowed. When counsel said there were also other witnesses to

support its contention that Vernon had snuck up to the Ortiz house and gotten into a fight once before because he was jealous, the trial court complained that all the evidence should have been presented in a 402 hearing so it would not be learning about the evidence on a piecemeal basis. (28 RT 4441.) Cross-examination of Vernon continued, without any reference to his previous approach to and fight with the victims at the Ortiz house.

At the beginning of the defense case, LaBritta Ross and Yolanda Harmon were called by the defense at a 402 hearing regarding third-party culpability. Ms. Ross, LaTonya's cousin, testified that she had contact with Vernon because she was close to LaTonya. (38 RT 6152.) She described an incident when the police were called by Vernon. The incident began at the Motel 6. Vernon called the police because he thought LaTonya and Ernest Hunt were doing drugs in her motel room. The police came and found no drugs at all; LaTonya was there with her child Jared. (38 RT 6155, 6160.) After talking with all parties, the police learned that LaTonya's car was broken, and Ernest Hunt was helping her fix her car. The police told LaTonya that if she had any more problems with Vernon, she should contact them. (38 RT 6154.)

Vernon came to the place LaBritta lived, at her grandmother's house, several times to buy drugs from LaBritta's boyfriend; she saw this happen (38 RT 6157-6158, 6163.)

LaTonya told LaBritta that Vernon was in love with her, and was jealous of certain other people. (38 RT 6158.) She said that ever since she broke up with Vernon, he was always harassing her and following her. (38 RT 6160.) LaTonya also told her that once when Vernon was supposed to be fixing her car, he actually put sugar or something in the gas tank, so the car no longer worked. (38 RT 6160.) The gas tank incident happened sometime after the motel incident. (38 RT 6161.)

In the last six months of LaTonya's life, Ms. Ross testified that she couldn't describe LaTonya's relationship with Vernon in any other way than to say that they broke up, they got back together; they broke up, they got back together. (38 RT 6162.)

LaTonya had asked her to help with Jared's birthday party, and she agreed to do so. LaTonya had not said anything about Vernon Neal being a part of the party preparation. (38 RT 6162.)

On cross-examination, Ms. Ross testified that she had not personally witnessed any of this, other than Vernon buying drugs from her boyfriend. The rest was all information she got from LaTonya. (38 RT 6163-6167.)

Yolanda Harmon was also a cousin of LaTonya, and saw her regularly. (38 RT 6176.) She knew Vernon Neal, who was "sometimes LaTonya's boyfriend, and sometimes not." (38 RT 6177.) One day, Vernon approached her while she was working in her yard. He told her about an incident at Dale Roberson's house, where Sam Ortiz was living: "He just wanted to explain to me he was looking for LaTonya, and he said he went to the house that was there, and he was knocking and trying to talk with her, but nobody answered, "so he said he was worried about her, and he kind of knocked the door in trying to get, you know, get in." (38 RT 6177-6178.)

Vernon wanted Yolanda to know that he only did it because he was worried about LaTonya. He told her that after he knocked the door in, there was "like a little melee, or something, with pushing and shoving. Somebody tried to hit him to make him get out, and he just tried to protect himself; he tried to get LaTonya to go away with him." (38 RT 6179.)

Vernon told her that Sam was doing drugs, and he thought he was getting LaTonya more involved in it. (38 RT 6180.) Yolanda thought the whole thing was a jealousy issue rather a moral issue, because she knew that Vernon himself was using drugs. (38 RT 6181.)

On the following day, the trial court summarized its understanding of the issue, and concluded that the evidence pointing to Vernon Neal was "hearsay, rumor, speculation and hunches," not sufficient to allow Mr. Weatherton to present a third-party culpability defense. (39 RT 6198-6200.) After further argument regarding the third-party culpability issues, and potential hearsay exceptions,[21] the court reaffirmed its rulings, and refused to allow any of the evidence provided by Ms. Ross or Ms. Harmon to be presented to the jury, other than evidence from Ms. Ross to impeach Vernon Neal's testimony that he had distanced himself from LaTonya. (39 RT 6220-6221.)

The trial court's ruling was wrong. There was evidence that Vernon Neal was indeed jealous of Sam's relationship with LaTonya, and not long before the night of the homicides had broken into the house where the crimes were committed because of an intense desire to see LaTonya and had gotten into a fight with the victims. Vernon Neal was again present at the crime scene no later than within minutes of when decedents and Nelva Bell were shot, after searching for LaTonya throughout the night.

Evidence before the jury showed that Vernon Neal spent much of the previous evening and the early morning before the crimes at bench in search

---

[21] See Claim I.C., *post.*

of LaTonya Roberson. He told the jury that LaTonya wanted him to help her put on a party for her one-year-old son. The evidence and cross-examination erroneously barred by the trial court included the following:

3. Wrongly Excluded Evidence

a. Evidence impeaching Vernon's explanations as to why, in the hours preceding the homicides, he was searching for LaTonya.

In his testimony before the jury, Vernon claimed that he was looking for LaTonya because she wanted him to assist her with putting on a birthday party for her son Jared. (27 RT 4347.) The excluded testimony of LaTonya's cousin, LaBritta Ross, would have shown that LaTonya's state of mind vis-a-vis Vernon made it unlikely that LaTonya would have wanted Vernon's assistance in putting on a birthday party for her child.

According to LaBritta, LaTonya had told her that Vernon was jealous and was always harassing and following her, and had gone so far as to put sugar in her gas tank and to call the police with a false report that she and Ernest Hunt were doing drugs in LaTonya's motel room. (38 RT 6155, 6158-6160.) This was relevant circumstantial evidence casting doubt on the truthfulness of Vernon's explanation of his activities before arriving at what was or would become the murder scene, and should have been admitted before the jury.

The jury did hear that Vernon had provided a different explanation for his search for LaTonya to Detective Cervello, i.e., that prior to testifying he had told Cervello that he wanted to find LaTonya because he knew she would be getting a check, and he wanted to stop her from blowing it all on drugs. (27 RT 4392.) That explanation could also have been impeached by erroneously excluded testimony, to wit, LaBritta's testimony that she had seen Vernon himself purchase drugs several times (38 RT 6157-6158), as well as Yolanda Harmon's testimony that Vernon himself was using drugs. (38 RT 6181.)

The jury was unlikely to believe that a drug user was going to search through the night for LaTonya to keep her from spending money on drugs. The reasonable inference was that the explanation Vernon offered as to why he searched for Latonya that night depended on who he was talking to, that neither of the explanations the jury had heard was true, and that the real explanation was something entirely different.

b. Evidence concerning a prior incident, roughly a month before the homicides, when Vernon searched for LaTonya, broke into Sam's house to find her, and got into a fight with Sam and LaTonya.

This was a prior incident when Vernon behaved with remarkable similarity to how, according to his own testimony, he behaved when he

approached Sam Ortiz's house in the early morning of November 1, 1998, the day of the homicides.

On this earlier occasion Vernon snuck up to the house occupied by Sam Ortiz while LaTonya was inside, listened for her voice, then broke open the door and ended up fighting with LaTonya and Sam. The incident was attested to by Vernon himself at the 402 hearing (27 RT 4405-4406), and confirmed by Yolanda Harmon, who, at another 402 hearing, testified to a description of the incident Vernon had provided to her. (38 RT 6177-6181.)

During cross-examination, after Vernon denied feeling any jealousy concerning LaTonya, defense counsel attempted to question him concerning the prior incident during which he had gotten into a fight with Sam and LaTonya at Sam's house, but the trial court barred such inquiry. (27 RT 4433.) The court erred in so doing.

The inquiry was clearly relevant to impeach Vernon's testimony that he harbored no jealousy. A jury, despite Vernon's sexual relationship with LaTonya and his having searched for her through the night, could perhaps have credited his claim that he had no jealousy regarding LaTonya; but the prior similar incident, involving a physical fight, would certainly have made it more difficult to do so.

In light of the other evidence concerning Vernon's motive and opportunity, his disappearance for over an hour between directing an officer to the crime scene and returning to the scene himself, his inconsistent explanations as to why he had gone to the Ortiz residence in the first place, and the complete absence of any of the physical evidence connecting Fred Weatherton to the offense that one would expect to find had he been involved, made evidence concerning the prior incident relevant to raising a reasonable doubt as to Weatherton's guilt and to supporting as a reasonable possibility that Vernon was the actual perpetrator.

Further, had Vernon, on cross-examination, denied the incident, or deviated in any significant way from what he had told Yolanda Harmon, Ms. Harmon's testimony would have been admissible to impeach Vernon and to confirm that, as he had told her, he had been looking for LaTonya on the night of the prior incident, he had knocked the door in, and had gotten into a "little melee" with Sam and LaTonya. (38 RT 6179.)

Ms. Harmon's testimony would have been independently relevant to impeach Vernon's claim that he harbored no jealousy regarding LaTonya, since in describing the incident to Ms. Harmon he provided an apparent false explanation as to why he had been looking for LaTonya. Vernon told her he did what he did because he was worried about LaTonya and wanted

to remove LaTonya from a drug-taking situation. (38 RT 6179-6180.) But as Yolanda knew, and the jury should have learned, Vernon himself was a purchaser and user of drugs, which made his claimed concern about LaTonya's drug use very dubious, and supported an inference that the real reason he broke into Sam's house was not LaTonya's moral well-being, but his own jealousy. (38 RT 6181.)

c. Evidence concerning Vernon's conflicting explanations at to why he had been looking for LaTonya on the night of the earlier incident

Had the trial court permitted counsel to ask Vernon about the prior incident, counsel would have been able to place before the jury Vernon's conflicting explanations as to why Vernon was looking for LaTonya on that occasion. We, of course, do not know for sure how Vernon would have explained this earlier search for LaTonya. But it is likely that he would have repeated what he told the trial court during his 402 testimony, i.e., that he went to Sam's house because LaTonya owed him money. (27 RT 4405-4506.)

This is inconsistent with what he told Yolanda Harmon about being motivated by his concern for LaTonya's well being. (38 RT 6198-6180.) The reasonable inference would be that when asked why he spent a night looking for LaTonya or broke into someone's house to find her, Vernon's

answer would depend upon who he was talking to, that neither the explanation provided to the Court nor the explanation provided to Yolanda Harmon was true, and that the real explanation was something entirely different.

d. Evidence as to what's Vernon's motive was for sneaking up to Sam Ortiz's house in the early morning hours of November 1, 1998, the day of the homicides.

The trial court ruled that until and unless it authorized presentation of a third-party defense — and it never did — trial counsel would be precluded from asking Vernon what his motive was for sneaking up on Sam Ortiz's house. (27 RT 4343.) This too was error. As we have seen, and will discuss further, there was sufficient evidence to support a finding of a reasonable possibility that Vernon was the perpetrator and hence a reasonable doubt as to Mr. Weatherton's guilt. But the precluded question was also relevant to probe Vernon's credibility — and in particular the truthfulness of his explanation as to why he was there at Ortiz's home in the early morning hours of November 1.

If he was really there to provide requested assistance on a birthday party, why was he sneaking up? Why didn't he just walk up to the door and knock? Why did he tell the court that he stood outside "and listened to see if I could hear LaTonya's voice, because usually when she's up there, I'll

listen to see if I could hear her voice, people talking inside"? (27 RT 4422.) Why did he say that he "accidentally" yelled her name out? (28 RT 4423.) Mr. Weatherton was entitled to elicit, and the jury to hear, Vernon's explanation.

It was prejudicial error for the trial court to bar Mr. Weatherton from conducting cross-examination and otherwise presenting evidence to show or at least raise as a reasonable possibility that Vernon Neal was the perpetrator and was tainted as a witness by bias flowing from his relationship with LaTonya and his interesting in concealing his own culpability.

C. Mr. Weatherton Was Entitled to Present Relevant Evidence of a Third Party's Culpability.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants "the right to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691; see also *Washington v. Texas* (1967) 388 U.S. 14, 22-23; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The right to compulsory process and confrontation are independently guaranteed by the California Constitution. (Cal. Const., art. I, § 15.) "The defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant's behalf . . . and to be confronted with the witnesses against the defendant . . . [t]he right of an

accused to compel witnesses to come into court and give evidence in the accused's defense is a fundamental one." (*People v. Jacinto* (2010) 49 Cal.4th 263, 268-269; *People v. Riser* (1957) 47 Cal.2d 566, 571.)

Third-party culpability evidence is admissible if it is "capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall*, *supra*, 41 Cal.3d at p. 833; see also *People v. Page* (2008) 44 Cal.4th 1, 36; *People v. Geier* (2007) 41 Cal.4th 555, 581; *People v. Prince* (2007) 40 Cal.4th 1179, 1242; and *People v. Robinson* (2005) 37 Cal.4th 592, 625.

"[I]n making these assessments, 'courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion [citation].'" (*People v. Robinson*, *supra*, 37 Cal.4th at p. 625.)

Here, the prosecutor pointed to Nelva Bell's eyewitness identification of Mr. Weatherton as a reason for rejecting evidence of third-party culpability. (3 CT 657.) The trial court was greatly impressed with the testimony of Nelva Bell. (21 RT 3506.) However, the trial court cannot rely on the strength of the prosecution's evidence against the defendant to exclude third-party culpability evidence.

In *Holmes v. South Carolina* (2006) 547 U.S. 319, the U.S. Supreme Court found a federal constitutional violation resulting from a rule of evidence that precluded the defendant from introducing third-party culpability evidence when there was strong evidence of the defendant's guilt. *Holmes* reaffirmed the "widely accepted" rule that third-party culpability evidence that does not sufficiently connect the third party to the crime may be excluded. (See *Holmes v. South Carolina, supra*, 547 U.S. at p. 327.)

But in considering whether the South Carolina evidentiary rule violated the Constitution, the United States Supreme Court stated,

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" [Citations.] This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or

'disproportionate to the purposes they are designed to serve.'" [Citations].

(*Holmes*, *supra*, 547 U.S. at pp. 324-325.)

Under the rule then in effect in South Carolina,

> [T]he trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues. . . . . The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, petitioner proffered evidence that, if believed, squarely proved that White, not petitioner, was the perpetrator. It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of petitioner's guilt.
>
> The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the [rule in effect] and other similar third-party guilt rules were designed to further.

(*Holmes*, *supra*, 547 U.S. at pp. 330-331.)

The high court unanimously reversed Mr. Holmes's convictions, and held that the rule in question violated a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.' *Crane*, 476 U.S. at p. 690, 106 S.Ct. 2142 (quoting *Trombetta*, 467 U.S. at p. 485, 104 S.Ct. 2528)." (*Holmes*, *supra*, 547 U.S. at pp. 330-331.)

In *People v. Page*, *supra*, 44 Cal.4th 1, the defendant was accused of raping and murdering an 11-year girl. He sought to introduce evidence that the police failed to investigate two other suspects: one, a man who lived in the same apartment complex known to have asked the victim to accompany him on a trip into the desert, who was known to spend a lot of time with the younger residents, and another, who was found exposing himself and masturbating two days after the crime. The second man's shoeprints were analyzed, and compared to those found near the victim.

This Court affirmed the trial court's rejection of this evidence, on the basis that there was nothing to link either suspect to the commission of the crime: "The possibility the police may have chosen not to follow up more thoroughly on all leads does not impeach the evidence against defendant." (*Page*, *supra*, 44 Cal.4th at p. 34.) Because the proffered evidence has no tendency to establish any relevant fact, it properly was excluded by the trial court. (*Ibid.*)

Here, in contrast, Vernon Neal was right behind LaTonya Roberson as she went from her house to the house of Sam Ortiz; she had left her brother Eric about 15 minutes before Vernon arrived. He then continued on to look for her at Sam Ortiz's house despite the fact that he was late for his new job. His own testimony establishes that he arrived at the house within minutes of the shooting. Without Nelva Bell's identification of Mr. Weatherton, Vernon would have been the first candidate as perpetrator.

Other factors weighing toward Vernon Neal as the perpetrator and supporting the relevance of the excluded evidence and cross-examination include the lack of support for the offense as an economic crime. Although there was some discussion of a possible three hundred dollars at the crime scene at the preliminary hearing, the three parties shot were not known to have any significant amount of money or drugs. Prosecution witness Curtis Neal assumed that it could not have been an economic crime, because of the victims' poverty (p. 40, *ante*), and Sam Ortiz's wallet remained at the crime scene, with $40 in it. (42 RT 6794; 1 SCT 270.)

It is true that the police found no evidence of Vernon Neal's having committed this crime, but it is also true that they did not look for it. No police officer ever searched Vernon's car, or his house. Vernon spent over an hour either at Del Webb Country Club or back at his house after

reporting the crime to Eric Roberson, before returning to the crime scene to be interviewed. Unlike Mr. Weatherton, he had every opportunity to hide an army jacket, big black gun, gloves, and whatever was taken from the crime scene.

Mr. Weatherton was seen by Deputy Johnson wearing his blue, black and white jacket shortly after 7 a.m., not close to the tamarisk trees or the canal. (28 RT 4532.) He was thoroughly searched shortly after the crime was committed, and subjected to gunshot residue tests. His person and clothing were examined for traces of blood. No trace of these crimes was found on his person, in the car where he slept, or in the house where he ate and washed.

The prosecution knew that Mr. Weatherton had no access to a functioning vehicle. Its theory that Mr. Weatherton threw crime-related materials into the All-American canal nearby is improbable, if not preposterous. Access to the canal was blocked by a fence taller than himself topped with barbed wire facing away from the canal, with empty space of approximately 60 feet between the fence and the canal. (See photographs of the fence and canal at 1 SCT 261, 263, 265.) Mr. Weatherton would have had to make a superhuman toss of a pistol, khaki Army jacket, fingerless gloves, and money to clear the fence and the empty

ground to reach the canal. Extensive police efforts to drag the canal produced nothing.

In sum, there would be no question that the prime suspect in this case would be Vernon Neal, were it not for the identification of Mr. Weatherton by Nelva Bell. Vernon was a jealous lover who had previously broken into the Ortiz house to find LaTonya and fought with the victims — the same house where the crimes were committed.

The prosecutor cited two cases in support of its motion to exclude all third-party culpability testimony: *People v. Mendez* (1924) 193 Cal. 39, and *People v. Pride* (1992) 3 Cal.4th 195. In *Mendez*, there was general evidence that four Mexicans residing a quarter-mile away from the victim had quarreled with him, and had fled shortly thereafter. "The trial court rejected testimony about the victim's dispute with the missing laborers, concluding that such evidence of possible motive was not linked to any other evidence "having the inherent tendency" to connect them to the commission of the crime. It similarly rejected testimony describing three of the four men who disappeared because, as the defendant conceded, the descriptions were "so general and indefinite that they would apply equally to hundreds of persons." (193 Cal. at p. 51; see *People v. Hall*, *supra*, 41 Cal.3d at pp. 832-833.)

Thus, in *Mendez*, there was evidence of a possible motive, but not of opportunity, or any evidence linking these men to the commission of the crime. This Court affirmed: "[M]ere evidence of motive in another person, or of motive coupled with threats of such other person, is inadmissible unless coupled with other evidence tending to directly connect such other person with the actual commission of the crime charged." (193 Cal. at p. 51.) The Court observed that the rule rests on the sound basis that evidence must be both relevant and material. In the interests of judicial order and expediency, strict limits must be imposed on the scope of inquiry into collateral or insignificant matters that might suggest third-party culpability. (*Id.* at p. 52.)

In *People v. Arline* (1970) 13 Cal.App.3d 200, the Court of Appeal "[r]earticulated those limits. To be admissible, it declared, evidence implicating a third party in lieu of the defendant must rise to the level of "'substantial proof of a probability that this happened.'" (*Id.* at p. 204; see *People v. Hall, supra,* 41 Cal.3d at p. 832.) This rule, which came to be known as the *Mendez-Arline* rule, was explicitly rejected by this Court in *Hall*, which held that the normal rules of evidence apply to third-party culpability evidence, and any such evidence that might raise a reasonable doubt as to whether or not the accused committed the crime was admissible,

subject to any limitations imposed by section 352. (*Hall*, 41 Cal.3d at p. 834.)

In *Pride*, the defendant sought to admit "motive" evidence: the husband of the victim received $40,000 in life insurance benefits, bought a house, traveled abroad at some point after her death, and remarried over a year later. The husband also frantically searched for his wife throughout their apartment building and called people who might know her whereabouts. This Court found that his behavior was "not remarkable in the slightest degree," and that there was no evidence that he was present at the time of the crimes. Generic "motive" evidence of the sort common to every such crimes was not held to be sufficiently linked to the crime to be relevant, and the exclusion of this argument by the trial court was affirmed. (*Id.*, 3 Cal.4th at pp. 237-238.)

Here, Vernon Neal by his own testimony was at the scene no later than within moments of the crime's commission. He had every opportunity to commit the crime. There was also evidence that he was a jealous lover, and that he was looking for LaTonya, and found her in the house, and probably the bed, of another man. Mr. Weatherton should have been allowed to show that Vernon's discovery of LaTonya with Sam Ortiz occurred while she was still alive, and not just after she had been shot.

D. The Trial Court Prejudicially Restricted Mr. Weatherton's Right to Impeach Vernon Neal.

Vernon Neal was not only a very plausible alternative suspect, he was also a key witness for the prosecution. As such, Mr. Weatherton had a state and federal constitutional right to cross-examine him regarding any matter that had a tendency in reason to undercut his credibility, including bias or an interest in the case that could affect his truthfulness. (1 Jefferson's Cal. Evidence Benchbook (4th ed. CJA-CEB 2009) §§ 28.103, 28.107, pp. 557-558; Evid. Code, § 780).)

Presenting the jury with substantial material evidence impeaching the credibility of prosecution witnesses can be critical: "We have recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679.) Proof of matters to attack a witness's credibility "may be made through cross-examination of the witness, introduction of extrinsic evidence, or both." (Jefferson, *supra*, § 28.107, p. 558.)

Here the cross-examination Mr. Weatherton sought to conduct and the evidence he sought to introduce in support of a third-party culpability defense, bore directly on Vernon's credibility and for that reason, as well,

should have been permitted. Questions and evidence bearing on Vernon's jealousy concerning LaTonya, his prior nighttime break-in into Sam Ortiz's home when LaTonya was there and his "little melee" with the victims, along with his possible role as the actual perpetrator clearly suggest a bias or interest in the case, whether based on a passion for one of the victims, or his interest in hiding or deflecting suspicion concerning his own culpability.

The evidence summarized above (see Claim I.B., *ante*) that was precluded by the trial court was not only relevant to the question of whether Vernon was the perpetrator, but it was also evidence of his Vernon's bias and his interest as a witness against Mr. Weatherton.

The trial court specifically ruled that Vernon could be impeached on these grounds. (27 RT 4424, 4428.) However, when counsel attempted to do so, the trial court refused to allow it, saying that it was part of a third-party culpability claim. (28 RT 4435-4436.) The problem was that such evidence was relevant to *both* claims. The trial court erred in refusing to allow for one reason that which it had elsewhere permitted for a separate, and valid reason. Mr. Weatherton should have been permitted to present relevant evidence and conduct relevant cross-examination to impeach Vernon's credibility by showing his bias and interest in the case.

E. Testimony of LaBritta Ross and Yolanda Harmon Regarding LaTonya Roberson's Statements about Vernon Neal Were Admissible to Show LaTonya's State of Mind.

The prosecutor strenuously argued that Yolanda and LaBritta's testimony about Vernon Neal's obsession with the decedent LaTonya and his jealously of other men was inadmissible hearsay because LaTonya's statements were excluded by Evidence Code section 1250, subdivision (b), which bans the use of hearsay statements of a statement of memory or belief to prove the fact remembered or believed.[22] (39 RT 6202-6204.) She quoted from the Assembly's comments repudiating the case of *People v. Merkouris* (1959) 52 Cal.2d 672, which held that hearsay statements of the victim regarding fear of the defendant were admissible to prove the defendant's guilt. (39 RT 6211-6214.)

---

[22] In full, Evidence Code section 1250 provides:

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

Defense counsel argued that LaTonya's state of mind was at issue, and that the statements of LaTonya to LaBritta were trustworthy. (39 RT 6204.) The trial court ruled that the testimony of LaBritta regarding what LaTonya told her about Vernon's harassment and stalking of her, and Yolanda's testimony of what Vernon told her about his prior fight at the Ortiz house was inadmissible hearsay, and refused to allow it to be presented to the jury. (39 RT 6220-6221.)

This ruling was error. Vernon Neal placed LaTonya's state of mind at issue when he told the jury that he was looking for LaTonya because she expected him to assist her with putting on a birthday party. The prosecutor asked him, "why were you interested in that on that particular morning, where she was?" He answered, "Because she's supposed to have a birthday party for her son, whose birthday was earlier in the week. She didn't have any money so she wanted to borrow the money, you know, to get with me so she could have the party for her son, that particular weekend, on Halloween." (27 RT 4347.)

If LaTonya actually told Vernon that she wanted to see him, that would explain his efforts to find her. However, his repeated, night-long efforts to find LaTonya take on an entirely different light if she did not want

to see him at all. It becomes much more like the harassment and stalking she had complained about to LaBritta.

Evidence Code section 1250 provides an exception to the hearsay rule for statements of the declarant's then existing mental or physical state. Under section 1250, as under existing law, a statement of the declarant's state of mind at the time of the statement is admissible when the then existing state of mind is itself an issue in the case. (*Adkins v. Brett* (1920) 184 Cal. 252.) A statement of the declarant's then existing state of mind is also admissible when relevant to show the declarant's state of mind at a time prior or subsequent to the statement. (*People v. Majors* (1998) 18 Cal.4th 385, 403-405; *Watenpaugh v. State Teachers' Retirement System* (1959) 51 Cal.2d 675; *Whitlow v. Durst* (1942) 20 Cal.2d 523.)

"Where that evidence involves the victim's fear of the defendant, we have initially looked to whether the victim's state of mind was really in dispute and whether it was relevant to an issue in the case. [Citations.]" (*People v. Thompson* (1988) 45 Cal.3d 86, 103-104.) A murder victim's statement to her sister that she was "fed up" with defendant living in her house was admissible in defendant's murder prosecution as statement of victim's then existing state of mind; it was direct evidence of victim's attitude toward defendant. (*People v. Ortiz* (1995) 38 Cal.App.4th 377,

391.) The victim's invitations to her sister and friend to come to her home on the day of murder were admissible as nonhearsay circumstantial evidence. The fact that she made such invitations tended to show that she had not asked defendant to come to her home on that date for romantic liaison as defendant alleged. (*Id.* at pp. 390-391.)

Here the statements made to LaBritta are direct evidence of the victim's attitude towards Vernon Neal. They tend to show that LaTonya had no intention of involving Vernon Neal in the party for her child, thereby disproving Vernon's assertion that he had been searching for LaTonya because she wanted him to assist in the party's preparation.

In *People v. Romero* (2007) 149 Cal.App.4th 29, 37-38, a witness's testimony that the homicide victim had told him that defendant, the victim's lover, would kill him if he found the victim with another man was admissible under the state of mind exception to the hearsay rule. Defendant had asserted self-defense, making the victim's statement relevant, and the statement appeared to have been entirely spontaneous and made in the company of someone the victim was comfortable with and trusted. Here, there is no question that LaTonya and LaBritta were close. The prosecutor did not, and could not, argue that the statements at issue were not trustworthy.

The statements LaTonya made to LaBritta cast a very strong doubt on Vernon's sworn testimony that LaTonya actually wanted to see him, and to be helped by him in preparing the party for Jared. Without any invitation from LaTonya, Vernon's behavior the night before, in looking for LaTonya at her house and at Ernest Hunt's house, and again early in the morning, when he again went to her house, and then went over to Sam Ortiz's house even though he was running late for his new job, becomes a portrayal of a jealous and obsessed man, and makes it more likely that it was Vernon who found her alive with Sam Ortiz.

F. The Improper Restrictions on Mr. Weatherton's Right to Defend Himself Separately and Cumulatively Violated His Right to Defend Himself, and Severely Prejudiced His Right to a Fair Trial.

Failure to allow Mr. Weatherton to present the jury with the excluded evidence and to conduct the excluded cross-examination violated Mr. Weatherton' right to have a meaningful opportunity to present a complete defense, his right to confront and cross-examine the witnesses against him, and his right to a reliable adjudication of the capital charges against him and a reliable determination of any sentence imposed, in violation of Mr. Weatherton's rights under the Sixth, Eighth and Fourteenth Amendments. (*Holmes*, *supra*, 547 U.S. at p. 331; Cf. *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302 [where hearsay declaration was

trustworthy and critical to defense, constitutional rights are implicated and "the hearsay rule may not be applied mechanistically to defeat the ends of justice"]; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Davis v. Alaska*, *supra*, 415 U.S. at p. 320; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

This was a constellation of trial errors. They require reversal unless it can be said "beyond a reasonable doubt that the [errors] did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 681.)

As evidenced by the extensive hearings on potential jury misconduct that closed this trial (see Claim IV, *post*), the case was close. A direct eyewitness identification was countered by the lack of any physical evidence that would reasonably be expected when an accused with no means of transportation was arrested near the crime shortly after its occurrence. The lack of any blood on Mr. Weatherton or his clothing, for example, was explained by one juror who told the others she had received training in blood flow after gunshot wounds, and that blood flowed away from the shooter rather than towards him.[23]

---

[23] As shown below, this "testimony" was false. (See Claim IV, *post.*)

The eyewitness was under stress, under the influence of drugs, was prone to paranoia when high on cocaine, and had a paranoid view of Mr. Weatherton that continued years later, when she blamed him for causing her to be detained for the sale of cocaine just before trial, even though he had long been incarcerated in jail.

The record is clear that there were serious disputes among the jurors. Significant testimony was requested and re-read during deliberations. There were at least three votes for acquittal on the first ballot, more than 11 hours of deliberation, and a juror who experienced immediate remorse after the verdict. (See Claim IV, *post.*)

It is reasonably probable that had Mr. Weatherton been able to produce evidence of an alternative suspect, and been permitted to fully cross-examine and impeach that suspect when he testified for the prosecution, he would not have been convicted. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.) It simply cannot be said beyond a reasonable doubt that proceedings would not have been affected by the introduction, and subsequent argument, of the third-party culpability and impeachment evidence excluded by the trial court. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

II. THE TRIAL COURT'S ORDER THAT MR. WEATHERTON BE PHYSICALLY RESTRAINED WAS BASED ON CASE LAW OVERRULED SHORTLY AFTER MR. WEATHERTON'S CONVICTIONS; THERE WAS NO MANIFEST NEED FOR ANY SUCH RESTRAINT, AND MR. WEATHERTON WAS PREJUDICED BY THE JURY'S AWARENESS OF HIS RESTRAINTS.

A. Introduction

In this case, Mr. Weatherton was compelled to wear physical restraints throughout his trial, despite the trial court's explicit and repeated recognition that he had never caused the slightest problem in court, and that his disagreements with rulings was always expressed in a reasonable manner. He had never caused problems in court during his many prior court appearances, which include two prior instances of representing himself. However, the trial court was finally persuaded to restrain Mr. Weatherton by the prosecution's strenuous insistence that Mr. Weatherton's past record of violence was a legitimate basis for imposing restraints, and by two cases: *People v. Mar* (2000) 77 Cal.App.4th 1284, and *People v. Garcia* (1997) 56 Cal.App.4th 1349, 1357.

This Court granted a petition for review in the *Mar* case shortly after Mr. Weatherton's convictions, and reversed it. (See *People v. Mar* (2002) 28 Cal.4th 1201.) In the *Mar* case, this Court overruled *People v. Garcia*, *supra*. There was no manifest need to shackle Mr. Weatherton. The trial

court would not have done so had it not been erroneously guided by *Garcia* and *Mar*.

The error in imposing restraints on Mr. Weatherton was prejudicial. The trial court and the prosecutor recognized that the jury was aware of the restraints under which Mr. Weatherton was laboring. The jury was instructed to ignore those restraints, but such instructions have never been thought to eliminate the inevitable prejudice caused by the apparent need to physical restrain the accused. In a case as close as this (see prejudice discussions, *ante*, at pp. 95-97), and particularly where Mr. Weatherton was often the only African-American in the courtroom, it cannot be said beyond a reasonable doubt that the jury would have reached the same verdict without this improper treatment of Mr. Weatherton as a force of potential immediate danger and disruption that had to be controlled.

B. Factual and Legal Background

Mr. Weatherton was initially placed into physical restraint very early in these proceedings. The record is silent as to when he was first restrained, but on February 28, 2001, before his trial began, he placed on the record his discomfort, saying that both his wrists and his feet were swollen and painful as result of his shackles. (3 PRT 408.)

On October 5, 2001, the prosecution moved to chain Mr. Weatherton to a chair, or at least to a "React Belt," during his trial. (4 CT 1041-1044.) The matter came up on November 26, 2001; Mr. Weatherton asked that his restraints be removed, and argued that there was no justification for them.

The trial court initially agreed. It indicated that it had not seen any problems with Mr. Weatherton in the courtroom. (6 RT 502.) The prosecution made a lengthy and strenuous argument insisting that restraints be imposed. The parties ultimately agreed that the matter deserved a full evidentiary hearing. Mr. Weatherton agreed to wear a leg brace during the handful of court appearances before the hearing date.[24]

During the hearing, counsel argued that no restraints at all were necessary, and throughout a long lifetime of appearing in court, there had never been evidence of Mr. Weatherton, who had represented himself at least twice before, disrupting the proceedings. (10 RT 1110.)

The court acknowledged that its own experience was in accord. "I should put on the record during the couple years I have been having him in court there has not been any outbursts at all. As you said, there have

---

[24] Mr. Weatherton was placed in discomfort with the React Belt, which required that he sit at an unusual angle that cause him back pain. He therefore asked that if he had to be restrained, he preferred a leg brace. (10 RT 1110.)

been resistance to certain things, but it was always in a normal tone in a legal argument, not shouting or disruption." (10 RT 1112.)

The prosecutor then called one witness in support of her motion: Fernando Rodriguez, a correctional corporal at the Riverside County Jail at Indio. (10 RT 1114.) Corporal Rodriguez told of an incident where Mr. Weatherton was riding in an elevator, and "seemed upset." Corporal Rodriguez testified that he asked Mr. Weatherton what was the matter, and that Mr. Weatherton replied by saying, "whoever the prosecuting attorney was, was not getting the information that they were hoping to get, and that he had to go back to court on Friday and if — he made the statement kind of off-handedly if he did not get what they were supposed to be giving him, that he might go off in court, and we might have to come up and drag him out of court. . . . ¶ He was agitated when he said it, as far as kind of pacing back and forth, but when he made the statement he kind of laughed and left it at that." (10 RT 1117.)

Corporal Rodriguez described disciplinary markers, the write-ups made by jail staff summarizing incidents where an inmate breaks the rules of the jail. Mr. Weatherton did not receive a disciplinary marker for this incident, nor had he ever been given a marker during his three years in jail. (10 RT 1127.)

The prosecutor then turned the witness's attention to February 26, 2000, when there was supposedly a disturbance in one of the housing units with several inmates. Corporal Rodriguez did not know if Mr. Weatherton was one of the people involved. (10 RT 1123.) The prosecutor then asked about a May 30, 2000, incident. The only mention of Mr. Weatherton was that Mr. Weatherton was the victim of a "242" in court with another prisoner. (10 RT 1124.) The witness's log included an entry re razor blades found underneath a mattress in Mr. Weatherton's housing unit. On April 15, 2001, there was an incident where Mr. Weatherton apparently slapped another inmate where the inmate was repeatedly flushing the toilet. (10 RT 1124-1126.) These are the only four incidents involving Mr. Weatherton of which the witness was aware during his three years in jail. (10 RT 1127-1128.)

Finally, the prosecution marked as an exhibit Mr. Weatherton's felony conviction for an attempt to escape from county jail in 1974. Counsel pointed out that the escape was from the USC Medical Center when Mr. Weatherton went to see the dentist, and he hardly got out of the room. (10 RT 1130.)

In argument, the prosecutor contended that *Garcia* case did not consider a stun belt a significant restraint; in *Garcia*, the court "was able to

take into consideration the fact that the defendant was charged with a crime of violence." (10 RT 1135.)

The trial court summarized its understanding of the prosecution's factual showing: "You have four incidents; one where the deputy was not sure if he was joking, two where he was a victim, so that does not count. Three is the razor blade, and four is the slap. You have an escape that is 27 years old." (10 RT 1137.) The court then asked the prosecutor how much weight, if any, it could give to Mr. Weatherton's criminal record. She replied that the court could, and should, take into consideration Mr. Weatherton's record of violent acts in the past. (10 RT 1138.)

The trial court then cited *People v. Mar*, *supra*, 77 Cal.App.4th 1284 (reversed by this Court in *People v. Mar*, *supra*, 28 Cal.4th 1201) for the principle that defendant's attempted escape plus misconduct with jail staff was sufficient for the use of a stun belt in court. (10 RT 1138.) The prosecutor then read from *People v. Garcia*, *supra*, 56 Cal.App.4th at p. 1357, where the court stated that a stun belt could be justified upon a showing of good cause based upon a totality of the facts and circumstances. When directly asked by the trial court, the prosecutor stated that she did not think that *Garcia* changed the applicable standard. (10 RT 1138-1139.)

Counsel for Mr. Weatherton argued that there was simply no evidence, either from her personal experiences or in Mr. Weatherton's record, of his having been disruptive in a courtroom. (10 RT 1141.) The prosecutor argued forcefully that the court should restrain Mr. Weatherton. (10 RT 1145 et seq.)

Finally, the trial court ruled, that, under the *Garcia* and *Mar* cases, there was good cause for Mr. Weatherton to have a stun belt.[25] The court gave little weight to accusations of jail misconduct, and recognized that Mr. Weatherton's behavior in court had been "fine." The attempted escape was "pretty old." However, the court found under the cases cited that a relevant factor was Mr. Weatherton's past criminal record, which contained a past history of a lot of violence, and noted that the victim testifying in the preliminary hearing was fearful:

> Okay. Under the cases that we talked about, Garcia and Marr [*sic*], I am going to find under the totality of the circumstances there is good cause to have a stun belt. The Court is not giving a tremendous amount of weight to the conduct in the jail. I did note that his conduct in the courtroom has been fine. The attempt escape is pretty old. But I am taking into consideration his record showing past

---

[25] The trial court probed Mr. Weatherton's reluctance to use a stun belt; counsel told him that the belt pushes him forward, and causes back problems. The court noted that when he stood up to greet the jury there was a "visible click" on his leg brace that the court could hear, and the court was sure that the jury could hear it as well. (10 RT 1142.)

> history of a lot of violence. The victim's concern in the courtroom appeared to be very fearful, and the fact that there was probable cause found at the preliminary hearing that somewhat — not somewhat, but he terrorized the victim at the time of this crime, so in my discretion I am going to allow the stun belt.

(10 RT 1151-1152.)

C. Argument

An accused should be brought before court with the appearance, dignity, and self-respect of a free and innocent man, that is, without physical restraints. In criminal prosecutions, both the due process clause and the confrontation clause of the Sixth Amendment require that, "no person shall be tried while shackled and gagged except as a last resort." (*Illinois v. Allen* (1970) 397 U.S. 337; see also *Deck v. Missouri* (2005) 544 U.S. 622; *Tyers v. Finner* (9th Cir. 1983) 709 F.3d 1274, 1284; *Jones v. Meyer* (9th Cir. 1990) 889 F.2d 883, 884, cert. den. 498 U.S. 832.)

The use of shackles indicates that the justice system itself marks the defendant as presently dangerous, and different from everyone else in the courtroom. It "is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." (*Allen, supra*, at p. 344.) As this Court has observed,

> [T]he shackling of a criminal defendant will [cause] prejudice in the minds of the jurors. When a defendant is charged with any crime, and particularly if he is accused of a violent crime,

> his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged.

(*People v. Duran* (1976) 16 Cal.3d 282, 290; see also *People v. Tuilaepa* (1993) 4 Cal.4th 569, 583-584.)

In *Duran*, this Court discussed the recognition by the English common law hundreds of years ago of the damage done by physical restraints to the presumption of innocence and the damage done to a defendant's ability to defend himself, and affirmed that a defendant may be burdened with physical restraints only when "there is a manifest need for such restraints." (*Duran*, 16 Cal.3d at pp. 290-291.) The Court held that it was an abuse of discretion to impose physical restraints in the absence of a record showing of violence or threat of violence or other nonconforming conduct in the courtroom, and that the trial court's ruling was not based on any such showing. Because the Court concluded "upon our examination of the entire cause that it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the errors," the Court found it unnecessary to determine if the federal Constitution was also violated. (*Id.* at p. 296.)

The *Duran* Court listed several cases in which a manifest need to impose physical restraints was shown. A review of these cases shows how

little they resemble the case at bench. (See *People v. Kimball* (1936) 5 Cal.2d 608, 611 [defendant expressed intention to escape, threatened to kill witnesses, secreted lead pipe in courtroom]; *People v. Burwell* (1955) 44 Cal.2d 16, 33 [defendant had written letters stating that he intended to procure a weapon and escape from the courtroom with the aid of friends]; *People v. Hillery* (1967) 65 Cal.2d 795, 806 [defendant had resisted being brought to court, refused to dress for court, and had to be taken bodily from prison to court]; *People v. Burnett* (1967) 251 Cal.App.2d 651, 655 [defendant had escaped from jail on two prior occasions, trial was being held in "makeshift quarters" instead of courthouse]; *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-864 [defendant attempted to escape from county jail while awaiting trial on other escape charges]; and *People v. Loomis* (1938) 27 Cal.App.2d 236, 239 [defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel table, fought with the officers, and threw himself on the floor]; see also *People v. Duran*, *supra*, 16 Cal.3d at pp. 290-291.)

The court in *Garcia* held that the rigorous "manifest need" standard imposed in *Duran* was not applicable to the use of a stun belt, and that the use of such a belt instead could be justified under a less demanding "good cause" standard. (*Garcia*, *supra*, 56 Cal.App.4th at p. 1357 [66 Cal.Rptr.2d

350].) That was the standard wrongly relied on by the trial court in this case.

The trial court did not rely on any evidence of in-court disruption or threats, and gave little weight to the uncertain testimony of the jail guard. The facts it relied on were Mr. Weatherton's past history of violence — none of which was related to a courtroom — and the potential fears of a prosecution witness. These reasons, particularly in light of the court's explicit recognition of Mr. Weatherton's good courtroom conduct over a period of years, do not constitute a "manifest need" for the imposition of restraints.

D. Prejudice

The court has found no prejudice when restraints were wrongly imposed where there was not evidence that the jury was aware of the restraints. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1113-1114; *People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Majors*, *supra*, 18 Cal.4th at p. 406; *People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 584; *People v. Cox* (1991) 53 Cal.3d 618, 652-653.) Here, the trial court placed on the record that it could hear the leg braces click when Mr. Weatherton stood to greet the jury, and it was sure that the jury could, too. (10 RT 1142.) Later in the trial, during the jury's site viewing, the court noted that Mr.

Weatherton had a chain visible across the front of his suit when he got out of the car. (43 RT 7008.) The court left no doubt that the jury was quite aware that Mr. Weatherton was being physically restrained. The jury was instructed about the restraints during the penalty phase. (59 RT 8893-8894.)

As evidenced by the extensive hearings on potential jury misconduct that closed this trial, the case was close. (See Claim IV, *post.*) A direct eyewitness identification was countered by the lack of any physical evidence that would reasonably be expected when the accused was arrested near the crime shortly after its occurrence. The eyewitness was under stress, under the influence of drugs, and had a paranoid view of Mr. Weatherton that continued years later, when she blamed him for causing her to be detained for the sale of cocaine even though he had long been incarcerated in jail.

The shackling of Mr. Weatherton accentuated his already marked difference from everyone else in the criminal justice system in this case. As Mr. Weatherton himself noted, he was often the only African-American in the courtroom. (55 RT 8376.) He was called a "Bengal Tiger" by the prosecutor in closing argument. (59 RT 8971-8972.) Despite his unbroken record of courtroom cooperation over decades, he was visibly treated as a

dangerous man before the jury — not in the past but in the present moment, during his trial.

This treatment seriously undermined the fundamental concept that Mr. Weatherton was clothed with the presumption of innocence while being tried (*People v. Mar*, *supra*, 28 Cal.4th at p. 1216, fn. 3; *People v. Slaughter, supra*, 27 Cal.4th at pp. 1113-1114), and would have been prejudicial at the penalty phase as well, making him appear a more appropriate candidate for a death sentence. It is reasonably probable that had Mr. Weatherton not been hampered by restraints throughout his trial, that verdicts more favorable to him would have been reached. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.) It cannot be said beyond a reasonable doubt that the verdicts were unaffected by the improper physical restraints imposed on him. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 634; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

III. THE TRIAL COURT ERRED IN PROHIBITING MR. WEATHERTON FROM FULLY QUESTIONING NELVA BELL ABOUT HER SALES OF COCAINE AFTER THE CRIME AND BEFORE MR. WEATHERTON'S TRIAL.

A. Factual Background

In October of 2001, three years after the crimes at bench and just before jury selection, Riverside County Deputy Sheriff Justin Anderson had been acquainted with Teresa Cecena for about seven months. He considered her a reliable source as far as things went on the "street level." (23 RT 3718.) When he ran into her, she was under the influence. He searched her for drugs but didn't find any. He did not arrest her for being under the influence, but asked her where she got the drugs. She gave him the name Nellie, and gave him an address in the Michigan Apartments in Palm Desert. When he went there, there was no one by that name to be found. (23 RT 3718-3719.)

A week or two later, he saw Ms. Cecena again, searched her, and found a small amount of what she told him was methamphetamine. He recalled telling her it was crack cocaine. She told him she got it from the same person, but gave him a different address. He testified that as a favor to her because she did point out the correct address, he put the drugs into the gutter and stomped on it to where it was not usable by anybody else.

(23 RT 3721.) He then went to the Michigan Apartments, along with Deputy Reichle. (23 RT 3722.)

The person who answered the door identified herself as Nellie Bell. She produced a driver's license that had that name on it with the same address, and invited him in. He asked her if she knew Teresa. She avoided his questions about what she had provided Teresa, and eventually became very upset. As they moved from the living room back toward her bedroom, she appeared to be getting nervous, and asked Deputy Anderson to go get a warrant. She did not allow him to search the bedroom, or any other part of the apartment. (23 RT 3723-3724.)

Ms. Bell explained to him that she was in some kind of witness protection program and that she was close with the district attorney and would call them right then and there. She "pretty much reenacted the whole crime in which she had been shot," and became very upset, very dramatic. She telephoned a person named Cynthia. (23 RT 3725.)

Deputy Anderson departed, and had not seen Ms. Cecena since that day. He also had no further contact with Nelva Bell. The district attorney's office called him down to a meeting, and asked him what had happened. After he told them, they directed him to go about his business and do whatever he would have done normally regarding the witness. He never did

get a search warrant for Nelva Bell's apartment, and never did any surveillance to see if she was selling drugs. (24 RT 3726-3727.) Once he found out that Ms. Bell was involved in the case at bench, he wanted to stay away from it. (24 RT 3728.)

Cynthia Galvan was the victim/witness advocate assigned to this case, and assigned to Ms. Bell. Nelva called her in October in 2001 about police being at her house. She was hysterical, saying the police were there, and accusing her of selling drugs; she felt that Boo Boo [appellant Fred Weatherton] was behind it. Ms. Galvan asked her if she had sold any drugs, and she denied it. (25 RT 3972-3973.) After the call, Ms. Galvan advised deputy district attorney Diana Carter, and called Ms. Bell back half an hour later. (25 RT 3975.)

Ms. Bell told her the police had searched her entire apartment. She was still upset, and convinced that Mr. Weatherton was behind everything, and was leading the police to think she was selling drugs or using drugs. Ms. Bell said nothing about Teresa Cecena. (25 RT 3975.)

Ms. Galvan was present at a D.A.'s office meeting with Deputy Anderson, to discuss the incident. She had actually talked to Anderson while he was at Nelva's house. He told her he was there to search her house because he believed she was selling drugs. She informed Anderson

that Ms. Bell was a victim in a death penalty case, and that she would be a witness in this case. (25 RT 3977.)

Eventually, Ms. Bell admitted that she had purchased drugs for Teresa Cecena. Detective Cervello called her, and there was a followup meeting with Cervello, the district attorney, and Ms. Galvan, in which Ms. Bell admitted getting drugs for Teresa. (25 RT 3978.)

When Ms. Bell was asked if Officer Anderson came to her house asking her about getting drugs for Teresa Cecena, she denied it. She testified that he came "saying that he heard that did I know a guy named Stanley, that he heard the drug was sold out of my house, that I had a bunch of guns, and I told him no, it's a lie." (26 RT 4082.) Only then did he ask her if she knew about Teresa Cecena. She testified that Officer Anderson was there with somebody else and he did indeed search her bedroom. She denied telling him that she was friends with the D.A., but she testified that she told him, "Let me call the D.A., my D.A., because what you talkin' about? And I got a picture with me and Boo Boo on there about that, this, the court, and he said oh, no, he was leaving." (26 RT 4085.)

She called the D.A.'s office while Deputy Anderson was there, "because I thought Boo Boo had sent some people to try to set me up because I knew no drugs had been sold out of my house. . . ." She called

Ms. Galvan, too, and told her, " I'm not trippin'. Boo Boo — I believe Boo set me up." (26 RT 4086.)

She eventually admitted purchasing drugs for Teresa Cecena on two separate occasions. (26 RT 4086.) Ms. Bell became upset, because she thought that Mr. Weatherton was causing her problems, "setting her up." (26 RT 4086-4089.) At first, she thought the D.A.'s office was going to represent her about this, because they represented her on everything else, but they told her to get a lawyer. (26 RT 4090.) She got a lawyer, Mr. Lehman, and wanted him to sit right next to her when she testified. (26 RT 4093.)

Defense counsel wanted to use this incident not only to present the jury with acts of moral turpitude, but also to attack Ms. Bell's credibility. They wanted to impeach her testimony that Deputy Anderson and his associate had searched her whole house with Anderson's testimony that she had not allowed him to search her apartment. The trial court believed that to be "impeachment on a collateral matter." The trial court also refused to allow any exploration by Mr. Weatherton of where Ms. Bell got the crack cocaine that she sold to Ms. Cecena. Finally, the court also refused to allow any evidence showing a promise or delivery of leniency. (26 RT 4097.)

These rulings were error. Refusing to allow Mr. Weatherton to present evidence that Ms. Bell testified inaccurately in claiming to have seen Deputy Andersen search her apartment is not collateral at all. Repeated instances of drug purchases and drug sales by Ms. Bell were overlooked by the authorities. There may have been no promise of leniency, but there was truly a delivery of leniency. After his meeting with the prosecution, Deputy Anderson wanted nothing more to do with Ms. Bell, and steered clear of her. She was not investigated any further and was never charged for these felonies.

The prosecutor minimized Ms. Bell's crimes by asserting that no drugs were ever found in her apartment, and called Ms. Cecena a "lying, high prostitute." (23 RT 3575-3576.) Her discourse did not include a reference to any specific lie told by Ms. Cecena, and omitted the pivotal fact that Ms. Bell refused to allow a search of her apartment, according to Deputy Anderson, and that Ms. Bell successfully mobilized the prosecution to make sure she was not troubled further.

Ms. Bell's refusal to permit a search may have served her at the time, but no one can say today, nor could they say at the time of trial, that she was not then selling crack cocaine on an intermittent or regular basis. The trial court's restrictions prohibited Mr. Weatherton from exploring the true

nature and frequency of the actions committed by Ms. Bell that showed moral turpitude, and contrasting the reality of her conduct with Ms. Bell's vehement denials and her insistence that Mr. Weatherton was somehow behind these charges.

It is true that Ms. Bell believed sincerely that she had been shot by Mr. Weatherton, and that she would have so testified even without favors extended to her. But Mr. Weatherton mounted an attack on the accuracy of her memory. He showed that there was no motive for him to commit the crime; that the crime was not likely to have been committed for money, given the poverty of the victims and the money remaining in Sam Ortiz's wallet; that an eyewitness's certainty is not correlated with accuracy; and that Ms. Bell was so intoxicated that her mistaken belief that Mr. Weatherton had terrorized Ernest Hunt bled over to her memory of who came through the door, and what they said when they entered. In closing argument, counsel asked why the shooter would say something like, "LaTonya, LaTonya, I just found Ernest dead." (46 RT 7608.)

Ms. Bell had developed a paranoid and mistaken view of Mr. Weatherton, that was likely heightened with she felt under attack. She believed that Mr. Weatherton had somehow engineered a police search of her apartment in October of 2001, almost three years after his incarceration.

She held this belief when she was undisputably sober. This fixation on Mr. Weatherton led her to mistakenly impute manipulative and destructive behavior to him here, and very likely did as well for the commitment offense.

At trial, Ms. Bell acknowledged on direct examination that she sold crack cocaine twice to Teresa Cecena. She explained that she did it because Teresa's bus could not make it to the Nairobi area, the source of the drug. (26 RT 4180, 27 RT 4225.) She strongly denied that she ever had crack cocaine in her house, or that she ever lied to Deputy Andersen and Cynthia Galvan about these misdeeds. (27 RT 4273-4275.)

Mr. Weatherton was not allowed to bring out her prior inconsistent statements about her criminal behavior to either Anderson or Galvan, or to impeach her insistence that Andersen had searched her whole apartment with Anderson's testimony that she would not allow him to search her residence. Thus, she was allowed to present the facts of her criminal activity in a very self-serving way.

She "explained" to the jury that her purchases of cocaine for Ms. Cecena were an act of generosity, since Ms. Cecena could not travel. In response to very leading questions, she told the jury that she had only done this favor for Ms. Cecena twice. (27 RT 4290.) Mr. Weatherton was not

allowed to bring out the fact that no criminal charges were ever pressed against her for these drug sales, and he was not allowed to explore where Ms. Bell purchased the cocaine that she sold to Ms. Cecena. The trial court erred in prohibiting Mr. Weatherton from exploring this matter further, and in allowing Ms. Bell to present a sanitized and misleading version of her conduct.

B. Prejudice

Ms. Bell had suffered grievously from the bullet wounds inflicted on her, but Mr. Weatherton's jury was not given a full picture of this critical prosecution witness. Ms. Bell, as all parties recognized, was a central part of the case against Mr. Weatherton. Ms. Bell's obsession with Mr. Weatherton continued for years. When put together with her fears for Ernest Hunt, despite Hunt's rage at LaTonya for leaving her baby behind to go sleep with another man, and the inexplicable statement attributed to Mr. Weatherton at the entrance to the crime scene, an entirely unlikely assertion that Ernest Hunt was dead,[26] a picture emerges of Ms. Bell as a sorely afflicted but less than reliable witness.

---

[26] Ernest Hunt, of course, was not dead, and the armed intruder would have had no reason for asserting that he was. Ms. Bell's "hearing" such an assertion can most easily be understood as the product of her cocaine-enhanced paranoia concerning Mr. Weatherton and the danger she feared he posed to Ernest.

Failure to allow Mr. Weatherton to present the jury with the excluded evidence violated Mr. Weatherton' right to have a meaningful opportunity to present a complete defense, to confront and impeach the witnesses against him, and to a reliable adjudication of the capital charges against him and a reliable determination of any sentence imposed, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Holmes*, *supra*, 547 U.S. at p. 331; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *California v. Trombetta*, *supra*, 467 U.S. at p. 485.) This was a trial error that requires reversal unless it can be said "beyond a reasonable doubt that [it] did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 681.)

As evidenced by the extensive hearings on potential jury misconduct that closed this trial (see Claim IV, *post*), the case was very close. (See discussion of prejudice, *ante*, at pp. 95-97.) There is good reason to believe that had Mr. Weatherton been able to produce evidence undercutting Ms. Bell's ability to perceive and accurately remember, he would have been able to hold on to one or more of the jurors who initially voted for acquittal, and not been convicted.

It is reasonably probable that had Mr. Weatherton been able to present these facts about Ms. Bell's conduct and memory along with her irrational beliefs about him to the jury, that verdicts more favorable to him would have been reached. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.) It cannot be said beyond a reasonable doubt that the verdicts were unaffected by this failure to allow him to present a critical part of his defense. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

IV. MR. WEATHERTON'S CONVICTIONS AND SENTENCE MUST BE SET ASIDE BECAUSE OF PREJUDICIAL JURY MISCONDUCT.

A. Factual Background

1. February 25, 2002 – Allegation of Misconduct on the Elevator

On February 25, 2002 — five days after the guilt phase verdict and shortly after Mr. Weatherton was appointed as his own counsel at the penalty phase — the trial court played for the parties a phone message it had just received. The caller stated, "I just want to report something that I heard in the elevator. There is — I guess he was a juror, a young man in Department 3R. He had a blue tag. He was talking about the trial which I didn't think he was supposed to talk about when you were on jury duty. This man said that this guy should be getting the death penalty, because that's what he wants. I don't know too much about the jury duty since it has been quite a few years since I have been on one, but they are not supposed to be talking about that in public. Thank you." (52 RT 8037-8038.)

After discussion, the parties determined that the blue tag meant that the man to whom the caller was referring was a juror in Mr. Weatherton's trial, and was one of the three men on the jury: Juror No. 1, Juror No. 5 (the

foreman), or alternate Juror No. 5.[27] Since no one knew who else may have been in the elevator, the court decided to question not only the men, but also the other jurors. (52 RT 8040-8041.)

The parties turned to discussion of the admissibility of various penalty phase evidentiary items. At the end of the day on February 26, 2002, the court scheduled a hearing on the issue the following morning. The first witness was to be the most likely candidate, Juror No. 1. (53 RT 8193-8194.)

2. February 27, 2002 – Additional Misconduct Emerges

a. Juror No. 3's Allegations that Other Jurors Advocated for Death Penalty During Guilt Phase Deliberations

On the morning of February 27, 2002, prosecutor Dianna Carter began by announcing that she had been approached by Mr. Silva, an attorney. According to Ms. Carter, Mr. Silva told her that a juror whom Ms. Carter believed was Juror No. 3, had approached Mr. Silva and asked if she could talk with him. Mr. Silva refused, but accompanied her to the courthouse. (54 RT 8196.)

---

[27] Resolution of the question of who said this was lost in the storm that followed, but the "logical candidate" [prosecutor] and the "only young man" [trial court] on the jury was Juror No. 1. (52 RT 8039; 55 RT 8366.)

Juror No. 3 entered the courtroom. She told the court that she was concerned that Mr. Weatherton was not getting a fair trial with the jurors. The trial court interrupted her and asked her to leave the courtroom. (54 RT 8197-8198.)

After Juror No. 3 left the courtroom, the court and two prosecutors, Ms. Carter and Ms. Nguyen, embarked on a lengthy discussion of what should be done. The trial court was uncertain; it wondered if there had been misconduct in the guilt phase, i.e., consideration of penalty during guilt-phase deliberations, and, if so, "what's the solution? Excuse that juror, admonish the jury, and continue on? Declare a mistrial?" (54 RT 8204.)

Discussions between the court and the prosecutors continued. The trial court believed that even if a juror came forth and revealed she had known Fred Weatherton since high school and knew all about his background and did not reveal that to the court, the court would still not be able to "undermine the guilt verdict" at this stage of the proceedings since the verdict was recorded.[28] (54 RT 8216.) No one was sure of how to proceed. (54 RT 8222.)

---

[28] The court did not indicate why it thought that the verdict's having been "recorded" barred the court from setting the verdict aside if persuaded that prejudicial jury misconduct had occurred.

After the prosecutors conferred with each other, Ms. Carter addressed the court about the necessity of continuing with the trial.

> [MS. CARTER]: At this point, there's nothing, today, there's nothing that's going to be done one way or another about the rendering of the guilty verdict that's already recorded. And we realize, of course, that there are avenues open to the defendant to do whatever investigation they [*sic*] seek to do with regard to that issue.
>
> THE COURT: Right.
>
> MS. CARTER: But, given that that's not the issue, given that we are now in — in the midst, basically, or soon to be in the midst of a trial, we have to decide whether or not 1, 2, 5, or 12 of these jurors can still be fair and impartial based upon what they seen [*sic*] or done or heard.

(54 RT 8226-8227.)

Mr. Weatherton was eventually asked for his opinion. He said that he thought the trial court was obliged to conduct a hearing, at least to inquire of Juror No. 3 what had occurred. (54 RT 8227.) The court agreed, but said that, contrary to its usual practice, it would not allow counsel to directly ask any questions. It then invited counsel to propose questions for the court to ask. The prosecutor said that the questions needed to be narrowly focused. Mr. Weatherton simply wanted to find out why the juror

thought he had not gotten a fair trial. (54 RT 8228-8231.) The court then called Juror No. 3 to the stand.

The court first told her it was not interested in the subjective processes of the jury's deliberation. It described several forms of jury misconduct, mostly in terms of the admonition it had given to the jurors as the trial began, and then asked the witness for a legal conclusion: "Do you think that some other juror failed to follow court orders and engaged in some misconduct?" Juror No. 3 answered, "yes." (54 RT 8232.)

She stated that Juror No. 1 and Juror No. 5, the foreman, discussed the penalty verdict during guilt phase deliberations. (54 RT 8232.) She further quoted Juror No. 1 as saying during guilt phase deliberations that "he [Mr. Weatherton] should get the death penalty," and said that Juror No. 5 agreed. (54 RT 8234-8235.)

After Juror No. 3 was dismissed, the court and counsel agreed that they needed to ask Juror No. 3 exactly when the events she described took place, and that the other jurors would also have to be questioned. (54 RT 8239-8240.) Ms. Nguyen, quoting *In re Hitchings* (1993) 6 Cal.4th 97, 118, argued that Juror No. 3 had committed serious misconduct by approaching a lawyer. (54 RT 8241-8242.) The court rebuffed Mr. Weatherton's request that it ask Juror No. 3 specifically what she meant by saying that Mr.

Weatherton did not get a fair trial. (54 RT 8244.) After further discussion of what procedures to follow, the court recalled Juror No. 3 and asked her when the statements that concerned her occurred. She testified that the statements that "he should get the death penalty concerned her were toward the end of deliberations, but before any verdicts were reached. (54 RT 8250.)

The court then called Juror No. 5, the foreman, to testify. He denied or could not recall any discussion of penalty during guilt phase deliberations. (54 RT 8251.)

Juror No. 1 was called to testify. After a lengthy introduction in which the witness was cautioned not to volunteer any information, Juror No. 1 answered "No" to a series of questions about whether any juror had ever discussed penalty or punishment during guilt phase deliberations, and whether he had said or heard a male juror say anything in the elevator after the jury was released two days earlier about the death penalty or punishment. He said he still had an open mind about the penalty to be imposed. (54 RT 8254-8256.)

After a lengthy cautionary opening, the court then asked Juror No. 2 if any juror discussed penalty or punishment in the guilt phase, and the juror answered, "No." (54 RT 8257.) The juror could not recall if anyone had

suggested what the penalty should be. (54 RT 8258.) The same process was followed for Juror No. 4, who likewise could not recall if anyone expressed an opinion during deliberations about the appropriate penalty or punishment. (54 RT 8260-8261.) Jurors No. 6 and No. 7 made similar answers to the same questions (54 RT 8284-8267), as did Jurors No. 8 through 12. (54 RT 8267-8285.)

b. Allegations by Alternate Jurors No. 1 and No. 4 of Misconduct Outside the Courthouse

The prosecutor then indicated that the court still needed to talk to the one gentleman alternate about remarks in the elevator. The court decided to question all the alternate jurors to see if they heard anyone express an opinion about the case outside the courtroom. (54 RT 8286-8287.)

When the court asked Alternate Juror No. 1 if she had heard anyone discussing that case, or more specifically, the potential penalties or punishment, she answered, "Yes." (54 RT 8287.) It happened more than once: in the hall, in the elevator, out on the balcony. It wasn't just one person; she heard people say "yes" that the defendant should receive the death penalty, and they felt that way very strongly, and she heard other people say "no," because they were not convinced. She could not remember juror numbers or names. (54 RT 8288.)

When asked specifically what was said, Alternate Juror No. 1 testified said that she was not very good at recalling exact language. However, Juror No. 1 was the most active in this respect. He even called her at home, and left a message on her answering machine. She did not return his call because she didn't figure she was supposed to hear what the guy had to say. On a message, Juror No. 1 "said he had interesting news was how he put it with inflection in his voice. And I know that he had called two other people that same weekend and had discussed in great detail things that were going on." (54 RT 8289.) One of the other people he called was Alternate Juror No. 6.[29] The other one, still an alternate, had red hair — but not the one that sits next to him. (54 RT 8287-8291.)

The court asked Alternate Juror No. 1 if she was able to follow the instruction that since she was an alternate, she could not discuss the case with anyone pending her substitution in as a juror. She answered, "Yes," with the exception of her husband; "I can't keep anything — what we say between each other is between us." (54 RT 8290.)

Alternate Juror No. 2 denied knowing anything about out-of-court discussions about the case or prejudging of guilt or penalty. (54 RT 8291-

---

[29] Alternate Juror No. 6 replaced Juror No. 8 after the first day of guilt-phase deliberations, and became Juror No. 8. (See Claim VIII, *post.*)

8292.) However, Alternate Juror No. 4 testified that she heard discussions of guilt or innocence and the appropriate penalty outside the courtroom many times. (54 RT 8294.) She had given Juror No. 1 rides home before deliberations began, and he often stated that he felt that Mr. Weatherton was guilty. In fact, she testified that just before she entered the courtroom he had told her what was going on at the hearing. (54 RT 8294-8295.)

Alternate Juror No. 5 denied hearing anyone express an opinion about the case regarding the proper penalty. The court then recalled Juror No. 5; the foreman denied hearing anyone express an opinion about the case outside the courtroom. (54 RT 8300.)

At this point the trial court said, "we kind of resolved one issue and opened another one." (54 RT 8300.) It asked the prosecutor what steps should be taken. (54 RT 8301.) Ms. Carter pointed out the lack of any corroboration from the jury for Juror No. 3's allegations, and wanted to come to a conclusion about Juror No. 3 and her misconduct of consulting an attorney. (54 RT 8302-8305.)

Before adjourning, the court wanted to hear from Juror No. 8 (former Alternate Juror No. 6), who had been implicated by Alternate Juror No. 4 as discussing the case with Juror No. 1 outside the courtroom. Mr.

Weatherton wanted a more in-depth inquiry: "In fact, I think that the jurors need to be sworn in." The court answered, "They are." (54 RT 8306.)

When Juror No. 8 was asked by the court if any juror had discussed the case with her, she replied, "maybe a comment, but I have never really listened, so I couldn't even tell you if there was — I can't be direct on that, because I — a comment maybe, but — and I couldn't even tell you which juror by number. But I have never really — I don't know. No." (54 RT 8308.)

After her testimony, the prosecutor talked about having penalty phase witnesses in the next morning, while Mr. Weatherton said that it looked like there had been a lot of juror misconduct, and that he would be moving for a mistrial the following morning. (54 RT 8310-8312.) At his request, the trial court recalled Juror No. 1 and asked him whether he made phone calls to other jurors, and if so, what the conversations were about. (54 RT 8313.) Juror No. 1 denied ever talking about the case with anyone outside the courtroom, and flatly denied ever making any telephone calls to other jurors. (54 RT 8314-8315.)

3. February 28, 2002 – Further Testimony Regarding Juror No. 1's Misconduct; Oral Motion for New Trial Denied on Grounds that It Must Be in Writing

On the following morning, February 28, 2002, the trial court engaged in an extended dialogue with the parties, primarily with the two prosecutors. (55 RT 8317-8362.) The court then said,

> [THE COURT]: I think that Juror Number 1 clearly should be excused and maybe an OSC re: contempt set for him. I think that Alternate Number 1 should be excused for discussing the case with her husband and indicating that she's going to continue to do it. I think Alternate Number 4 should be excused for discussing the case with Juror Number 1, even though she told us that she knew she shouldn't be and was trying to tell him that they shouldn't be discussing it. She admitted they went ahead and discussed it during deliberations, I think, and — although I wonder how she was giving him a ride home during deliberations.
>
> MS. CARTER: I think she said before, Your Honor. We might want to check the transcript, but I'm pretty sure she said before deliberations.
>
> THE COURT: And I think that — I thought that Juror Number 3 could be rehabilitated because she didn't learn any information and might be able to follow the instructions, but the other factors were pointed out to me that she contacted an attorney without — contrary the my instructions, she didn't volunteer that she made that contact, we had to ask her, she ratified the verdict, and made a late report of an incident that the 10 other jurors disagree with her. And so I think that she should be excused as well.

(55 RT 8362-8363.)

The court added that the replacement of two seated jurors and the dismissal of two alternate jurors would leave 12 seated jurors and no available alternates. (55 RT 8364.)

After discussion between the court and prosecutor about penalty phase witnesses, Mr. Weatherton then challenged the fairness of his trial. He stated that, according to Alternate Juror No. 4, Juror No. 1 indicated he believed in Mr. Weatherton's guilt long before all presentation of evidence had concluded. He contended that the penalty phase would be just a formality:

> I mean, this is a death penalty case. I know it's my life that's — that's at stake and I don't imagine very many people in this room care about that. For the most part, I am the only nigger in the courtroom. And run my family off.[30] So I just don't see how excusing some jurors is going to remedy, you know, me and allow me to get a fair trial, to allow me to even get a fair hearing . . . I think that Juror No. 1 and Juror No. 5, you know — they had their minds already made up.

(55 RT 8377.)

The court disagreed with his summary of the evidence, but determined that more questions had to be asked of Alternate Juror No. 4,

---

[30] Mr. Weatherton is referring to the fact that his family was not allowed to remain in the courtroom to watch the trial since there was a chance that they would be called as witnesses at the penalty phase of his trial. Actually, in a hearing without his presence, it appears that it was more his counsel's desire to exclude he family rather than the trial couirt's ruling. (26 RT 4125 et seq.)

Alternate Juror No. 1, and Juror No. 1. The court found there was sufficient evidence that Juror No. 1 committed misconduct and should be excused because "he talked to people." However, the court said it did not know whether there was sufficient evidence to conclude whether or not he prejudged the evidence. (55 RT 8387-8388.) The court rejected the prosecutor's efforts to end all questioning of jurors, and called Alternate Juror No. 4 back to the stand. (55 RT 8394.)

The court told her that it wanted "to continue the little discussion they had yesterday," and reminded her that she was under oath. (55 RT 8395.) Alternate Juror No. 4 testified that she gave Juror No. 1 a ride almost every day from the second week of the trial onward. (55 RT 8395-8396.) Conversations about guilt or innocence happened several times. Juror No. 1 told her that he felt that the witness Nelva Bell was "it," and because of that, "there should be nothing else." She countered by saying that Mr. Weatherton was still innocent, because they had not yet heard all the evidence in the case. Juror No. 1 also said that when he got in the deliberation room, he was going to vote guilty. (55 RT 8396-8397.)

THE COURT: Was — he was going to listen to what other people had to say?

A. No. His mind was made up. That's what I thought.

(55 RT 8398.)

Juror No. 1 told her that he felt Mr. Weatherton was guilty. He told her that he felt "that he would have a battle especially with Juror No. 3, and that they would probably argue." (55 RT 8399.) Furthermore, during deliberations, he telephoned Alternate Juror No. 4 to report that he was indeed arguing with Juror No. 3 about the verdict. After he left the courtroom the previous day (Feb. 27, 2002), Alternate Juror No. 4 observed Juror No. 1 talking with other jurors in the hall. She did not know what they were talking about. (55 RT 8399-8400.)

The court then recalled Juror No. 1 and questioned him about the allegations.[31]

THE COURT: Good afternoon. Thank you for being patient with us.

JUROR NO. 1 Uh-huh.

---

[31] Juror No. 1 answered the court's questions, as set forth in the following text. However, Juror No. 1 later confessed that the answers he gave the court at the hearings on February 27 and 28, 2002, were false, and that he had knowingly perjured himself because "I didn't believe that the things that were said were important, and I didn't want to get the girls and myself into unnecessary trouble." (See 67 RT 9934-9935.)

THE COURT: We have talked to several jurors now, and it is pretty clear to me that you were basically talking to everybody about the case during the whole time prior to deliberations and during deliberations. So that's no longer a question in my mind anymore. What I want to know is if you made up your mind on innocence or guilt prior to the start of deliberations?
(55 RT 8400.)

Juror No. 1 then falsely denied having made up his mind before deliberations began; falsely testified that he never said to anyone that he had made up his mind that defendant was guilty prior to deliberations; falsely testified that his conversations with the other jurors in the hallway the day before were "just saying goodbye, see you tomorrow, that's it"; and falsely denied ever talking about the nature of what was going on inside the court when he was outside the court. (55 RT 8401.)

When the court told him that several other jurors testified that he had expressed his opinion before deliberations began that Mr. Weatherton was guilty, Juror No. 1 falsely testified that "he didn't know what they were talking about" (55 RT 8401), insisting that during deliberations he took into consideration what other jurors said and gave his opinion with the hope they would consider what he said. (55 RT 8402-8405.)

After discussion, Mr. Weatherton called Juror No. 3 as a witness regarding her observations outside he courtroom. She testified that Juror

No. 1 talked about how he felt around other jurors; specifically, while jurors were in the smoking area he was telling Juror No. 8 that he felt Mr. Weatherton was guilty — a couple of days after the trial started. (55 RT 8409-8410.)

At the conclusion of Juror No. 3's testimony Mr. Weatherton moved for a mistrial, on the basis that Juror No. 1 had believed that he was guilty as soon as Ms. Bell testified, and expressed that opinion to other jurors. After some discussion, it became clear that what he was asking for was a motion for a new trial, pursuant to section 1181, subdivision (3). The trial court said that such motions had to be made in writing:

THE COURT:	A new trial has to be, as you know, it has to be prepared under the Court rules, local rules and California Rules of Court. The district attorney has to be given notice and the time to respond. And I cannot have the jury on hold for a few weeks while you do that.
MR. WEATHERTON:	I don't think it will take a few weeks, your Honor. I think that —
THE COURT:	Well, because of notice, the D.A. has to have, what, 10 days notice?
MS. CARTER:	That's correct.

MR. WEATHERTON: Well, according to my C.E.B. Book, I could make that motion oral or a written motion in that I can could make that motion at any time.

(55 RT 8418-8419.)

The prosecutor made it very clear that she would not waive any time, or right to notice:

> No. I am not going to waive my time. I am entitled to prepare points and authorities and do research in answer to — it is not as though if he does not do it Monday, it could never be done. He could proceed and do motions for mistrials and new trials any time he likes as long as he complies with the statutory scheme, and the Court could hear it. That does not prevent us from proceeding on into the penalty phase.

(55 RT 8422.)

After further discussion, the trial court said, "but I am still waiting for you to tell me what you are doing."

MR. WEATHERTON: Oh. Well, I am going to — Well, I at this time make a motion for a new trial under section 1181(3).

THE COURT: All right. Then Ms. Carter's right. We have to proceed on until I get that motion and she has proper notice to respond to it, and it could be briefed and argued. We are not going to get anywhere today, so I need to bring the jurors in.

(55 RT 8423.)

Then, the court dismissed two seated jurors [Juror No. 1 and Juror No. 3], and two alternate jurors [No. 1 and No. 4]. (55 RT 8423.) The court proceeded straight to the penalty phase of the trial, and swore in the alternate jurors who replaced the two discharged seated jurors. (55 RT 8425.)

4. March 4, 2002 – Hearing on Written New Trial Motion Postponed until After Penalty Phase

On the following Monday, March 4, 2002, Mr. Weatherton presented the court with a written motion for a mistrial and/or a motion for a new trial, with supporting declarations. In that motion Mr. Weatherton sought a mistrial on the basis of various forms of jury misconduct, including Juror No. 1's prejudgment of guilt, and supported the motion with declarations from four jurors and alternates. (40 CT 11,712-11,727; 43 CT 12,521-12,550.) The court stated, "A juror has predecided a case and participated in deliberation and affected the other jurors that are still sitting."

MS. CARTER: We don't have any evidence that that happened.

THE COURT: Sure we do. Juror No. 1 prejudged the case, period.

(56 RT 8437.)

In an extended dialogue with the trial court, the prosecutor argued that even if the juror had prejudged the case, he had to express something in

the jury room that somehow tainted the other jurors, and pointed to the fact that the other jurors said that nothing he said had any influence on them.[32] (56 RT 8440-8444.) The prosecutor sought to focus the discussion on the upcoming penalty phase and away from the implications of juror misconduct during the guilt phase, and insisted that there was no evidence that any juror was actually tainted by misconduct. (56 RT 8443-8444.)

The trial court distinguished the prosecutor's argument, which was based on the introduction of extraneous facts into deliberations, from the constitutional entitlement to 12 unbiased jurors. The trial court initially resisted the prosecutor's argument that any such misconduct by Juror No. 1 did not effect the other jurors, who could therefore proceed untainted to a penalty phase. (56 RT 8441.) In an extended discussion of the *Hitchings*

---

[32] Compare the prosecution's embrace of testimony regarding the juror's subjective mental process here with its extensive reliance on Evidence Code section 1150's ban on considering evidence of a juror's mental processes at the subsequent evidentiary hearing. (See, e.g., discussion of juror declarations at 61 RT 9159–62 RT 9272 [131 paragraphs in Juror No. 3's declaration]; 62 RT 9276-9286 [43 paragraphs in Alt. Juror No. 4's declaration]; 62 RT 9286-9291 [30 paragraphs in Alt. Juror No. 1's declaration]; and 62 RT 9291-9301 [54 paragraphs in former Juror No. 8's declaration].)

More fundamentally, the prosecutor's theory that relief would be required only if the prejudging juror influenced other jurors was profoundly wrong. A defendant is entitled to 12 fair and unbiased jurors. (See, e.g., *In re Hitchings*, *supra*, 6 Cal.4th 97 [reversing judgment because a single juror had lied on voir dire and prejudged guilt].)

case, the trial court pointed out that the problem that led to this Court's rejecting the referee's finding and reversing the case was that the offending juror had prejudged the case, whether or not she had tainted the other jurors. (56 RT 8441, 8444-8445.)

The prosecutor continued to argue that any prejudging by Juror No. 1 was a private matter, because there was no satisfactory evidence that he said anything to any other juror. She vigorously attacked Juror No. 3 and Alternate Juror No. 4, saying that they had conspired to lie about Juror No. 1, and should not be believed. (56 RT 8457-8458.)

After an extended quote from the *Hitchings* case, the trial court felt that his obligation was to overturn the guilt phase verdict. (See 56 RT 8452-8453, esp. 8453, lines 17-28.) But, the court did not want to do it, and continued to allow the prosecutor to explore ways of surmounting what seemed to him to be his legal obligation. The trial court looked to the prosecutor for guidance, and viewed itself as aligned with the prosecution; in its extended dialogue with the prosecutor, it was asking for direction on what *we* should do to solve the "problem." (See, e.g., 56 RT 8457.)

The prosecutor stated that she did not believe that there had been a factual showing that Juror 1 talked to other jurors and was trying to lobby them to vote guilty before the deliberations even started, but she contended

that even if this were so, there was still no need to overturn the verdict. The prosecutor argued that *unless Mr. Weatherton could show subjective effects on other jurors of Juror No. 1's prejudgment, there was no misconduct.* (56 RT 8455.) She sought to distinguish the present case from the *Nesler* case,[33] where reversal was based on extraneous evidence brought into deliberations. (56 RT 8456.)

The trial court responded, "This is your opportunity to rebut the jury misconduct by Juror No. 1, and maybe others, I don't know. What do you have? You didn't ask any questions. I don't know what we could do to rebut that." (56 RT 8457.)

The prosecutor did not explain or justify her failure to ask questions of the witnesses. Instead, she developed a scenario wherein, in response to any new trial motion, the prosecution would be entitled to get declarations from all the other jurors, and would then attack the credibility of Juror No. 3 and Alternate Juror No. 4 in particular, after the penalty phase had concluded. This would happen after her office would interview the jurors via investigators. A thorough hearing could then be conducted, but such a hearing could not take place until after all the jurors are discharged. (56 RT 8457-8458.)

---

[33] *People v. Nesler* (1997) 16 Cal.4th 561.

For one more moment, the trial court felt that the verdicts had to be overturned: "I don't think it matters. I think Juror No. 1's participation in jury misconduct affected the other people's ability to continue on in this trial." (56 RT 8459.)

The prosecutor then launched an intense attack on Juror No. 3 and Alternate Juror No. 4: "Judge, what if in the end it turns out that Juror No. 3 and Alternate Juror No. 4 have fabricated this whole thing? . . . Let's just do the penalty phase. Let's argue after everybody is discharged. Let's see what turns up. Let's interview everybody. Let's put them on the stand. Let's get affidavits, and then let's decide what to do with regard to misconduct, if there was any, and how that affected the guilt verdict and/or the penalty verdict."

THE COURT: *"I think the courts say otherwise. Once you have that one juror, then the whole deliberation process in that aspect is tainted."* (56 RT 8459-8460, emphasis added.)

The prosecutor then argued at length that even if one juror was indeed tainted, that did not matter unless the other jurors were also tainted. (56 RT 8460-8461.) She asserted that in *Nesler*, *Carpenter*,[34] and *Hitchings*, this Court "doesn't just discuss the misconduct of that juror, and

---

[34] *In re Carpenter* (1995) 9 Cal.4th 634.

does that make that juror right to sit, but discusses somehow tainting the other jurors." (56 RT 8461.)

The prosecutor continued attacking the credibility of the jurors who spoke of Juror No. 1 having prejudged the case, and insisted that the only course was to carry on with the penalty phase, and then, after all jurors were discharged, to hold a hearing. She told the court that "with all due respect, one of the allegations in this case is that Juror No. 1 prejudged. I — I think if the Court examines the things we have been talking about this morning, the court is prejudging. The court is judging whether or not Juror No. 1 prejudged." The prosecutor then argued that the witnesses who testified to Juror No. 1's behavior were themselves incredible.[35] (56 RT 8482-8483.)

The trial court turned to the prosecutor for direction on why it had done what it had done, and what its actions meant:

THE COURT:	Okay. By excusing Juror No. 1 haven't I already concluded factually that he committed misconduct?
MS. CARTER:	There — you may have concluded that he committed misconduct that rose to the level of it's safer to dismiss him than keep him on the jury, but the People's

[35] To end any suspense on this question, Juror No. 1, after being given immunity against criminal charges at the post-penalty-trial evidentiary hearing, admitted forming an opinion of Mr. Weatherton's guilt before deliberations began. (67 RT 9969.)

position is that's not the same burden that the defense is going to have to meet to show that he committed misconduct that rises to the level of dismissing a verdict and granting a motion for a new trial.

THE COURT: So I dismissed [Juror No. 1] because he was discussing the case, but you're saying that he wasn't necessarily dismissed because he prejudged?

(56 RT 8484.)

MS. CARTER: Well, I guess only you know that.

(56 RT 8484-8485.)

The prosecutor argued that there were "levels of misconduct," and said there was not enough misconduct here to require that the verdict be set aside. (56 RT 8488.) She told the trial court it was "completely safe" in its discharge of Juror No. 1 because Mr. Weatherton had agreed to his dismissal. She acknowledged that there might be issues that Mr. Weatherton could "explore on appellate review," but insisted that there not be any decision made on such a motion until she had a chance to further explore the credibility, or lack thereof, of the discharged jurors, by talking to the jurors who remained on the case, which could not be done until after the penalty phase was concluded. (56 RT 8490.)

When the prosecutor directly asked the court why it seemed to believe that Juror No. 1 had prejudged the case, the trial court began to backtrack, and indicated receptivity to an argument that credibility of witnesses who say that No. 1 prejudged the case might be questioned. (56 RT 8490.) The prosecutor then launched an attack on the credibility of Alternate Juror No. 4. The primary basis for this attack was the alternate's failure to have spoken up earlier. (56 RT 8491-8494.) She concluded by urging the court not to decide anything until there has been a full-blown motion for a new trial with thoroughly researched points and authorities and witnesses interviewed who are now seated jurors who can not be interviewed until after the penalty phase. (56 RT 8494-9495.)

Mr. Weatherton then quoted from his CEB book, section 55.33: "Motion for new trial, although the guilt and penalty phase may be viewed as segments of one continuous trial, the motion for a new trial between the guilt and penalty phases may forestall or render unnecessary the penalty phase. The court and prosecutor may prefer to litigate a motion for new trial before resources have been spent on a penalty phase. If reversible error has already been committed, a penalty phase would be futile." (56 RT 8495.)

The trial court then asked Mr. Weatherton if he wanted to hear the motion "prior to the start of the penalty phase." (56 RT 8495.) Mr. Weatherton answered that he did not believe he had received a fair trial because of previous jury misconduct, and certainly didn't think he would receive a fair trial from the same jury in the penalty phase. (56 8495-8496.)

The trial court then turned to the prosecutor:

> THE COURT: So, Miss Carter, do you want to put the jury on hold and have this motion in between? I think what he just read suggested that it would be concurrence of the parties to avoid wasted allocation of resources.
>
> MS. CARTER: Actually, no, Your Honor. And I'll tell you why. If we're ever going to establish or come to a conclusion about the credibility of Juror Number 1 versus Juror Number 3 and Alternate Number 4, we're going to have to talk to the other jurors, in detail, in depth, about what occurred in the hallway, what occurred in the deliberation room, et cetera. We can't do that before the penalty phase.

(56 RT 8696.)

The trial court ultimately overlooked the fact that all jurors had already appeared and were questioned about misconduct under oath, and accepted the prosecutor's argument that she could not rebut any presumption of misconduct without an opportunity to interview seated

jurors, who she could not talk to outside the courtroom, and that the court could not make any credibility determinations until all jurors were released from service and could be interviewed by both the defense and the prosecution. (56 RT 8500-8502.)

The court then turned to the prosecutor and asked, "Ms. Carter, if I take the mistrial [*sic*] under submission and do we have to set the motion for a new trial ten days out since he's filed it?" Ms. Carter replied, "Well, we can, judge, but unfortunately, if we're not done with the penalty phase ten days out, I think I'm going to have a right to ask for a continuance because my position is this court can't make a credibility call until the other jurors are released from service and they can be interviewed by both the defense at that point and the prosecution without worry of contaminating the jury." The motion for a new trial was set for Friday, March 15. (56 RT 8502-8503.)

Mr. Weatherton then objected to the jury, on grounds that only 12 jurors remained, and that without any alternates, everything was like a "pressure cooker" that would insure that no misconduct would be recognized. The court overruled his objection. The jury was brought in, and at that point on the afternoon of March 4, 2002, the penalty phase of Mr. Weatherton's trial began. (56 RT 8505.)

5. March 5, 2002 – Prosecutor Seeks and Is Granted Delay in Replying to Motion for New Trial Until After Verdict Is In and Her Office Has Opportunity to Interview All Jurors

On the afternoon of the following day, March 5, 2002, after having presented part of her case in aggravation, the prosecutor stated that she could not file a comprehensive set of points and authorities in response to the new trial motion until after the verdict was in and her office had an opportunity to interview all the jurors. (57 RT 8663.) The court said that it was required to set a hearing date according to when the motion for a new trial was filed, and indicated that the prosecutor would have to bring something to court; "maybe you can just bring a 1050 [motion for continuance] to court." The prosecutor agreed to do that the next morning. (57 RT 8664.)

Mr. Weatherton renewed his motion for a mistrial, and asked again to proceed with his motion for a new trial. He pointed out that the declarations included other allegations of misconduct beyond those concerning Juror No. 1, such as allegations that Juror No. 11, a corrections officer, had offered the jury her personal expertise concerning gunshot residue. The trial court indicated that it would not be doing further investigation into potential jury misconduct because it had already done so:

THE COURT:	I've already inquired of the jury, and that was included: "Tell me about any misconduct that they heard in the jury room." No one answered up. And *Cleveland*[36] also tells us how to conduct such investigations and inquiries by he Court very cautiously and very delicately, and I followed that procedure.
MR. WEATHERTON:	And it also says, "The need to protect the sanctity of jury deliberations, however, does not preclude reasonable inquiry by the Court into allegations of misconduct during deliberations."
THE COURT:	And you and I disagree, I guess, that I've done that.

(57 RT 8668-8669.)

The court then read aloud the first 15 of the 56 paragraphs in the declaration by former Juror No. 8 that Mr. Weatherton handed to the court that morning. "I mean, there's 50 points here but I just read the first 15, none of which have anything pertinent to offer. So I think I've conducted an investigation." (57 RT 8669-8670.) Mr. Weatherton disagreed, and indicated that the court had not asked specific questions of the jurors, nor had it allowed him to ask specific questions. (57 RT 8670-8671.) The

---

[36] *People v. Cleveland* (2001) 25 Cal.4th 461.

prosecutor again urged the court to put everything off until after the penalty phase had concluded, and "all parties" had had an opportunity to talk with the jurors. (57 RT 8671-8672.)

The court returned to the new declaration, and read the remaining paragraphs. The declaration was submitted by former Juror No. 8, who had been discharged from the jury over defense objection after the first day of guilt phase deliberations. The court then indicated that it found "only one thing" of potential importance in the new declaration, the declarant's statement that "Juror No. 1 clearly stated his belief that Mr. Weatherton was guilty before deliberations." (57 RT 8676.) The court dismissed her paragraphs about how she was dismissed from the jury without good cause, and said that the motion for a mistrial was still under submission, and the prosecutor continued to present penalty phase witnesses.

6. March 6, 2002 – Motion to Disqualify Trial Judge Filed; Appearance of Mr. Vinegrad, a Third Prosecutor

On the following afternoon, Mr. Weatherton filed a statement of disqualification of Judge Hawkins. He asserted that the judge had been biased against him during the trial, had failed to allow him access to legal materials after granting him the right to self-representation, and was

abdicating his duties by refusing to rule on his motions for a mistrial and/or a motion for a new trial.

> [I]n the face of prima facie jury misconduct, the judge has not only ruled against any request that I have made, but in fact has refused to rule on my motion for a mistrial based on jury misconduct. However, the judge has continued to move forward on my case. Judge Hawkins has abdicated his duties as judge by refusing to rule on my motion for mistrial, and is clearly showing his bias and interest in the case by continuing to go forward, without ruling.

(41 CT 11,681-11,682.)

In open court, Mr. Weatherton again asked the court to rule on his motion for a mistrial. (58 RT 8830.) The court indicated it would think about it while discussing penalty phase instructions. After discussion of penalty phase scheduling, the trial court brought up the prosecution's motion for continuance of the new trial motion. (58 RT 8866.) The trial court expressed uncertainty about resolving the motion for mistrial and the motion for a new trial, and discussed several possibilities with the prosecution, who continued to argue that nothing could be decided until it had the opportunity to interview the jurors in depth; after doing so, it expected to be able to show that Alternate Juror No. 4 and Juror No. 3 were incredible witnesses. (58 RT 8869-8873.)

At the end of the afternoon, after the closing penalty phase instructions were read to the jury, the prosecution renewed its motion for a

continuance, and indicated that Mr. Vinegrad would be handling all aspects of the jury misconduct issue. (58 RT 8885.)

Mr. Vinegrad then appeared for the prosecution, and addressed the court at length. He told the court the steps he believed would be necessary in order to resolved the motions based on jury misconduct. He mentioned the need to authenticate each of the declarations, and then described the need to go through each of them line by line to see whether any of the statements would survive a gauntlet of procedural and evidentiary objections. (58 RT 8886-8893.)

At the end of this presentation, Mr. Weatherton objected to the prosecutor's office bringing in a third attorney against him. After argument, the trial court overruled the objection, without prejudice to Mr. Weatherton's renewing the objection with supporting authorities at some later date. (58 RT 8994.)

Mr. Vinegrad then laid out the case law that he believed should govern the hearing. At the end of his discourse, Mr. Weatherton asked the court to prohibit the prosecution from talking to the jurors before their testimony. (59 RT 9003.) The court ruled that it would give jurors the standard post-verdict jury admonition which says they are free to discuss

any aspect of the case with anyone they want, and denied his request. (59 RT 9004.)

7. March 15 – Hearing on Motion for New Trial

The hearing on the motion for new trial began on March 15, 2002, eight days after the jury had returned a death verdict. The trial court and Mr. Weatherton summarized the grounds upon which Mr. Weatherton was alleging jury misconduct, including the following:

(1) use of a dream by juror to falsely "confirm" that Fred's bloody footprint was by the crime scene;

(2) juror prejudging the case, talking to other jurors before deliberations, telling them defendant was guilty; and

(3) juror relating evidence via her "expertise" to persuade jurors to vote for guilt. (60 RT 9020-9023.)

Mr. Vinegrad, who conducted the bulk of the hearing, first charged that the declarations were not authentic. (60 RT 9024.) He threatened to prosecute Mr. Weatherton's investigator David Sandberg for practicing law without a license (60 RT 9031) and asked the court to admonish standby counsel Clark Head and the witness not to "collude." The court duly made the order, even though he said that he did not suspect collusion. (60 RT 9036.) The court at no point directed any similar "don't collude" order to

Mr. Vinegrad (or his investigator) and any witness Mr. Vinegrad called. Eventually, after testimony from Sandberg, Clark Head, and Mickie Reed, the trial court ruled that there was sufficient evidence to authenticate the declarations. (61 RT 9119.) The parties then turned to the declarations, and reviewed them line by line.[37] (61 RT 9125 et seq.)

On March 20, 2002, the court began hearing testimony from each of the declarants: Alternate Juror No. 1 (63 RT 9336 et seq.); former Juror No. 8 (64 RT 9499 et seq.); Juror No. 3 (64 RT 9519 et seq.); and Alternate Juror No. 4 (65 RT 9636 et seq.) The process was very different from the court's previous inquiries into potential jury misconduct.

---

[37] Attached to Mr. Weatherton's motion for a new trial were declarations gathered over the weekend of March 1-3, 2002, by his investigator, from Alternate Jurors 1 and 3, former Juror No. 8, and Juror No. 3. (43 CT 12,522 et seq.) The style of drafting declarations adopted by Mr. Sandberg and Mr. Head meant that there are hundreds of paragraphs on which separate rulings were made, most consisting of one sentence. After the declarations were authenticated, the trial court ruled on the admissibility of each of the separate paragraph. (See 61 RT 9159–62 RT 9272 [131 paragraphs in Juror No. 3's declaration]; 62 RT 9276-9286 [43 paragraphs in Alt. Juror No. 4's declaration]; 62 RT 9286-9291 [30 paragraphs in Alt. Juror No. 1's declaration]; and 62 RT 9291-9301 [54 paragraphs in former Juror No. 8's declaration]. The rulings which Mr. Weatherton believes were erroneous will be discussed, as relevant, in each argument section below; the declarations were largely supplanted by the live testimony from and cross-examination of each of the declarants.

Mr. Vinegrad repeatedly referred to the possibility of prosecuting jurors for contempt, or violating their oaths, or for perjury. (See 63 RT 9305, 9320, 9329.)

> The People will not grant transactional immunity, and obviously use immunity would just cover and preclude the prosecution from ever using what they are about to say on the witness stand in a further — it would not preclude the People on a transactional immunity from actually prosecuting them based on the admissions to juror misconduct set forth in their declarations made under penalty of perjury. There is that distinction there.

(63 RT 9333.)

Alternate Juror No. 1 was sworn in first. (63 RT 9333.) The trial court opened with a lengthy warning to the witness that she may be incriminating herself: "Based on your declaration that I have, that you could potentially be testifying about violations of your oath as a juror or violations of a court order, which could subject you to prosecution by the D.A.'s office or contempt of court by this Court." The court did not indicate what violation or violations it had in mind. The court had asked three private attorneys to be here in case a juror wanted to speak with counsel. (63 RT 9334-9335.)

When Mr. Weatherton was invited to question the witness, the prosecutor interrupted, and said that the witness may not understand what questions might incriminate her. (63 RT 9335.) When Mr. Weatherton

asked the witness if she "had occasion to discuss this case with anybody," the trial court interrupted:

> THE COURT: Ma'am, that's one of the questions that the prosecutor was talking about that may incriminate you if your answer would show that you violated your oath as a juror when you could be potentially prosecuted for contempt of court for violating a court order. Do you want to speak with an attorney about what your rights are?
>
> WITNESS: I have a question.
>
> THE COURT: Yes.
>
> WITNESS: Was I obligated as an alternate juror to report any misconduct?
>
> THE COURT: You — I don't think you — yes, you were. I don't know what your obligation was, but your were instructed to report any, if I recall.

(63 RT 9336-9337.)

The court added that an attorney would be appointed at no cost to the witness. When the witness had no response, the court suggested that the parties take a break. The witness was excused from the courtroom. Mr. Koosed volunteered as conflict attorney to talk with the witness. Before doing so, however, he suggested that grants of immunity from the

prosecution or the court would be the appropriate measure to take for each juror, and quoted from the *Von Villas*[38] case:

> MR. KOOSED: "The prosecutor's efforts to in some way preclude examination of the jurors by suggesting that his office might file perjury charges against them if they testified in accordance with their earlier statements to the defendant's investigator were ill advised at best." [quoting *Von Villas*] I'm not saying that that's happening here because I don't know. I'm just coming in.
>
> THE COURT: The DA's already announced that that's a possibility. They're not going to give them immunity.

(63 RT 9339.)

> MR. KOOSED: I don't know why they're playing hide-the-ball. You would think that we'd want to find out if justice occurred here or not. . . . We should not all sit around and hide behind threats of prosecution and contempt of court. And I'll instruct her what I think she should do, but as the Court has seen, the simple question by Mr. Weatherton, and then the follow-up question by the Court, has caused her to break down in tears over her, what I can only guess, is struggle as to whether or not she should hide behind the Fifth Amendment right not to be prosecuted or

[38] *People v. Von Villas* (1992) 11 Cal.App.4th 175, 257.

> come forward and show what occurred during this trial.

(63 RT 9340.)

The trial court rejected that idea, and pointed out that the prosecutor was not going to give her immunity. The court had no sympathy at all with the witness, who had violated its directive by talking with her husband about the case, and indicating that it believed that she would continue to do so: "It's a juror like that that caused us a lot of problems and taxpayers a lot of money."[39] (63 RT 9341.)

The prosecutor vehemently objected to counsel's comments about efforts to "hide the ball," and asked that they be stricken. He acknowledged the court could grant the witness use immunity as to a particular question, but affirmed that prosecution would not grant her transactional immunity. In a lengthy discourse, he urged that every single question should be

---

[39] The judge's wrath towards Alternate Juror No. 1 was misplaced. As an alternate, her excusal for having discussed the case in private with her husband cost the taxpayers very little. The conduct on her part which may ultimately prove costly is her testifying (and providing a declaration) as to her observations of Juror No.1's misconduct. For that, she should have been applauded instead of being treated like a criminal. She would never have spoken up had she not been summoned by the court to testify on February 27, 2002, when she was obliged under oath to tell the truth. There was no evidence that she did otherwise.

subjected to possible Fifth Amendment discussions between the witness and her counsel. (63 RT 9342-9345.)

The trial court then read from the CEB book on when it was appropriate for the court to confer immunity on a potential witness absent consent of prosecutor. (63 RT 9345-9347.) After discussion of *Von Villas,* the prosecutor concluded by saying that it was not asking for use immunity, but if the trial court wanted to make such an offer, it would not be opposed. (63 RT 9348-9351.)

Meanwhile, the court searched through the transcript looking for the place where Alt. Juror No. 1 had said that she would keep on violating the court's injunctions not to talk about the case, to no avail: "I can't find it right now, but that's where the bear is sleeping in the cave, so to speak." (63 RT 9352-9353.)

The prosecutor then asked the court where in the transcript he might find the specific admonition given to the jurors. No one knew what the admonition was, nor where it could be found. The parties spent some time looking through the case record, to no avail. Mr. Weatherton eventually directed everyone to 24 RT 3807, where the jurors were given the standard

pre-trial instruction, CALJIC No. 0.50.[40] Ms. Carter then suggested that the parties break to see if they could find any additional language admonishing the jurors. None was ever found. (63 RT 9353-9355.)

After the break, Mr. Koosed told the court that he had spoken with the witness, who had broken down on the stand. She was torn between her desire to testify as to what had happened, and her fears for herself and her family of being prosecuted and the potential loss of her livelihood. (63 RT 9356.)

The court: "Well, I think I already told you how I felt about what these jurors have done and the problems that they've created and the costs, great cost they've caused the Court to incur." (63 RT 9357.)

After further discussion, the witness was asked the same question about discussing the case with others, and she asserted her Fifth Amendment privilege, on advice of counsel. Then, she was given transactional immunity by the trial court. (83 RT 9358-9360.)

---

[40] In relevant part, that instruction admonished the jurors to not form or express any opinions or converse with anyone about the case until it was submitted for deliberations, to keep an open mind about the case until that point, to not read or listen to any media accounts of the case, and to promptly report to the court any attempt by any person to influence or discuss the case with any member of the jury. (24 RT 3810-3813.)

The witness testified that she heard discussions about the case outside the courtroom throughout the entire proceeding. (63 RT 9361, 9366.) She testified that there was a group of smokers who met on the balcony to smoke; she heard discussions among that group regarding the case, but not exclusively the smokers. (63 RT 9362-9363.)

She heard discussions about the case on several occasions outside the courtroom among the jurors. On the first day of Nelva Bell's testimony, Juror No. 1 stated that he would vote for guilt because he believed there was no denying Nelva Bell's testimony. Others present included Juror No. 3, Alternate Juror No. 6, and possibly others. He made similar statements on many other occasions outside the courtroom, and perhaps in the elevator. (63 RT 9361, 9363.) She never heard Juror No. 1 say anything about weighing the evidence one way or the other; he just said that the defendant was guilty. (63 RT 9371.)

Alternate Juror No. 1 did hear other jurors state defendant was guilty before deliberations in the guilt phase, but could not remember names. The people or person she overheard making statements that the defendant was guilty before deliberations was female. (63 RT 9372.)

On the day she was dismissed as a juror, the four people who were dismissed stood outside the courthouse talking about what had gone on,

including Juror No. 1. He said that when questioned by the court as to what had occurred throughout the trial, any discussions outside in the halls, etc., that he had said that he did not discuss the case with anybody and did not hear anybody discuss the case, because he was covering for everyone else, as he assumed that everyone else was covering for him. (63 RT 9373-9375.)

On cross-examination, she was asked why she did not write down what Juror No. 1 had said about Mr. Weatherton being guilty immediately after the testimony of Nelva Bell:

> Q: When you heard Juror No. 1 purportedly make this statement that he would vote guilty because Nelva Bell was believable, you didn't write it down, correct?
>
> A: No, but it impressed me.
>
> Q: It impressed you, so you thought it was pretty important; correct?
>
> A: It impressed me because it was the very beginning of the trial.
>
> Q: You immediately thought hey, he shouldn't be saying something like that; correct?
>
> A: I would think more — I was thinking that he shouldn't be thinking like that."

(63 RT 9417.)

The witness described how she, Alternate Juror No. 4, and Juror No. 3 met outside the courthouse after they had been dismissed, how they approached the prosecutors and were rebuffed, and how she eventually made a recorded statement that evening to Mr. Sandberg. (63 RT 9424-9442.) Each of them wondered why they had been dismissed when there were other jurors who had also talked about the case prior to deliberations, and done the same thing they were told was the basis of their dismissal. (63 RT 9435.)

When was asked why she talked to her husband, a former crack user, about the influence of drugs on memory during the trial, she said that she knew it was wrong, but "I wanted to know the answer. My curiosity overrode my judgment." (63 RT 9449.) She violated the oath she had signed the previous October when she filled out the jury questionnaire. "How important is it? I could say that it was very important; that I had a lapse in judgment. I asked my husband, and I did wrong." (63 RT 9421.)

8. March 21, 2002

Former Juror No. 8 was called as a witness. After the court gave her an extended warning of possible criminal violations, it acknowledged not seeing anything in her declaration that could possibly be given any criminal spin. Nonetheless, the court advised her of her Fifth Amendment rights not

to incriminate herself, and indicated that it had appointed a lawyer to assist her. (64 RT 9498-9499.)

She testified that after the first day of deliberations, she called the clerk.

> I explained to her that my grandfather had passed away and that I might need some time because he'd had came to visit us from Guadalajara, so we weren't sure if we were going to transport the body to Guadalajara or do the funeral here. So I didn't know how long that I was going to be needing to come back.

(64 RT 9504-9505.)

Shortly thereafter, she found a message on her phone from the clerk saying that she had been dismissed from the jury. She had not asked to be excused, and had not given the clerk any guess as to how long a time she would need to be off, and had not talked to the judge. (64 RT 9504-9505.)

Former Juror No. 3 then was called as a witness. She, too, was given a threatening preliminary warning by the trial court.[41] She testified that

---

[41] "The declaration that you prepared and was filed with the court contains statements by you under penalty of perjury that could potentially be subject to contempt of court or prosecution for violation of your oath as a juror. And you have a right not to incriminate yourself. You have a right not to be called to testify against yourself. In other words, you can't be compelled to give evidence that's going to be used against you to prosecute you. This testimony is a little different than your — the declaration that you voluntarily gave. This is compulsory testimony. So that's why I'm telling you you have a right to remain silent, you have a right to, as they say on TV, take the 5th and not answer the questions, and that's why I've asked you to

before the jury retired to deliberate, she was present with Juror No. 1, Alternate Juror No. 1 and Alternate Juror No. 6, but not Alternate Juror No. 4, when the case was discussed. She recalled No. 1 discussing with Alternate Juror No. 6 why he thought Mr. Weatherton was guilty early in the trial, after the third or fourth day of evidence. (64 RT 9520.)

Later in the trial, during the testimony of Curtis Neal, she was having lunch at a nearby restaurant with Juror No. 1, Alternate Juror No. 4, Alternate Juror No. 6 and perhaps others. She became upset when Juror No. 1 said that "he was going to vote guilty no matter what." (64 RT 9523.)

Q. Did he — did he — did he state why he was going to vote guilty?

A. If he did, I wasn't really paying attention but I don't believe so, no.

Q. Did any of the other jurors comment?

A. No.

Q. Did any of the other jurors participate in the discussion?

A. All of us did to begin with, and then one of the — I think it was number — Alternate 4, I believe, she's the one that said, you know what, guys, we're not even

---

come here with an attorney so they can advise you, as to each individual question, whether or not you will be tending to incriminate yourself." (64 RT 9518-9520.)

discussing this, you know, why are we discussing it? And then we started talking about other items.

(64 RT 9523.)

Juror No. 3 testified that one of the jurors informed them all that she was a correctional officer, and had knowledge about guns because they frequently sent her to training courses. "She explained to us how the blood would splatter or not splatter during the shooting of a gun." (64 RT 9526.) The same juror also told the jury that she was also trained in gunshot residue, issues, and that sometimes gunshot residue is not detected at all, and that some guns don't leave it. The juror in question was identified as No. 11. (64 RT 9527.)

Juror No. 3 also testified that during deliberations, the jury discussed a bloody footprint that had supposedly been found. (64 RT 9529.)

On cross-examination, the prosecution repeatedly examined her about small variations in her testimony about Juror No. 1, i.e., why the language in her declaration did not precisely match her testimony in court, repeatedly drew forth admissions from Juror No. 3 that she had not spoken about misconduct prior to deliberations despite having taken an oath to do so,[42] and highlighted the fact that she had approached Alternate Juror No. 4

---

[42] There was no oath taken by the jurors other than the general oath to try the case and render a true verdict according to the law, evidence and

about representing her in a future real estate transaction. (65 RT 9538 et seq.)

On the following day, prior to the testimony of Alternate Juror No. 4, the prosecution placed in the record, with Mr. Weatherton's agreement, an excerpt of the tape-recording made of an interview of Juror No. 3 by David Sandberg, which it believed impeached Juror No. 3. The portion was transcribed in the record as follows:

> [Former Juror 3:] "Well, he has made statements to us beforehand, not just to me, but to a group of us. We were all at lunch. And, huh, how it came about, I don't know. But he, you know, he made a statement that um, well, no matter what happens I am going in there and vote guilty the first, the first time I vote because just in case."
>
> Mr. Sandberg then says: "Just in case what are you —"
>
> Former Juror 3. "We didn't discuss it no more after that so I, I am assuming just in case we all said not."
>
> Mr. Sandberg: "Okay."
>
> Former Juror 3. "You know because he wanted to discuss it, you know, so that's why — so for sure with him, I don't know if he was dead set on guilty, because I think he was a little immature."

(64 RT 9633-9634.)

---

instructions of the court. (24 RT 3784.)

After asserting her privilege against self-incrimination, former Alternate Juror No. 4 was provided immunity. She testified that during the testimony of Nelva Bell, while the jurors were walking in the corridor, Juror No. 6 said, "that poor woman, look what he did to her." Others agreed. (64 RT 9638.)

She gave Juror No. 1 rides home, beginning in the second or third week of trial. He consistently said that Mr. Weatherton was guilty. She countered that he was still innocent; the judge had told them he was innocent until they deliberated, and she wasn't trying to form an opinion. (64 RT 9639.)

She described going to lunch during the trial at Pizza Hut when Juror No. 1 said that once they got into deliberations, he and Juror No. 3 were going to be on opposite sides.

Q. Did he say he was going to vote guilty?

A. He did that all the time. He said that all the time.

Q. Did he say it that day?

A. Yes.

(65 RT 9640-9641.)

On another occasion during the trial, several jurors had lunch at Cactus Jack's. When Juror No. 1 said he felt the defendant was guilty, the

witness said, "let's not talk about it," and they moved on to other topics. (65 RT 9641-9642.)

She did not come to deliberations. However, Juror No. 1 called her. He said things were not going well; Juror No. 3 was upset; eight jurors voted for guilt, three voted not guilty, and one was undecided. He complained about the foreman, and said that things were "chaotic." (65 RT 9642.)

During their rides, the case came up for discussion every day, and every day Juror No. 1 said that Mr. Weatherton was guilty. (65 RT 9648.) When asked if Juror No. 1 ever indicated in any way that he would be impartial, she answered, "he said he would listen to others and what they had to say, but he still was going to hold guilty initially.

> Q. So he was set, he was going to vote guilty no matter what?
>
> A. Yes.

(65 RT 9649.)[43]

On cross-examination, the prosecutor pointed out to her that she had violated her oath not to talk about the case. She explained, "Well, I tried

---

[43] The prosecutor objected to this answer, on grounds that Mr. Weatherton was "misquoting the witness." The objection was sustained. (65 RT 9649.)

not to violate it in this case. But riding home with Juror No. 1, when things were being discussed, I would always say the judge told us not to discuss the case. But he also told us not to form an opinion, and I was trying not to form an opinion. So I would tell him that he's innocent until proven guilty." (65 RT 9651-9652.)

When Mr. Weatherton objected to the prosecutor's asking Alternate Juror No. 4 over and over and over in an argumentative manner why she had not reported this violation of her duty, the objection was overruled. (65 RT 9655.)

The prosecutor then questioned Alternate Juror No. 4 about the antidepressants she acknowledged taking after the death of her husband in her questionnaire. She stated she was taking Zoloft, and it had help lift her from her depressed mood. (65 RT 9664-9665.) He explored the witness's discussions with Juror No. 3 about possibly handling the sale of some property, and each contact the two women had with each other, including how many minutes they were seated together in a taco shop after the declarations were signed, how much time they spent together with the prosecution in the courthouse hallway, and their communications on the telephone. (65 RT 9667-9686.)

The prosecutor then questioned her about her statement that she heard one juror say, "look what he did to that poor woman," after the testimony of Nelva Bell. (65 RT 9686-9688.) She was one of only two jurors who acknowledged hearing it. When she was asked why no other juror reported hearing it, she answered, "Maybe we were the only two who were brave enough to come forward." (65 RT 9690-9691.)

Q. In your mind, ma'am, is there a difference between being brave and being honest?

A. No.

Q. They are the same thing?

A. You have to be brave to be honest.

(65 RT 9691.)

When the prosecutor asked the witness how she felt when Juror No. 1 called her to tell her about the verdict, she indicated that she was not enthused by it. The prosecutor asked her what she meant by saying that she wasn't enthused.

A. Well, when I made my declaration, I did not talk in full detail. I just wasn't enthused with the things that he was telling me that went on in the deliberations.

Q. What did he tell you went on?

A. He told me that —

MR. VINEGRAD: Objection. 1150.

THE COURT: Overruled.

THE WITNESS: He told me that Juror Number 8 [former Alt. No. 6] had had a dream and saw some pictures, and that she saw a footprint in the picture. And he says that was the deciding point to turn the other people to guilty. And I says to him that I wasn't enthused, because I told him, I says well, I says the prosecutor's had that picture for three years, and if that was there, they should have been able to have found it. And he says well, it was there. So that's what they did. So that's why I wasn't enthused.

(65 RT 9699.)

9. March 26, 2002

Four more jurors appeared in court to testify. The trial court initially thanked them for appearing, and apologized to them for asking them to return. He explained that "we have had some jurors, former jurors, excused jurors who disagreed with the verdict and a couple of alternates making claims that the jury in this case engaged in misconduct, and as a result, Mr. Weatherton was denied a fair trial." (66 RT 9738.) The court then pointed out that the previous witnesses had all sworn that they had violated their oaths, and he had indicated to them that their testimony might lead to criminal charges, so he had appointed independent lawyers for them. He

told the jurors that he did not want to frighten or scare them, and he thought they were not involved with potential criminal conduct, but that he was also willing to appoint them independent lawyers if they wanted to consult with them, at no cost.[44] (66 RT 9739-9740.)

The court then described the areas of inquiry he would follow, and indicated that counsel might want to ask follow-up questions. (66 RT 9741.) When Alternate Juror No. 2 was called to the stand, Mr. Weatherton asked that the other witnesses be excluded from the courtroom. The prosecutor joined this motion — but the trial court overruled it, and allowed the other three jurors then present to remain in the courtroom while the witness testified. (66 RT 9742-9743.)

---

[44] The trial court's introductory remarks were reflective of the court's bias, improperly communicated to the witnesses the testimony the court expected to hear, and put improper pressure on them to testify accordingly. The court erred in suggesting to the witnesses that the prior witnesses had been motived by disagreement with the verdict. They did not say anything in regard to jury misconduct until called to the witness stand by the trial court on February 27, 2002 — and as the prosecutor and trial court frequently pointed out, they had a duty to report misconduct. The violation of duty to which they had testified was a failure to come forth more quickly to report misconduct. The court had no basis for assuming that the witnesses yet to testify would report no improprieties. Were they to do so, the court presumably would be deeming them to have violated their oaths, as well, by not having reported the improprieties at an earlier point — and hence, subject to "criminal charges." In fact, they did report improprieties, but there was no threat to them of made of criminal charges, even when Juror No. 1 admitted under oath having perjured himself. (See Claim VII, *post.*)

Alternate Juror No. 2 said she saw no improprieties of any kind. (66 RT 9743-9744.) When she described a discussion among the jurors, Mr. Weatherton objected again to the court's allowing the other jurors to remain in the courtroom during the witness's testimony; his objection was denied. (66 RT 9745.) The witness then described her contact with Detective Cervello, and discussions with members of the prosecution staff. (66 RT 9751 et seq.)

Juror No. 5, the foreman, also told the court that he was not aware of any improprieties. He saw groups of jurors talking with each other the whole time, but never in his presence. (66 RT 9762.) When he was asked if the jurors exchanged information about their profession, he answered:

> A. Yes. I believe that that did come up.
>
> Q. And do you recall what it was?
>
> A. It was — we were talking about the fact that there was — the crime scene, the blood, the lack of blood on yourself at the time, and I believe one juror mentioned well, in the shooting you are blowing away rather than back. But I think we just took that on — you know, based on her opinion, because there were still folks in the room that weren't buying into that.

(66 RT 9768-9769.)

> Q. Did any juror mention their profession while deliberating in the jury room?
>
> A. Yes, sir, they did.

Q. What juror was that?

A. It was the juror who was the corrections officer.

Q. Do you know the number of that juror?

A. 11. That's a guess.

Q. Is that juror one of the jurors that was setting out in the hallway this morning with you?

A. Yes, sir.

Q. What exactly did that juror say about her profession?

A. She said that she was a corrections officer. She had knowledge of weapons. She had knowledge of, you know —

Q. What did you take that to mean?

A. I took that to mean that that was her opinion, and that's why that was her justification in reading the evidence as to why there was or was not blood in certain places.

. . . . . .

Q. So she never mentioned that she had a lot of — well, had training in guns, with guns?

A. Yes, she did. She said that she was a corrections officer, and she had knowledge through her work. She didn't talk about specific training. She talked about knowledge.

Q. Okay. What was the extent of that knowledge?

A. That she had a weapon; she knew how to fire the weapon, and she had an opinion as to what happened when that weapon was fired.

Q. Did she talk about how blood might splatter?

A. Yes, sir, she did.

Q. What exactly did she say?

A. She said that when — when the — when the bullet hit, it blew, you know, if it hit a person, it would blow a person back, not forward, which seemed to make sense.

(66 RT 9770-9771.)

Juror No. 11 was then called to the stand.

Q. During the course of deliberations, did you mention that you had received training with guns?

A. When?

Q. During the course of deliberations?

A. Yes.

Q. Do you recall what the circumstances were?

A. Yes.

Q. What were they?

A. Was a juror that brought up the amount of blood and the blood on the clothes that the person wore during the shooting and brought up the question as to the amount of blood and brought up, you know, the question as to when a weapon is shot, you know, is it blood splatter, you know, is it — it was more around the amount of blood that was found on the clothing.

Q. Did you at any time mention your training with guns?

A. Somebody made a comment regarding — somebody was assuming, I should say. They were trying to assume that there was no way that there couldn't have been any blood on the clothes of the person that shot all these people, and I came back with the comment that, you know, it is not like we see on the movies where there is a huge amount of blood when somebody's shot, you know. . . . I referred to my training when the juror brought up the issue in regards to the amount of blood.

(66 RT 9798-9799.)

A. I told her that what I have seen is not what we see in the every day world as far as the amount of blood.

Q. Okay. What have you seen?

A. When?

Q. Well, what was you referring to?

A. During training, or what? I was referring to my training.

(66 RT 9799.)

Jurors No. 9 and 6 followed; each testified that they were not aware of any improprieties. (66 RT 9823-9834.) Juror No. 12 said the same. When asked if she heard anyone speak about their training in the course of deliberations, she remembered hearing Juror No. 11 say something about blood spatter and her experience, and added, "Most of us, I've never handled a gun, so there might have been a question that came up about it, I don't know." (66 RT 9843.)

10. March 27, 2002

Juror No. 10 was called as a witness. After denying she had seen anything inappropriate when asked by the court, Mr. Weatherton asked her if during deliberations, she recalled any juror talking about their training with guns. She testified that Juror No. 11 had done so, in the context of explaining or commenting on the evidence regarding bullet trajectory. (67 RT 9885-9886.)

Before testifying, Juror No. 4 consulted an attorney. She testified that at some point, probably after the guilt phase verdict but before the penalty phase started, she witnessed jurors reading the newspaper, an article about Mr. Weatherton. (67 RT 9892-9893.) She only knew about the article's content because of what the jurors said about the article. (67 RT 9893.) The first time she ever mentioned this to anyone was shortly before her appearance that day on the witness stand.[45] (67 RT 9898.) She was reminded by the previous witness's testimony that there was discussion about how gunshots would not splatter much, whereas a knife would cause splattering. (67 RT 9900.)

---

[45] This juror was not menaced by the court or prosecutor in any way for failing to promptly report this direct violation of the court's directions to the jury.

Juror No. 1 was called to the stand. The trial court initially gave him detailed map of how he hoped the witness would testify.

> THE COURT: I should tell you, [JUROR NO. 1], that part of the allegations that were made were made against you just like I told you when you were in the jury box. So you could keep those in mind when you are discussing it with your attorney. A couple of jurors said that they discussed the case with you and a couple — one juror said that you said you were going to vote guilty right away just in case because you wanted to discuss it and hear what the other jurors had to say. They said I don't think he was dead set on guilty, I think he just wanted to open it for discussion;[46] he was immature and confused. So those are things that you should keep in mind when you are talking with your attorney and before you testify.

(67 RT 9911.)

After recess, the witness invoked his Fifth Amendment privilege not to answer the first few questions. When the prosecutor indicated that he would not be granting the witness immunity, Mr. Weatherton asked the court to do so. The trial court mistakenly thought that Juror No. 1 was in a different category from the previous witnesses because he had not made statements under oath that would make him vulnerable to criminal

---

[46] The trial court was in error. It supplied motives for Juror No. 1's statement to other jurors that he was going to vote guilty on the first ballot "just in case" that were not part of the excerpt of Juror No. 3's taped interview, and were refuted by Juror No. 3's sworn testimony. But Juror No. 1 was certainly more likely to embrace this story if told that other jurors had already testified to it.

prosecution. However, the prosecutor referred the court to a transcript page (RT 8314) where Juror No. 1 flatly denied ever discussing the case outside the courtroom with anyone prior to deliberations. The court then proceeded to grant him immunity. (67 RT 9915.)

On direct examination by Mr. Weatherton, the witness first described his contacts with Detective Cervello and the prosecution after the guilty verdict. On February 28, 2002, the day he and the others were excused after testifying, he could not remember anything that he might have said, other than going up to Ms. Carter and telling her that he admired her. (67 RT 9919-9920.)

He acknowledged talking about the case with Alternate Juror No. 4 in the car when she gave him rides, but could not remember anything at all that was said.

> Q. Did you ever make any comments to her regarding Ms. Bell's testimony?
>
> A. I don't remember anything specific. I mean that — maybe it may be something we talked about, but I don't remember anything specific. We — you know, she made a lot of comments about witnesses.
>
> Q. What about you?
>
> A. I may have made this — you know, a statement, agreed or whatever, I don't know. But like I said, I don't remember anything specifically that was said.

Q. How would you classify your memory? Would you classify your memory as poor? As good? Very good?

A. Well, actually depends on what I am trying to remember. As far as this case, I was pretty much trying to forget it all.

(67 RT 9924.)

He did remember going to Cactus Jack's with other jurors one time for lunch:

Q. Did you ever make — during that lunch at Cactus Jack's, did you ever make a statement that you were going to vote guilty irregardless of the evidence?

A. No. If I — I really wasn't in the discussion much. To be frank, I was working on my puzzle book that I was really into that, and I was working on that most of the lunch. I don't remember any discussion about the case during that lunch.

Q. You never made — did you ever hear anyone discussing the case?

A. Aside from when it was discussed with me, no. But between any other, no.

(67 RT 9926-9927.)

Q. You never told a juror or alternate juror in this case that you felt the defendant was guilty?

A. You know, I don't remember saying that. I may have, but I don't remember saying that.

(67 RT 9929.)

Mr. Weatherton then quoted Alternate Juror No. 4's testimony about the witness's calling her during deliberations, and asked him if it was true. He acknowledged giving her a call, and said the reason for the call was that he was calling to see if she was okay, because she had been sick:

> A. Like I said, I called to see if she was okay. She did ask me questions. I don't remember what I told her or if anything, you know, but that's not why I called her.

(67 RT 9929-9930.)

The witness recalled going to lunch at the Pizza Hut with Juror No. 3 and Alternate Juror No. 4:

> Q. Did you discuss the case with those present at the Pizza Hut that day?
>
> A. We may have. We may have. I don't remember. I don't remember any specific conversation. It is possible.

(67 RT 9931.)

Somewhere around the second week of trial, Alternate Juror No. 4 starting picking him up in the mornings and dropping him off in the afternoons. When asked if they talked about the case every day, he said, "I wouldn't say every day. I mean — but I don't remember discussing it every day." (67 RT 9932.)

He didn't remember making the exact statement that once he got into deliberations, he was going to vote guilty, and he and Juror No. 3 were

going to be on opposite sides, but, "I mean — I mean it's possible that I said something, you know, but I don't remember saying just exactly like that or anything like that." (67 RT 9932.) He denied saying that he was going to vote guilty to Alternate Juror No. 4 "all the time." (67 RT 9933.) He remembered saying that he was unsure and unconvinced, and saying that he couldn't wait to start talking about it. (67 RT 9933.)

He explained testifying falsely on February 27 and February 28, 2002: "I didn't believe that the things that were said were important, and I didn't want to get the girls and myself into unnecessary trouble." (67 RT 9934.) When asked if he violated his oath as a juror, he said, "Technically, I guess I did, yes." (67 RT 9935.)

When asked if he ever told Juror No. 3 that Mr. Weatherton was guilty before deliberations began, he answered,

> A. I may have. I don't remember saying, but I may have. I never said I was sure of anything, though.
>
> Q. But you may have told Juror No. 3 that you felt the defendant was guilty before deliberations?
>
> A. May have said that. I was leaning that way so far. I don't know.
>
> Q. Did you ever tell Alternate Juror No. 4 that you felt the defendant was guilty before deliberations?

A. I don't remember.

(67 RT 9938.)

He believed Juror No. 3 would lie, and that she did lie: "I'm aware of some of the things that she said that happened in deliberation, stuff that's not true and stuff like that."

Q: For example?

A: I wasn't given *specifics*, but the things that she had just mentioned outside.[47]

(67 RT 9939, emphasis added.)

He acknowledged calling Alternate Juror No. 1 one time, but it was solely because of a component he had for a PlayStation that she had wanted for her son. (67 RT 9940.)

When asked if he ever told Alternate Juror No. 4 that he felt the defendant was guilty because he had to believe what Nelva Bell said, he answered, "I believe I said believed Nelva Bell, but I never said I would

---

[47] This indicates that he had no personal knowledge of what untruths Juror No. 3 may have told, but was presented with information about her testimony by others.

vote you guilty because of it. I do believe I said I believed Nelva Bell."[48] (67 RT 9942.)

The witness described being called by Detective Cervello, who told him what other jurors were saying about him. He saw two jurors with newspapers in the jury box, one a female who liked to do crossword puzzles, and the other, the foreman, Juror No. 5.[49] (67 RT 9948-9949.)

On cross-examination, the prosecutor asked a series of questions highlighting the fact that Juror No. 1 had no prior experience as a juror, and had no opinions on this case before being called to court and serving on this case. (67 RT 9958.) The witness said that he actually did not form his opinion as to Mr. Weatherton's guilt until after viewing the interview of Nelva Bell on videotape in the hospital. (67 RT 9959.)

He stated that the conversations about the case he had with Alternate Juror No. 4 were made up of her speculating about other people than Mr. Weatherton who may have committed the crime. He denied expressing his opinion that Mr. Weatherton was guilty to anyone before seeing the video.

---

[48] In the context of this case, in which the central issue was the accuracy of Ms. Bell's identification of the assailant, Juror No. 1's statement "I believe Nelva Bell" was itself the equivalent of "I believe Mr. Weatherton is guilty." As the prosecutor put it in closing argument, if "we believe what Nelva Bell told us . . . all of the crimes are true." (46 RT 7570.)

[49] He made no timely report of this potential violation of the court's directives to the jury.

(67 RT 9960.) He testified that on his rides with Alternate Juror No. 4, he would respond to her statements that she thought it was someone else by saying that he didn't agree with her, "but that was it." He had no opinion about the case prior to coming to court, and did not have any opinion prior to Ms. Bell's testimony. (67 RT 9961-9962.)

His best recollection was that he said that he was leaning toward guilty but was not yet sure, and was eager to start discussions with other jurors. He may have said to other jurors that his initial vote would be guilty, and he wanted to see where the case was going to go, and hear what others had to say. (67 RT 9964.) Mr. Weatherton's objection that the prosecutor was not just leading the witness, but telling him what to say, was overruled. (67 RT 9966-9967.)

On redirect examination, when directly asked, Juror No. 1 confirmed that he violated his oath by forming an opinion that Mr. Weatherton was guilty before the case was submitted to him. (67 RT 9969.)

On March 27, 1992, the Honorable David T. McEachen, sitting on assignment by the judicial council for Riverside County, found that Mr. Weatherton failed to state sufficient facts to support a finding that Judge Hawkins should be disqualified, and denied Mr. Weatherton's challenge for cause. (43 CT 12,692; 44 CT 12,712-12,714.)

11. March 28, 2002

Mr. Weatherton informed the court and prosecution that Victoria Penley, a local attorney, would like to be heard before the two witnesses that were scheduled to testify. (68 RT 9975.)

Ms. Penley stated that she was an officer of the court. She approached attorney Mickie Reed after reading a newspaper article about problems with the jury in this case. She told Clark Head and Mickie Reed about her secretary's daughter, Juror No. 8 [former Alt. No. 6]. Juror No. 8 had told her mother that she had discovered evidence of footprints and other things that the rest of the jurors had not discovered or noticed. (68 RT 9978.)

Ms. Penley said that she stopped her, and said, I don't think you should be discussing this with me, and she shouldn't be discussing it with you. That was while the trial was pending. The day before, Juror No. 8 came to Ms. Penley's office to pick up her mother's dog; Ms. Penley had been taking care of it for the last three days because her secretary had surgery. Juror No. 8 said she had been called to court today, and started to discuss the case. When Miss Penley asked her not to discuss this with me or anyone, Juror 8 "just laughed at me and said well, she thought she was

going to call the other jurors and talk to them about what was going on." (68 RT 9978-9979.)

Ms. Penley testified that she had a law practice in Palm Desert. (68 RT 9981.) Juror No. 8 spoke with her the previous day about the trial. (68 RT 9982.) Objections to questions about what the juror's mother told Ms. Henley about her daughter's talking about the trial outside the courtroom were sustained as hearsay. (67 RT 9983.)

Juror No. 8 told her that she had been called back into court. She said that she had done nothing wrong, and started to talk about what had gone on during her attendance at the jury; when the witness told her to stop, she said it was now okay to talk about the case because it was over, and she was going to call some other jurors to talk about what was going on. (68 RT 9984-9985.)

Juror No. 8, former Alternate Juror No. 6, was called to the stand. She testified that she had participated in the last half of the guilt phase deliberations and the penalty phase deliberations.[50] (68 RT 9994-9995.) When asked by the court if she witnessed any juror or alternate juror talking about the case outside the courtroom either prior to or during deliberations,

---

[50] The trial court persisted in believing that she had not participated in guilt phase deliberations. (67 RT 9994-9995.)

she answered, "Oh, I did." (67 RT 9995.) This was on more than one occasion. She did not want to listen or participate, so she would block them out, and play her Game Boy. (67 RT 9995-9996.)

Talking about the case took place on the second floor balcony. She could not recall who started talking about it, but the people involved were Juror No. 1, Juror No. 3, herself, and Alternate Juror No. 1. Juror No. 1 didn't smoke, but he sat out there anyway. (67 RT 9996.) It also happened in the elevator. (67 RT 9998.) She remembered that this happened during the Date Festival.[51] (67 RT 9998-9999.)

The trial court then asked her,

> [D]id you hear directly any juror or alternate juror make a statement or comment indicating that they had prejudged the issue that they're going to ask to be deciding before it was submitted to them? That means they decided innocence or guilt, or death or life, prior to hearing all the evidence, instructions by the court, arguments of counsel, and what the other fellow jurors had to say?
>
> A. Yes. I'm sorry.
>
> Q. All right. And who would that be?
>
> A. Former Juror No. 1.

(68 RT 9999.)

---

[51] In 2002, the Date Festival took place on February 16-17, during guilt phase deliberations.

She remembered that it happened on the first day she became part of deliberations, at lunch time when they we walking towards the elevators; he said, I think [Juror No. 3] is mad at me because I think he's guilty." (68 RT 10,000.)

She knew that other jurors were also discussing the case, but did not report it to the court. The reason was because she blocked it out, and did not pay attention; if what they were talking about had anything to do with the courts she would walk away, or block it out; so she could not be completely sure if they were talking about this particular case, except for the incident involving Juror No. 1. (68 RT 10,003-10,004.)

She remembered discussing the case with her mother. On the day the guilt verdict was reached, she was very emotional, and talked to her mother about the case. (68 RT 10,021.) She told her mother what had happened, and how emotional it was for her. She also told her about a footprint in a picture.[52] (68 RT 10,008.)

At the close of the witness's testimony, Mr. Weatherton indicated that he wanted to call the juror's mother to testify. However, he did not have return on the service of a subpoena. His investigator John Bretz told

---

[52] Objections to questions about the impact of footprints in pictures were sustained as violative of Evidence Code section 1150. (68 RT 10,008.)

the court that "the only reason that at this point I didn't subpoena her mother is because Miss Penley told me that she just got out of the hospital and was a very sick woman. I was hoping to elicit what we're trying to get here, so we didn't have to go after the mother." The court responded that the hearing was over. (68 RT 10,031.)

After further discussion, Mr. Weatherton made an offer of proof that the mother of Juror No. 8 (Alternate Juror No. 6) would have offered testimony substantiating the daughter's introduction of footprints in blood in a picture that had a decisive influence on jurors during deliberation, and she would have impeached her daughter's testimony as to the discussing the case with a non-juror. The court refused to allow such testimony, saying it did not implicate any evidence presented to the jury outside the courtroom, and that "if the jurors looked at the evidence, whatever they saw in it, decided under the law is within their purview." (68 RT 10,039.) With that, the hearing concluded.

B. The Trial Court's Ruling – No Prejudicial Misconduct by Juror No. 1

The trial court acknowledged that Juror No. 1 committed "serious misconduct." (68 RT 10,118.) The court further found that the misconduct was not prejudicial. It first stated that "the Court agrees with the district attorney that the most compelling evidence is Juror Number 3's tape

recording done by Mr. Sandberg as opposed to her altered declaration or her actual testimony in Court, and the statement given to Mr. Sandberg by Alternate Number 4." (68 RT 10,118.)

The trial court here acted like it had ferreted out the truth by going to the source, and found evidence that undermined or contradicted later sworn testimony. But the taped-statement language on which it relies reads as follows:

Former Juror 3:	"Well, he has made statements to us beforehand, not just to me, but to a group of us. We were all at lunch. And, huh, how it came about, I don't know. But he, you know, he made a statement that um, well, no matter what happens I am going in there and vote guilty the first, the first time I vote because just in case."
Mr. Sandberg:	"Just in case what are you—"
Former Juror 3:	"We didn't discuss it no more after that so I, I am assuming just in case we all said not."
Mr. Sandberg:	"Okay."

(64 RT 9633.)

There is nothing here about Juror No. 1's conduct that contradicts anything that Juror No. 3 — or the other participants at the lunch, including Alternate Juror No. 1 and Alternate Juror No. 4 —ever attested to, nor did Juror No. 1 dispute it. (See 67 RT 9931.)

Former Juror 3 then added, "You know because he wanted to discuss it, you know, so that's why — so for sure with him, I don't know if he was dead set on guilty, because I think he was a little immature." (64 RT 9633-9634.)

It is this psychological speculation the trial court sees as somehow discrediting and undermining all else attested to by Juror No. 3, and by the witnesses who corroborate her. In a spectacular example of wishful thinking, the trial court treated Juror No. 3's explanation of why she didn't know what Juror No. 1's true feelings were as establishing that Juror No. 1 was open minded, and ignored her consistent, corroborated, and uncontradicted testimony regarding Juror No. 1's actual conduct.

The recorded statements inserted into this record and relied on by the Court actually strengthen Mr. Weatherton's claim by confirming that Juror No. 1, prior to the close of evidence, had formed an intent to vote guilty and communicated that intent to other seated and alternate jurors at lunch outside the courtroom. They provide no support for the trial court's refusal to acknowledge the egregious misconduct committed in this case.

The trial court ruled that Juror No. 1 did not have an actual bias, and did not actually make up his mind until late in the proceedings, and probably not until deliberations:

> Whether or not Mr. Ponce, Juror Number 1 is credible is questionable and the Court need not even consider his testimony except to the extent that what he says is consistent with or corroborates those statements made by Juror Number 3 and Alternate Number 4 where advanced in support of their motion by the defendant. . . . there is no evidence of actual bias on the part of Juror Number 1; he did not consider any extraneous evidence; he did not arrive at the Court with a prior opinion, and he formed an opinion based on the evidence that was presented in the courtroom and then nothing else from what we could tell from the facts, and as stated before, and Mr. Weatherton has quoted me that Nelva Bell's testimony was rather compelling, and Mr. Ponce said it was reinforced by the playing of the video of her just days after the event, and also as noted in the cases, there was a request for a re-reading of testimony which indicates that the jurors still had an open mind, were still considering the evidence, and Mr. Ponce testified that that reinforced his initial premature voicing of an opinion based on the evidence.

(68 RT 10,018-10,019.)

The trial court earlier stated that it did not find that either Juror No. 1 or Juror No. 3 had much credibility. (68 RT 10,064.) Nonetheless, the court accepted Juror No. 1's uncorroborated and oft-contradicted testimony that while he had indeed formed an opinion of Mr. Weatherton's guilt before the case was submitted to the jury for deliberations, he had done so not after Nelva Bell's live testimony, but only after the prosecution showed the videotaped interview of Ms. Bell in the hospital, just prior to instructions and argument.

Why did the court believe this testimony from an acknowledged perjurer, when it was contradicted by three other witnesses? Earlier on the same day, the court stated that it did not consider Alternate Juror No. 4's testimony to be relevant because she did not deliberate (68 RT 10,064); that she had not promptly reported misconduct, and had prejudged the case.[53] Alternate Juror No. 1 likewise did not deliberate, and the court believed (wrongly) she had testified somewhere that she would not follow the court's instructions if she remained on the jury; and was furthermore a bad juror: "it's a juror like that that caused us a lot of problems and taxpayers a lot of money." (63 RT 9341.) Juror No. 3 was somehow discredited by the excerpt of her taped interview discussed above, and by the failure of other jurors to agree with what she said about the process of deliberations.

There is no basis at all for dismissing an alternate juror's testimony, or any other witness's testimony, on the subject of whether or not Juror No. 1 had formed or expressed an opinion of Mr. Weatherton's guilt prior to deliberations on the ground that the witness had not participated in deliberations. That fact has no bearing whatsoever on the accuracy of any

---

[53] Alternate Juror No. 4 did not so testify. She said that she thought that Mr. Weatherton was innocent until proven guilty because that was how she had been instructed by the trial court. (65 RT 9651-9652.)

witness's testimony concerning Juror No.1's statements and behavior outside the jury room.

There is no evidence showing that the person who asked for the reread of Nelva Bell's testimony was Juror No. 1. Even if it had been Juror No. 1, this would not have refuted the evidence that he had previously made up his mind. He might well have requested the reread in order to persuade jurors who were not yet convinced that Ms. Bell was able to accurately perceive and recall what happened to her. The jury's request for a reread probably means that there were differences among the jurors, but in no way refutes the evidence showing that Juror No. 1 had formed an opinion of Mr. Weatherton's guilt prior to deliberations and had said as much to other jurors. The trial court refers to unnamed "cases" for support for the idea that a request for testimony to be read back indicates that a particular juror had an open mind, but there are no such cases.

Perhaps the trial court, which deemed the excerpt from Juror No. 3's taped statement to be compelling evidence, was influenced by the mistaken view that all would be fine if Juror No.1's mid-trial formation and announcement of an intent to vote guilty extended only to the first ballot and he remained open to being persuaded to thereafter change his mind. But such a juror — committed midway though trial to vote guilty on the

first ballot — is hardly the open-minded juror to which a defendant is constitutionally entitled. Twelve such jurors would ensure the defendant's immediate conviction without consideration of the evidence or any meaningful deliberations.

Finally, the court pointed out that "[Juror No. 3] never once articulated any evidence or opinion that anything that [Juror No. 1] may have said or not have said influenced her one way or the other in her decision to ultimately vote guilty in this case." (68 RT 10,120.) This is a largely irrelevant point, since a defendant is entitled to 12 fair and open-minded jurors; and reversal is required even if the biased juror has no impact on any other juror.

As a factual matter, however, Juror No. 1's efforts were virtually certain to have contributed to Juror No. 3's last-minute change of heart. The extensive hearing means that we have an exceptional understanding in this case of the process of deliberations. Juror No. 1 said to outsiders both prior to and during deliberations that he expected a battle with Juror No. 3, because he was going to vote for guilt and she was going to vote for innocence. During deliberations, after former Juror No. 8 was dismissed, he told Juror No. 8's replacement in the hallway outside the jury room that he was having a fight with Juror No. 3. (55 RT 8398-8399; 68 RT 10,000.)

He called Alternate Juror No. 4, and told her that deliberations were not going well, that Juror No. 3 was upset. (65 RT 9642.) The record is undisputed that he had determined during the guilt phase that Nelva Bell was telling the truth, that Mr. Weatherton was guilty, that Juror No. 3 did not feel the same way as he did, and that he felt he would be battling her in the deliberations.

The first ballot was eight jurors for guilt, three for innocent, and one undecided. (65 RT 9642.) One of the "innocent" votes was removed from the jury due to the death of her grandfather. (See Declaration of former Juror No. 8, 43 CT 12,433.) Finally, there was one holdout — Juror No. 3. Eventually, she changed her vote to guilty, cried when polled, and regretted her vote as soon as she left the courtroom; in the prosecutor's words, she had "buyer's remorse." (56 RT 8494.) How can anyone say that Juror No. 1's determination to change her vote did not significantly contribute to the pressure on Juror No. 3, the last holdout juror?

Juror No. 3 was never asked precisely what pressures led her to change her vote, and it is not at all likely that any such information would have been admissible in these proceedings; the point of Evidence Code section 1150 is precisely to avoid such psychological reconstructions. Here, the trial court has flouted the law on which it elsewhere relied on heavily,

and has made a very unwarranted leap from Juror No. 3's non-answer to a question that was never asked. In truth, the steady attack on her by a juror that regarded her as his chief opponent from early in the trial surely affected not only her, but other jurors.

C. Juror No. 1 Committed Prejudicial Misconduct

A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722, *In re Hitchings*, *supra*, 6 Cal.4th at p. 110.) "'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.'" (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110, citing *People v. Galloway* (1927) 202 Cal. 81, 92 [259 P. 332].)

A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

"For a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361; accord, *People v. Brown* (1976) 61 Cal.App.3d 476, 480.) The Penal Code provides that jurors must not "converse among themselves or with anyone else on any subject connected with the trial, or . . . form or express any opinion thereon until the cause is finally submitted to them." ([Former] § 1122 [now § 1122, subd. (b)].) . . . Violation of this duty is serious misconduct. [Citation.]' [Citation.]" (*People v. Majors*, *supra*, 18 Cal.4th at pp. 422-423.)

> The law does not demand that the jury sit with the muteness of the Sphinx, and when jurors are observed to be talking among themselves it will not be presumed that the act involves impropriety, but *in order to predicate misconduct of the fact it must be made to appear that the conversation had improper reference to the evidence, or the merits of the case.*

(*People v. Kramer* (1897) 117 Cal. 647, 649, emphasis added; accord, *United States v. Klee* (9th Cir. 1974) 494 F.2d 384.)

As a general rule, juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted. [Citations.]" (*In re Hitchings*, *supra*, 6 Cal.4th 97 at p. 118.) In determining whether misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose

from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]" (*People v. Nesler*, *supra*, 16 Cal.4th at p. 582 (lead opn. of George, C. J.); accord, *People v. Majors*, *supra*, 18 Cal.4th at p. 417.)

As discussed in *People v. Holloway*, *supra*, 50 Cal.3d at pages 1108-1109, the presumption of prejudice merely excuses the defendant from affirmatively proving prejudice when that cannot be done. The presumption prevails "'unless the contrary appears.'" (*Id.* at p. 1108.)

> The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred. The law thus recognizes the substantial barrier to proof of prejudice which Evidence Code section 1150[54] erects, and it seeks to lower that barrier somewhat.

(*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416.)

---

[54] Evidence Code section 1150 reads as follows:

"(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

Any presumption of prejudice arising from juror misconduct is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant. (*People v. Stewart* (2004) 33 Cal.4th 425, 511.)

In this case, the record makes unmistakably clear that the Juror No. 1 formed a opinion that Nelva Bell told the truth and that Mr. Weatherton was guilty during the trial and before deliberations, and that he expressed that opinion to other jurors [Juror No. 3 and Juror No. 8, Alt. Jurors No. 1 and No. 4] several times outside the courtroom prior to and during deliberations. Furthermore, he lied under oath when asked about such discussions. He testified that he had lied because he "didn't want to get the girls or himself in unnecessary trouble." (67 RT 9934.)

Juror No. 1 committed two kinds of prejudicial misconduct: (1) He formed an opinion that Mr. Weatherton was guilty before the trial was completed and the case turned over to the jury, thereby prejudging the case; and (2) he expressed that opinion, in argumentative form, to several other

jurors and in public places outside the courtroom before the case was turned over to the jury to decide.

1. Juror No. 1 Formed the Opinion that Mr. Weatherton Was Guilty During Presentation of Guilt Phase Evidence, and Was Actually Biased Against Him.

The evidence that Juror No. 1 in fact decided that Mr. Weatherton was guilty before the case was submitted to him is overwhelming. In fact, he testified under oath, after immunity was given him, that he had done just that. (68 RT 9969.) We not only have his own sworn admission, but we have the testimony of three other jurors or alternates to the same effect.

a. Alternate Juror No. 1

She testified that on the first day of Nelva Bell's testimony, Juror No. 1 stated that he would vote for guilt because he believed there was no denying Nelva Bell's testimony. (63 RT 9363, 9417.) She never heard Juror No. 1 say anything about weighing the evidence one way or the other; he just said that the defendant was guilty. (63 RT 9371.)

The trial court did not like Alternate Juror No. 1 because she was one of the jurors who, in the court's view, had caused problems and caused the county to incur great costs (63 RT 9357), and because she acknowledged talking with her husband about the case prior to deliberations. The court was convinced that she had testified that she would continue to violate the

court's instructions not to talk about the case if kept on the jury, but it could not find such testimony in this record. (63 RT 9252-9253.) Neither can Mr. Weatherton.

Her testimony is corroborated by alternate Juror No. 4 and Juror No. 3 as well as by Juror No. 1 himself, who acknowledged telling Alternate Juror No. 4 on their rides to and from the trial that he believed Nelva Bell (68 RT 9942), which in this case was the equivalent of saying he believed Mr. Weatherton was guilty as charged, and who could not remember or did not dispute other depictions of him saying that Mr. Weatherton was guilty outside the courtroom before deliberations began.

b. Juror No. 3

She testified that several jurors were at lunch during the trial, and she became upset when Juror No. 1 said that "he was going to vote guilty no matter what."

Q. Did he — did he — did he state why he was going to vote guilty?

A. If he did, I wasn't really paying attention but I don't believe so, no.

Q. Did any of the other jurors comment?

A. No.

Q. Did any of the other jurors participate in the discussion?

A. All of us did to begin with, and then one of the — I think it was number — Alternate 4, I believe, she's the one that said, you know what, guys, we're not even discussing this, you know, why are we discussing it? And then we started talking about other items.

(64 RT 9523.)

c. Alternate Juror No. 4

She testified that Juror No. 1 consistently said that Mr. Weatherton was guilty while they rode to and from the trial. (64 RT 9639.) She described going to lunch during the trial at Pizza Hut when Juror No. 1 said that once they got into deliberations, he and Juror No. 3 were going to be on opposite sides.

Q. Did he say he was going to vote guilty?

A. He did that all the time. He said that all the time.

Q. Did he say it that day?

A. Yes.

(65 RT 9640-9641.)

On another occasion during the trial, several jurors had lunch at Cactus Jack's. When Juror No. 1 said he felt the defendant was guilty, Alternate Juror No. 4 said, "let's not talk about it," and they moved on to other topics. (65 RT 9641-9642.)

During their rides, the case came up for discussion every day, and every day Juror No. 1 said that Mr. Weatherton was guilty. (65 RT 9648.) When asked if Juror No. 1 ever indicated in any way that he would be impartial, she answered, "he said he would listen to others and what they had to say, but he still was going to hold guilty initially.

> Q. So he was set, he was going to vote guilty no matter what?
>
> A. Yes.

(65 RT 9649.)

The prosecutor attacked her, as he attacked Alternate Juror No. 1, by berating her for not promptly informing the court of the misconduct at issue. He further brought out that she had taken Zoloft for depression after the death of her husband, and she discussed handling the sale of real estate for Juror No. 3. (65 RT 9663-9686.)

Nevertheless, she appeared as a person of integrity and of good standing in the community (43 CT 12,610 et seq.) and a credible witness, with no discernible motive to lie about Juror No. 1's statements to her. There was no hint of personal animus between them. Indeed, Alternate Juror No. 4 repeatedly gave Juror No. 1 rides to and from the courthouse. And certainly her failure to report Juror No. 1's misconduct on her own did not make her less credible than Juror No. 1, who actually (and admittedly)

committed perjury on two successive occasions when called to testify about his actions (55 RT 8314-8315; 56 RT 8412-8413; 68 RT 9934-9935), and who, unlike Alternate Juror No. 4, repeatedly claimed to have only a limited or nonspecific memory of what he stated on various out-of-court occasions. (See pp. 178-182, *ante*.) The trial court, however, found Alternate Juror No. 4's testimony to be irrelevant. In resolving Mr. Weatherton's motion for a new trial, the trial court said that it was not concerned with the testimony of Alternate Juror No. 4 because she did not participate in deliberations. (68 RT 10,065.)

This may have been appropriate when considering the effect of Juror No. 1's behavior on influencing other jurors during deliberations, but the court was obligated to weigh what she said in determining the critical question: Did Juror No. 1 actually decide that Mr. Weatherton was guilty before the case was submitted to him?

The trial court also faulted her for not promptly reporting misconduct, and wrongly said that she admitted that she prejudged the case. (68 RT 10,066.) Alternate Juror No. 4 spent more time with Juror No. 1 than anyone involved in this case. She and he both testified that she gave him rides to court, and back home, every day after the second or third week of the trial. She testified that he said that Mr. Weatherton was guilty "all

the time." They argued about it; she countered that he was innocent until proven guilty, according to the judge's instructions. (65 RT 9651-9652.)

She testified that Juror No. 1 expected to be on opposite sides from Juror No. 3. (65 RT 9640-9641.) He called her after the first day of deliberations and told her that it was not going well for him, and he was struggling with Juror No. 3. She also testified that he said he was going to listen to the other jurors, but that does not alter the fact that before the evidence was all in he had formed and expressed the opinion that Mr. Weatherton was guilty and had resolved to cast his ballot for conviction. Alternate Juror No. 4 never qualified her testimony that Juror No. 1 made up his mind that Mr. Weatherton was guilty after Nelva Bell's testimony, and was going to vote guilty as soon as he could.

Juror No. 1's preoccupation with Juror No. 3 is not only corroborated by Alternate Juror No. 1, Alternate Juror No. 4 and Juror No. 3, but by Juror No. 8 who testified that on the day she was appointed to the jury, Juror No. 1, again ignoring the court's directives, spoke to her in the hallway and told her that Juror No. 3 was mad at him because he thought Mr. Weatherton was guilty. (68 RT 10,000.)

In *Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, one juror told another during trial that he believed the

trial was a waste of time and the decision was clear-cut, and he began discussing a newspaper article about the case. The court held that the juror's misconduct indicated that he had made up his mind to vote for the defense before the plaintiff had finished presenting evidence during the trial. Therefore, it reversed the case. (*Id.* at pp. 1678-1680.) Juror No. 1's prejudgment of the case was *by itself* an improper influence on the verdict. (*Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 788.)

As the prosecutor correctly pointed out in closing argument on the new trial motion, the juror in *Hitchings* had formed her opinion before trial, and concealed that opinion during voir dire. (68 RT 10,076.) There is nothing comparable here. There was nothing comparable in *Hitchings*, however, to Juror No. 1's frequent and public insistence on Mr. Weatherton's guilt before deliberations began, and this case was far closer. The key similarity in both cases is that in each, one juror prejudged the case, and had made up his or her mind prior to deliberations that the accused was guilty. (*In re Hitchings*, *supra*, 6 Cal.4th at pp. 119-121.)

Juror No. 1's actual bias against Mr. Weatherton require that the verdicts against him be set aside. If even one juror prejudges the case before all the evidence and argument are concluded, that juror is biased. (*In re Hitchings*, *supra*, 6 Cal.4th at pp. 119-121; *Grobeson v. City of Los*

Angeles, supra, 190 Cal.App.4th at p. 792.) "The bias or prejudice of even a single juror" violates a criminal defendant's "right to a fair trial." (*Dyer v. Calderon* (9th Cir. 1998) (en banc) 151 F.3d 970, 973.) "Actual bias against a defendant on a juror's part is sufficient to taint an entire trial." (*Green v. White* (9th Cir. 2000) 232 F.3d 671, 676.) The presence of juror bias is a structural error not subject to harmless error analysis. (*Dyer*, *supra*, 151 F.3d at 973, n. 2, quoting *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71; see *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629 [113 S.Ct. 1710, 123 L.Ed.2d 353] [structural errors infect the integrity of the entire trial process].)

2. Juror No. 1 Expressed His Premature Opinion to Other Jurors, Arguing in Public Places that Mr. Weatherton Was Guilty Before the Case Was Turned Over to the Jury.

At trial respondent relied heavily on the case of *United States v. Klee, supra,* where the court considered a claim of jury misconduct based on premature discussions by jurors. (65 RT 9701; 67 RT 9970 et seq.) So did the trial court. (68 RT 10,052-10,053.) The *Klee* court quoted a view on human nature expressed by a dissenting judge in *Winebrenner v. United States* (8th Cir. 1945) 147 F.2d 322: "'No normal honest Americans ever worked together in a common inquiry for any length of time with their

mouths sealed up like automatons or oysters.' We think that there is a good deal in what he says." (*United States v. Klee*, *supra*, 494 F.2d at p. 396.)

The *Klee* court found no misconduct because "[t]he juror's affidavit here does not assert that any of the jurors relied upon any evidence outside of the record in reaching their verdict, *nor does it assert that any of the jurors actually decided upon the defendant's guilt before the case was submitted to them*." (*United States v. Klee*, *supra*, 494 F.2d at p. 396, emphasis added.)

Thus, *Klee* is nothing like the present case, where Juror No. 1's discussions about the case consisted largely of argumentative assertions that Mr. Weatherton was guilty, that he believed Nelva Bell, he expected to fight with Juror No. 3 during deliberations, and he was going to vote guilty on the first ballot.

Juror No. 1's disdain for the process in which he participated is shown by his sworn testimony. Initially, he denied ever saying anything about the case to anyone prior to the case being turned over to the jurors, or ever making any telephone calls to them, and said that he had an open mind and was uncertain until deliberations began. (55 RT 8314-8315.) He said the same thing on the witness stand the following day. (56 RT 8412-8413.)

In the wake of several witnesses attesting to the contrary, he acknowledged that his earlier testimony was false. He explained that he had testified falsely in order to keep himself and the other jurors out of trouble. He assumed that the other jurors were covering up for him, as he was covering up for them. He also testified that he didn't believe it to have been very serious, that his lies were only "technically" lies. (68 RT 9934-9935.) Not only had he formed an opinion, but he expressed that opinion many times to others jurors during the presentation of guilt phase evidence, and had announced his intention to vote guilty.

As noted above, it is virtually certain that Juror No. 1's active and repeated insistence that Mr. Weatherton was guilty influenced other jurors, and the verdicts against Mr. Weatherton. (See pp. 195-197, *ante*.) His flagrant violations of the court's order not to discuss the case before deliberations was prejudicial juror misconduct.

D. The Introduction of Extraneous — and False — Evidence into Deliberations by a Juror Claiming Special Expertise Was Prejudicial Misconduct.

1. Introduction; Trial Court's Ruling

One of the favorable parts of the case investigation for Mr. Weatherton was the lack of any forensic evidence pointing to him, and particularly the lack of any bloodstains found on him or his clothing, given

that the decedent Latonya Roberson was shot twice by a weapon no more than 18-24 inches away, and Mr. Weatherton, who had no means of transportation, was arrested shortly after the crime was committed. (See counsel's closing argument, 46 RT 7596-7588.)

This issue became a point of contention between jurors during deliberations. Juror No. 11 told the jury that she had training and knowledge gained from her occupation as a correctional officer, and that the fact that Mr. Weatherton did not have any blood on him did not mean he wasn't the shooter; gunshot wounds did not behave as commonly portrayed in movies and on TV, with blood gushing out, and gunshot wounds differ from knife wounds in that the victims bleed backwards rather than forwards. Mr. Weatherton had no opportunity to correct or contest this "expert" assertion.[55]

The trial court seemed to recognized that juror No. 11's reliance on her specialized training to convince the other jurors that the lack of blood on Mr. Weatherton was not probative might be misconduct, because it went far beyond the testimony of Michelle Merritt that if a shooter is far enough

---

[55] In fact, Juror No. 11 was wrong; under the undisputed circumstances of this case, the shooter was highly likely to have been hit by "back-spatter," or a mist of high-velocity blood spatter that typically rebounds up to three or four feet back from a gunshot wound. (See Claim IV.H., *post.*)

away from the victim, there will be no blood on him or her. The court suggested that there was no misconduct because no harm was done; Juror No. 11 was attempting to influence Juror No. 3, who was not persuaded. (61 RT 9199.) Thus, the court was looking at the impact of misconduct was on subjective processes; something forbidden by Evidence Code section 1150.

The trial court's later ruling rejecting Mr. Weatherton's claim of misconduct by Juror No. 11, however, reads as follows in its entirety:

> [W]e had allegations of extraneous evidence being introduced in forms of expertise and gunshot residue, [and] blood spatter . . . Now, factually I don't find them to be issues of misconduct.
>
> With respect to Juror Number 11's job as a corrections officer and her training and knowledge of firearms, I got the testimony from different jurors that said — talked about her discussing the evidence saying that it is common sense that someone would fall back if they were shot, common sense with a stabbing you would have blood slinging around rather than a shooting. Ms. Kippel said there was nothing extra injected into the deliberations that was not already presented in evidence. Juror Number 11 herself said — what she said was that we need to make a decision based on the evidence, we can't make an assumption that things are like on TV or in the movies; that's what she was arguing. She said that one juror automatically assumed that there should be blood splattering out and Juror Number 11 said we can't assume that what's on TV, that's the way it is; we must consider the evidence, look at the photos, and based on what is on TV is not what I have seen. Ms. Rudloff said she didn't discuss the case, didn't discuss evidence in the case in her experience and Juror Number 7 said that training didn't have anything to do

with — I can't read my own writing, anything to do with the discussion of the evidence regarding guns.

(68 RT 10,060-10,061.)

This ruling was prejudicial error.

2. Factual Record

Juror No. 3 testified that one of the jurors informed them all that she was a correctional officer, and had knowledge about guns because they frequently sent her to training courses. "She explained to us how the blood would splatter or not splatter during the shooting of a gun." (64 RT 9526.)

Juror No. 5, the foreman, was asked by Mr. Weatherton if the jurors exchanged information about their profession. He answered:

A. Yes. I believe that that did come up.

Q. And do you recall what it was?

A. It was — we were talking about the fact that there was — the crime scene, the blood, the lack of blood on yourself at the time, and I believe one juror mentioned well, in the shooting you are blowing away rather than back. But I think we just took that on — you know, based on her opinion, because there were still folks in the room that weren't buying into that.

(66 RT 9768-9769.)

Q. Did any juror mention their profession while deliberating in the jury room?

A. Yes, sir, they did.

Q. What juror was that?

A. It was the juror who was the corrections officer.

Q. Do you know the number of that juror?

A. 11. That's a guess.

Q. Is that juror one of the jurors that was setting out in the hallway this morning with you?

A. Yes, sir.

Q. What exactly did that juror say about her profession?

A. She said that she was a corrections officer. She had knowledge of weapons. She had knowledge of, you know —

Q. What did you take that to mean?

A. I took that to mean that that was her opinion, and that's why that was her justification in reading the evidence as to why there was or was not blood in certain places.

. . . . .

Q. So she never mentioned that she had a lot of — well, had training in guns, with guns?

A. Yes, she did. She said that she was a corrections officer, and she had knowledge through her work. She didn't talk about specific training. She talked about knowledge.

Q. Okay. What was the extent of that knowledge?

A. That she had a weapon; she knew how to fire the weapon, and she had an opinion as to what happened when that weapon was fired.

Q. Did she talk about how blood might splatter?

A. Yes, sir, she did.

Q. What exactly did she say?

A. She said that when — when the — when the bullet hit, it blew, you know, if it hit a person, it would blow a person back, not forward, which seemed to make sense.

(66 RT 9770-9771.)

Juror No. 11 was then called to the stand.

Q. During the course of deliberations, did you mention that you had received training with guns?

A. When?

Q. During the course of deliberations?

A. Yes.

Q. Do you recall what the circumstances were?

A. Yes.

Q. What were they?

A. Was a juror that brought up the amount of blood and the blood on the clothes that the person wore during the shooting and brought up the question as to the amount of blood and brought up, you know, the question as to when a weapon is shot, you know, is it blood splatter, you know, is it — it was more around the amount of blood that was found on the clothing.

Q. Did you at any time mention your training with guns?

A. Somebody made a comment regarding — somebody was assuming, I should say. They were trying to assume that there was no way that there couldn't have been any blood on the clothes of the person that shot all these people, and I came back with the comment that, you know, it is not like we see on the movies where there is a huge amount of blood when somebody's shot, you know . . . *I referred to my training when the juror brought up the issue in regards to the amount of blood. I told her that what I have seen is not what we see in the every day world as far as the amount of blood.*

Q. Okay. What have you seen?

A. When?

Q. Well, what was you referring to?

A. During training, or what? I was referring to my training.

(66 RT 9798-9799, emphasis added.)

Juror No. 10 was called as a witness. After denying she had seen anything inappropriate when asked by the court, Mr. Weatherton asked her if during deliberations, she recalled any juror talking about their training with guns. She testified that Juror No. 11 had done so, in the context of explaining or commenting on the evidence regarding bullet trajectory. (67 RT 9885-9886.)

Juror No. 12 remembered hearing Juror No. 11 say something about blood spatter and her experience, and added, "Most of us, I've never

handled a gun, so there might have been a question that came up about it, I don't know." (66 RT 9843.)

Juror No. 4 testified that she recalled a juror talking about shooting and guns and blood, she remembered statements being made about how a gunshot would not splatter much whereas a knife would cause splattering. (67 RT 9899-9900.)

3. Juror No. 11 Committed Misconduct

A juror may commit misconduct by receiving or proffering to other jurors information about the case that was not received in evidence at trial. (*In re Lucas* (2004) 33 Cal.4th 682, 696; *People v. Nesler, supra*, 16 Cal.4th at p. 578.)

> It is not improper for a juror . . . to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct.

(*In re Malone* (1996) 12 Cal.4th 935, 963; *In re Lucas, supra*, 33 Cal.4th at p. 696.)

When an evidentiary hearing is held regarding a charge of juror misconduct, the trial court's credibility determinations and finding of facts

are normally accorded deference. However, "whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]" (*People v. Nesler, supra*, 16 Cal.4th at p. 582.)

During deliberations, there were debates between the jurors on the subject of blood spatter, and specifically over whether the shooter would have been bloodied by his actions. At least one of the jurors acknowledged knowing nothing about the behavior of blood in response to wounds. Juror No. 11 told the jury that it was her opinion, based on her training and knowledge as a corrections officer, that there would have been no blood on the shooter because blood from a gunshot wound, unlike a knife wound, goes backward rather than coming forward; it behaves differently from what one would think from watching TV.

There is simply no recognition by the trial court of what actually happened, or that Juror No. 11 invoked her special training and expertise to buttress her opinion. The court made no findings suggesting disbelief or any reason to doubt the clear testimony concerning this incident provided by the jury foreman [No. 5], Juror No. 11 [the corrections officer], or the other jurors who testified about it.

The court simply ignores Juror No. 11's pertinent testimony, and ignores entirely all of the foreman Juror No. 5's testimony that demonstrates misconduct. Their testimony, supported by the testimony of Jurors No. 12, 10, 4, and 3, made it clear that the subject of blood spatter from gunshot wounds was regarded as important by the jury, and that Juror No. 11 tried to counter what she believed were common misconceptions based on TV and movies with her "expertise" that derived from her experience and training. That expertise distinguished between knife and bullet wounds, adding luster to its off-base assertions about the impact of bullet wounds.

The trial court does not really deny that she did this. Juror No. 11's misconduct was to present herself as an expert, and tell the jury how to evaluate the evidence before them based on her expertise, to "clear up" misconceptions supposedly created by TV and movies. That is precisely what happened in *In re Malone*, *supra*.

In *Malone*, petitioner had defended himself by submitting a favorable lie-detector test to the jury. One juror, however, was a psychologist. She told the jury during deliberations that based on her expertise, the defendant's lie detector test was unreliable. This Court held that a juror "should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external

information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone, supra*, 12 Cal.4th at p. 963.)

In *Malone*, respondent argued that there was no misconduct because there was no extraneous evidence presented, just the presentation of opinions and ideas. This Court rejected that contention, saying that although this was true, "her assertion that this information was drawn from her own professional knowledge was an improper injection of extrajudicial specialized information into the deliberations." (12 Cal.4th at p. 964, fn. 16.)

So, too, Juror No. 11 did not inject new "factual" evidence into this case. She did what an expert does, which is to tell the jury how to consider the evidence before them. This is precisely what Dr. Pittel and Dr. Siegel did regarding the short-term and long-term effects of crack cocaine usage — based on their expertise, they offered their opinions on how the evidence should be interpreted. The point of Juror No. 11 describing her training and experience was to clothe her opinion that Mr. Weatherton could have shot the victims, not changed his clothes (beyond removing an army jacket), and still not have any blood on him, with objectivity, to make it more persuasive. This was extra-judicial evidence, and misconduct.

The misconduct in this case is illuminated by this Court's conclusion in *In re Lucas, supra*, that no misconduct had occurred. In *Lucas*, one juror related to the jury that he had taken the drugs that the petitioner claimed to have taken before committing the crime at issue, and that petitioner's description of the drug's effects was not correct. This court found no misconduct:

> We observe that a juror's statement that a defendant's sole defense is not credible does not, of course, by itself constitute misconduct. In the present case, the evidence does not suggest that Juror K. brought highly technical information before the jury. *Unlike the juror in question in In re Malone, supra, 12 Cal.4th 935, 963, 50 Cal.Rptr.2d 281, 911 P.2d 468, for example, Juror K. did not hold himself out as an expert in a technical matter on the basis of his education or occupation, but merely related his own experience.* Under the circumstances, Juror K.'s apparently brief comments merely reflected his own experience as it related to the evidence received at the trial and the inferences that petitioner sought to have the jurors draw from that evidence. His experience, although not shared by the majority of persons, is fairly common.

(*In re Lucas, supra*, 33 Cal.4th at p. 697, emphasis added.)

The type of misconduct described by the court as requiring a new trial in *Malone* is the kind of misconduct committed by Juror No. 11 in this case. The testimony of Juror No. 11 about the behavior of blood when a person is shot, and her distinction between gunshot wounds and knife wounds, was made at a time when Mr. Weatherton could not answer her.

The juror misconduct in this case implicates petitioner's fundamental constitutional rights (1) to confront and cross-examine adverse witnesses, (2) to be tried by an impartial jury, (3) to due process of law, and (4) to a reliable adjudication of the capital charges against him and a reliable determination of any sentence imposed. (Cal. Const., art. I, §§ 7, 15, 16; U.S. Const., 6th and 14th Amends.; *Parker v. Gladden* (1966) 385 U.S. 363, 364.) As the United States Supreme Court has explained: "'Due process means a jury capable and willing to decide the case solely on the evidence before it. . . .' [Citations.]" (*People v. Nesler, supra*, 16 Cal.4th at p. 578, quoting *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473, and *Smith v. Phillips* (1982) 455 U.S. 209, 217.) In this case, the jury's receipt, discussion and consideration of extra-judicial evidence during their deliberations which bore heavily on a contested issue at trial constituted misconduct.

E. Juror No. 11's Misconduct was Prejudicial

"Juror misconduct raises a rebuttable presumption of prejudice; a trial court presented with competent evidence of juror misconduct must consider whether the evidence suggests a substantial likelihood that one or more jurors were biased by the misconduct." (*People v. Dykes* (2009) 46 Cal.4th 731, 809.)

A substantial likelihood of juror bias

> [m]ay appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not "inherently" prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant.

(*People v. Nesler, supra*, 16 Cal.4th at pp. 578-579, citing *In re Carpenter*, *supra*, 9 Cal.4th at pp. 653-654; *People v. Holloway*, *supra*, 50 Cal.3d at pp. 1110-1111; *People v. Marshall* (1990) 50 Cal.3d 912, 950-951.)

In *Malone*, this Court found the presumption of prejudice rebutted, because the assertions of the juror presenting herself as an expert "were substantially the same as the evidence produced at trial." (*In re Malone*, *supra*, 12 Cal.4th at p. 964.) Here, in contrast, there was no evidence at all presented to the jury on high-velocity blood spatter, back spatter, or anything else related to the behavior of blood upon impact of a bullet or a knife — Juror No. 11 was the sole "expert witness" on these matters.

Criminalist Michelle Merritt was called by Mr. Weatherton to detail her futile efforts to find traces of blood, carpet fiber, etc. On cross-examination, she recognized the obvious fact that if one is far enough away when shooting another, there won't be evidence of blood. She said nothing about the directionality of blood flow in response to any kind of wound.

Mr. Weatherton thus had no opportunity to take curative steps, such as asking for an instruction that the testimony be disregarded, or to cross-examine the source of such testimony, or to present evidence refuting Juror No. 11's assertions. Such evidence is, and was, readily available.

"Back spatter" results from blood droplets directed back from the wound towards the source of energy, or the shooter. The back spatter is of high velocity, and takes the form of a mist, with many very small drops flying back towards the shooter. It typically flies three or four feet before dissipating. (See Stuart H. James, Paul E. Kish, T. Paulette Sutton, Principles of Bloodstain Pattern Analysis: Theory and Practice (CRC Press, 2005), p. 136 et seq.) Trial evidence showed that the shooter of LaTonya Roberson was close enough to her to leave stippling on her body, or within 18-24 inches. It is highly likely that the shooter did indeed have blood on his or her body, clothing, and/or weapon.

Evidence of high-velocity blood spatter on an accused is often introduced by the prosecution, and has been occasionally used by the defense. The Los Angeles trial of Phil Spector, for example, hinged on the testimony of bloodstain pattern analysis. The prosecution argued that the blood on Mr. Spector's clothing showed that he was within three feet of the victim because of the limited range of back spatter, supporting its

contention that he fired the fatal bullet through the victim's mouth. The defense countered with expert testimony that blood spatter from the particular weapon at issue could have reach at least six feet away from the victim, supporting the defense's contention that the victim committed suicide in Mr. Spector's presence. (See Yong, P., *Spector Trial Expert Backs Suicide Theory*, L.A. Times (June 27, 2007).) Both the prosecution and defense experts in *Spector*, who differed over whether back spatter of blood from a weapon would rebound three feet or six feet, would apparently have agreed that the shooter of the victims in this case would likely have been impacted by Ms. Roberson's blood, and probably Mr. Ortiz's as well.

As shown throughout this brief, the case against Mr. Weatherton was close. The initial ballot showed three jurors voting for innocence, and one undecided. An issue of vital importance to Mr. Weatherton was effectively taken away from him by a juror presenting herself as an expert, without his knowledge, and at a time when he could not present evidence countering her. There is a substantial likelihood that at least one of the jurors who initially voted for an acquittal would have held his or her ground without the misconduct by Juror No. 11. Petitioner's convictions and sentence must be set aside.

V. THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION, MISTAKENLY RULED THAT MR. WEATHERTON'S MOTION FOR A NEW TRIAL COULD NOT BE MADE ORALLY, AND MISTAKENLY POSTPONED THE HEARING UNTIL AFTER THE PENALTY PHASE AND DEATH VERDICT, THEREBY PREJUDICIALLY SKEWING THE HEARING'S RESULTS AWAY FROM A FINDING THAT A NEW TRIAL WAS REQUIRED

On February 28, 2002, after the testimony of all the jurors had been taken and the resulting record showed that misconduct had been committed, Mr. Weatherton moved for a new trial. The trial court responded that such motions had to be made in writing:

> A new trial has to be, as you know, it has to be prepared under the Court rules, local rules and California Rules of Court. The district attorney has to be given notice and the time to respond. And I cannot have the jury on hold for a few weeks while you do that.

(55 RT 8418-8419.)

The court stated that the D.A. needed ten days' notice, and ordered that the case proceed to the penalty phase. (55 RT 8418-8419.)

The trial court was wrong. For decades, new trial motions could only be made orally. Mr. Weatherton made his motion in a timely manner, and at a time when the trial court knew that Juror No. 1 had committed misconduct. All jurors and alternates had already testified under oath. If there were any loose ends, any of them could have been called back by the court. There was no legitimate reason for the delay; but by waiting until the

death verdict was obtained, the court had a far greater investment in upholding the verdicts in this case. The court's error was prejudicial.

A. The Law Regarding New Trial Motions

Every criminal defendant has a right to a trial by an unbiased, impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) A criminal defendant may move for a new trial on specified grounds, including juror misconduct. (§ 1181, subds. (3) & (4).)[56]

Formerly, an application for a new trial could *only* be orally made to the court before the entry of judgment. In *People v. Ah Sam* (1871) 41 Cal. 645, 651, this Court wrote, "The statute neither required nor authorized this motion to be made in writing. It must be made viva voce." More recently, it has been recognized that such a motion can be made either orally or in writing, and the only time limit imposed by section 1182 is that the motion be made and determined before judgment.[57] This Court affirmed that it was

---

[56] Section 1181 provides, "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; [¶] 4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors. . . ."

[57] Section 1202 provides as follows: "If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in Section 1191, why judgment should not be pronounced, it shall thereupon

error for a trial court to refuse to hear a defendant's timely oral motion for a new trial. (*People v. Braxton* (2004) 34 Cal.4th 798, 807.) In *Braxton*, this Court recognized that a new trial motion could be made any time before sentence was imposed, but encouraged counsel to bring such motions in a timely fashion. (*Id.*, 34 Cal.4th at 807, fn. 2.)

It is true that Mr. Weatherton eventually got a hearing on his motion, and a ruling by the trial court — only after a penalty phase trial and the return of a verdict of death. All parties had already had every opportunity to question each of the seated and alternate jurors on February 27 and February 28, 2002. The trial court noted that the prosecutor did not take advantage of the opportunity to question the sworn witnesses at a hearing before the penalty phase. (56 RT 8452.)

The prosecutor wanted the opportunity to send lawyers and police officers to the homes of the jurors after a penalty phase verdict had been obtained to obtain statements. The trial court acted as if it were bound by the prosecutor's desires, but in fact it was either required to hold a prompt

---

be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of Section 1191, then the defendant shall be entitled to a new trial. If the court shall refuse to hear a defendant's motion for new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to a new trial."

hearing once Mr. Weatherton made his oral motion, or to exercise its discretion and hold the hearing before the penalty phase took place.

Postponing resolution of the new trial motion prejudiced Mr. Weatherton. It meant that the judicial system had already rendered a verdict of death at a time when the jury's initial finding of guilt was in the balance. This had the inevitable effect of skewing the trial court toward preservation of the verdicts already obtained.

B. The Law Regarding Mistrial Motions

As Mr. Weatherton pointed out in his written motion, a motion for mistrial is a request to the court to terminate the trial before the verdict. (40 CT 11,712 et seq.) A motion for mistrial should be granted if there is prejudice that cannot be cured by instruction or jury admonition. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) A defendant's motion for a mistrial should be granted if the defendant suffers prejudice that cannot be cured by admonition or instruction. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985; *People v. Hines* (1997) 15 Cal.4th 997, 1038.)

Grounds for a mistrial are as wide as the concept of prejudice; they include juror misconduct. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 67 [considering and rejecting a claim that mistrial was committed by bailiff's ex parte contact with jurors, because record showed that contact

could not have led to undue or untoward influence, since it consisted of nothing more that the bailiff telling jurors to continue with their deliberations].)

Evidence of jury misconduct surfaced between the guilt and penalty phases of Mr. Weatherton's trial. A death penalty trial is a unitary trial, a single proceeding before the same trier of fact that resolved issues of guilt and the presence of one or more special circumstances. (See § 190.3.) If Mr. Weatherton's motion for a mistrial was valid, and the jury misconduct of which he complained had tainted the guilt verdict and/or so prejudiced the remaining jury members that a fair trial was impossible, then the granting of that motion would have avoided a pointless penalty phase.

This Court reviews a ruling denying a motion for mistrial for abuse of discretion. (*People v. Welch* (1999) 20 Cal.4th 701, 749.) Here, there was no ruling made by the trial court until the trial itself was over. Mr. Weatherton has reviewed numerous appellate decisions in search of another case where a motion for mistrial was delayed until the trial's conclusion, and has not been able to find any such case. The trial court simply failed to exercise its discretion. That failure was error.

In *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, this Court held that a sentencing court's failure to exercise discretion pursuant

to section 1385 was an abuse of discretion because it mistakenly believed it lacked authority to exercise such discretion. (*Id.*, at p. 530, fn. 13.) Here, the trial court mistakenly believed that motions for new trial could only be submitted in writing and that the prosecution was entitled to a minimum of ten days' notice in which to respond.

California courts have discretion to appoint advisory counsel to assist an indigent defendant who elects self-representation. (*People v. Bigelow* (1984) 37 Cal.3d 731, 742.) When a defendant requests appointment of advisory counsel, a court's failure to exercise its discretion is serious error and its denial of a request for advisory counsel in a capital case may constitute an abuse of discretion. (*Id.* at p. 743.) This Court held in *Bigelow* that failure to exercise discretion on a request for advisory counsel in circumstances where a refusal to grant the request would be an abuse of discretion requires automatic reversal of a resulting conviction because of the inherent difficulty in assessing prejudice.

It is settled law that if unduly prejudicial events occur during a trial, failure to make a motion for a mistrial waives that error. (See, e.g., *People v. Anderson* (2009) 47 Cal.4th 92, 100, fn. 3; *People v. Jennings* (1991) 53 Cal.3d 334, 383-384.) What if a timely motion is made, but no ruling ensues until the trial is over? The whole point of a motion for

mistrial is to stop irrevocably tainted proceedings. That point is lost if the motion is not ruled upon until the disputed proceedings have continued and been concluded.

The prosecutor insisted on being allowed to interview all jurors after the trial had concluded, but the prosecution had already had the opportunity to question and cross-examine all jurors, who had been summoned under oath to testify. The only authority it cited for further delay was a mistaken assertion that it was entitled to at least ten days notice for any motion for a new trial, and a written motion. This was wrong. In any event, it did not foreclose resolution of Mr. Weatherton's *mistrial* motion prior to commencement of the penalty phase.

Had his motion been granted, it would have precluded entirely the penalty phase proceedings. Failure of the trail court to exercise its discretion on Mr. Weatherton's motion for a mistrial requires that the penalty phase verdict against him be set aside.

VI. THE TRIAL COURT WRONGLY PRECLUDED MR. WEATHERTON FROM INTRODUCING EVIDENCE THAT THE JURY FOREMAN REFUSED TO ASK FOR REREADS OF TESTIMONY OR EXHIBITS ON A CRITICAL POINT REQUESTED BY JUROR NO. 3.

A. Factual Background

Attached to Mr. Weatherton's motion for a new trial were declarations gathered over the weekend of March 1-3, 2002, by his investigator, from Alternate Jurors No. 1 and 4, former Juror No. 8, and Juror No. 3. (43 CT 12,522 et seq.) After the declarations were authenticated, the trial court ruled on the admissibility of each of the separate paragraph. (See 61 RT 9159–62 RT 9272 [131 paragraphs in Juror No. 3's declaration]; 62 RT 9276-9286 [43 paragraphs in Alt. Juror No. 4's declaration]; 62 RT 9286-9291 [30 paragraphs in Alt. Juror No. 1's declaration]; and 62 RT 9291-9301 [54 paragraphs in former Juror No. 8's declaration].

Among the materials excluded by the trial court were paragraphs concerning new Juror No. 8's dream about a bloody footprint and the jury's discussions about that dream during deliberations. Mr. Weatherton concedes that commentary about the impact of the "bloody footprint" dream was properly excluded. However, evidence of the fact that a bloody footprint was discussed, together with the fact that the jury foreman refused

to ask that the jury be provided with testimony and/or exhibits on this topic when requested by a skeptical juror to do so, was evidence of jury misconduct, a prejudicial infringement on Mr. Weatherton's rights to due process and trial by jury as well as a violation of the rights of jurors under section 1138.

The statute governing what evidence may and may not be presented regarding juror misconduct is Evidence Code section 1150, subdivision (a), which provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent or to dissent from the verdict or concerning the mental processes by which it was determined.

(Evid. Code § 1150, subd. (a).)

This statute distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved. . . ." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349.)

> This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under [Evidence

> Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.

(*People v. Steele* (2002) 27 Cal.4th 1230, 1261; see also *People v. Hutchinson, supra*, at p. 350; *In re Hamilton* (1999) 20 Cal.4th 273, 294; and *Ballard v. Uribe* (1986) 41 Cal.3d 564, 575-578 (conc. opn. of Mosk, J.).)

On March 18, 2002, the following discussion ensued regarding Juror No. 3's declaration:

> MR. VINEGRAD: Paragraph number 12: "That I felt that the foreman was too controlling during deliberations because when I requested he request of the Court certain items of testimony or evidence, he refused to do as I asked. I felt he did not think what I wanted was important."
>
> People submit that that's irrelevant and is excludable under 1150. Her feelings about the foreman was too controlling, her allegation that she requested that the foreman obtain certain items of testimony or evidence and he didn't do so, irrelevant.
>
> THE COURT: Mr. Weatherton?
>
> MR. WEATHERTON: I'd submit, Your Honor.
>
> THE COURT: I think under *Orchard* —
>
> MR. VINEGRAD: And also *Keenan*.

THE COURT: — at 17 Cal.App., what is it, Cal.App.3rd, 568 4th, I didn't write it down, in that case the foreman chastised and embarrassed a juror to vote not guilty during deliberations.

MR. VINEGRAD: Apparently *Keenan*, 46 Cal.3d, at 478—

THE COURT: Basically the Court held that this was thought process, give and take during deliberations, expected to be heated, argumentative.

MR. VINEGRAD: Right.

THE COURT: So that would be stricken.

(61 RT 9165-9166.)

Continuing with the declaration of Juror No. 3:

MR. VINEGRAD: 74: "The foreman refused to request evidence or testimony for jurors. I requested to have testimony read back dealing with the footprint evidence. The foreman, Juror 5, refused to request the evidence and stated he believed Officer Rody." Same thing with respect to the allegation we previously discussed regarding the foreman being —

THE COURT: Well, you continue on, because 75 —

MR. VINEGRAD: 75: "This was not the first time the foreman refused to bring the yellow form to the bailiff." 76: "The foreman often said he did not think a certain testimony was necessary." I requested the testimony of Nelva Bell, the lineup photos, the testimony of Curtis Neal, and

possibly other item that the foreman chose not to request.
People's position is those are all excludable as coming in within the provisions of 1150, mental deliberate thought processes, irrelevant. Number are based upon speculation, hearsay.

THE COURT: And the *Orchard* case that I cited about the juror chastising and embarrassing jurors during deliberation, that's part of the collaborative effort or lack thereof, I guess it is. We've already had this issue. I'm going to strike it.

THE CLERK: Is that 74 all the way through 79 stricken?

THE COURT: Yes.

(61 RT 9241-9242.)

In *People v. Orchard* (1971) 127 Cal.App.3d 568, the case on which the trial court relied, defendant pointed to heated exchanges between jurors, and submitted an affidavit to the effect that the foreman had angrily berated a juror for 10 to 15 minutes, causing that juror to change her mind and vote guilty for fear of being continually berated. The court found that this was not sufficient:

> Stripped of its inadmissible portions, the sum total of [J]uror Bosman's affidavit simply describes an account of interchange between jurors in which the foreman sought to persuade Mrs. Bosman to maintain an open mind. To permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors

> would deprive the jury room of its inherent quality of free expression.

(*People v. Orchard, supra*, 17 Cal.App.3d at p. 574.)

Orchard does stand for the proposition that the parts of Mr. Weatherton's witness declarations concerning the presence of testy exchanges between jurors cannot in themselves provide a basis for the granting of a new trial. *Orchard*, however, does not in any way stand as authority for excluding from consideration "events those open to sight, hearing, and the other senses and thus subject to corroboration." The foreman's refusal to ask for a reread of critical testimony is just such an event.

B. The Foreman's Refusal Violated State Statutory Law, the Trial Court's Instructions, and Mr. Weatherton's Constitutional Rights to Due Process, Trial by Jury, and a Reliable Determination of Guilt and Sentence.

Penal Code section 1138, enacted in 1872, provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

(Pen. Code, § 1138.)

There was apparently "disagreement" between jurors in this case as to the testimony (or evidence), in which case the literal wording of the statute says "they must require the [bailiff] to conduct them into court" where the required information "must be given." This Court, citing section 1138, has said "any juror may request a readback of testimony." (*People v. Burgener* (2003) 29 Cal.4th 833, 880.)

In addition to the clear language of the statute mandating the rereading of testimony upon the jury's request; there is "a respectable line of authority which holds that upon request by the jury for the rereading of testimony, such assistance must be given." (*People v. Butler* (1975) 47 Cal.App.3d 273, 280.) This Court has specifically recognized "the right to have testimony read or further instructions given." (*People v. De La Roi* (1944) 23 Cal.2d 692, 701.) Failure to provide the jury with a readback of requested evidence has been found to be reversible error. (See *People v. Henderson* (1935) 4 Cal.2d 188; *People v. Litteral* (1978) 79 Cal.App.3d 790; *People v. Butler*, *supra*, 47 Cal.App.3d 273; *People v. York* (1969) 272 Cal.App.2d 463.) "[A]ny testimony given at trial may be pertinent to the jury's decision." (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1024.)

In analyzing this issue, it is important to keep in mind the dual

nature of the right established by section 1138, "a statutory provision safeguarding civil rights and guaranteeing a fair trial." (*People v. De La Roi*, *supra*, 23 Cal.2d at 703 (dis. opn. of Edmonds, J.).) First of all, "[a]lthough the mandate of Penal Code section 1138 is an important protection for a party, it is the right of *the jury* which is the primary concern of the statute." (*People v. Butler*, *supra*, 47 Cal.App.3d at p. 283, emphasis in original.) Section 1138 establishes "the jurors' fundamental right to be apprised of the evidence upon which they are sworn conscientiously to act." (*Id.*) "[I]t is the duty of the court . . . to protect the jury's rights under section 1138." (*People v. Litteral*, *supra*, 79 Cal.App.3d at p. 797.)

On the other hand, although considered the jury's right (particularly as to the question of whether they wish any rereading at all and, if so, which parts of the testimony), when the jury attempts to exercise this right and is frustrated by the trial court, the defendant's rights come into play. Thus, in *People v. Weatherford* (1945) 27 Cal.2d 401, this Court held that the trial court had failed to reinstruct the jury in accord with section 1138, and reversed the conviction because the defendant had been denied his right to "a fair trial, conducted substantially according to law." (27 Cal.2d at p. 420.) And, in *People v. York*, *supra*, 272 Cal.App.2d 463, the court found error in refusing to reread testimony requested by the jury as required

by section 1138 and held that "the error constitutes a denial of due process of the law, and was prejudicial to defendant." (272 Cal.App.2d at p. 466.)

Although the failure of the jury to hear testimony reread that was important to one or more jurors in Mr. Weatherton's case was the fault of the foreman and not the court, the effect is precisely the same; the jury was deprived of its right to hear testimony felt to be critical reread. Mr. Weatherton has been unable to find California cases addressing where it was the foreman at fault instead of the clerk or court or counsel. In a Texas case, the defendant alleged that the jury foreman refused to send a note to the judge because she had previously served on a jury before the same judge and knew that the trial court could not permit deposition testimony to be read back to the jury. The court held that "it was highly improper for the foreman to have expressed her opinion as to the judge's ruling on a jury request," but after reviewing the case's facts, found that there was no reversible error resulting from the foreman's actions. (*Caterpillar Tractor Co. v. Boyett* (1984) 674 S.W.2d 782, 793.)

Recognizing that a failure to obey the mandate of section 1138 to reread all testimony requested by the jury implicates the defendant's constitutional rights to a fair trial, due process of law and trial by jury, how is the prejudice flowing from the error to be assessed? Our system entrusts

to the jury the task of finding facts and applying the law to them. No matter what the judge or counsel or the parties may feel to be the salient evidence, it is the jury who must decide what evidence is important to its deliberations. (*People v. Butler*, *supra*, 47 Cal.App.3d at p. 283.)

Thus, when the jurors request a rereading of testimony, the evidence is "obviously of importance to the jury in their deliberations." (*State v. Wolf* (1965) 207 A.2d 670, 675.) Similarly, if the requested rereading is denied, the jury is deprived of "the chance to rehear testimony *it felt a need to rehear*." (*People v. Litteral*, *supra*, 79 Cal.App.3d at p. 797, emphasis added.)

Courts have recognized the subjective nature of the jurors' decision as to what evidence they feel a need to rehear in order to carry out their deliberations, and the resultant impossibility of "gaug[ing] the precise effect" (*People v. Gainer* (1977) 19 Cal.3d 835, 854) on deliberations of the denial of that information. Thus, in *People v. Henderson*, *supra*, 4 Cal.2d at p. 194, in reversing the conviction, this Court stated: "[w]ho can say that the jury, in their five-hour deliberation, might not have reached an opposite conclusion had they had the benefit of having reread to them that which they requested. . . ."

In *People v. York, supra,* 272 Cal.App.2d at p. 465, the court reversed, stating, "[w]e have no way of knowing whether they would have reached the same verdict had the testimony of the officer been read to them." In *People v. Butler, supra,* 47 Cal.App.3d at p. 281, the court reversed the conviction because "the appellate court is put in that position that we cannot say, or even speculate, what effect the rereading of the requested testimony would have had or what effect was created by the failure to reread that testimony."

Here, the impropriety could well have cost Mr. Weatherton more favorable verdicts. According to testimony from several jurors, an issue of great, even decisive, importance was assertions by the new Juror No. 8, former Alternate Juror No. 6, of a dream she had about a photograph of Mr. Weatherton's footprint showing blood. (61 RT 9230; 64 RT 9529; 65 RT 9699; 68 RT 9798-9799, 10,008.) According to Alternate Juror No. 4, Juror No. 1 told her that was a pivotal moment in the jury's deliberations. (65 RT 9699.)

Mr. Weatherton complained about this on grounds that there was in fact no such photograph, but the trial court was correct when it said that examining what in fact moved the jurors was an inappropriate intrusion into the jurors' subjective processes, and was banned by Evidence Code section

1150. However, if one of the doubting jurors felt that this effort to corroborate Nelva Bell was misguided, and wanted to summon the most relevant evidence to show as much to her fellow jurors, but was blocked from so doing by the foreman, this was prejudicial interference with Mr. Weatherton's constitutional right to a jury trial.

The trial court's ruling was not based on any doubt that the action complained of took place; its view was that this was simply part of the rough and tumble of deliberations. This was error. This complaint is not about hurt feelings. The effect of the trial court's refusal to consider this evidence and weigh its effects meant that Mr. Weatherton's jury was deprived of one of its long-established rights, and he himself was deprived of his constitutional right to a jury trial. On this basis alone, the motion for a new trial should have been granted, and Mr. Weatherton's convictions and sentence set aside.

VII. THE TRIAL COURT WAS BIASED AGAINST MR. WEATHERTON DURING THE JURY MISCONDUCT PROCEEDINGS.

As noted in the Statement of Facts, Mr. Weatherton filed a Statement of Disqualification against the trial court on March 6, 2002, after failing in his efforts to obtain a ruling on his motion for a mistrial. (41 CT 11,861 et seq.) The trial court answered him by saying, inter alia, in a declaration of its own, that it had indeed ruled on the motion for mistrial, both before and after the statement for disqualification was filed. (43 CT 12,514.) The judge assigned to rule on Mr. Weatherton's motion duly repeated what the trial court had asserted in its declaration. (44 CT 12,712.)

But the trial court was wrong. It had momentarily denied the motion without prejudice, but was ultimately persuaded by the prosecutor that it was "too early" to rule on the motion for mistrial, and that such a ruling should wait until the hearing on Mr. Weatherton's motion for a new trial was concluded. (56 RT 8500-8502.) The court later clarified that the mistrial motion remained under submission. (57 RT 8664.) Mr. Weatherton renewed his motion shortly thereafter, without success in obtaining any ruling. (57 RT 8665, 8668.) The court repeated that the mistrial motion was under submission. (57 RT 8678.)

Mr. Weatherton again renewed his motion for a mistrial; the trial court told him it was thinking about it. (58 RT 8830.) Later, the court said it was denying the motion without prejudice to it being renewed at any time. (58 RT 8874.) Mr. Weatherton again moved for mistrial based on the fact that the jury's integrity had been undermined by a great deal of jury misconduct, as shown by the declarations he attached to his motion for a new trial. The court again denied without prejudice, saying that it would later incorporate all the declarations, and Mr. Weatherton could renew the motion at any time or at the time the new trial motion was to be heard. (59 RT 8889.) There was nothing like a definitive ruling until the motion for a new trial was denied, on March 27, 2002. (68 RT 10,120.)

After Mr. Weatherton's motion to disqualify the trial court was filed, the trial court did little to conceal its bias. Although there were no jurors for the trial court to influence, its prejudgment of the case is an independent basis for overturning Mr. Weatherton's convictions, and it should be taken into account when filing in the blanks around the trial court's often cryptic or unsupported rulings on Mr. Weatherton's substantive claims of juror misconduct.

A. Disparate Treatment of Juror Witnesses

The trial court called all jurors to the witness stand twice when the first indications of misconduct surfaced. (See pp. 123-136, *ante*.) The prosecutor's examination of these witnesses was desultory or nonexistent; the court noted that the persecutor had the opportunity to question the jurors, but did not take advantage of it. (56 RT 8457.) At the time of the evidentiary hearing after the death verdict was obtained, however, the prosecution's attitude was completely different.

The jurors who had prepared declarations for Mr. Weatherton's motion for a mistrial/new trial were treated as likely criminals, and threatened with prosecution for perjury or contempt of court. Their "crime" was violation of the court's order to promptly report instances of juror misconduct. (63 RT 9333 et seq.) Mr. Weatherton has scoured the appellate records in an effort to see if anyone, at any time in California's history, has been prosecuted for this crime, or even been found in contempt of court for not promptly reporting, for example, another juror talking about the case outside the courtroom. He has not been able to find such a case.

Nevertheless, jurors were frightened and reduced to tears by the prosecutor's threats to prosecute them, which were legitimized and supported by the judge. (See p. 156, *ante*.) Jurors who had not filed

declarations on Mr. Weatherton's behalf, but who had committed the same "crimes," did not have their failures noted in any way by the court or the prosecution, and did not have their credibility questioned in any way by the trial court.

Juror No. 8, former Alternate Juror No. 6, for example, testified that she frequently witnessed jurors talking about the case outside the courtroom prior to and during deliberations. (67 RT 9995.) Rather than report this to the court, however, she would block out such talk by playing her Game Boy. (67 RT 9995-9996.) No threats of criminal prosecution were made in response to this dereliction.[58]

Juror No. 4 likewise reported on March 27, 2002, that she witnessed jurors reading a newspaper article that they told her was about Mr. Weatherton between the guilt phase verdict and the beginning of the penalty phase trial. (67 RT 9892-9893.) She said nothing about it until just prior to her testimony. (67 RT 9898.) Despite this specific violation of the trial court's directives (see, e.g., the court's instructions to the jury to not discuss the case with each other or read any newspaper accounts about this case, at

---

[58] On February 27, 2002, when asked if any juror had discussed the case with her, she replied, "maybe a comment, but I have never really listened, so I couldn't even tell you if there was — I can't be direct on that, because I — a comment maybe, but — and I couldn't even tell you which juror by number. But I have never really — I don't know. No." (54 RT 8308.)

24 RT 3807 et seq., esp. 3811-3812), she was never threatened by anyone with criminal prosecution.

On March 27, 2002, Juror No. 1 admitted perjuring himself on the witness stand. He said he did it to protect himself and others (the "girls"), and that he thought it was just a "technical" thing. (67 RT 9934-9935.) No one with prosecutorial powers said anything about prosecuting this admitted felony. The disparate treatment of jurors according to whether or not they supported the motion for a new trial was blatant, and fundamentally unfair.

B. The Trial Court's Biased (and Biasing) Introductory Remarks to "Favorable" Jurors

On March 26, 2002, the first day of testimony for jurors who had not prepared declarations, the trial court explained that "we have had some jurors, former jurors, excused jurors who disagreed with the verdict and a couple of alternates making claims that the jury in this case engaged in misconduct, and as a result, Mr. Weatherton was denied a fair trial." (66 RT 9738.)

The court then pointed out that the previous witnesses had all sworn that they had violated their oaths, and he had indicated to them that their testimony might lead to criminal charges, so he had appointed independent lawyers for them. He told the jurors that he did not want to frighten or scare them, and he thought they were not involved with potential criminal

conduct, but that he was also willing to appoint them independent lawyers if they wanted to consult with them, at no cost. (66 RT 9738-9740.) The court praised the jurors for their services, and repeatedly apologized for making them answer more questions.

The trial court's warm and extensive introductory remarks improperly communicated to the witnesses the testimony the court expected to hear, and put improper pressure on them to testify accordingly. The violation of duty to which previous jurors had acknowledged was a failure to come forth more quickly to report misconduct. The court had no basis for assuming that the witnesses yet to testify would report no improprieties. Were they to do so — and they did — the court presumably would be deeming them to have violated their oaths, as well, by not having reported the improprieties at an earlier point — and hence, subject to "criminal charges." But no such threats to them were made by either the prosecutor or the trial court.

C. Spoonfeeding Testimony to Juror No. 1

Juror No. 1 was called to the stand. The trial court initially gave him detailed map of how he hoped the witness would testify:

> I should tell you, [JUROR NO. 1], that part of the allegations that were made were made against you just like I told you when you were in the jury box. So you could keep those in mind when you are discussing it with your attorney. A couple

> of jurors said that they discussed the case with you and a couple — one juror said that you said you were going to vote guilty right away just in case because you wanted to discuss it and hear what the other jurors had to say. They said I don't think he was dead set on guilty, I think he just wanted to open it for discussion; he was immature and confused. So those are things that you should keep in mind when you are talking with your attorney and before you testify.

(67 RT 9911.)

The court is certainly making clear what it wants to hear. And the court's statement is not accurate in that "they" (the previously testifying jurors) hadn't actually opined that they did not think his mind was made up. Actually, all three previous witnesses had no doubt that he told them he had made up his mind beforehand; Juror No. 3 speculated that he may not have truly done so, but was just confused and immature.

The trial court is here seizing on psychological speculation of Juror No. 3, and ignoring direct testimony of several witnesses about Juror No. 1's actual words. Although the trial court was wrong, Juror No. 1 was more likely to embrace this story if told that other jurors had already testified to it. And so he did — until directly asked by Mr. Weatherton if he had made up his mind prior to the beginning of guilt phase deliberations.

D. Allowing "Favorable" Jurors to Hear Each Other's Testimony

Throughout the trial, the trial court routinely granted the unopposed request of the parties that witnesses who had not yet testified be excluded from the courtroom. For example, there was an extensive discussion about the issue as the trial began, when Mr. Weatherton wanted his family to be present, but his counsel was reluctant to waive any testimony those family members might eventually give at a penalty phase. The prosecutor, meanwhile, told the court and Mr. Weatherton that it advised members of Mr. Ortiz's family not to attend the trial since they might eventually be called as witnesses. (26 RT 4126 et seq.)

However, after the jurors who had prepared declarations for Mr. Weatherton testified, the jurors who had not provided declarations were allowed to hear each other's testimony,[59] despite repeated objections by Mr. Weatherton, who asked that witnesses who had not yet testified remain outside the courtroom. (66 RT 9742-9743; 67 RT 9745.) As a result, several of the jurors sat in the courtroom while their fellow jurors were provided leading questions by the trial court and were examined by the prosecutor and Mr. Weatherton.

---

[59] The jurors who had prepared declarations, like all earlier witnesses in the trial, did not get to sit in on one another's testimony.

Mr. Weatherton renewed his motion on the following day. (67 RT 9861.) As the trial court noted, the relevant evidence code section only requires that the accused be present, and that all other witnesses may be excluded at the discretion of the trial court. (68 RT 9862-9863.) After a full trial of excluding actual or potential witnesses, however, it was a violation of fundamental fairness under state and federal constitutions, equal protection of the laws to subject Mr. Weatherton's witnesses to such a blatantly different standard.

E. Overt Anger at Jurors Who Filed Affidavits Describing Misconduct

The court: "It's a juror like that that caused us a lot of problems and taxpayers a lot of money." (63 RT 9341.)

The court: "Well, I think I already told you how I felt about what these jurors have done and the problems that they've created and the costs, great cost they've caused the Court to incur." (63 RT 9357.)

The court's anger towards Alternate Jurors No. 1 and 4, and Juror No. 3, its toleration of witness badgering by Mr. Vinegrad, and its benign attitude toward the perjurious Juror No. 1, were injudicious. Unless the court had some reason to suspect Alternate Jurors Nos. 1 and 4, and Juror No. 3 of perjury — and it did not — the court's anger and concern for costs appears to be based on their revealing what appears to have been Juror

No. 1's misconduct — hardly something for the court to be angry at them about. Indeed, the court and the prosecutor frequently faulted them for not coming forward sooner; and they, of course, had no choice once called to the stand.

F. Reliance on Prosecution for Guidance; Identification with Prosecutorial Side

The trial court was uncertain as to what to do when Mr. Weatherton indicated that he was making a motion for a new trial, and spent dozens of pages talking with the prosecutor about what to do. (See, e.g., 55 RT 8415 et seq.) On March 4, 2002, the following dialogue took place:

> THE COURT: Okay. Miss Carter, if I take the mistrial under submission and do we have to set the motion for new trial ten days out since he's filed it?
>
> MS. CARTER: Well, we can, Judge, but unfortunately, if we're not done with the penalty phase by ten days out, I think I'm going to have a right to ask for a continuance because my position is this Court can't make a credibility call until the other jurors are released from service and they can be interviewed by both the defense at that point and the prosecution without worry of contaminating the jury.
>
> MR. WEATHERTON: Those jurors don't have to, they don't have to allow the prosecutor to interview them, or the defense. I mean, what if the jurors don't

want you to talk to them? What if they don't want to talk to you?

THE COURT: Okay. We'll set it for — right now we'll set it for Friday the 15th, and if you need a continuance you can let me know by filing a 1050 or whatever in advance.

MS. CARTER: Thank you, Your Honor.

(56 RT 8502-8503.)

When Mr. Weatherton reminded the court during its questioning of jurors on February 27, 2002, of the elevator incident that triggered the inquiry into jury misconduct, the trial court turned to the prosecutor and said, "you know, I forgot about that. Should we also ask them about the elevator?" (54 RT 8259.)

Ms. Carter: "Well, first of all, I think you should start, before you go any further with the elevator, you should ask the three male jurors." (54 RT 8259.)

The court not only asked the prosecutor what to do, but it also asked the prosecutor about what it had already done:

THE COURT: Okay. By excusing Juror Number 1 haven't I already concluded factually that he committed misconduct?

MS. CARTER: There — you may have concluded that he committed misconduct that rose to the level of it's safer to dismiss him than keep him on the jury, but the People's

position is that's not the same burden that the defense is going to have to meet to show that he committed misconduct that rises to the level of dismissing a verdict and granting a motion for a new trial.

THE COURT: Okay. So I dismissed him because he was discussing the case, but you're saying that he wasn't necessarily dismissed because he prejudged?

MS. CARTER: Well, I guess only you know that.

(56 RT 8484.)

G. The Decision to Postpone the Hearing and Ruling Until After a Penalty Verdict had been Returned

This error is raised as Claim V, but it is worth mentioning here in that the decision to postpone reflects bias (going along with the prosecutor, subordinating fairness to efficiency, etc.) and also intensified the court's bias by providing an added incentive to not grant relief. This decision meant there was a greater investment in sustaining the trial outcome — two verdicts to save, not just one.

H. Applicable Law

A claim of judicial bias is essentially a claim that the court has prejudged the case. To succeed on as judicial bias claim, Mr. Weatherton must "overcome a presumption of honesty and integrity in those serving as adjudicators." (*Withrow v. Larkin* (1975) 421 U.S. 35, 47; see *People v.*

Cowan (2010) 50 Cal.4th 401, 456-457.) He must also show that the trial judge "prejudged, or reasonably appears to have prejudged, an issue." (*Kenneally v. Lungren* (9th Cir. 1992) 967 F.2d 329, 333.)

Here, the trial court was resolutely set against granting Mr. Weatherton a new trial. It not only made bad rulings on the merits of issues presented, but it did so in an atmosphere of overt resentment and intimidation of several jurors, who only emerged to testify when called to the witness stand at the court's behest, of overt dependence on the prosecutor for direction, and blatant inequality in its treatment of the witnesses who testified for and against the motion for a new trial.

It is prosecutorial misconduct to make statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony. (*In re Martin* (1987) 44 Cal.3d 1, 30.) So, too, is threatening a defense witness with a perjury prosecution. (*People v. Bryant* (1984) 157 Cal.App.3d 582, 586; *People v. Williams* (2009) 170 Cal.App.4th 587, 631.) Such threats from a trial judge are even more likely to improperly intimidate witnesses.

The trial court gave way to resentment and anger at the jurors who it believed had caused a terrible waste of resources. It prejudged the outcome of the motion for a new trial, and forgot its fundamental task of doing

justice to Mr. Weatherton as well as the prosecution, and the community as a whole.

VIII. THE TRIAL COURT'S DISMISSAL OF JUROR NO. 8 DURING DELIBERATIONS DESPITE THE ABSENCE OF ANY REQUEST BY THE JUROR OR MEETING WITH THE JUROR VIOLATED MR. WEATHERTON'S RIGHT TO A JURY TRIAL.

A. Factual Background

Mr. Weatherton's jury retired to deliberate on February 14, 2002. At the end of the day, the clerk reported that Juror No. 8 called and said she needed to take more than a week off because of the death of her grandfather. (48 RT 7775.) On the following day, the trial court cited authority under section 1089, C.C.P. section 233, and *In re Mendes* (1979) 23 Cal.3d 847, and asked defense counsel, "Would you like me to have her come in? I guess the wake's not until Thursday."

MR. HEAD: Yes, Your Honor.

THE COURT: This is also the juror that is related to the victim, remember?

MS. REED: Not to her knowledge.

THE COURT: Yes, she doesn't know it but she's related to the victim.

MS. CARTER: Well, you got to wonder if at the grandfather's funeral she's going to discover that she's related to the victim.

THE COURT: Okay. And how do you want to handle read back and playing of the videos? You might start calling Miss —

THE CLERK: I don't have a phone number and *I had already told her she was excused so —*

THE COURT: Well, can you get her phone number from the jury room?

THE CLERK: Uh-huh.

MS. CARTER: With regard —

THE COURT: Miss Number 8.

(48 RT 7778-7779, emphasis added.)

It was at this point that counsel learned that Juror Number 8 had already been excused by the clerk.

Shortly thereafter, the clerk found Juror No. 8's phone number

THE CLERK: I got a cell phone from her work and I was just calling it and she did not answer, but I did — she does have a voice mail on it so I left a voice mail message telling her it was pretty important that she get in touch with me and to get in here.

THE COURT: Okay. Well, apparently, under the Code and the cases, I can go ahead, just excuse her without even consulting counsel, but we'll give her a little bit to see if she'll call back and get her in here so she can verify to the defense's satisfaction that she's unavailable, if we can. If not, we'll just go with my decision on it.

(48 RT 7787-7788.)

Following the morning recess, the trial court stated:

> We haven't heard from Juror Number 8. We called her work, we got a cell phone, we left a message on her cell phone. She hasn't responded. There's no answer at home. She's probably on the way to Borrego Springs, I don't know. ¶ I read *Mendes* over the break and *Mendes* is a case very similar to this. Prior to counsel coming in in the morning, juror called and said, there's a death in the family. The judge excused that juror for good cause, and Supreme Court held there was no error that, as a result of a death in the family, a juror probably would have difficulty concentrating at any rate. Anybody else find anything?

(48 RT 7789-7790.)

Mr. Head, counsel for Mr. Weatherton, responded, "No. I read the case, also, Your Honor, and a couple of other cases. Our objections would be that there has not been a sufficient evidentiary basis upon which to determine that the juror is unavailable." Counsel then objected to the juror's dismissal on numerous state and federal constitutional grounds. The trial court appointed Alternate Juror No. 6 to replace Juror No. 8. (48 RT 7789-7790.)

B. Legal Argument

The dismissal of Juror No. 8 midway through the guilt phase deliberations violated California law and Mr. Weatherton's rights to a chosen impartial tribunal, due process, and a reliable judgment under the Fifth, Sixth, Eighth, and Fourteenth Amendments. The court's action also

violated Penal Code section 1089, which only permits the court to exercise discretion to discharge a sitting juror for good cause shown. Accordingly, the judgment must be reversed.

The Sixth Amendment to the United States Constitution and the California Constitution both guarantee the right to trial by an impartial jury. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16.) The right derives from common law and is extended to the states through the Fourteenth Amendment due process clause. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) The California Constitution also guarantees a unanimous verdict and trial by 12 jurors in a criminal case. (Cal. Const., art. I, § 16.) Because the right to trial by jury is a cornerstone of our system of jurisprudence, it should be zealously guarded by the courts which must resolve any doubt in favor of preserving and furthering such right. (See, e.g., *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 411; *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 653.)

In addition, the double jeopardy clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects "the interest of an accused in retaining a chosen jury." (*Crist v. Bretz* (1979) 437 U.S. 25, 36; see also *Benton v. Maryland* (1969) 395 U.S. 784 [Fourteenth

Amendment due process clause encompasses double jeopardy clause and extends it to states].)

A defendant's "valued right to have his trial completed by a particular tribunal" is "an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice." (*Crist v. Bretz*, *supra*, 437 U.S. at p. 36, citing *Wade v. Hunter* (1949) 336 U.S. 684, 689.) Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict. (*Crist v. Bretz, supra*, 437 U.S. at p. 36; *People v. Hernandez* (2003) 30 Cal.4th 1, 9.)

Section 1089[60] authorizes the trial court to discharge a juror before or after the final submission of the case to the jury only if, upon good cause, the juror is "found to be unable to perform his or her duty." (*People v. Bennett* (2009) 45 Cal.4th 577, 621) A juror's inability to perform "must appear in the record as a 'demonstrable reality.'" (*Ibid.*; see *People v.*

---

[60] In pertinent part, section 1089 reads as follows: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors."

Barnwell (2007) 41 Cal.4th 1038, 1052-1053.) This Court reviews the trial court's decision for abuse of discretion. (*People v. Lynch* (2010) 50 Cal.4th 693, 744.)

The parties agreed that the most applicable case was *In re Mendes* (*supra*, 23 Cal.3d 847, superceded by statute on other grounds, *People v. Cottle* (2006) 39 Cal.4th 246, 254.) In *Mendes*, on the first day of the defendants' trial for attempted receipt of stolen property (§§ 664, 496) and receiving stolen property (§ 496), 12 jurors were chosen and sworn. At the end of the day, after challenges to the prospective jurors had exhausted the venire without the selection of an alternate juror, the trial court stated it was going to go ahead without an alternate. (*Mendes*, *supra*, 23 Cal.3d at p. 851.)

On the following day, before the trial began, a juror informed the trial court that her brother had died the night before and asked to be excused from jury duty. The trial court did so. When counsel arrived and were informed of that fact, they moved for a mistrial on the ground of former jeopardy. This Court found that the trial court did not abuse its discretion in excusing the juror immediately without either consulting counsel or conducting a hearing. (*Mendes*, *supra*, 23 Cal.3d at p. 852.)

This Court reaffirmed the principle that "the trial court has at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality" but found that the reason for the juror's request to be excused clearly constituted "good cause" under Penal Code section 1089, and the trial court was warranted in concluding that normal grief would make it exceedingly difficult for the juror to concentrate on the evidence, the arguments of counsel, the instructions and the jury's deliberations: "In our view, under such circumstances, a hearing would have been pointless and perhaps callous." (*Mendes*, *supra*, 23 Cal.3d at p. 852.)

In *Mendes*, this Court reaffirmed the principle that "Unless the facts clearly establish a sufficient basis on which to reach an informed and intelligent decision, the court must conduct an appropriate hearing in the presence of litigants and counsel on the question of the juror's ability to serve. [citation omitted]." (*Mendes*, *supra*, 23 Cal.3d at p. 852.)

In *People v. Cunningham* (2001) 25 Cal.4th 926, 1028-1030, this Court upheld a trial court's determination that there was good cause to dismiss a juror concerned about the impending death of her father — after a personal interview with the juror and an agreement by both sides that such a dismissal was warranted. (See also *People v. Ashmus* (1991) 54 Cal.3d 932,

986-987 [not unreasonable for the trial court to discharge juror who called the judge and asked to be discharged because of death of his mother the night before].)

Here, Juror No. 8 did not ask to be excused. The trial court never spoke to her, and may in fact have simply endorsed a decision made by the clerk rather than making an independent determination. The trial court's determination that good cause exists to discharge a juror must be supported by substantial evidence. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1100.) "Where, as here, there is no evidence at all to show good cause (because no inquiry of any kind was made), the procedure used was by definition inadequate. (*People v. Green* (1995) 31 Cal.App.4th 1001, 1011-1012 [the reason for the juror's inability to continue 'must appear in the record as a demonstrable reality'].)" (*People v. Delamora* (1996) 48 Cal.App.4th 1850, 1855-1856.)

In *Mendes*, this Court's basis for upholding the trial court's granting of the juror's request to be discharged was a recognition of and respect for the juror's expressed desires. Here, there was no such request. The scant information available did not indicate any desire, or it indicated

ambivalence.[61] Mr. Weatherton was entitled to at least a hearing to ask her face-to-face whether she could stay on his jury.

The trial court did not have any of the clarity of the trial court in *Mendes* as to the juror's wishes, and had no basis on which to form its opinion other than brief, inconclusive hearsay statements from its clerk that did not mention a desire to be excused from the jury. This did not constitute the substantial evidence of good cause required by section 1089, prior decisions of this Court, and the U.S. Constitution. (*Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 995.) Mr. Weatherton was deprived of the "essential feature" of the jury required by the Sixth and Fourteenth Amendments. (*Ibid*; *Williams v. Florida* (1970) 399 U.S. 78, 100.) Accordingly, Mr. Weatherton's convictions and sentence must be set aside.

---

[61] The trial court apparently viewed it as significant that the juror in question was unknowingly related to the victim Samuel Ortiz. There was no evidence so indicating, and the juror's declaration denied any such relationship. Juror No. 8 filed a declaration that was attached to Mr. Weatherton's motion for a new trial, indicating that in fact she had no relationship with Mr. Ortiz. She also swore that she was one of the persons who voted for Mr. Weatherton's innocence on the first ballot. (43 CT 12,522 et seq.) Because the action of a court in discharging a juror must be tested in the light of the evidence before it at the time of the decision (*People v. von Badenthal* (1935) 8 Cal.App.2d 404, 412), Juror No. 8's declaration will not be relied on in this argument to show that the trial court abused its discretion in excusing her. While this error is prejudicial per se, it is worth noting that she was one of the three jurors who initially voted for acquittal. (43 CT 12,522-12,524.)

IX. THE TRIAL COURT WRONGLY PRECLUDED MR. WEATHERTON'S EXPERT FROM TESTIFYING THAT THE 28 PERSONS EXONERATED IN A DEPARTMENT OF JUSTICE STUDY WERE EXCLUDED BY DNA EVIDENCE.

Mr. Weatherton presented Dr. Robert Shomer as an expert to testify about the problems of eyewitness identifications as evidence in criminal cases. At a 402 hearing prior to his testimony, it emerged that Dr. Shomer wanted to not only describe how eyewitness identifications are particularly powerful sources of information for a jury because of the great confidence exhibited by the witness, but how that confidence is not related to accuracy. To show the perils of eyewitness identification testimony, Mr. Weatherton asked him about a 1996 study by the U.S. Department of Justice ("DOJ") which examined 28 cases of persons exonerated by DNA evidence; 75 to 80 percent of the wrongly convicted were found guilty primarily due to erroneous eyewitness identifications, and 6 of the 28 were convicted by eyewitnesses who said they knew the person they identified as the perpetrator. (41 RT 6570.)

The trial court did not want Dr. Shomer to mention DNA. The court thought it would lead to side issues, and allow the prosecution to argue that "thanks to DNA we have now convicted hundreds of thousands of criminal we could not convict before. . . . Because when he cites to the study, is he going to throw out there DNA to try to bias the jury." (41 RT 6594.)

MR. HEAD: They were primarily rape and sexual assault cases. He is not saying he is making these statements to prejudice the jury, he is saying it because it is the study.

MS. CARTER: But if the effect is to prejudice the jury, he ought to not be allowed to do so.

THE COURT: Here's what I think. I think he could testify. I think that if he is talking about the federal DOJ study, he could be examined and cross-examined on a study wherein they found that the ID was erroneous without talking about DNA.

(41 RT 6595.)

After further argument, the trial court allowed Dr. Shomer to testify about the DOJ study, but would not allow him to mention that the exonerated persons had been excluded by DNA testing. Counsel for Mr. Weatherton then confirmed his understanding of the court's ruling: "So I need to tell Dr. Shomer not to mention DNA, basically." The court responded: "Yes, during that study." Mr. Head: "Okay. Talk about the study, but not DNA." (41 RT 6607.)

Shortly thereafter, Dr. Shomer testified about the importance of "a sample of people who let's say were convicted and then exonerated on some kind of biological grounds." (41 RT 6623.) The prosecutor promptly objected, and asked that his testimony be stricken because of a "flagrant

disregard of a court order." (41 RT 6624.) Counsel said that he had spoken to Dr. Shomer, and simply told him not to mention DNA. After further argument, the trial court struck from the record the question and answer, and directed the jury not to consider them. (41 RT 6633.)

If the jury had been informed that the DOJ exonerations were based on DNA exclusions, it would have been more confident that the 28 exonerees had indeed been wrongfully convicted and hence more comfortable with the arguments relating to the dangers of erroneous eyewitness identification even when the defendant was known to the witness. The court's statement about "hundreds of thousands" of person convicted as a result of DNA would never have been disputed by defendant, and could only have strengthened the contention that the ones exonerated by DNA were truly innocent. The trial court's ruling was illogical and improper, and infringed on Mr. Weatherton's right to defend himself.

As noted above (see Claim I, *ante*), "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." This right is applicable in state as well as federal prosecutions. (*Washington v. Texas*, *supra*, 388 U.S. at pp. 17-19; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) The substantive limitation on excluding criminal defense evidence secured by

the plain terms of the Compulsory Process Clause is also grounded in the general constitutional guarantee of due process. (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; *Rock v. Arkansas* (1987) 483 U.S. 44, 51.)

Those rights are violated when the government interferes with the exercise of a defendant's right to present witnesses in his own defense. (*People v. Mincey* (1992) 2 Cal.4th 408, 460.) As a fundamental element of due process of law, a criminal defendant must be afforded a meaningful opportunity to present a complete defense, subject to the limitations imposed by the rules of evidence. (*People v. Lucas* (1995) 12 Cal.4th 415, 464.)

None of the rules of evidence say anything that would preclude Dr. Shomer from telling the jury that the 28 exonerees in the DOJ study were exonerated by DNA evidence. No side issues would be opened by this testimony. The court's statement that a huge number of criminal convictions have been obtained by way of DNA is not relevant, and in any event, only supports Mr. Weatherton's point — that the 28 persons were accurately excluded.

There was no reason at all to limit Dr. Shomer's depiction of a very influential study that was one of the first studies to systematically demonstrate the power of DNA testing, and to underline how dangerous a

confident eyewitness identification can be at a criminal trial. This error touched a "live nerve" of the case, unnecessarily undercutting the chief expert witness called by Mr. Weatherton. It meant that Dr. Shomer's conclusions were likely undermined by one or more jurors' understandable residuum of doubt concerning the innocence of the exonerees — a doubt that could have been eliminated by simply allowing Dr. Shomer to more fully describe the study.

It cannot be said beyond a reasonable doubt that Mr. Weatherton was not prejudiced by the exclusion of evidence related to how the exonerees in the DOJ study were actually exonerated. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Accordingly, Mr. Weatherton's convictions and sentence must be set aside.

X. THE TRIAL COURT PREJUDICIALLY USURPED THE JURY'S FUNCTIONS AND DISMISSED MR. WEATHERTON'S EXPERT TESTIMONY BY GIVING CALJIC NO. 2.92.

On February 11, 2002, the parties discussed which instructions should be given to the jury. (45 RT 7349 et seq.) The prosecution asked that CALJIC No. 2.92 (Factors to Consider in Proving Identity by Eyewitness Testimony) be given. (45 RT 7428.) Counsel for Mr. Weatherton objected, saying that the instruction's practical effect would be to lead the jury to believe that certainty was a contributor to accuracy, even though Mr. Weatherton had presented testimony undercutting that assumption. (45 RT 7429.) The trial court disagreed, and gave the instruction. (46 RT 7529-7530.)[62]

---

[62] With some minor, nonsubstantive modifications, CALJIC No. 2.92, as read to the jury, instructed as follows: "Eyewitness testimony has been received in the trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including but not limited to the following: The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; The stress, if any, to which the witness was subjected at the time of their observation; The witness' ability following the observation to provide a description of the perpetrator of the act; The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness; Any cross-racial or ethnic nature of the identification; The witness' capacity to make an identification; Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup; The period of time

In the context of this case, giving this instruction over objection was error. The jury heard testimony from both prosecution and defense experts about what factors were relevant in assessing the accuracy of eyewitness testimony. Mr. Weatherton's expert, Dr. Shomer, told the jury that an eyewitness's certainty was a non-issue — that there was no correlation between certainty and accuracy. (41 RT 6621.) By expressly instructing the jury that "the extent to which the witness was certain or uncertain" was a factor "bear[ing] upon the accuracy of the witness' identification of the defendant," the trial court effectively eliminated this critical portion of Dr. Shomer's testimony by placing the authority of the court behind a factual proposition (certainty or lack thereof is indeed relevant) that Mr. Weatherton's expert had contradicted.

Here, the instruction at issue directed the jury to take into account the degree of Nelva Bell's confidence as a factor to consider in weighing the accuracy of her identification of Mr. Weatherton, notwithstanding the evidence presented that her confidence had no bearing at all on her

---

between the alleged criminal act and the witness' identification; Whether the witness had prior contacts with the alleged perpetrator; *The extent the witness was certain or uncertain of their identification*; Whether the witness' identification is in fact a product of their own recollection or any other evidence relating to the witness' ability to make that identification." (46 RT 7529-7530, emphasis added.)

accuracy. Giving this instruction on the most critical question in the case — whether Nelva Bell was accurately recounting what she had seen, or whether it was a paranoid continuation of a mistaken impression of Mr. Weatherton and his alleged threat to Ernest Hunt — was an improper invasion of the jury's province, and an unwarranted, highly improper direction to disregard defense evidence.

This Court has observed that "CALJIC No. 2.92 normally provides sufficient guidance on the subject of eyewitness identification factors." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230-1231.) In *Johnson*, there was the testimony of one expert witness offered by the defendant, who said that certainty did not correlate with accuracy, along with an instruction directing the jury to consider the expert's testimony "regarding acquisition, retention, or retrieval of information presented to the senses of an eyewitness." (*Id.*, at pp. 1231-1232.)

In this case, there was no such instruction directing the jury to consider expert opinion on these subjects. Instead, there were competing experts, and the prosecution's expert, Dr. Ebbesen, told the jury that there was a relationship between confidence and accuracy, except for people who are confident about everything. (44 RT 7180.)

Jury instructions are supposed to provide the jury with a neutral, non-argumentative guide to the relevant law and consideration of the evidence. In the context of this case, the instruction presumed that a key witness for Mr. Weatherton was wrong — that certainty was a relevant factor for the jury to consider. This was a critical point. Nelva Bell was uncertain in virtually every way as to how the crime was committed, but was supremely confident that she had identified the right person. (26 RT 4192-4193.)

If her confidence was not an indication of accuracy, then Mr. Weatherton's points about Nelva Bell and how Ms. Bell became concerned with dangers allegedly posed by Mr. Weatherton to Ernest Hunt as she consumed more crack cocaine; the perpetrator's mysterious announcement that Ernest Hunt was dead when arriving at the crime scene; Ms. Bell's record of paranoia; and her chronic drug use all would have had more persuasive impact and likely raised a reasonable doubt in the minds of one or more jurors. All these points undermining Ms. Bell's testimony were themselves undermined by an instruction that credited Ms. Bell's certainty as supporting the accuracy of her identification.

The jury was by no means required to accept Dr. Shomer's testimony instead of Dr. Ebbesen's testimony about the relevance of certainty to accuracy in an eyewitness identification. However, they should not have

been foreclosed from weighing Mr. Weatherton's evidence by an instruction telling the jury that Dr. Shomer's testimony was wrong.

On this critical point, the error was prejudicial. In *People v. Wright* (1988) 45 Cal.3d 1126, 1142, this Court noted expert testimony might assist the jury in its task of evaluating testimony and the other evidence before it, without usurping the jury's functions of determining the credibility of the witnesses and affording their testimony the appropriate weight. The Court reasoned:

> An instruction that "explained" the influence of the various psychological factors would of necessity adopt the views of certain experts and incorporate the results of certain psychological studies while discounting others. It would require the trial judge to endorse, and require the jury to follow, a particular theory relating to the reliability of eyewitness identifications. Such an instruction would improperly invade the domain of the jury, and confuse the roles of expert witness and the judge.

(*People v. Wright, supra*, 45 Cal.3d at p. 1141.)

That is exactly what happened in this case. It is reasonably probable that without this instruction, those jurors who doubted the accuracy of Ms. Bell's identification of Mr. Weatherton would have held on to those doubts, and Mr. Weatherton would have received more favorable verdicts. Certainly the error cannot be deemed harmless beyond a reasonable doubt. By arbitrarily directing that important defense evidence be disregarded, the

instruction invaded the province of the jury and undermined Mr. Weatherton's rights to present a defense, to trial by jury, and to reliable determinations of guilt and sentence, in violation of the Sixth, Eighth, and Fourteenth Amendments. Further, an improper jury instruction, even if not otherwise violative of a specific constitutional safeguard, rises to the level of a constitutional violation and violates due process if it so infects the trial that there is a reasonable likelihood that the trial was unfair. (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.) This issue lay at the heart of the prosecution's case. The error deprived Mr. Weatherton of jury consideration of critical expert testimony, and requires that his convictions and sentence be reversed.

XI. POTENTIALLY EXCULPATORY EVIDENCE WITH VALUE THAT WAS APPARENT WAS DESTROYED WITHOUT NOTICE TO MR. WEATHERTON.

Mr. Weatherton's counsel, John Hemmer, filed an informal motion for discovery on February 9, 1999. (1 CT 49.) On March 11, 1999, Mr. Hemmer filed a request for preservation of all evidence, and a request for further discovery concerning a narcotics raid in the Liberia/Nairobi neighborhood in early March of 1999 by an unknown law enforcement agency, and the recovery of a gun allegedly used by Mr. Weatherton. (1 CT 54 et seq.) On April 1, 1999, Mr. Hemmer filed a motion to compel disclosure pursuant to section 1054.1 that specified various items of discovery that had not yet been turned over to the defendant. (1 CT 59 et seq.)

On March 7, 2000, counsel filed a more detailed motion for discovery. (1 CT 129.) Mr. Weatherton himself filed a detailed motion for a pretrial discovery compliance order on September 12, 2001. (4 CT 973 et seq.) Earlier, on July 13, 2000, Mr. Weatherton filed a motion for sanctions for failure to preserve material evidence. (2 CT 573 et seq.) In that motion he relied primarily on *California v. Trombetta*, *supra*, 467 U.S. at p. 485 [due process under the 14th Amend.], and article I, sections 15 and 24 of the California Constitution.

At some point in the spring or summer of 1999, the house in which the crimes were committed was leveled. At a hearing on January 4, 2002, it was established that Dwight Harmon, property owner and brother of Yolanda Harmon, decided to tear the house down because it "was attracting a bad element." (25 RT 3924.) He told the prosecutor's office about his intentions. He spoke with an investigator to ask whether it was okay to tear down the property, and waited to hear back from him. He also called the city of Indio about getting a permit to tear it down, which required an inspection of the house to see if it had any asbestos in it. (25 RT 3934.)

It was going to be at least three or four weeks before the city of Indio could "line everything up." However, people from Mexico wanted the wood from the house and were willing to tear it down, "so we really did not have to get the permit from the city because it was torn down that week." (25 RT 3934-3935.) No one connected with Mr. Weatherton was notified of the destruction of the property until after it had taken place. He would have given any defense attorney or investigator permission to inspect the property had they asked. (25 RT 3935.)

Mr. Harmon did not know whether there was electricity in the house. His brother-in-law provided electricity to some houses in that area; his name is Goldist Roberson, or Dale Roberson. If there were any electricity

bills, Mr. Roberson would be paying them. (25 RT 3926.) He did not remember any light fixtures in the house. He went inside the house two or three times between the time the crime was committed and when the house was torn down. (25 RT 3927.)

After the prosecutor's office learned that the property was to be torn down, Deputy District Attorney Shelly Scott directed Richard Twiss and forensic technician Marvin Spreyne to make a videotape of the property. (25 RT 3951, 3954-3955.) A videotape was made on February 1, 1999, a little after 11:00 a.m., using available light (38 RT 6052-6053), and was shown to the jury. (38 RT 6056-6071.) Mr. Spreyne thought that there was a small window on the north side of the house, and that the place was not well lit. (25 RT 3950.) He remembered seeing blood at the crime scene, blood spatter on the furniture and sofa and floor. (25 RT 3953.)

Counsel argued that the destruction of the crime scene meant that exculpatory evidence was destroyed. For example, Mr. Spreyne's testimony was that the light was dim and that there was covering over the one window, but Mr. Weatherton could not duplicate for the jury the lighting conditions — a critical issue in an eyewitness identification case. The sun came up according to the almanac at 6:05 a.m. in the east, opposite the only (covered) window, and the homicide occurred sometime between 5:45 and

6:45 a.m. If the scene were preserved, defendant could have duplicated the lighting conditions. Counsel argued that if the court were not going to impose sanctions on the prosecutor, it should instruct the jury that the lighting was dim and it was difficult to see at the time the crimes were committed. (25 RT 3959-3961.)

The prosecution countered by arguing that the loss of the crime scene was not important, since the case was an eyewitness identification case, and that defense counsel had had plenty of time to examine the crime scene before it was destroyed. (25 RT 3962, 3969.) The trial court denied the motion for sanctions and the request for jury instruction dimness of the lighting and the difficulty seeing at the time of the incident. (25 RT 3969.) This ruling was prejudicial error.

A. Legal Discussion

The U.S. Supreme Court has held law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta*, *supra*, 467 U.S. at p. 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a

nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta*, *supra*, 467 U.S. at p. 489; *People v. Beeler, supra*, 9 Cal.4th at p. 976.)

The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57.) In such cases, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58;[63] accord, *People v. Beeler, supra*, 9 Cal.4th at p. 976.)

---

[63] Larry Youngblood was initially convicted largely due to eyewitness identification, and was ultimately exonerated because more sophisticated DNA testing was able to show that he could not have been the perpetrator. In October 1983, a ten-year-old boy was abducted from a carnival in Pima County, Arizona, and molested and sodomized for over an hour by a middle-aged man. At the hospital, semen samples were collected from his rectum as well as the from the clothing he was wearing at the time of the assault.

Based on the boy's description of the assailant, Youngblood was charged with the crime. He maintained his innocence at trial. No serological tests were conducted before trial, as the police improperly stored the evidence and it had degraded. Expert witnesses at trial stated that, had the evidence been stored correctly, test results might have demonstrated Youngblood's innocence. He was convicted in 1985 of child molestation, sexual assault, and kidnapping.

Youngblood appealed his conviction, claiming the destruction of potentially exculpatory evidence violated his due process rights, and the

On review, a California appellate court must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling. (*People v. Roybal* (1998) 19 Cal.4th 481, 509-510; *People v. Cooper* (1991) 53 Cal.3d 771, 810; *People v. Carter* (2005) 36 Cal.4th 1215, 1246.)

Here, Nelva Bell's testimony as to how the crime supposedly occurred was at odds with the forensic evidence regarding the bullet wounds sustained by the decedents. (See Statement of Facts, *ante*.) The issue of back spatter and bloody footprints were prominent during jury deliberations. Mr. Weatherton was unable to present evidence on these topics, even though it was likely available in the blood seen by Mr. Spreyne.

The crime scene is *always* a critical source of evidence. The prosecution was put on notice that it was going to be destroyed, was

---

Arizona Court of Appeals set aside his conviction. He was released from prison, but in 1988, the U.S. Supreme Court reversed the lower court's ruling, and his conviction was reinstated (*Arizona v. Youngblood*, *supra*.) In 2000, more sophisticated DNA technology exonerated Youngblood, and he was released from prison in August 2000. The district attorney's office dismissed the charges against Larry Youngblood that year.

Shortly thereafter, the DNA profile from the evidence was entered into national convicted offender databases. In early 2001, officials got a hit, matching the profile of Walter Cruise. In August 2002, Cruise was convicted of the crime and sentenced to 24 years. (See *Know the Cases: Larry Youngblood*, Innocence Project < http://www.innocenceproject.org/ Content/Larry_Youngblood.php> [as of Jan. 13, 2011].)

specifically asked if that was okay, and rather than seeking to stop this from happening or notifying the defense, simply proceeded to take a video to preserve what it needed for its own litigational purposes. There is no way the crime scene's destruction without notice to defense counsel could have been anything other than in bad faith. Without the crime scene, there was no comparable way Mr. Weatherton could present evidence of the light available at the time of the crime, and no way at all to obtain evidence related to blood patterns, bullet shell patterns, or evidence of functioning sources of music — Vernon Neal testified that there was loud music blaring from the crime scene when he approached, something no one else noticed. (28 RT 4484-4487.)

Blood spatter patterns were discussed by the jury in an attempt to account for why Mr. Weatherton had no traces of blood on him when arrested; had a mist of bloodstains akin to back spatter been discovered at the crime scene, it would have bolstered the exculpatory value of the lack of any such blood on Mr. Weatherton's person when he was arrested shortly after the crime's commission. (See Claim IV.G. and IV.H., *ante*, for an account of how important this issue was during juror deliberations.) It cannot be said beyond a reasonable doubt that Mr. Weatherton was not

prejudiced by the destruction of the evidence described herein. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The failure to preserve the crime scene deprived Mr. Weatherton of jury consideration of important evidence, and requires that his convictions and sentence be reversed.

XII. THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION BY ALLOWING A JURY POLL TO DETERMINE THAT THE JURY SHOULD VISIT WHAT REMAINED OF THE CRIME SCENE.

A. Factual Background

On January 22, 2002, the prosecutor indicated that it would be asking for a jury "field trip" to the crime scene. (37 RT 5444.) Counsel objected, saying that the scene had been destroyed, and cited the cases of *People v. Price* (1991) 1 Cal.4th 324, and *People v. Williams* (1997) 6 Cal.4th 153, arguing that the crime scene was torn down, and it would be impossible to get the same sense of perspective or lighting: "I don't think the prosecution can sustain its burden of showing that the conditions for jury view would be substantially the same as those under which the witnesses made their observations." (34 RT 5599.)

The prosecutor said she would direct the jury to focus on distances, and that the houses and trees were still in the same position. The trial court denied the "field trip" without prejudice, and told the prosecution they were welcome to reconstruct the room in which the shootings took place in the courtroom if they wanted to talk about distances. (34 RT 5603.)

On January 28, 2002, the parties returned to the issue. (37 RT 6019.) The trial court suggested a straw poll of jury members to see if they thought a visit to the crime scene would be beneficial. (37 RT 6023.) Counsel

objected to a straw poll, and said that the jury probably did not know that the crime scene had been razed. (37 RT 6034.)

On the following day, the trial court asked the jurors to think it over and report back to him anonymously whether they thought it would be beneficial for them to visit the crime scene. (38 RT 6110.)

The parties returned to the question on January 31, 2002. Counsel for Mr. Weatherton urged the court to decline the prosecutor's request:

> MS. REED: The house is not there. The walls are not there. The foundation, quite frankly, are very deceiving. My stepdad is a contractor, and he could build a 4,000 square foot house, and somebody could go out there and look and say I want a big house. It looks small. You cannot tell from a foundation what a house looked like, how the rooms were; where the furniture is. There is absolutely no real probative value of looking at that scene. There is, however, a great prejudicial effect. Mr. Weatherton, if he is going to be present, and he has a right to be present at all stages of the proceedings, and to hear what is being said, is going to have to be in chains in front of the jury. . . . We have a diagram with measurements already in evidence. It has measurements how big the room was. It has where the furniture was placed. We have pictures. I believe they have seen the video. I don't know what we are hoping to prove by taking them out there and showing them a place where the house was and is no longer there, and it could prejudice Mr. Weatherton. What is the point?

THE COURT: The prejudice to Mr. Weatherton was one of my initial concerns because of the requirement to use shackles when he is out there. And I was assuming that Mr. Weatherton would want to go, because he wants to be present at every stage of the proceedings, particularly if he is representing himself next week. And then the deputy district attorney pointed out to me that he can remain in the car if he elects and see whatever is taking place without them ever knowing that he is shackled if he elects not to get out.

MS. REED: And not hear what is being said?

MS. CARTER: There is not going to be anything said.

THE COURT: There should not be anything said. Shouldn't be any talking. If there was any talking it would be someone saying those are the tamarisk trees. That's the house. Except that we had the video narrated, so they should know all that already. And there is no reason to narrate the visit that I could think of.

MS. REED: Quite frankly, there is no reason for the visit.

THE COURT: Well, that's part two of what you just brought up, and I was thinking that we now have some what of a reading of the jury, and a lot of them think that a visit would be beneficial. So now I am thinking, are those people going to go, any of those people that want to see the scene going to go there without the Court's permission against my instructions? I know we assume the

legal fiction they have been told not to, I wonder if the curiosity would take them out there, and we have some jurors that have been to the scene and some that have not. And I am worried about that disparity.[64]

MS. CARTER: Judge, I think we have to assume they won't go if the Court ordered them not to.

THE COURT: It is like Mr. Weatherton said we have this legal fiction where they hear something, and you tell them pretend you did not hear that.

(40 RT 6518-6520.)

The parties continued to discuss what would be revealed and what would be distorted by a site visit. The prosecutor wanted the jury to see how easy it would be to bury a gun in the desert without it being discovered (40 RT 6525-6526.) The trial court pointed out aspects helpful as well as harmful to Mr. Weatherton, i.e., how close the various sites were to each other, which would make it not surprise that his footprints would be around, and that he was seen by Officer Rody Johnson on a street that was in the opposite direction from the canal. (40 RT 6527-6528.) Eventually, the

---

[64] Contrast the trial court's easy acceptance of the frailties of human nature here with its palpable anger at jurors who were threatened with criminal prosecution — not for anything they had done, but because they failed to promptly report other jurors who violated the court's directives. (Claim IV, *ante*.)

court ruled, saying "I took a poll and I committed, so we will go out there." (40 RT 6532.)

On February 6, 2002, the jury visited the crime scene. (43 RT 6981, 6986.) Shortly before the visit, counsel objected again on due process grounds to a site visit, since the site has been so changed since the crime. (42 RT 6955-6956.) Shortly after the visit, counsel moved for a mistrial, on grounds that two prosecutors, Ms. Carter and Ms. Nguyen were standing on the foundation slab of the crime scene next to the jurors, on what was supposed to be a neutrally viewed crime scene site. (43 RT 7007.) The trial court denied the motion, but noted that Mr. Weatherton was seen by the jurors wearing a three-piece suit, with a chain visible across his waist about where his belt would be. (43 RT 7007-7008.)

The trial court's "ruling" was an inappropriate deference to a jury's straw poll. To the extent the court cited any reasons, it referred to the disparity between those jurors who likely violated his directives and those who did not. A ruling based on neutralizing the supposed effects of an unknown quantity of jurors violating the court's directives is not a sufficient reason to allow a site visit to a site that had been completely changed, and largely eliminated, since the crime's commission over three years prior to the jury's visit. It was prejudicial error for the court to have allowed the

jury to visit the foundation of the house where the crime was committed, to mingle there with the prosecutors, and to see Mr. Weatherton in chains.

B. Legal Argument

Juries have long been authorized to visit the scene of a crime or crimes, provided specified precautionary measures are taken.[65]

> The standard of review for a trial court's decision to grant or deny a request for a jury view is abuse of discretion. [Citation.] When the purpose of the view is to test the veracity of a witness's testimony about observations the witness made, the trial court may properly consider whether the conditions for the jury view will be substantially the same as those under which the witness made the observations, whether there are other means of testing the veracity of the witness's testimony, and practical difficulties in conducting a jury view.

(*People v. Price*, *supra*, 1 Cal.4th at p. 422, cited in *People v. Jones* (2011) 51 Cal.4th 346, 377-378.)

---

[65] Section 1119, first enacted as part of the original Penal Code in 1872, currently provides in full: "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time."

This Court cannot review the question of whether discretion was appropriately exercised if it was never exercised at all. "[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations]." (*People v. Penoli* (1996) 46 Cal.App.4th 298, 302.) "Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations]." (*Id.* at p. 306.)

Where the trial court failed to exercise its discretion, this Court will assess prejudice by making an independent ruling, and then assessing the impact of any wrongful inclusion or exclusion of evidence on the trial's outcome, using the appropriate standard of prejudice assessment. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1011 [trial court failed to exercise discretion re admissibility of prior convictions]; *People v. Hamilton* (1988) 45 Cal.3d 351, 376-377 [failure to exercise discretion to strike special circumstance].) Here, since there is no trial court weighing of the probative value of the evidence at issue against its prejudicial effect, this Court is free to make its own assessment.

Why did the trial court allow this jury visit? The reasons articulated by the trial court were that it wanted those jurors who obeyed its directives to be on the same footing as those who disobeyed them, and that the poll he took of the jurors indicated that they wanted to visit the crime scene. To the extent these are reasons, they are not sufficient. A speculative need to place jurors who follow instructions on equal footing with unidentified jurors who might be committing misconduct is hardly a reason to admit evidence or conduct a crime scene view that should not otherwise be admitted or conducted.

Further, even if juror preference, as opposed to a judicial weighing of possible utility versus potential prejudice, could provided a basis for a crime scene view, there's nothing in the record to indicate whether the jurors themselves would have opted for a visit to the crime scene had they known in advance that the actual scene of the crime — the house — had been razed. To the extent that the trial court simply failed to exercise its discretion, this Court owes its decision no deference at all.

Mr. Weatherton was prejudiced by this unnecessary and misleading visit to the crime scene. The house itself was missing. The naked slab had the practical effect, recognized by the trial court (and anyone who has

visited a construction site to see the foundation before a house itself is constructed) of minimizing the structure's scale in the minds of viewers.

It also put Mr. Weatherton in the difficult position of waiving his right to be present, at a time when his dissatisfaction with counsel's failures to investigate was on the record, or exposing himself as a chained man to the jurors. The trial court should not have allowed the jury to vote on what must have been an irresistible opportunity after two months of trial to stretch their legs and visit what remained of the scene of the crime.

Although there is no record of anyone having spoken, or of the jury going anywhere other than the foundation of the house where the crimes were committed, the visit should not have been used by prosecution counsel to ingratiate themselves with jurors. It was improper for two prosecution lawyers to be mingling with the jurors, especially in the close quarters of the house's foundation. Nor should the jury have been exposed to the dimension-distorting impression created by viewing the foundation of the no longer standing house.

Having wrongfully permitted the heart of the crime scene — the house — to be razed without notice to the defense (see Claim XI, *ante*), the prosecution should not have permitted to benefit from a visit to what remained. The crime scene visit was unwarranted, unfair, and misleading,

and deprived Mr. Weatherton of due process and a fair, reliable, and impartial determination of his guilt and sentence, in violation of his rights under the Sixth, Eighth and Fourteenth Amendments. Accordingly, Mr. Weatherton's convictions and sentence must be set aside.

XIII. MR. WEATHERTON'S RIGHTS TO DISCOVERY WERE PREJUDICIALLY VIOLATED.

Mr. Weatherton's counsel, John Hemmer, filed an informal motion for discovery on February 9, 1999. (1 CT 49.) On March 11, 1999, Mr. Hemmer filed a request for preservation of all evidence, and a request for further discovery concerning a narcotics raid in the Liberia/Nairobi neighborhood in early March of 1999 by an unknown law enforcement agency, and the recovery of a gun allegedly used by Mr. Weatherton. (1 CT 54 et seq.) On April 1, 1999, Mr. Hemmer filed a motion to compel disclosure pursuant to section 1054.1 that specified various items of discovery that had not yet been turned over to the defendant. (1 CT 59 et seq.)

On March 7, 2000, counsel Clark Head filed a more detailed motion for discovery. (1 CT 129.) Mr. Weatherton himself filed a detailed motion for a pretrial discovery compliance order on September 12, 2001. (4 CT 973 et seq.) That motion provided the structure for hearings regarding discovery on October 10, 2001, and October 15, 2001. (4 PRT 556 et seq.)

The trial judge granted many of Mr. Weatherton's requests, but the court refused to give Mr. Weatherton access to interviews and materials concerning witnesses whom the prosecution did not expect to call as witnesses. (4 PRT 622; 4 CT 984-985.) The trial court also denied

counsel's request for even the naming of any informant who would not be called as a witness. (4 PRT 692.)

Item 16 of Mr. Weatherton's motion was a request for copies of medical records of Nelva Bell, including records of physical, mental and psychological examinations for periods before and after the crime. (4 CT 985.) The trial court relied on the California Education of the Bar (CEB) book on Criminal Procedure, § 11.26, and quoted:

> "The defense may secure the privileged psychiatric medical records of a prosecution witness if the defense can show good cause for the discovery of the records. Defense counsel should have a subpoena duces tecum for the records served on the person who has the records. The records should be subpoenaed so that they arrive before hearing is held on their admissibility. This hearing occurs during, not before, a trial," (*People v. Hammon* 15 Cal.4th 1117.) ¶ "When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court must balance the defendant's need for cross-examination against the state policies that the privilege is intended to serve."

(4 PRT 662-663.)

When counsel asked for at least the names of any treating mental health professionals, the trial court read language indicating that defense counsel should try through independent vehicles to obtain evidence of mental disorder. (4 PRT 664-665.) When the court considered how to word the order, it stated, "So how do you word this? The way you worded

it isn't sufficient, Miss Carter, when you say, 'Copies of all medical records as a result of the 11-1-98 gunshot wound,' that's too broad. That could go on forever, including psychological treatment." (4 PRT 665.)

After extensive argument (4 PRT 652 et seq.), the request was granted only insofar as the records were generated as a result of Ms. Bell's hospitalization for the gunshot wounds she suffered in the crime at bench. (4 CT 985; 4 PRT 666.)

Finally, when Mr. Weatherton asked for the blood sample taken from Nelva Bell at the hospital where she was taken after being shot, the trial court and the prosecutor believed that the blood had been destroyed, but in any event the trial court ordered that it be provided Mr. Weatherton only if it was in the prosecutor's possession. (1 RT 38.) The trial court's restrictions on discovery did not comport with either state or federal due process requirements.

The prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (*Brady v. Maryland* (1963) 373 U.S. 83, 87), a general request, or none at all. (*United States v. Agurs* (1976) 427 U.S. 97, 107.) Responsibility for *Brady* compliance lies exclusively with the prosecution, including the "duty to learn of any favorable evidence known to the others acting on the government's behalf

in the case." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) Whatever the reason for failing to discharge that obligation, the prosecution remains accountable for the consequence. (*Id.* at pp. 437-438.)

The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file, and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf. . . ." (*Kyles, supra*, 514 U.S. at p. 437.) "A contrary holding would enable the prosecutor 'to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial,' [citation]." (*United States ex rel. Smith v. Fairman* (7th Cir.1985) 769 F.2d 386, 391-392.) Thus, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." (*Giglio v. United States* (1972) 405 U.S. 150, 154.)

In *In re Brown* (1998) 17 Cal.4th 873, this Court held that the laboratory utilized by the police was part of the "prosecution team" for *Brady* purposes, concluding that "[the prosecutor thus had an obligation to determine if the lab's files contained any exculpatory evidence, such as the worksheet, and disclose it to petitioner. Whether or not he actually did

examine the files, the lab personnel's knowledge is imputed." (*Brown*, *supra*, at p. 880.) The Court reasoned, "Any other rule would leave the defendant's due process rights to the fortuity of a subordinate agency's procedural protocol, which the Supreme Court has squarely rejected." (*Id.* at pp. 880-881, citing *Kyles, supra*, 514 U.S. at p. 438.)

Nelva Bell's blood taken shortly after she was shot showed the presence of cocaine, but the preliminary sample did not specify the amount of cocaine or cocaine residue. Her blood was obviously going to be a critical piece of evidence, because Ms. Bell would necessarily be the key witness in any prosecution for the crimes at bench, and the question of whether her memory was colored by paranoia or pattern-recognition distortions at a time of great stress and little light was the subject of intense debate. Expert witnesses from both sides disputed over the impact of varying levels of cocaine intoxication, but were all limited by the lack of specificity as to how much cocaine was actually in her blood.

The record is silent as to whether or not it truly was the policy of the hospital to quickly destroy blood samples of crime victims, as was speculated by both the prosecutor and the court, but there is no reason to believe that the hospital would not have complied with any directions from the prosecution on the handling of such biological materials. It was

prejudicial error for the trial court to restrict the reach of Mr. Weatherton's discovery to materials actually in the possession of the district attorney's office, and to specifically deny his request that the hospital be directed to supply any samples of Ms. Bell's blood remaining in its possession. It was likewise improper for the prosecution to be allowed to keep from Mr. Weatherton the names and materials of people it had chosen not to call as witnesses, and the names of informants who it was not going to call as witnesses. Whatever qualities made these people undesirable witnesses for the prosecution meant that they may have had exculpatory value for petitioner. The trial court erred in limiting the prosecutor's obligations to Mr. Weatherton in this manner.

The denial of access to obviously relevant evidence denied Mr. Weatherton his rights to present a defense, to compulsory process, to confrontation, and reliable determinations of guilt and sentence (6th, 8th, 14th Amends.); that the burden is on the state to show the error was harmless beyond reasonable doubt, and that, in the absence of the names of and materials concerning potentially exculpatory witnesses, and the absence of blood samples and the importance of the issue to which they related (Nelva's ability to accurately perceive and recall the identity of her assailant), this burden cannot be met.

XIV. THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING OFFICER JOHNSON TO OFFER UNRELIABLE AND IRRELEVANT EVIDENCE THAT MR. WEATHERTON LEFT FOOTPRINTS RUNNING INTO A GROVE OF TREES TOWARD THE CANAL AND WALKING OUT AGAIN.

On January 2, 2002, counsel for Mr. Weatherton moved to preclude the prosecutor from mentioning in opening statement anything about footprints other than there were footprints seen in a certain place. Counsel argued that no expert would be able to say that a person was walking to the scene or running from the scene; there were no measurements taken, no pictures of footprints in a group, just photographs of widely spaced individual footprints; and the evidence was unreliable. The prosecutor disagreed, arguing that Officer Johnson would opine that he saw footprints walking one way and running the reverse direction, and Mr. Weatherton could produce an expert if he wanted to challenge Johnson's testimony. (23 RT 3684.)

The trial court indicated that problems with the shoe prints went to the weight and not the admissibility of the evidence, and allowed the prosecutor to mention Johnson's opinion in her opening statement. (23 RT 3738.).

During the testimony of Officer Johnson at a 402 hearing, counsel objected to any use of People's Exhibit 70, a diagram of footprints at the

scene constructed by Johnson within the last few months prior to Johnson's testimony, or about three years after the crime's commission. (26 RT 4073.) Counsel's objection was overruled. (26 RT 4074.)

On January 22, 2002, on the eve of Officer Johnson's testimony, counsel for Mr. Weatherton objected on state and federal constitutional grounds to testimony from Johnson about footprints showing a pattern of running or walking in particular direction. Counsel argued that the state's criminalist was only going to testify that the photographed shoes were similar, not that they belonged to Mr. Weatherton; that there were only six or eight photographs of poorly located shoe prints, but that Johnson drew a diagram three years later, relying on memory alone, that contained about 50 shoe prints; that Johnson was not qualified to make any of the conclusory statements in his report about running and walking and directionality of footprints. (34 RT 5498-5503.) The trial court was dubious of Johnson's qualifications, but denied counsel's objection. (34 RT 5503.) That denial was error.

There was no effort made by the prosecution to look at footprints in general; there was only an effort to find examples of footprints resembling Mr. Weatherton's shoes. The photographs of footprints were taken at

random locations around the crime scene and Mr. Weatherton's residence, with only the loosest of identifying notes made. (See pp. 34-36, *ante*.)

Johnson's scenario of Mr. Weatherton running one way through the trees and towards the canal, and then walking back, if it were truly believed by the prosecution, would have provided considerable guidance in terms of where to look for the missing army jacket, big gun and fingerless gloves, as well as any ill-gotten gains, because those items would have been disposed of before Mr. Weatherton's return trip — but the prosecution elsewhere argued that they could not find the weapon because Mr. Weatherton could have gone anywhere in the large desert area — the vast scope of possibilities was given as a reason why the jury should be allowed to visit the crime scene.

The trial court was very skeptical of the probative force of the footprint evidence, noting that Mr. Weatherton lived right there close to where the prints were found, and it would not be surprising that his footprints were there. (See 41 RT 6598-6599.) But, it allowed the evidence to come in anyway.

It is true that many points undermining the importance of the footprint evidence were made by counsel during cross-examination, and in closing argument. (46 RT 7632-7635.) However, the prejudicial force of

this "corroborative" evidence became apparent during guilt phase deliberations, when the apparent vision of a bloody footprint, suggesting that Mr. Weatherton had been in the house and stepped in blood, was a focal point of deliberations.

Mr. Weatherton recognizes that the jury's subjective processes are not admissible for any reason pursuant to Evidence Code section 1150, but the jury's discussion of the footprints just before returning its verdict is an objective, verifiable fact that could have been recorded. The practical effect of Johnson's unreliable testimony and diagram was to confuse and mislead the jury.

As criminalist Michelle Merritt testified, it would have been possible to obtain casts from some of the footprints photographed. But there were no casts, and there was no accurate placement of any of the photographed footprints in relation to the crime scene or where Mr. Weatherton lived, nor timely development of any charts or diagrams of particular footprints and their location, nor any indication that anyone looked for any footprints other than those made resembling in some respect Mr. Weatherton's shoes. The narrative offered by the prosecution was supported only by a diagram of several dozen footprints made by Johnson three years after he first surveyed

the scene — so long a time as to render his placements of footprints utterly unreliable.

The six photographed footprints made by shoes similar to Mr. Weatherton's were irrelevant. As the trial judge said, they are no more surprising that if the trial judge's fingerprints were found inside his own house. To the extent that Johnson's extrapolations of walking and running in a particular direction were relevant, the testimony was not at all reliable. Any probative value they may have had was substantially outweighed by the danger of undue prejudice, confusion of issues, and misleading the jury. (*People v. Alexander* (2010) 49 Cal.4th 846, 904-905.)

Reversal is required where the admission of prejudicial evidence rendered the trial fundamentally unfair and resulted in a denial of due process. (*Pulley v. Harris* (1984) 465 U.S. 37, 41.) It is reasonably probable that if the jury were not misled and distracted by this irrelevant and unreliable evidence, they would have reached verdicts more favorable to Mr. Weatherton. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.) It cannot be said beyond a reasonable doubt that the verdicts were unaffected by this unreliable and prejudicial evidence. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Mr. Weatherton's convictions and sentence should be set aside.

XV. THE TRIAL COURT ERRED IN ALLOWING A VICTIM/WITNESS ADVOCATE AND AN ATTORNEY TO ACCOMPANY NELVA BELL WHILE SHE TESTIFIED.

During the preliminary hearing, the trial court allowed Cynthia Galvan, a victim/witness advocate employed by the prosecutor's office (25 RT 3971), to act as a support person for Nelva Bell, pursuant to section 868.5, and sit with her on the witness stand. Mr. Weatherton's objection was overruled. (1 CT 174.)

Mr. Lehman, a conflicts attorney, was later authorized to sit with Ms. Bell while she answered questions about her purchase and sales of cocaine just before trial began (26 RT 4070.)

> THE COURT: Okay. Is it enough that he sits in the audience, or do you want him sitting right next to you?
>
> THE WITNESS: Next to me.
>
> THE COURT: All right.

(26 RT 4094.)

Ms. Galvan was a witness in her own right regarding Ms. Bell's encounter with sheriff's deputies regarding her sales of cocaine. She was allowed to sit with Ms. Bell during her trial testimony. (26 RT 4074-4077; 26 RT 4136 et seq.)

In *People v. Adams* (1993) 19 Cal.App.4th 412, the court upheld the constitutionality of section 868.5, but held there must be a case-specific showing of necessity for support via an evidentiary hearing. The court found this necessity requirement in *Coy v. Iowa* (1988) 487 U.S. 1012, 1021, which required individualized findings of necessity to justify child testimony from behind a screen, and *Maryland v. Craig* (1990) 497 U.S. 836, 855-856, which required an evidentiary hearing to determine whether child testimony on one-way closed circuit television was necessary to protect the child. (*People v. Adams, supra*, 19 Cal.App.4th at pp. 443-444.)

Among the factors to be considered in determining whether a support person's presence violates a defendant's due process rights are the relationship of the victim to the support person; the location of the support person in relation to the victim during the victim's testimony; whether the support person does anything that the jury could see that might influence the witness; and the age of the witness. (*People v. Patten* (1993) 9 Cal.App.4th 1718, 1731-1732.)

This Court has repeatedly recognized the importance of a witness's demeanor. In *Elkins v. Superior Court*, the Court wrote,

> Oral testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses. (*Ohio v.*

> *Roberts* (1980) 448 U.S. 56, 64.) A witness's demeanor is "part of the evidence" and is "of considerable legal consequence." (*People v. Adams* (1993) 19 Cal.App.4th 412, 438; see *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140-141 ["[O]ne who sees, hears and observes [a witness] may be convinced of his honesty, his integrity, [and] his reliability . . . because a great deal of that highly delicate process we call evaluating the credibility of a witness is based on . . . 'intuition'"].)

(*Elkins v. Superior Court* (2007) 41 Cal.4th at p. 1337, 1358.)

Section 868.5 was passed in 1978, as prosecutions for child sex abuse became common; it was designed to provide comfort for the most vulnerable of witnesses — young children. (See *People v. Adams*, *supra*, *passim*.) It has been approved for use in appropriate situation by adults, but the dangers that led to its being restricted are evident. Here, Ms. Bell was not only allowed to have a victim's rights advocate from the prosecutor's office sit next to her during her testimony in the case in chief, but she was also allowed to have an attorney sit next to her while being questioned about her purchase and sales of cocaine before the trial began. This is an extraordinary expansion of the statute; it would be akin to allowing a defendant charged with drug felonies to have a support person, or representative of the prosecuting agency to sit next to him or her while offering testimony on his own behalf.

Ms. Bell's demeanor could not have expressed more confidence. She turned and directly addressed Mr. Weatherton, pointing at him and accusing him of knowing full well that he was guilty. Her lack of any recall of the details that night was more than matched by her confidence that she was pointing to the right man. The trial court had little respect for the prosecution's efforts to create corroborative evidence (see 41 RT 6598-6599), but found Mr. Bell's testimony to be "compelling"; years later, the trial court recalled that "it sounded like she was channeling God through her." (70 RT 10,201.)

It was highly likely that her demeanor was substantially influenced by her knowledge that she had the full backing of the prosecution, and also of other elements of county officialdom, including the conflict attorney staff, should she encounter any discomfort. To have had any support person at all with her when questioned about her purchase and sales of cocaine was error. To have had a second support person, a member of the prosecutor's office, sit with her during her trial testimony, is too much — it begins to resemble a trial of many hundreds of years ago, when the jury decided not so much on the basis of percipient witness testimony as on the testimony of persons of standing in the community — the ancient practice of

compurgation,[66] which, along with trial by ordeal, was gradually placed by the right to a trial by jury. (*Crist v. Bretz*, *supra*, 437 U.S. at p. 36.)

The distorting impact on Ms. Bell's demeanor of the unwarranted personal support provided to her while on the witness stand, and the credibility bolstering effect of having her testify with two respectable members of the community sitting with her, impaired Mr. Weatherton's ability to confront and challenge the credibility of the key witness in the case against him, and thereby prejudicially undermined Mr. Weatherton's rights to confrontation, to present a defense, and to reliable determinations of guilt and sentence in violation of the Sixth, Eighth and Fourteenth Amendments. Mr. Weatherton's convictions and sentence must be vacated.

---

[66] In a trial by compurgation, an accused could hope to "prove" the truth of his statements respecting the lawfulness and orderliness of his conduct by having acquaintances from the vicinage solemnly, under compelling oaths, testify that the accused was on honorable, good, and proper man. (*George v. Day* (1966) 420 P.2d 677, 683.)

> The development of English criminal justice already had a long and complex history by the seventeenth century. Its roots extended to the period preceding the Norman Conquest (1066). In Anglo-Saxon England criminal proceedings were oral, personal, accusatory, and local. One person publicly charged another before the community, which in turn decided what form of proof — compurgation, ordeal, or battle — the trial should take. Compurgation, or oath taking, consisted of swearing a sacred pledge to the truthfulness of one's claim or denial, supported by similar oaths from community members.

(David J. Bodenhamer, Fair Trial: Rights of the Accused in American History (1992) p. 11.)

XVI. MR. WEATHERTON WAS PREJUDICIALLY DEPRIVED OF THE OPPORTUNITY TO REVIEW MATERIALS REGARDING NELVA BELL IN THE JUVENILE COURT'S POSSESSION.

On December 20, 2001, two and a half weeks before guilt phase opening statements, Mr. Weatherton sought to gain access to juvenile courts records pursuant to Welfare and Institutions Code section 827. (22 RT 3617 et seq.) Counsel's petition sought Child Protective Service (CPS) records concerning Nelva Bell. Counsel for the social workers who prepared the records accurately summarized what Mr. Weatherton wanted: He sought papers related to an incident in which CPS responded to an emergency situation in which one of the witnesses in the Weatherton trial (Nelva Bell) was involved in an investigation regarding her care of a child under her guardianship. (22 RT 3617.)

The particular materials requested were brief — emergency response referral information with a face page dated November 2, 1998. (See 22 RT 3638.) The juvenile court reviewed these documents in camera, and made two sentences available to Mr. Weatherton: statements made to Senior Social Worker Richard Russell by Nelva Bell, denying habitual drug use, and another saying that it was a "one-time incident." (22 RT 3635.) The court then ordered that a photocopy be made of the records at issue, and that

they be placed in a sealed envelope so that it could be "made available for inspection by the appellate court." (22 RT 3639.)

Present counsel for Mr. Weatherton sought access to these documents, which are now a part of this record, in order to determine if an appeal of the trial court's ruling is appropriate. (See 4 SCT 89, et seq.) His request was denied without comment by the trial court. (4 SCT 100.)

A. Legal Argument

Mr. Weatherton recognizes that it is the intent of the Legislature "that juvenile court records, in general, should be confidential." (Welf. & Inst. Code § 827, subd. (b).) "Courts have recognized, however, that this policy of confidentiality is not absolute." (*McClatchy Newspapers, Inc. v. Keisha T. (In re Keisha T.)* (1995) 38 Cal.App.4th 220, 230.) "For example, where the principle of confidentiality conflicts with a defendant's constitutional rights of confrontation and cross-examination, it *must give way*." (*Ibid.*, citing *Foster v. Superior Court* (1980) 107 Cal.App.3d 218, 229, emphasis added.)

The United States Supreme Court has held that a criminal defendant's Sixth Amendment right of confrontation and Fourteenth Amendment due process right to present a defense must prevail over any

right of privacy a juvenile witness or the state may have in protecting records against disclosure. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 320.)

The interests of a defendant in a capital case are even stronger than those of a defendant in a non-capital case. In a capital case, the defendant's Eighth Amendment right to heightened reliability and his Fourteenth Amendment right to due process of law require greater procedural protections than those available in cases in which the death penalty is not sought. (*Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Mr. Weatherton has no interest in the minor in whose name the records were created. His interest is in the minor's caregiver, Nelva Bell. Ms. Bell was the sole eyewitness. Her story of the event in question was consistent only in the accusation against Mr. Weatherton. Her statements disclosed by the juvenile court show her to be lying about both her long-term and short-term drug use two weeks after she was hospitalized.

Any further evidence tending to undercut her credibility would be valuable evidence for Mr. Weatherton. Present counsel has reviewed the entire record, and is in a better position to determine whether or not other information in the documents is exculpatory. Mr. Weatherton's right to present a defense requires that he now be allowed to review these

documents in their entirety, so that he may effectively appeal, if necessary, the juvenile court's failure to permit counsel to review potentially exculpatory defense.

B. Review by This Court

However poor a substitute for review by defense counsel it may be, in camera review of discovery materials by the trial court can never be justified unless "subject to appellate review." (*Foster v. Superior Court*, *supra*, 107 Cal.App.3d at p. 230, n. 2.) Accordingly, if the Court declines to grant Mr. Weatherton access to the entirety of the sealed material, Mr. Weatherton requests that the Court review the sealed material examined by the trial court in camera to determine whether Mr. Weatherton should have been granted discovery pursuant to his request. If the Court determines that any of the information was properly discoverable, Mr. Weatherton asks that the Court order disclosure of such information to Mr. Weatherton and grant Mr. Weatherton leave to file appropriate supplemental briefing.

XVII. THE TRIAL COURT ERRED IN DENYING MR. WEATHERTON THE OPPORTUNITY TO SHOW THAT HIS JURORS WERE SELECTED FROM AN UNREPRESENTATIVE VENIRE.

On July 13, 2000, Mr. Weatherton filed a motion to distribute a one-page questionnaire to all prospective jurors in his case. (2 CT 552.) The purpose of the motion was to gain statistical information necessary to prepare a challenge to the composition of the petit jury panel to be assembled in his case. On that same day, he filed a motion to quash the petit jury panel. (2 CT 565.)

Hearing was held on these motions on October 24, 2001. Mr. Weatherton first presented a report on demographics of the Indio/Palm Springs judicial district where the trial was being held, showing the percentage of African-Americans in the jury pool. (6 RT 476, Exh. 1; 1 SCT 182.) Royann Nelson, Regional Court Administrator for the Desert Springs Branch of the Riverside Superior Court, testified regarding the mechanisms for jury selection in that district: names are selected as necessary to compose a jury pool (in Mr. Weatherton's case, the court asked for 600 names to be selected). To select a jury pool of that size, she would obtain between four and six thousand names chosen randomly from DMV and voting records, and send them to a company in Utah with instructions to

pick 600 prospective jurors; that company actually prints the forms and mail them out. (6 RT 447-448, 466-467.)

From those who show up, the jury selection personnel start receiving requests to be excused for various legal reasons. The decision to grant excusals is made by jury staff pursuant to guidelines that do not take into consideration a person's race, national origin, religion, gender, sexual orientation, or any other "arbitrary means." (6 RT 463.) There are five people who are staff members who "receive appropriate training in how to excuse somebody." The decision is discretionary, based on the employee's determination of whether the person falls within a category of the guidelines. (6 RT 468.)

Based on the testimony of Ms. Nelson, the prosecutor argued that there was no evidence to suggest that there is any intentional exclusion of African-Americans, and that this lack of evidence trumps any sort of statistical disparity. (6 RT 477-478.) The trial court cited this Court's decision in *People v. Ayala* (2000) 23 Cal.4th 255, for the preposition that where there is a cognizable group within the population, and that group is under-represented in the jury pool, that under-representation must be a result of improper features of the jury selection process for there to be a legal remedy.

The trial court asked, "Why do we have to make a determination of whether they were under-represented, if he cannot show there is some improper feature in the random selection method?" After reading from *People v. Horton* (1995) 11 Cal.4th 1068, the court tentatively denied the motion, and denied counsel's request to present the jury with a mini-questionnaire unless counsel had other evidence to show there'd been some kind of systematic exclusion or non-random selection. (6 RT 481.)

The trial court thus precluded Mr. Weatherton from learning the racial composition of the jury pool, on grounds that the method used to choose prospective jurors was so airtight that no imaginable disparity between the number of African-Americans in the judicial district and the number called to serve on the jury could ever establish improper exclusion. The ruling was wrong.

> Under the federal and state Constitutions, an accused is entitled to a jury drawn from a representative cross-section of the community. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; [citations].) That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. [Citation.]

(*People v. Horton*, *supra*, 11 Cal.4th at pp. 1087-1088.)

"The federal and state guarantees are coextensive, and the analyses are identical. [Citations.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1159.)

> [T]o establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

(*Duren v. Missouri* (1979) 439 U.S. 357, 364 [99 S.Ct. 664, 58 L.Ed.2d 579].)

"The relevant 'community' for cross-section purposes is the community of qualified jurors in the judicial district in which the case is to be tried. [Citations.]" (*People v. Currie* (2001) 87 Cal.App.4th 225, 233 [104 Cal.Rptr.2d 430].)

This Court's rulings on challenges to the jury venire essentially hold that no possible statistical disparity will violate the constitution unless a defendant can show evidence of an improper selection method. Evidence that the statistical disparity is highly unlikely to be the result of random chance, or that the disparity has endured for a long time, does not establish a prima facie case of discrimination. (See *People v. Burgener*, *supra*, 29 Cal.4th at p. 858; *People v. Breaux* (1991) 1 Cal.4th 281, 298; *People v. Sanders* (1990) 51 Cal.3d 471, 492.)

The U.S. Supreme Court made it clear in *Duren* that it is not disparate treatment but disproportion itself that is the hallmark of a Sixth

Amendment violation: "[I]n Sixth Amendment fair-cross section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section." (*Duren*, 439 U.S. at p. 368 n. 26.) Given this statement, there can be no question that it is disparate impact and not purposefully disparate treatment that the Sixth Amendment forbids.

The critical inquiry under *Duren*'s third prong is whether the underrepresentation of the distinctive group is systematic — and a systematic discrepancy can be shown by numbers alone. (See *Duren*, 439 U.S. at p. 366 ["*his undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic*"], emphasis added; *id.* at p. 367 ["[w]omen were therefore systematically underrepresented within the meaning of *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)"].) As the First Circuit observed:

> The issue is not whether the discrepancy was purposeful; *Duren* . . . defined "systematic exclusion" as simply one that was "inherent in the particular jury-selection process;" viz., the system's result, regardless of intent. We are not concerned with perfection, but, assuming a distinctive group, a process which, however neutral on its face, consistently underran by some 70%, providing one juror when there should have been four, is surely excessive.

(*LaRoche v. Perrin* (1st Cir.1983) 718 F.2d 500, 503, overruled on other grounds in *Barber v. Ponte* (1985) 772 F.2d 982; see also *United States v. Jackman* (2nd Cir.1995) 46 F.3d 1240, 1244, 1248 [holding that the "underrepresentation (of Hartford and New Britain residents, and thus blacks and Hispanics, in the jury pool) 'was quite obviously due to the system by which juries were selected'"], quoting *Duren*, 439 U.S. at p. 367 [99 S.Ct. 664], emphasis added.)

Mr. Weatherton should not have been required to show discriminatory intent in order to make a Sixth Amendment fair cross-section challenge. (See *Thomas v. Borg* (9th Cir.1998) 159 F.3d 1147, 1150.) The trial court's ruling that no possible statistical disparity would support such a claim without evidence of an improper selection method was wrong. Mr. Weatherton should have been allowed to proceed with his claim. Remand is required to see just what was the statistical disparity between the number of African-Americans in the relevant judicial district, and the number chosen as part of Mr. Weatherton's venire.

XVIII. THERE WAS PLAUSIBLE JUSTIFICATION FOR THE TRIAL COURT TO HAVE GRANTED MR. WEATHERTON'S DISCOVERY REQUEST REGARDING THE PROSECUTOR'S CHARGING PRACTICES IN EASTERN RIVERSIDE COUNTY.

On July 13, 2000, counsel for Mr. Weatherton filed a motion for discovery of discriminatory charging practices. (2 CT 581 et seq.) In that motion he asked for an order for discovery of the Riverside County District Attorney's death penalty charging guidelines, procedures and practices over the preceding ten years, and those in effect for this case, the disposition of all death-eligible murder and robbery-murder cases handled by the Indio branch office in the past ten years, and the disposition of all other death-eligible multiple murder and robbery-murder cases handled by the Riverside County District Attorney's office.

In addition to points and authorities, counsel attached a declaration asserting that in the Eastern Section of Riverside County, since October of 1989 there had been ten special circumstances cases filed by the prosecutor's office; eight of them were filed against black men — and the prosecutor eventually dropped the death penalty charges against each of the two white men. (2 CT 585.)

The motion was argued on October 17, 2001. In addition to the ten cases listed by counsel in his declaration, he added two more: *People v.*

Cook, where the defendant is African-American, and *People v. Poore*, where the defendant is Caucasian. He contended that the dramatic statistical differences were plausible justification to inquire further into charging practices of the D.A.'s office in the area in which Mr. Weatherton was tried. (2 RT 136-138.)

The prosecutor responded that the declaration filed by counsel was insufficient to establish plausible justification for the court to require discovery re charging practices, and cited the case of *People v. McPeters* (1992) 2 Cal.4th 1148. In *McPeters*, this Court rejected a similar motion, in reliance on the U.S. Supreme Court's decision in *McCleskey v. Kemp*: "Apparent disparities in sentencing are an inevitable part of our criminal justice system." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 312 [107 S.Ct. 1756, 1778, 95 L.Ed.2d 262] fn. omitted.)

> [C]onstitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible." [Citation.] Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.

(481 U.S. at p. 313 [107 S.Ct. at p. 1778].)

In *McCleskey*, the Supreme Court held that an extensive study of 2,000 Georgia murder cases showing an apparent discrepancy in capital sentencing based on race of victim did not demonstrate a "constitutionally

significant risk of racial bias affecting the Georgia capital sentencing process." (481 U.S. at p. 313 [107 S.Ct. at p. 1778].)

Citing *McPeters*, the trial court denied Mr. Weatherton's request for discovery. (2 RT 148.) The trial court's ruling was reinforced by this Court's decision in *In re Seaton* (2004) 34 Cal.4th 193, in which the court found that racial statistics in Riverside County did not show that the accused was wrongly chosen for death penalty prosecution, and that district attorneys were not required to have guidelines for seeking the death penalty. (*Id.* at pp. 202-204.)

Mr. Weatherton, unlike Seaton or McCleskey, was not relying upon a statistical showing to prove discrimination in the capital sentencing process, but only to establish his entitlement to discovery on the issue. The showing he made was sufficient to raise a serious question about charging practices in Riverside County, and hence to warrant discovery. Even as to the ultimate merits of a claim of discriminatory charging or sentencing, international law has been more protective of an accused's rights than domestic law; international law does not pretend that simply because one is unable to photograph or record statements of overt racism, racism does not exist.

Evidence of pervasive racism established by statistical disparities is sufficient to show the existence of impermissible racism under international law. This point is fully developed below, in Claim XXIV. Accordingly, Mr. Weatherton requests that the Court reconsider its holding in *McPeters*, and remand to permit Mr. Weatherton to have the requested discovery and a hearing on the allegations of discriminatory charging practices.

XIX. THE PROCESS OF SELECTING "DEATH QUALIFIED" JURORS IS UNCONSTITUTIONAL.

A. Introduction

The death qualification process pursuant to which the trial court excluded prospective jurors in this case violated Mr. Weatherton's constitutional rights.[67] The process violated his jury trial right,[68] his right to

---

[67] This Court has held that the process of juror "death qualification" — i.e., the process of removing from the venire, in capital case jury selection, all prospective jurors whose views regarding the death penalty would prevent them from imposing the death penalty or substantially impair their capacity to do so is not unconstitutional. (*People v. Mills* (2010) 48 Cal.4th 158, 170-172; *People v. Ashmus*, *supra*, 54 Cal.3d at pp. 956-957 ["The exclusion through 'California death qualification' of 'guilt phase includables' does not offend the Sixth Amendment or article I, section 16 [of the California Constitution], as to the guaranty of trial by a jury drawn from a fair cross-section of the community."], cert. den. sub nom. *Ashums v. California* (1992) 506 U.S. 841.) Similarly, the U.S. Supreme Court has held that the death qualification process is not unconstitutional. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176-177.) Nevertheless, because the death penalty jurisprudence of the courts in this nation is not static but evolving (Steiker, *Commentary: Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty* (2002) 77 N.Y.U. L.Rev. 1475, 1490 [noting "recent changes in the Court's death penalty jurisprudence"]; Bienen, *Criminal Law: The Proportionality Review of Capital Cases by the State High Courts After Gregg: Only "The Appearance of Justice"?* (1996) 87 J. Crim. L. & Criminology 130, 132 [noting "tremendous changes in the jurisprudence and politics of capital punishment nationally"]), Mr. Weatherton respectfully presents this claim that application of the death qualification process during jury selection in his case was unconstitutional.

[68] Article III, section 2, clause 3 of the United States Constitution provides for the right to trial by jury in all criminal trials. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the

due process,[69] his right to equal protection,[70] and it inhibited the exercise of his right to be free from cruel and/or unusual punishment.[71] The selection process employed by the court resulted in impanelment of a jury biased in favor of conviction and imposition of the death penalty. It resulted in impanelment of a jury that was not impartial and that was not suited to serve the role the framers of the Constitution intended juries to fulfill. It resulted in the exclusion of impartial members of the venire. It was arbitrary. It effectively eliminated the handful of African-Americans who

---

crime shall have been committed. . . ." Article I, section 16 of the California Constitution provides, in pertinent part: "Trial by jury is an inviolate right and shall be secured to all. . . . In criminal actions in which a felony is charged, the jury shall consist of 12 persons."

[69] The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Article I, section 1 of the California Constitution provides that the right to "defend[] life and liberty" is an "inalienable right[]." Article I, sections 7 and 15 of the California Constitution provide that no person may be deprived of life or liberty without due process of law.

[70] The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article I, section 7 of the California Constitution establishes a coextensive safeguard.

[71] The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual" punishment. Article I, section 17 of the California Constitution provides: "Cruel or unusual punishment may not be inflicted. . . ."

were part of the venire, leading to an unrepresentative and biased jury. (See Claim XX, *post.*) And, it was carried out in a manner that prevented application of constitutional safeguards against cruel and/or unusual punishment.

B. Standard of Review

Appellate courts independently review purely constitutional questions. (*Ward v. Illinois* (1977) 431 U.S. 767, 768; *People v. Holloway* (2004) 33 Cal.4th 96, 120, cert. den. sub nom. *Holloway v. California* (2005) 543 U.S. 1156.)

C. Background – The Jury Selection Process in This Case

Jury selection in Mr. Weatherton's trial proceeded in the following manner: On October 16, 2001, both parties finally agreed on a 37-page questionnaire to distribute to those prospective jurors who were not given a hardship exemption. Approximately 600 jurors were called to the courthouse over three days, October 29, 30, and 31, 2001. The trial court made general remarks to them in six groups of approximately 100 on each morning and afternoon regarding the general nature of the case and the expected duration of the trial. (7 RT 518 et seq., 7 RT 626 et seq., 8 RT 708 et seq., 8 RT 805 et seq., 9 RT 909 et seq., 9 RT 1005 et seq.)

A very substantial number of the prospective jurors were granted hardship discharges. (See confidential hardship forms at 4 CT 1158 et seq. [10/29/01]; 15 CT 4133 et seq. [10/30/01]; and 25 CT 7110 et seq. [10/31/01].) Of those who remained, approximately 300 filled out juror questionnaires. Seven pages of the questionnaires (pp. 27-33, inclusive), and 17 questions, many of them open-ended, were concerned with the prospective jurors' "VIEWS ON THE DEATH PENALTY AND THE PENALTY OF LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE."

On December 3, 2001, after the court had dismissed those with meritorious hardship claims, and counsel had reviewed a substantial number of completed juror questionnaires, the court began the process of death qualification. (11 RT 1185 et seq.) During this phase of jury selection, the court and the attorneys questioned prospective jurors whose answers on the juror questionnaires did not result in stipulations to excuse them.

There were a significant number of questions concerning the issue of whether or not the jurors could credit the testimony of someone who used illegal drugs (see questions 88-96), and whether or not the prospective jurors agreed with the principle that the testimony of one witness, if believed, is enough to prove any fact (question 109). The court noted that

nobody was saying they could believe a witness or defendant who was high on drugs (10 RT 1109), and further observed that most people would not be happy with the testimony of only one witness. (11 RT 1200-1201, 1207-1208, 1211; 13 RT 1815.) The bulk of the questioning, however, centered on the prospective jurors' views concerning the death penalty.

They were asked for the purpose of ascertaining whether their views would substantially impair their capacity to consider imposition of either the death penalty or imprisonment for life without parole. During this death qualification phase, which continued through December 20, 2001, the trial court applied a standard pursuant to which it removed all prospective jurors who did not unequivocally indicate that they could consider imposing the death penalty, either on its own or in response to challenges for cause by the prosecutor, or after stipulation by counsel. (11 RT 1185 et seq.)

Finally, on January 3, 2002, after the removal of a large number of prospective jurors for cause, the attorneys exercised peremptory challenges. (24 RT 3767 et seq.) After a 12-person jury was selected (24 RT 3783), jury selection continued with respect to alternate jurors. After each side exhausted their available peremptory challenges, six alternates were selected and all jurors were sworn. (24 RT 3805.)

D. An Essential Prerequisite to an Impartial Jury Is That it Be Drawn from "A Representative Cross-Section of the Community"; and the Death-Qualification Process Undermines Both Representativeness and Impartiality

In a series of decisions beginning over seven decades ago the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from "a representative cross-section of the community." The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

The line of United States Supreme Court cases in point began with *Smith v. Texas* (1940) 311 U.S. 128. There the high court reversed on equal protection grounds a state conviction of a black defendant upon a showing that blacks had been systematically excluded from grand jury service. In

language that has proved to be seminal, Justice Black said for a unanimous court:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

(*Smith v. Texas*, *supra*, at p. 130 [61 S.Ct. at p. 165], fn. omitted.)

In such a war the courts cannot be pacifists. Yet today, "[T]he process of obtaining a 'death qualified jury' is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction." (*Baze v. Rees* (2008) 553 U.S. 35, 84 (conc. opn. of Stevens, J.).)

> Millions of Americans oppose the death penalty. A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases. An individual's opinion that a life sentence without the possibility of parole is the severest sentence that should be imposed in all but the most heinous cases does not even arguably "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

(*Uttecht v. Brown* (2007) 551 U.S. 1, 35 (dis. opn. of Stevens, J.); quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 420.)

E. Death Qualification Is a Recent Addition to the Process of Jury Selection and Undermines the Jury's Historical Role as Protector of the Citizenry

At the time this country was founded, citizen-jurors who believed the death penalty to be unthinkable, or simply wrong, in any particular case or context would not have been subject to a "for cause" challenge on the basis of partiality. The accused's right to an "impartial jury" was simply a tool to eliminate relational bias and personal interest from the criminal adjudication process. A citizen's view on the propriety or constitutionality of a particular law did not constitute a personal interest, but instead marked an important component of society's deliberative process. (Cohen & Smith, *The Death of Death-Qualification* (2008) 59 Case W. Res. L.Rev. 87, 88-89.) "That the Sixth Amendment might interfere with the government's effort to impose a death sentence is inconvenient, but the historical basis for the Amendment was to interpose the citizens between the State and the accused for just that purpose." (*Id.* at p. 113, fn. omitted.)

The high court has recently confirmed that the Framers intended criminal juries to have the power to give voice to the people in matters before the judiciary. (*Blakely v. Washington* (2004) 542 U.S. 296, 306 ["Just as suffrage ensures the people's ultimate control in the legislative and

executive branches, jury trial is meant to ensure their control in the judiciary."].)

F. The Constitutional Safeguards Against Cruel And/Or Unusual Punishment

The process of death-qualification inhibits enforcement of the Eighth Amendment's Cruel and Unusual Punishment Clause: The scope of that clause is measured by "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101 (plur. opn. of Warren, C.J.); accord, *Roper v. Simmons* (2005) 543 U.S. 551, 561.) That measure cannot be accurate in a process from which a substantial segment of society is excluded.

> Death-qualification eliminates from juries those citizens who would find a death sentence to be cruel and unusual either generally or in a particular context. As a result, when appellate courts review the frequency with which juries impose a death sentence for a certain class of capital crimes, that measure is necessarily an inaccurate thermometer for determining how much a society has chilled to the idea of executing certain classes of offenders.

(Cohen & Smith, *The Death of Death-Qualification*, *supra*, 59 Case W. Res. L.Rev. at pp. 120-121, fns. omitted.)

G. Due Process of Law

The Due Process Clause of the Fourteenth Amendment "guarantees the fundamental elements of fairness in a criminal trial." (*Spencer v. Texas*

(1967) 385 U.S. 554, 563.) The individual liberty interests protected by the Due Process Clause are largely enforced by observing the basic procedural safeguards contained in the Bill of Rights. (*Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 164 (conc. opn. of Frankfurter, J.).) The Supreme Court of the United States has "emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government. . . .'" (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845; quoting *Wolff v. McDonnell* (1974) 418 U.S. 539, 558.)

The procedures by which juries are selected must comport with the essential fairness required by the Due Process Clause of the Fourteenth Amendment. (*Morgan v. Illinois* (1992) 504 U.S. 719, 730-731.) The death qualification process is fundamentally unfair. It results in the impanelment of "a tribunal 'organized to convict.'" (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521; quoting *Fay v. New York* (1947) 332 U.S. 261, 294.) This fundamental unfairness violates due process.

H. Equal Protection of the Laws

"The Equal Protection Clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community. That means that

juries must be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals." (*Fay v. New York, supra*, 332 U.S. at pp. 296-297 (dis. opn. of Murphy, J.), citing *Smith v. Texas, supra*, 311 U.S. 128.) "Only in that way can the democratic traditions of the jury system be preserved." (332 U.S. at p. 297; citing *Glasser v. United States* (1942) 315 U.S. 60, 85.)

As discussed above, the death qualification process results in the exclusion from capital juries of prospective jurors whose views are deemed by the trial court to substantially interfere with their ability to consider imposition of the death penalty. Such individuals are otherwise qualified to serve. Accordingly, their exclusion violates equal protection.

I. Cognizability of this Issue on Appeal

Counsel for Mr. Weatherton in the trial court did not challenge the constitutionality of the death qualification process. Nevertheless, Mr. Weatherton is entitled to present this constitutional challenge on appeal. A defendant's failure to object to a ruling or procedure in the trial court does not result in a forfeiture of the defendant's right to pursue the issue on appeal if interposing an objection in the trial court would have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.) It is futile for a litigant to object to a procedure in the trial court that the trial court is bound to follow

under the principle of stare decisis. (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1177, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Ca1.2d 450, 455.)

XX. THE DEATH-QUALIFICATION PROCESS IN MR. WEATHERTON'S CASE STRIPPED THE JURY POOL OF ALL AFRICAN-AMERICANS, IN VIOLATION OF HIS RIGHTS TO A REPRESENTATIVE JURY POOL AND EQUAL PROTECTION OF THE LAWS.

The U.S. Supreme Court has held that "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors are not 'distinctive groups' for fair-cross-section purposes." (*Lockhart v. McCree, supra*, 476 U.S. at p. 175.) There is no doubt, however, that African-Americans are a distinctive group. (See *id.*, 476 U.S. at pp. 175-176.)

The *Lockhart* court stated,

> [W]e think it obvious that the concept of "distinctiveness" must be linked to the purposes of the fair-cross-section requirement. In *Taylor*,[72] *supra*, we identified those purposes as (1) "guard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of justice is a phase of civic responsibility. (*Id.*, 419 U.S. at pp. 530-531.)"

(476 U.S. at pp. 175-176.)

The high court's jury-representativeness cases have been based on both the fair-cross-section component of the Sixth Amendment and the

---

[72] *Taylor v. Louisiana* (1975) 419 U.S. 522.

Equal Protection Clause of the Fourteenth Amendment. (See *Peters v. Kiff* (1972) 407 U.S. 493 [Blacks; equal protection]; *Duren*, *supra* [women; fair cross-section]; *Taylor*, *supra* [same]; and *Castaneda v. Partida* (1977) 430 U.S. 482 [97 S.Ct. 1272, 51 L.Ed.2d 498] [Mexican-Americans; equal protection].) "The wholesale exclusion of these large groups from jury service clearly contravened all three of the aforementioned purposes of the fair-cross-section requirement." (*Lockhart, supra*, 476 U.S. at p. 175.)

Mr. Weatherton recognizes that this Court held in *In re Seaton*, *supra*, 34 Cal.4th at pp. 202-203, that a showing of statistical disparity in Riverside County, no matter how great, would not by itself establish a claim of racial bias. In this case, however, the death qualification process eliminated all Africa-Americans from the jury pool.

The record indicates, based on the jury questionnaires themselves and counsel's observations, that five of the 273 people whose questionnaires are part of the clerk's transcript were African American. (See 12 CT 3279 [Williams]; 12 CT 3427 [Amin];[73] 37 CT 10,766 [Rushing]; 45 CT 13,068 [Edwards-Wood]; and 46 CT 13,438 [Smith].)

---

[73] Mr. Amin did not identify his race on the questionnaire. However, counsel for Mr. Weatherton placed on the record, without dispute, that Mr. Amin was black. (13 RT 1783.)

The questionnaires of each of these potential jurors indicated that they were unalterably opposed to the death penalty, except for 77-year-old Gloria Smith, who filled out little of her questionnaire other than to beg the court not to put her on the jury (46 RT 13,435), and to say that she could not fill it out completely because "it is too stressful for me." (46 RT 13,472.)

Prospective juror Williams saw that a death penalty verdict resulted in "nothing but death." (12 CT 3312.) People who vote to impose it "are also guilty of murder." (12 CT 3313.) She believed for religious reasons that men should not judge whether someone should live or die. (12 CT 3307-3309.) Prospective jurors Amin, Rushing and Edwards-Wood were strongly opposed, because they saw no way to avoid wrongful convictions, which would mean the killing of an innocent person, with no remedy should the error come to light. (12 CT 3455; 37 CT 10,791; 45 CT 13,094.) Ms. Edwards-Wood would not vote for death regardless of the evidence presented, because of the number of people sentenced to death who were later shown to be innocent; she also felt it was imposed too often on African-Americans. (45 CT 13,098.)

Jeff Rushing likewise felt that evidence in death penalty cases sometimes turns out to be false or misleading, and that innocent people have been condemned to death. He was strongly opposed to the death

penalty, and thought that keeping someone in prison for life would protect society. (37 CT 10,794.) All four of them would never vote for death regardless of the evidence presented, and were clear candidates for dismissal for cause under the present state of the law. In fact, counsel stipulated to excusing Mr. Rushing and Ms. Edwards (16 RT 2683-2684), and did not oppose the prosecutor's challenge for cause against Ms. Williams. (13 RT 1686-1687.) Mr. Amin was dismissed for cause over counsel's opposition. (13 RT 1788.)

This rate of 100 percent African-American opposition is very different from national surveys. A nationwide Gallup poll released shortly after Mr. Weatherton's trial of support or opposition to the death penalty by gender and race indicates that 44 percent of African-Americans support the death penalty, while 49 percent oppose it. (See Gallup Organization, *Who Supports the Death Penalty?* (Nov. 16, 2004).) Among this 49 percent, or just under half the African-American population, there are doubtless many who would be able to set aside their beliefs and follow the law, and would thus be eligible under current law to serve on a jury when the death penalty is an option.

Why is Eastern Riverside County so different? It could be that this number is a statistical anomaly, although the odds of this happening by

chance are under 10 percent. A more likely explanation is the striking racial disparity in the proportion of African-Americans who are subject to capital punishment in that jurisdiction; the unrefuted numbers submitted by trial counsel were that 75 to 80 percent of the death penalties sought by the prosecutor in the previous ten years were for African-Americans. (See 2 CT 585.) In effect, whether consciously intended or not, the prosecutor, by disproportionately targeting African-Americans for capital punishment, has made it unlikely that African-Americans will qualify to serve on a Riverside capital jury.

In the seminal case of *People v. Wheeler* (1978) 22 Cal.3d 258, this Court wrote,

> As a recent commentator aptly put the point in the context of the case at bar, "It may be argued that the exclusion of jurors on the basis of group membership would be acceptable where it is believed that, for example, blacks are consistently more biased in favor of acquittal than whites. The argument misses the point of the right to an impartial jury under *Taylor*. Blacks may, in fact, be more inclined to acquit than whites. The tendency might stem from many factors, including sympathy for the economic or social circumstances of the defendant, a feeling that criminal sanctions are frequently too harshly applied, or simply an understandable suspicion of the operations of government. Whites may also be more inclined to convict, particularly of crimes against a white victim. But these tendencies do not stem from individual biases related to the peculiar facts or the particular party at trial, but from differing attitudes toward the administration of justice and the nature of criminal offenses. The representation on juries of these differences in juror attitudes is precisely what the

> representative cross-section standard elaborated in *Taylor* is designed to foster." (Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries* (1977) 86 Yale L.J. 1715, 1733, fn. 77.)

(*People v. Wheeler, supra*, 22 Cal.3d at p. 576, fn. 17.)

Here, it is likely that the level of trust among African-Americans in Eastern Riverside County death penalty prosecutions is so low that a very sizeable majority rejects any use at all of the ultimate sanction. By present standards of death-qualification, they are not allowed to ever sit on a capital jury. The death-qualification process in Eastern Riverside County in effect during Mr. Weatherton's trial violated his constitutional rights to equal protection of the laws, and to a jury chosen from a representative cross-section of the community in which he lived, and requires that his convictions and sentence be vacated.

PENALTY PHASE

XXI. THE TRIAL COURT ERRED IN IMPROPERLY DISMISSING JUROR NO. 2.

The prosecution began with the testimony of Nelva Bell on January 7, 2002. At the conclusion of her testimony, Juror No. 2 sent a letter to the court indicating that for religious reasons, he could not vote for the death penalty in a case where the prosecution's case was based solely on the testimony of only one eyewitness:

> I must respectfully request at this time that I be relieved of my obligation as a juror in the Weatherton trial. Information brought out at today's court session now brings this trial into conflict with my beliefs as an observer of Orthodox Judaism. Before we filled out our questionnaires, you mentioned the trial would be lengthy due to the number of people that would be testifying. I did not anticipate that there would only be one witness to the alleged crime. I may quote the Old Testament, Deuteronomy chapter 17, verse 6, quote, "at the mouth of two witnesses, or three witnesses, shall he that is to die be put to death; at the mouth of one witness he shall not be put to death." . . . . Thus even with proof beyond a reasonable doubt, I could vote the defendant guilty, but in the penalty phase I could not vote the death penalty. . . .

(27 RT 4312-4313.)

In proceedings held outside the presence of the jury, the court addressed the juror as follows:

> Do you, right now with the information that you have, do you foresee yourself ever voting for the death penalty in a case like this if we — that's assuming that we've had the guilt

phase, you've along with the other jurors have decided the defendant is guilty, and you found the special circumstances to be true, and now you're in the penalty phase and you've decided that the aggravating factors outweigh the mitigating factors and now you have to decide whether you're going to vote for life or death, in a case like this involving the facts that you already know, do you ever see yourself voting for death?

JUROR NO. 2: If there's enough supporting evidence to the eyewitness, yes.

(27 RT 4305-4306.)

The court then invited counsel to question the juror. In response to Mr. Weatherton's attorney, Juror No. 2 stated that if there were enough supporting evidence, he could consider that to be the equivalent of an eyewitness, and could vote for death. (27 RT 4306.)

The prosecutor asked the juror a question:

[MS. CARTER]: [H]ypothetically speaking, imagine that you come to the conclusion that Miss Bell is telling the truth about what happened and what she said she saw; however, there's not another iota of supporting evidence, there just isn't. It's Ms. Bell or not. You believe her. Can you vote for death?

JUROR NO. 2: No.

MS. CARTER: And you understand — and I understand what law you're talking about, you're talking about God's law, but you understand the law of the State of

California says that if one witness, if believed, is enough to prove any fact?

JUROR NO. 2: I understand that.

MS. CARTER: Right.

JUROR NO. 2: But I also have my religious belief as well.

MS. CARTER: And I don't want to — I'm not trying to argue you off of that, certainly you are entitled to that, and we just appreciate you telling us. I'm just trying to find out where the parameters of that feeling is on your part.

JUROR NO. 2: The parameter would be that if there is enough substantiating evidence to back her up I could consider that to be a second eyewitness.

MS. CARTER: Okay. But bottom line is, even if you believe her, if it turns out to be no other shred of substantiating evidence, even if you believe her you can't vote for the death penalty?

JUROR NO. 2: That's correct.

The court then questioned Juror No. 2 as follows:

[THE COURT]: [T]hat is an instruction that the Court would give you as the law of the State of California, one witness is sufficient to prove a fact if you believe that witness. That's different than your religious beliefs. This is another question in the same form. Would you be able to follow that law?

JUROR NO. 2: Are we talking about guilt or innocence or —

THE COURT: No, we're talking about life versus death in the second phase.

JUROR NO. 2: I would have, without the corroborating evidence, Your Honor, I would have a difficult time with that.

(27 RT 4307-4308.)

The trial court then excused the juror, and the parties argued whether or not he must be removed from the jury. The prosecutor contended that his answer to her abstract hypothetical controlled; the juror stated that he could not vote for the death penalty if there were only one eyewitness and no corroborating evidence; therefore, he was substantially impaired as a juror, and had to be excused.

Counsel for Mr. Weatherton argued that the fact that he was open to voting for death if there was evidence to corroborate the eyewitness saved him as a juror. The juror made it clear that one eyewitness would indeed be sufficient evidence for the proof of any fact, but stated he required more to impose death, and that he would consider corroborating evidence to be the equivalent of a second eyewitness.

The trial court reviewed jury instructions and statutes that specifically require corroboration, did not find that murder was included,

and finally stated, "Well, I guess it's my job to make these decisions so I'm going to excuse him." (27 RT 4316.) Counsel then objected, saying that such a ruling violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. (27 RT 4316-4317.)

The trial court's ruling was prejudicial error. Juror No. 2 never stated that his religious beliefs would affect his determination of the facts for purposes of adjudicating Mr. Weatherton's guilt or innocence. He made it explicitly clear that for purposes of the guilt phase one eyewitness, if believed, was indeed sufficient evidence to prove *any* fact, including Mr. Weatherton's guilt of murder.

But this juror, no doubt influenced by his religious belief, was concerned about a special need for reliability before a death sentence could be imposed. He believed (and saw the biblical rule he cited as embodying a belief) that a single eyewitness is not a reliable enough basis for a death sentence. A juror is entitled to demand more than proof beyond a reasonable doubt before imposing death, as is reflected by the Court's explicit recognition that jurors may consider lingering doubt in mitigation of sentence. (See, e.g., *People v. Gay* (2008) 42 Cal.4th 1195, 1221, 1227 [noting that California has "recognized the legitimacy of a lingering-doubt defense in the penalty phase of a capital trial" and that "'residual doubt is

perhaps the most effective strategy to employ at sentencing.'"].) This juror, and others of his faith, may believe that the inherent fallibility of human beings is such that a conviction based solely on the testimony of a single witness will always leave a lingering doubt — and be too unreliable to support a death sentence. The juror's willingness to forgo a second eyewitness and to accept corroboration by other evidence made clear that reliability — and eliminating otherwise unavoidable residual doubt — is what the juror was concerned about rather than rigid adherence to a religious rule. The juror was fit to serve in any capital case except the rare case in which a prosecutor planned to rely solely on a single witness and present nothing intended to corroborate that witness. This was not such a case.

This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, but by no means the most important part. The jury's role "is not merely to find facts, but also — and most important — to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

The fact that the juror required additional evidence beyond the one eyewitness sufficient for a factual determination of guilt in order to impose

death is in line with the statute's requirement that aggravating factors be found to support the "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) decision to impose death.

Juror No. 2 repeatedly stated that corroborating evidence other than a second eyewitness could be sufficient for a vote of death. His dismissal was clear error which violated Mr. Weatherton's rights to due process, an impartial jury and a reliable sentencing determination in violation of the Sixth, Eighth and Fourteenth Amendments, and requires that Mr. Weatherton's death penalty be set aside. (*Gray v. Mississippi* (1987) 481 U.S. 648.)

XXII. DUE PROCESS OF LAW NOW FORBIDS THE IRREVOCABLE PENALTY OF DEATH TO BE IMPOSED UNLESS GUILT IS FOUND BEYOND ALL DOUBT.

Even if this Court deems the evidence supportive of the jury's finding that Mr. Weatherton was guilty beyond a reasonable doubt of the charged crimes, it cannot reasonably say that Mr. Weatherton committed this crime beyond all doubt. Experience over the past 15 years tells us that there is a significant possibility that the investigators' confirmatory bias led them to a hasty conclusion that, even if based on long experience, was simply wrong. In light of our evolving recognition of this reality, the Eighth Amendment to the United States Constitution now prohibits affirmation of a death sentence unless guilt is proven beyond all doubt.

A. The Constitution Forbids Imposition of Death When a System Generates an Unacceptably High Number of Wrongful Convictions.

Reliability of criminal convictions is a bedrock constitutional requirement, and the goal of the numerous procedural protections guaranteed by the state and federal constitutions. The need is greatest in death penalty cases: "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the

appropriate punishment." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opn. of Stewart, Powell, and Stevens, JJ.) The need for reliability is no less great in the determination of guilt. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 637.)

Although the possibility of wrongful convictions has been a part of the debate on the death penalty for centuries,[74] the possibility has remained abstract, and the proportions long assumed to be minute. Over 20 years ago, a painstaking effort to identify wrongful convictions concluded that from 1900 through 1985, at least 139 innocent persons were sentenced to death and at least 23 innocent persons were executed.[75] This study sparked considerable controversy in the years following its appearance;[76] but we

---

[74] See generally Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987) 40 Stan. L.Rev. 21, 22. "In the mid-1770s, the British scholar Jeremy Bentham argued that capital punishment differs from all other punishments because '[f]or death, there is no remedy.' Jeremy Bentham, The Rationale of Punishment 186 (Robert Heward ed., 1830) (circa 1775). Bentham recognized that there could be no "system of penal procedure which could insure the Judge from being misled by false evidence or the fallibility of his own judgment," *id.* at 187, and he argued that execution prevents "the oppressed [from meeting] with some fortunate event by which his innocence may be proved. [citation omitted]." (*United States v. Quinones* (2d Cir. 2002) 313 F.3d 49, 63.)

[75] Bedau & Radelet, *supra*.

[76] See, e.g., Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study* (1988) 41 Stan. L.Rev. 121.

now know that wrongful convictions occur at a frequency far greater than even the boldest examiners dared suggest 15 years ago.[77]

A 1996 Department of Justice Report noted that every year since 1989, *in about 25 percent of the sexual assault cases referred to the FBI where results could be obtained (primarily by state and local law enforcement), the primary suspect has been excluded by forensic DNA testing*. Specifically, FBI officials report that out of roughly 10,000 sexual assault cases since 1989, about 2,000 tests have excluded the primary suspect, and about 6,000 have "matched" or included the primary suspect.[78] The National Institute of Justice's informal survey of private laboratories reveals a strikingly similar 26 percent rate. As noted by Peter Neufeld and Barry Scheck, "the consistency of these numbers strongly suggests that postarrest and postconviction DNA exonerations are tied to some strong,

---

[77] Huff, Rattner, and Sagarin, authors of the 1995 book *Convicted but Innocent,* spent more than a decade studying the persistence of wrongful convictions, gathering evidence and assessments from police administrators, sheriffs, prosecutors, public defenders, and judges. The three scholars concluded that about 0.5 percent of persons convicted of felonies are innocent.

[78] See Research Report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, U.S. Dept. of Justice (June 1996), at 0-3.

underlying systematic problems that generate erroneous accusations and convictions."[79]

The rate of mistakes in rape cases is stunning — and there is every reason to believe that the rate is even higher in robbery cases. Both rape and robbery are crimes of violence in which the perpetrator is often a stranger to the victim. They are both susceptible to the well-documented[80] dangers of eyewitness misidentification, the leading cause of wrongful convictions — a common mistake not restricted to crimes committed or thought to have been committed by strangers. (See Bureau of Justice Statistics, *Criminal Victimization in the United States 2002*, Table 29, cited in Samuel Gross et al., *Exonerations in the United States, 1989 through 2003* (2005) 95 J.Crim.L. and Criminology, No. 2, p. 530.) The nature of the crime of rape means that the victim must spend time with the

---

[79] Research Report, n. 5, pp. xxviii-xxix. In Actual Innocence (2000), Scheck, Neufeld and Jim Dwyer suggest that the true rate of wrongful convictions may be closer to ten percent than to one-half of one percent.

[80] See generally Brian Cutler, ed., *Expert Testimony on the Psychology of Eyewitness Identification*, Oxford University Press (2009); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony* (2003) 54 Ann. Rev. Psychol. 277, 278 (reviewing the literature over the last 30 years). Studies continue to be published regarding this issue. See, e.g., Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy* (2002) 87 J. Appl. Psychol. 112.

perpetrator, while robberies are usually quick, and generally involve less immediate physical contact.

As of April, 2004, Gross reported 120 exonerations in rape cases; 88 percent of them involved mistaken eyewitness identification. (Gross et al., *supra*, at pp. 529-530.) There were only three robbery exonerations, all of which include eyewitness misidentifications. Before DNA, the results were dramatically different. A study of all known cases of eyewitness identification in the United States from 1900 through 1983 found that misidentifications in robberies accounted for more than half of all misidentifications, and outnumbered rape cases by more than 2 to 1. (Samuel Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt* (1987) 16 Journal of Legal Studies 395, 413.) The difference in the number of recent exonerations is solely due to the availability of DNA testing in rape cases. (Gross et al., *Exonerations in the United States*, *supra*, at pp. 529-531.) If we had a technique for detecting false convictions in robberies comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations.

DNA testing has thus revealed that error of the gravest kind is institutionalized in criminal prosecutions. And capital cases are more, not less, vulnerable to mistake than rape or robbery cases. Murder cases

generate the most intense community pressure, which often leads to "confirmatory bias," or tunnel vision, by law enforcement officials who feel the heat. The victims of murder cases are by definition unavailable.[81]

Since 1973 and the reimposition of the death penalty after *Gregg v. Georgia* (1976) 428 U.S. 153, 138 people have been freed from death row after being cleared of their charges. These prisoners cumulatively spent over 1,000 years awaiting their freedom.[82] As the U.S. Supreme Court noted in June of 2002, "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." (*Atkins v. Virginia* (2002) 536 U.S. 304, 321, n. 25; see also *Ring v. Arizona* (2002) 122 S.Ct. 2428, 2447 (conc. opn. of Breyer, J.), noting the release of the 100th exonerated death row inmate since executions resumed in 1977.)

Prior to the revelations of DNA testing the consensus was best expressed by Justice Learned Hand: "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." (*United States v. Garsson* (S.D.N.Y. 1923) 291 F. 646, 649.) Justice

---

[81] See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital cases* (Autumn 1998) 61 Law and Contemporary Problems 123, 129-133; James Liebman, *The Overproduction of Death* (2000) 100 Colum.L.Rev. 2030.

[82] Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* (2004) Death Penalty Information Center <http://www.deathpenaltyinfo.org/node/523> [as of May 13, 2011].

Hand's formulation was reversed by Illinois Governor George Ryan, who was confronted with 13 cases of innocent men condemned to death, so many that he finally said, "Our capital system is haunted by the demon of error — error in determining guilt, and error in determining who among the guilty deserves to die."[83]

The profound shift in our understanding of the error level in serious criminal convictions led to a sweeping rejection of the Federal Death Penalty Act (FDPA) in *United States v. Quinones* (S.D.N.Y. 2002) 205 F.Supp.2d 256. The court held the FDPA unconstitutional because "it not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process." (*Quinones*, 205 F.Supp.2d at p. 257.) The court so held because: (1) In recent years, an extraordinary number of death row inmates have been exonerated, in some cases, after they came within days of execution—these exonerations, especially those based on DNA evidence, have opened a window on the workings of our system of determining guilt

---

[83] Governor George H. Ryan, Speech at the Northwestern University School of Law (Jan. 11, 2003) [hereinafter Ryan Speech], <http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/dePaulAddress.html> [as of Dec. 12, 2010].

in capital cases, and have shown that the risk of wrongful executions is far higher than anyone used to believe; (2) nothing about the procedural structure of federal capital litigation affords any special protection against that risk. (*Id.* at pp. 266-268.)

On appeal, the district court's decision was reversed. (*United States v. Quinones* (2d Cir. 2002) 313 F.3d 49.) The Second Circuit found that the likelihood of an innocent person being executed had long been a part of the debate over the death penalty's propriety in both Europe and the United States:

> [T]he argument that innocent people may be executed — in small or large numbers — is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment, and binding precedents of the Supreme Court prevent us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent.

(*Quinones*, *supra*, 313 F.3d at p. 62; see generally 313 F.3d at pp. 63-66.)

The court of appeals further found that no lower court could hold that the death penalty was unconstitutional, in light of three specific references to the death penalty in the U.S. Constitution, and the U.S. Supreme Court's decisions in *Gregg v. Georgia*, *supra*, 428 U.S. 153, and *Herrera v. Collins* (1993) 506 U.S. 390; the court interpreted *Gregg* as foreclosing a challenge to the death penalty as unconstitutional per se, and

Herrera as foreclosing any challenge to a death penalty scheme on grounds that it led to the execution of innocent people. (*Quinones, supra*, 313 F.3d at pp. 61-62, 67-70.)

The court's assertion that fear of executing an innocent person is no different now than at any time in our country's history is wrong. It simply picked statements from philosophers and death penalty opponents over the past 230 years warning of the irrevocable nature of death as a penalty and the danger of convicting innocent people, and did not acknowledge, let alone refute or minimize, what moved the district court to hold the FDPA unconstitutional: the abstract possibility of error has been made concrete in the last 15 years. Error has occurred, and is occurring, at a massively greater rate than anyone believed possible.

The Second Circuit's reading of the *Herrera* decision is likewise wrong. In her concurring opinion in *Herrera,* Justice O'Connor, joined by Justice Kennedy, wrote: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed . . . *the execution of a legally and factually innocent person would be a constitutionally intolerable event.*" (*Herrera*, 506 U.S. at p. 419, emphasis added.) Given the tenor of the dissent, 506 U.S. at p. 430 (dis. opn. by Blackmun, J., in which Stevens

and Souter, JJ., join), on this issue Justice O'Connor spoke for a majority of the Court.

Herrera had claimed that he was factually innocent, and could prove it with evidence that had only become available after trial. He had argued that the execution of an individual who is known to be innocent violates the Constitution. On his *factual* claim, the Court's reaction is best summarized in Justice O'Connor's pivotal concurring opinion: "Petitioner is not innocent, in any sense of the word." (*Herrera*, *supra*, 506 U.S. at p. 419.)

In *Herrera,* the Court was not asked to pass on the constitutionality of a system that repeatedly executes innocent people, and it had no record of such a systemic problem before it. As a result, the *Herrera* opinions deal solely with the rights of an individual defendant who had claimed (unpersuasively) to be able to prove that he was innocent after he had exhausted all ordinary remedies for direct and collateral review. The Court's discussion of the issues points in the opposite direction from the Second Circuit's description. The high court says that the execution of innocent defendants *is* a matter of critical constitutional importance.

In *Gregg* and its companion cases, the U.S. Supreme Court held (1) that the death penalty is not intrinsically unconstitutional (428 U.S. at p. 187), and (2) that three of the five death penalty statutes before the Court

contained adequate procedural safeguards to avoid the arbitrary imposition of death sentences that had been condemned in *Furman v. Georgia* (1972) 408 U.S. 238. (*Gregg*, 428 U.S. at p. 207; *Proffitt v. Florida* (1976) 428 U.S. 242, 259-260; *Jurek v. Texas* (1976) 428 U.S. 262, 276.) Neither of those issues is raised here. But there is another holding in *Gregg* (and in *Furman*) that is pertinent: (3) that the constitutionality of the death penalty must be examined and re-examined in light of "the evolving standards of decency that mark the progress of a maturing society." (*Gregg*, 428 U.S. at p. 173, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101.)

The Supreme Court repeatedly has relied on that third holding to declare unconstitutional specific applications of the death penalty and procedures used to administer it.[84] In many of these cases following *Gregg*, the Court has applied new information and new arguments to old procedures, and has found them wanting. In *Roper v. Simmons* (2005) 543 U.S. 551, the high court reversed its decision in *Stanford v. Kentucky* (1989) 492 U.S. 361), and held that the execution for an offense committed

---

[84] See, e.g., *Woodson v. North Carolina*, *supra*, 428 U.S. 280; *Coker v. Georgia* (1977) 433 U.S. 584; *Gardner v. Florida* (1977) 430 U.S. 349; *Lockett v. Ohio* (1978) 438 U.S. 586; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Simmons v. South Carolina* (1994) 512 U.S. 154; *Thompson v. Oklahoma* (1988) 487 U.S. 815.

by a defendant under the age of 18 is unconstitutional. (See also *Atkins v. Virginia, supra*, reversing *Penry v. Lynaugh* (1989) 492 U.S. 302, by holding that mentally retarded persons are categorically exempt from the death penalty.)

The precise issue here — the constitutionality of the beyond-a-reasonable-doubt standard in the face of mounting new evidence that under current procedures it leads to the executions of a substantial number of innocent defendants — has never been addressed by the U.S. Supreme Court. The issue in this case was not decided in *Herrera*, and it has not been addressed in *Gregg* or in any other post-*Gregg* case. The issue did not ripen until recently. It remains undecided to this day. This Court's authority to consider it, within the framework created by *Gregg* and subsequent cases, is beyond dispute.

B. California's Death Penalty Scheme Is Afflicted with All the Factors identified as Leading Causes of False Convictions

The high number of wrongful convictions has made it possible for causal factors to be identified. They are: (1) mistaken eyewitness identifications; (2) false "incentivized" testimony from accomplices and jailhouse informants; (3) false confessions; (4) wrong science; and

(5) official misconduct.[85] One of the most thorough reviews of the sources of wrongful convictions was done in Illinois. Governor Ryan appointed a Governor's Commission to study how and why so many innocent men in his

---

[85] National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward (2009); Gould, The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System (2009); Samuel Gross, *Convicting the Innocent* (2008) 4 Ann. Rev. of L. and Social Science 173; *Errors of Justice: Nature, Sources and Remedies* (Cambridge Studies in Criminology) by Brian Forst, Alfred Blumstein (Series Editor), David Farrington (Series Editor) Cambridge University Press (2003); *Innocence Lost . . . and Found: Faces of Wrongful Conviction Symposium* (2006) 37 Golden Gate L.Rev. 1; Kreimer & Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA* (Dec. 2002) 151 U. Penn. L.Rev. 547 [describing several examples of wrongful convictions in Pennsylvania, some based on testimony of jailhouse informants]; Liebman, *The Overproduction of Death* (2000) 100 Colum.L.Rev. 2030 [noting several cases in which jailhouse snitches were used to secure faulty convictions]; Garvey (Ed.), Beyond Repair? America's Death Penalty (2003); Blume, *Twenty-five Years of Death: a Report of the Cornell Death Penalty Project on the 'Modern' Era of Capital Punishment in South Carolina* (2002) 54 S.C. L.Rev. 285; American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: a Guide for Examining the Administration of the Death Penalty in the United States* (2002) Ohio St. L.J., Symposium: Addressing Capital Punishment through Statutory Reform; Scheck et al., *Actual Innocence* (2000) [out of 62 cases in which DNA has exonerated an innocent defendant, 13 cases, or 21 percent, relied to some extent on the testimony of informers]; Keith Findley, *Learning from Our Mistakes: a Criminal Justice Commission to Study Wrongful Convictions* (2002) 38 Cal. Western L.Rev. 333; Stanley Cohen, The Wrong Men: America's Epidemic of Wrongful Death Row Convictions (2003); Warden, *The Snitch System: How Incentivized Witnesses Put 38 Innocent Americans on Death Row* (2002) Research Report, Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern Univ. School of Law.

state could have been sentenced to death, and to "submit to the Governor a written report detailing its findings and providing comprehensive advice and recommendations to the Governor that will further ensure the administration of capital punishment in the State of Illinois will be fair and accurate." The commission included judges, prosecutors and defense lawyers from across the political spectrum, all of whom were familiar with Illinois' death penalty system.[86] On April 15, 2002, after two years of study, the Illinois Governor's Commission issued its Report [hereinafter Illinois Commission Report]. (Report of the Governor's Commission on

---

[86] Former federal prosecutor and First Assistant Illinois Attorney General, Judge Frank McGarr served as the Commission's Chairman. (Illinois Commission Report, note 5, at 1.) Judge McGarr spent 18 years on the federal bench and served as Chief Judge of the Federal District Court for the Northern District of Illinois between 1981 and 1986. (*Id.*) A former member of the Illinois General Assembly and the United States Congress, Senator Paul Simon served as Co-Chair. (*Id.*) Since he retired from the United States Senate in 1997, Senator Simon has been a professor at Southern Illinois University and Director of its Public Policy Institute. (*Id.*) Thomas P. Sullivan also served as Co-Chair. Formerly a United States Attorney for the Northern District of Illinois from 1977 to 1981, Mr. Sullivan is now in private practice at Jenner & Block. (*Id.*) The Commission included six former prosecutors, four current or former defense lawyers, and two current or former judges: Judge McGarr and Judge William H. Webster. (*Id.*) Refer to the "Commission Members" section of the Illinois Commission Report for more information. (Commission Members, Illinois Commission on Capital Punishment <http://www.idoc.state.il.us/ccp/ccp/member_info.html>.)

Capital Punishment (Apr. 15, 2002) <http://www.idoc.state.il.us/ ccp/ccp/reports/commission_report/ index.html> [as of Dec. 12, 2010].)

The Commission found that the primary problem, from which many others flow, is the intense community pressure on law enforcement authorities to resolve horrific cases. This pressure leads to tunnel vision,[87] or "confirmatory bias," the premature closing off of investigative leads, directive interviews of suspect and witnesses, provision of irresistible favors to informants and accomplices, and misuse of science. Community pressure can make officials desperate enough for resolution to commit misconduct, which is present in a high percentage of known wrongful convictions.

Here, Mr. Weatherton's convictions and sentence rest solely on the evidentiary basis most likely to lead to error: eyewitness identification. There is no other evidence in this case pointing to Mr. Weatherton, and much evidence or testimony indicating that this was not an economic crime,

---

[87] The Illinois Commission Report suggests that tunnel vision occurs "where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty." (Illinois Commission Report at p. 20.) Officers become so convinced that they have arrested the correct person that they often ignore information pointing in another direction. (*Id.* at 20-21; see also Stanley Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England* (2000) 68 Fordham L.Rev. 1379.)

and someone else, particularly Vernon Neal, was a likely perpetrator. Ms. Bell was supremely confident in her identification of Mr. Weatherton, but she continued to attribute inordinate powers to him years after the crime was committed, and had formed an inaccurate and paranoid view of him the night before regarding Ernest Hunt. She was drug-impaired, and a long-time user of crack cocaine.

Ms. Bell's identification of Mr. Weatherton was emphatic, but it was not conclusive. After the authorities heard her accusation, the rest of the investigation was marked by confirmatory bias — a bias so steep that they made no attempt to investigate Vernon Neal's car or house, even though he was alone for more than an hour immediately after reporting the crime.

The Illinois Commission Report's recommendations were designed to combat the influence of confirmatory bias by training and by particular procedures to eliminate the effect of various forms of witness direction. The first 19 recommendations are concerned with police and pre-trial procedures, and with accuracy in catching the real perpetrator. An additional six recommendations relate to informant and accomplice testimony. The recommendations also require police to receive training on

issues that have caused wrongful convictions.[88] None of these recommendations is in effect now in California.[89]

The risk of wrongful executions, wrongful convictions and wrongful death sentences was recognized in the Final Report of the California Commission on the Fair Administration of Justice.[90] The Report noted a significant number of exonerations of people convicted of murder, and made a comprehensive series of recommendations to improve California's system of death penalty trials, appeals, and postconviction challenges to death sentences. (See Final Report, pp. 20-30.)

For over 40 years, the Model Penal Code barred death where "although the evidence suffices to sustain the verdict, it does not foreclose

---

[88] See, e.g., Recommendation #16: All police who work on homicide cases should receive periodic training in the following areas, and experts on these subjects should be retained to conduct training and prepare manuals on these topics: (1) The risks of false testimony by in-custody informants ("jailhouse snitches"). (2) The risks of false testimony by accomplice witnesses. (3) The dangers of tunnel vision or confirmatory bias. (4) The risks of wrongful convictions in homicide cases. (5) Police investigative and interrogation methods. (6) Police investigating and reporting of exculpatory evidence. (7) Forensic evidence. (8) The risks of false confessions. (Illinois Commission Report, p. 40.)

[89] A meticulous comparison of the Commission's recommendations with current California practice was made by Robert Sanger in *Comparison of the Illinois Commission Report on Capital Punishment with The Capital Punishment System in California* (2003) 44 Santa Clara L.Rev. 101.

[90] California Commission on the Fair Administration of Justice, *Final Report and Recommendations* (April 2008).

all doubt respecting the defendant's guilt." (See Margery Malkin Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt* (2001) 21 N. Ill. U. L.Rev. 41, 50-51, quoting Model Penal Code § 210.6(1)(f).) The commentary notes that "[t]his provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains, the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal." (*Ibid.*)

While no capital sentencing jurisdiction ever adopted the requirement that all doubt be foreclosed before one could be subjected to consideration for a death sentence, the American Law Institute's Model Penal Code created the modern framework for the death penalty, one adopted by Georgia and relied on by the high court when capital punishment was reinstated in 1976. (See *Gregg v. Georgia*, *supra*, 428 U.S. at pp. 189-191.)

However, citing "the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment," the American Law Institute retracted its guidelines for

administration of the death penalty in the United States in April of 2009.[91] A study commissioned by the institute concluded that decades of experience had proved that the system could not reconcile the twin goals of individualized decisions about who should be executed and systemic fairness. It added that capital punishment was plagued by racial disparities, was enormously expensive, and carried a significant risk of executing innocent people.

C. Conclusion

In *Unites States v. Quinones*, the district court wrote, "[t]he best evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed, and that, on the other hand, convincing proof of their innocence often does not emerge until long after their conviction." (*Quinones*, 205 F.Supp.2d 256, 257.) As of June 2011 , California's system has about 714 people on its death row. Most have never had their cases thoroughly reviewed by the courts, and many do not even have lawyers to initiate a review. It is highly likely that many of those now on California's death row are innocent of the

---

[91] See Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty, Executive Committee of the American Law Institute (April 2009).

crimes for which they were convicted, or of the aggravating circumstances that contributed to their being sentenced to death.

All aspects of criminal investigation and prosecution that have been identified as productive of wrongful convictions in capital cases are inherent parts of California's criminal justice system. There is no reason to believe they are not having the same effect in California.

The standard of proof upon which the jury was instructed in this case has been in effect around the country for decades, and was the controlling standard for *hundreds* of felony convictions now known to have been erroneous. However adequate it may be for criminal cases in which life or death is not at stake, it should not guide juries or reviewing courts in capital cases.

This Court has thus far rejected claims that death penalty cases require a standard of proof higher than beyond a reasonable doubt. (*People v. Riel* (2000) 22 Cal.4th 1153, 1182; *People v. Kaurish* (1990) 52 Cal.3d 648, 706.) Both these cases simply cited the plurality opinion in *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-175, without further analysis. Neither this Court nor the U.S. Supreme Court has yet confronted the new reality of criminal trials exposed by DNA testing and other post-conviction investigations in criminal trials — a significant percentage of capital cases

are so flawed that innocent people are convicted and sentenced to death for crimes they did not commit. Even if the odds are 90 percent in favor of the accuracy of a guilt finding, there are now many innocent people sitting on California's Death Row.

Aside from the complex revamping of criminal procedure along the lines of the Illinois Commission Report, which can only be done by the legislature, this number could be significantly reduced by simply requiring that proof of guilt in such cases be beyond all doubt. Since we now know beyond all doubt that innocent people are routinely sentenced to death, the Eighth Amendment requires that we translate that knowledge into the appropriate burden of proof in cases where death is a potential outcome. Because Mr. Weatherton's jury was not instructed on that burden of proof, Mr. Weatherton's sentence of death must be set aside.

XXIII. THE VIOLATIONS OF MR. WEATHERTON'S RIGHTS CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT MR. WEATHERTON'S CONVICTIONS AND PENALTY BE SET ASIDE.

A. Introduction

Mr. Weatherton was deprived of a fair trial and a reliable penalty in violation of customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above-mentioned instruments as well as the International Convention Against All Forms of Racial Discrimination.

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise accepted the applicability of these standards to their own citizens. This Court has not only the right, but the obligation, to enforce these standards.

B. Background

International law "confers fundamental rights upon all people vis-a-vis their own governments." (*Filartiga v. Pena-Irala* (2nd Cir. 1980)

630 F.2d 876, 885.) International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252; *Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64.)

The first modern international human rights provisions appear in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[92] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

---

[92] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere — without regard to race, language or religion — we cannot have permanent peace and security in the world.

Robertson, Human Rights in Europe (1985) p. 22, n.22 (quoting President Truman).

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights (Universal Declaration)[93] and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[94] The Universal Declaration is part of the International Bill of Human Rights,[95] which also includes the International Covenant on Civil and Political Rights (International Covenant),[96] the Optional Protocol to the International Covenant,[97] the International Covenant on Economic, Social and Cultural Rights,[98] and the human rights provisions of the UN Charter.

---

[93] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization.

[94] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951. Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Burgenthal, *International Human Rights in a Nutshell*, Vol. 14 (1988) p. 48

[95] See generally, Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[96] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976.

[97] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[98] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

The United States and our Bill of Rights was the inspiration of international human rights law. Our government has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As a key participant in drafting the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[99] In the late 1960s and throughout the 1970s, the United States became a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[100]

In the 1990s, the United States ratified three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination (Race Convention),[101] and the International

---

[99] Sohn and Burgenthal, *International Protection of Human Rights* (1973) pp. 506-509.

[100] Burgenthal, *International Human Rights*, *supra*, p. 230.

[101] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[102] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[103]

The United States, by signing and ratifying the International Covenant, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. Many of the substantive clauses of these

---

ratification on October 20, 1994. 60 U.N.T.S. 195 (1994).
More than 100 countries are parties to the Race Convention.

[102] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at p. 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. 1465 U.N.T.S. 85 (1994).

[103] Burgenthal, *International Human Rights*, *supra*, p.4.

treaties articulate customary international law and thus bind our government.[104]

Safeguards adopted by international organizations are also indicative of customary international law. The Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty adopted by the United Nations Economic and Social Council provides, "[c]apital punishment may only be carried out pursuant to *a final judgement by a competent court after legal process which gives all possible safeguards to ensure a fair trial . . .* including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." (emphasis added).

This Court has repeatedly rejected claims that international law has any application to California capital proceedings, on grounds that it does not prohibit a sentence in accord with state and federal constitutional requirements. (*People v. Hamilton* (2009) 45 Cal.4th 863, 896; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) To the extent that this Court has concluded that international law need not be considered as long as standards of domestic law are met,

---

[104] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731, 737.

then the opinion in *Jenkins* and ensuing cases (see, e.g., *People v. Curl* (2009) 46 Cal.4th 339, 362-363), effectively relegates international legal principles to the trash can, holding that international law is no broader than the law of a sovereign state. If this were the case, then every nation on earth could claim that international law is only binding to the extent it reiterates domestic law.

As the United States Constitution and Supreme Court jurisprudence recognize, international law is part of the law of this land. International treaties have supremacy in this country. (U.S. Const., art. VI, § 2.) Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; see *Eye v. Robertson* (1884) 112 U.S. 580; U.S. Const. art. I, § 8 (Congress has authority to "define and punish . . . offenses against the law of nations").) This Court therefore has an obligation to fully consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, it should enforce violations of international law where that law provides more protections for individuals than does domestic law.

XXIV. THE RACIAL DISCRIMINATION PERMEATING CAPITAL SENTENCING THAT IS ACCEPTED BY DOMESTIC LAW VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT MR. WEATHERTON'S DEATH PENALTY BE SET ASIDE.

There is one area of law in which international law clearly reaches further than domestic law: race discrimination. Mr. Weatherton is aware of this Court's language that a defendant "does not have to turn to international law for protection from racial discrimination. Both the state and federal Constitutions and various statutory provisions prohibit the state from engaging in racial discrimination." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.) A closer look, however, shows that racism is both implicitly and explicitly accepted by U.S. Courts, including this Court, in the context of the death penalty.

Race discrimination is an inevitable byproduct of a system which is structured to allow discretion, even when the exercise of discretion is guided by racism. Because the death penalty is in fact imposed in the United States in a racially discriminatory manner, international law, as evidenced by the International Covenant, the American Declaration, and the Race Convention, all of which are subscribed to by the United States, prohibits its application to Mr. Weatherton, a man of African-American background.

Article 26 of the International Covenant provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex. . . ."[105] Again, this protection is found in article 2 of the American Declaration which guarantees the right of equality before the law.[106]

The Race Convention, a signed and ratified treaty, contains extensive protections against racial discrimination. Article 5 of the Convention provides:

> [S]tates Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution. . . .[107]

---

[105] International Covenant on Civil and Political Rights, *supra*.

[106] American Declaration of the Rights and Duties of Man, *supra*.

[107] International Convention Against All Forms of Racial Discrimination, *supra*. Indeed, long before this Convention, the United States recognized the international obligations to cease state practices that discriminated on the basis of race. See also *Oyama v. California* (1948)

Furthermore, "States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . . ."[108]

---

332 U.S. 633, holding that the California Alien Land Law preventing an alien ineligible for citizenship from obtaining land violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion, stated that the UN Charter was a federal law that outlawed racial discrimination and noted:

> Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

(*Id.* at p. 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law, and stating that:

> The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . When our nation signed the Charter of the United Nations we thereby became bound to the following principles (article 55, subd. c, and see article 56): "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." (59 Stat. 1031, 1046.)

(*Id.* at p. 604.)

[108] International Convention Against All Forms of Racial Discrimination, *supra*.

Section 702 of the Restatement Third of the Foreign Relations Law of the United States recognizes that a state violates international law if, as a matter of state policy, it practices, encourages or condones systematic racial discrimination. The right to be free from governmental discrimination on the basis of race is so universally accepted by nations that it constitutes a peremptory norm of international law, or *jus cogens*.[109] As such, the courts ought to consider and weigh the *jus cogens* quality of international norms; if of *jus cogens* quality, these norms should have a stronger influence against, and increase the burden of justification for, contrary state actions.[110] (See, e.g., *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232, 238 (prohibition against torture has gained status as *jus cogens* because of widespread condemnation of practice).)

The death penalty in the United States has long been imposed in a racially discriminatory manner. The 1990 report of the United States General Accounting Office synthesized 28 studies and concluded that there

---

[109] A peremptory norm of international law, *jus cogens*, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512; Restatement Third of the Foreign Relations Law, *supra*.)

[110] Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society* (1988) 28 Va. J. Int'l L. 627-628.

is a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision.[111] In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., "those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."[112] The GAO report noted that racism was "found at all stages of the criminal justice system process."[113]

The Baldus study, an empirical analysis accounting for 230 non-racial variables, also found strong evidence of racial bias. The study concluded that killers of whites in Georgia are 4.3 times more likely to be

---

[111] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) GAO/GGD-90-57. (In *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726, the United States Supreme Court held that Georgia and Texas state statutes governing the imposition and carrying out of the death penalty violated the Eighth and Fourteenth Amendments of the Constitution.)

[112] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) *supra*, at p. 5.

[113] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing*, *supra*, p. 6.

sentenced to death than killers of blacks.[114] Professor Baldus, along with statistician George Woodworth, also conducted a study of race and the death penalty in Philadelphia in the years 1996–1998. They examined a large sample of murders eligible for the death penalty between 1983 and 1993. They found that, even after controlling for levels of crime severity and the defendant's criminal background, blacks in Philadelphia were 3.9 times more likely to receive a death sentence than other similarly situated defendants.[115]

In 1994, a Staff Report by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary concluded that "racial minorities are being prosecuted under federal death penalty law far beyond their proportion in the general population or the proposition of criminal offenders."[116] The report analyzed the application of specific provisions of the Anti-Drug Abuse Act of 1988 (also known as the "drug

---

[114] Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia* (1998) 83 Cornell L.Rev. 1638.

[115] *Ibid.*

[116] *Racial Disparities in Federal Death Penalty Prosecutions 1988-1994*, Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 103 Cong. 2nd Sess., March 1994.

kingpin law"), which authorize the death penalty for murders committed by those involved in certain drug trafficking activities, to criminal defendants.

Significantly, the staff report found that while three-quarters of those convicted under the provisions of the Anti-Drug Abuse Act have been white and only 24 percent of the defendants have been black, just the opposite is true for those chosen for death penalty prosecutions: 78 percent of the defendants have been black and only 11 percent of the defendants have been white.[117] This contrasts sharply with the statistics of federal death penalty prosecutions before the 1972 *Furman* decision: between 1930 and 1972, 85 percent of those executed under federal law were white and 9 percent were black.[118] Looking at this information, the staff report concluded that the "dramatic racial turnaround under the drug kingpin law clearly requires remedial action."[119]

The staff report also stated that

> Nearly 40% of those executed since 1976 have been black, even though blacks constitute only 12% of the population. And in almost every death penalty case, the race of the victim is white. Last year alone, 89% of the death sentences carried out involved white victims, even though 50% of the homicides in this country have black victims. Of the 229

---

[117] *Ibid.*

[118] *Ibid.*

[119] *Ibid.*

> executions that have occurred since the death penalty was reinstated, only one has involved a white defendant for the murder of a black person.[120]

These statistics led the staff report to conclude that "Race continues to plague the application of the death penalty in the United States."[121]

In 1995, researchers at the University of Louisville found that blacks convicted for killing whites were more likely to receive the death penalty than any other offender-victim combination.[122] In fact, in 1996 "100% of the inmates [on Kentucky's death row] were there for murdering a white victim, and none were there for the murder of a black victim, despite the fact that there have been over 1,000 African-Americans murdered in Kentucky since the death penalty was reinstated."[123] This evident bias in use of the death penalty led to Kentucky's Racial Justice Act, passed in 1998, which permits race-based challenges to prosecutorial decisions to seek the death penalty.[124] There is no equivalent in California, nor is there

---

[120] *Ibid.*

[121] *Ibid.*

[122] Keil and Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991* (1995) 20 Am.J.Crim.Just. 17.

[123] Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Death Penalty Information Center (June 1998).

[124] *Ibid.*

even a jury instruction that warns the jurors to avoid race or group prejudice in their deliberations over the appropriate penalty.

In August 2009, North Carolina passed the Racial Justice Act, becoming the second state to allow statistical evidence to show racial bias in the death penalty. In an individual case, the law allows a judge to overturn the death sentence or prevent prosecutors from seeking the death penalty if bias is shown. Governor Beverly Purdue, who signed the act into law, stated "I have always been a supporter of death penalty, but I have always believed it must be carried out fairly. The Racial Justice Act ensures that when North Carolina hands down our state's harshest punishment to our most heinous criminals — the decision is based on the facts and the law, not racial prejudice." (*Perdue signs Racial Justice Act* (Aug. 11, 2009) WRAL <http://www.wral.com/news/state/story/5769609/> [as of Dec. 12, 2010].)

A recent study in North Carolina found that the odds of a defendant receiving a death sentence were three times higher if the person was convicted of killing a white person than if he had killed a black person. The study, conducted by Professors Michael Radelet and Glenn Pierce, examined 15,281 homicides in the state between 1980 and 2007, which resulted in 368 death sentences. Even after accounting for additional

factors, such as multiple victims or homicides accompanied with a rape, robbery or other felony, researchers found that race was still a significant predictor of who was sentenced to death. The study will be published in the North Carolina Law Review. (M. Burns (Ed.) *Study: Race plays role in N.C. death penalty* (July 22, 2010) WRAL <http://www.wral.com/news/local/story/8017956/> [as of Dec. 12, 2010].)

Although roundly condemned in the abstract, racism permeates our criminal justice system. Its persistence is encouraged by the requirement that it be photographed or documented before any court will act to condemn it. In *McCleskey v. Kemp*, *supra*, 481 U.S. 279, the U.S. Supreme Court rejected a federal Equal Protection challenge to a Georgia death sentence which was shown by statistical evidence to have been imposed pursuant to a statewide pattern of racially disproportionate capital sentencing.

Starting from the premise that the federal Equal Protection Clause is concerned only with state action consisting of purposeful discrimination by official decision-makers, the *McCleskey* majority opinion first translated this principle into a requirement that, "to prevail under the Equal Protection Clause, McCleskey must prove that the decision-makers in his case acted with discriminatory purpose" (481 U.S. at p. 292) and then held that "an inference drawn from the general statistics [concerning capital sentencing

patterns] to a specific decision in a trial and sentencing is simply not comparable to" statistical proof of racial discrimination in other contexts. (*Id.* at p. 294.) Hence, the majority held, any claim that a death sentence violates the federal Equal Protection Clause must be established by case-specific proof of subjective racial animus on the part of the prosecutor, jurors, judge or legislature. (*Id.* at pp. 292-299.)

Thus, the *McCleskey* majority limited the federal Equal Protection Clause to treating "the superficial, short-lived situation where we can point to one or another specific decision-maker and show that his decisions were the product of conscious bigotry," while leaving untreated "the far more basic, more intractable, and more destructive situation where hundreds upon hundreds of different public decision-makers, acting like Georgia's prosecutors and judges and juries — without collusion and in many cases without consciousness of their own racial biases — combine to produce a pattern that bespeaks the profound prejudice of an entire population."[125]

The *McCleskey* decision was driven by a realization that racial discrimination in capital sentencing was not peculiar to Georgia, but was inevitable under any modern-day American procedure for imposing the

---

[125] Amsterdam, *Race and the Death Penalty* (1988) 7 Criminal Justice Ethics 2, at p. 86.

death penalty.[126] Thus, the court saw that its only real choices were to outlaw capital punishment entirely or to tolerate racial bias in the dispensing of death sentences. It chose the latter. However legal at present in the United States, this choice clearly violates the Race Convention, and international law.

---

[126] The *McCleskey* majority says repeatedly that the death penalty in the United States would be abolished de facto if the Court were to hold that a statistical showing of state-wide racially discriminatory capital-sentencing practices sufficed to invalidate death sentences imposed under those practices. (See, e.g., 481 U.S. at p. 319 ("McCleskey's wide-ranging arguments . . . basically challenge the validity of capital punishment in our multiracial society"); *id.* at pp. 312-313 ("At most, the . . . [empirical study presented by McCleskey] indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . As this Court has recognized, any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.'. . . Specifically, 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death."'"); *id.* at p. 312 n. 35 ("No one contends that all sentencing disparities can be eliminated."); *id.* at p. 315 n. 37 ("The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. . . . Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. As we reiterate . . . , the requirement of heightened rationality in the imposition of capital punishment does not 'plac[e] totally unrealistic conditions on its use.'"); *id.* at p. 319 ("The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor [this is a euphemism for race — the only "factor" at issue in *McCleskey*] in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.'"); and see *id.* at pp. 310-311.)

The discretion that is now a mandatory part of California's death penalty sentencing scheme guarantees that racism will have an opportunity to flourish throughout the process. The Supreme Court recognizes that any "process that . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" is intolerably inhumane. (*Woodson v. North Carolina*, *supra*, 426 U.S. at p. 304.) The problem with this now-constitutionally-required discretion, though, is that — as the Supreme Court was compelled to concede in *McCleskey*, 481 U.S. at p. 312 — "'the power to be lenient [also] is the power to discriminate.'"

The same reluctance to impose the death penalty regularly which had put an end to mandatory capital sentencing sways jurors, and often prosecutors as well, to forgo the extreme punishment of death unless their outrage at a crime overwhelms their empathy for the defendant. Neither outrage nor empathy are dispassionate, rational processes. They are impressionistic and impulsive and are strongly moved by racial, caste, and class biases. Capital sentencing procedures conferring broad discretion on prosecutors to seek and jurors to choose a death sentence provide "a unique opportunity for racial prejudice" (*Turner v. Murray* (1986) 476 U.S. 28, 35) to operate in ways that courts cannot, and do not, effectively restrain.

This Court has explicitly allowed racism to be part of the process of exercising peremptory challenges of potential jurors, provided that it is not the only reason for such challenges. In *People v. Montiel* (1993) 5 Cal.4th 887, the Court wrote, "To rebut a race- or group-bias challenge, counsel need only give a *nondiscriminatory* reason which, under all the circumstances, including logical relevance to the case, appears *genuine* and thus supports the conclusion that race or group prejudice *alone* was not the basis for excusing the juror. (Citations omitted.)" (*People v. Montiel*, *supra*, 5 Cal.4th at p. 910, fn. 9; emphasis in original.)

To say that "race or group prejudice *alone*" is an impermissible basis of a peremptory challenge must mean that race bias is permissible if it is not the only basis for the exercise of a peremptory challenge. Otherwise, the word "alone" would be superfluous. It cannot have been accidentally included as part of the standard's delineation; not only do principles of judicial interpretation require us to give significance to each word, but the Court's emphasizing the word "alone" must mean that the word was an integral part of the standard's formulation — a part worth emphasizing.

Mr. Weatherton can discern no other contribution of the word "alone" to this formulation than a recognition that *some* racism, or purposeful discrimination, is permissible, so long as it is not the only basis

for the exercise of a peremptory challenge. By allowing purposeful discrimination provided that it is not the sole basis for the removal of a juror, this Court institutionalizes the routine practice of racism.

This Court has not done so in other aspects of the law; elsewhere, it has recognized that destructive behavior may be motivated by various reasons in addition to race bias, and nevertheless condemned such behavior. (See *In re Sassounian* (1995) 9 Cal.4th 535, 549, fn. 11 [to satisfy national origin special circumstance, § 190.2, subd. (a)(16), killing need not have been *solely* because of victim's "nationality or country of origin"]; *In re M.S.* (1995) 10 Cal.4th 698, 716 [the words "because of" construed as found in the similarly worded statutes, §§ 422.6 and 422.7, to only require that the prohibited bias be a substantial factor in the commission of the crime].)

The language in *Montiel*, however, means that racism is permissible, provided it is not the only factor — indeed, there is nothing in this Court's pronouncements that would prevent it from being a substantial factor in the decision to excuse a potential juror. This Court continues to leave open the possibility that racist intent may coexist with permissible intent in the exercise of peremptory challenges. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197; *People v. Schmeck* (2005) 37 Cal.4th 240, 276-277.)

Race discrimination is both the most detectable symptom and the most invidious consequence of the inability to rationally regulate life-and-death sentencing choices. It has persisted unchecked under every form of post-*Furman* capital-sentencing procedure. None of the statutes upheld by *Gregg v. Georgia*, *supra*, 428 U.S. 153, and its progeny are formally sufficient to cure the *Furman* arbitrariness/discrimination problem or have come close to eliminating it. To the contrary, capital sentencing decisions under the "guided discretion" type of statute sustained in *Gregg* and in effect in California have consistently been found to turn on the race of the victim and secondarily on the race of the defendant, usually in combination.

Here, the net effect of the law as applied to the selection of the jury pool (see Claim XX, *ante*), the prosecutor's absolute discretion to charge the death penalty as he pleases, without any requirement that guidelines be developed or made public (see Claim XVIII, *ante*), and the process of death qualification, was to exclude entirely all African-Americans from serving on Mr. Weatherton's jury — it was not even necessary for the prosecutor to exercise peremptory challenges to achieve a jury without a single African-American.

The protections of the Race Convention, International Covenant and American Declaration establish an affirmative obligation of the United States to redress racial discrimination and to proceed with vigor and deliberation to ensure that race is not a prejudicial factor in criminal prosecutions. It is incumbent upon the Court to view the application of the death penalty in this case both in light of the international commitments the United States has made to the protection of individuals against racial discrimination, and in acceptance of the overwhelming evidence that race discrimination is an inextricable part of our death penalty scheme. Because the death penalty as applied in California is fraught with intractable discrimination and racism, it violates international norms of *jus cogens* quality. Mr. Weatherton's death sentence must be reversed.

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

In *People v. Schmeck, supra*, 37 Cal.3d 240, a capital appellant represented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an Mr. Weatherton to preserve these attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[127] Mr. Weatherton

---

[127] See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574 [108 Cal.Rptr.3d 87, 169-170]; *People v. McWhorter* (2009) 47 Cal.4th 318; *People v. D'Arcy* (2010) 48 Cal.4th 257, 307-309; *People v. Mills, supra*, 48 Cal.4th at pp. 213-215; *People v. Ervine* (2009) 47 Cal.4th 745, 810-811; *People v.*

identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

A. Failure to Narrow

California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the federal Constitution.

B. Burden of Proof and Persuasion

Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that an aggravating circumstance or aggravating

---

Carrington (2009) 47 Cal.4th 145, 198-199; *People v. Martinez* (2010) 47 Cal.4th 911, 967-968.

circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated Mr. Weatherton's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Ervine*, *supra*, 47 Cal.4th at pp. 810-811; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

C. Factor (a)

Section 190.3, factor (a) — which permits a jury to sentence a defendant to death based on the "circumstances of the crime" — is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates Mr. Weatherton's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment.

The jury in this case was instructed in accord with this provision. (59 RT 8909.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[128] and Mr. Weatherton's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) This Court has repeatedly rejected these arguments. (See,

---

[128] *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington*, *supra*, 542 U.S. 296; *United States v. Booker* (2005) 543 U.S. 220; *Cunningham v. California* (2007) 549 U.S. 270.

e.g., *People v. Mills*, *supra*, 48 Cal.4th at pp. 213-214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Ervine*, *supra*, 47 Cal.4th at p. 810 ; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 378; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

D. Factor (b)

During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (59 RT 8909.) The jurors were not told that they could rely on this factor (b) evidence unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 and its progeny, the trial court's failure violated Mr. Weatherton's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.)

In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual

punishment. This Court has repeatedly rejected these arguments. (See, e.g. *People v. Martinez, supra*, 47 Cal.4th at p. 968; *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

E. Factor (c)

During the penalty phase, the state introduced evidence that Mr. Weatherton had prior felony convictions. (59 RT 8909.) This evidence was admitted pursuant to section 190.3, factor (c). The jurors were never told that before they could rely on this or any other aggravating factor, they had to unanimously agree that defendant had committed the prior crime. In light of the Supreme Court decisions in *Ring v. Arizona* (2002) 536 U.S. 584 and its progeny, the trial court's failure violated Mr. Weatherton's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments; *People v. Schmeck, supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the federal Constitution.

F. Inapplicable, Vague, Limited and Burdenless Factors

At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC No. 8.85. (59 RT 8909-8912.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors; (2) it contained vague and ill-defined factors, particularly factors (a) and (k); (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial"; and (4) it failed to specify a burden of proof as to either mitigation or aggravation.

These errors, taken singly or in combination, violated Mr. Weatherton's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray* (1996) 13 Cal.4th 313, 358-359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

G. Written Findings

The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on,

in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*People v. Taylor*, *supra*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

H. Intercase Proportionality Review

The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308-309; *People v. Mills*, *supra*, 48 Cal.4th at p. 214 ; *People v. Martinez*, *supra*, 47 Cal.4th at

p. 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

I. Disparate Sentence Review

The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of he fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v. Ervine*, *supra*, 47 Cal.4th at p. 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

J. Cruel and Unusual Punishment

The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g. *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379.)

Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

K. Cumulative Deficiencies

Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6. See also *Pulley v. Harris*, *supra*, 465 U.S. at p. 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited

herein, Mr. Weatherton has not presented them in sufficient detail, Mr. Weatherton will seek leave to file a supplemental brief more fully discussing these issues.

XXVI. THE ERRORS, BOTH SINGLY AND CUMULATIVELY, OBSTRUCTED A FAIR TRIAL, AND REQUIRE REVERSAL.

This case was close. There was direct eyewitness testimony identifying Mr. Weatherton as the perpetrator, but the was also evidence suggesting the improbability of his guilt — i.e., that lack of blood or gunshot residue on him or his possessions though he was arrested moments after the shootings, lack of any evidence in his possession (gun, army jacket, money, gloves) that one would expect to be found if he had been guilty. And the jury's tangled response confirms the closeness of this case — they were deeply divided.

His defense required that he raise a reasonable doubt as to the accuracy of Nelva Bell's identification. He attempted to do so along three broad avenues: (1) presenting evidence that someone else did the crime; (2) pointing out the importance of the missing incriminating evidence (and presence of exculpatory evidence, like the $40 in Sam Ortiz's wallet); and (3) directly attacking the reliability of Nelva Bell's testimony. He was frustrated by improper rulings in each of these areas.

First, he was wrongly precluded from presenting relevant evidence that the man who purported to discover the victims within moments of the

shooting was himself the perpetrator, and wrongly precluded from fully cross-examining that witness, and impeaching him with other witnesses.

Second, the trial court allowed improper "evidence" undercutting the significance of the missing evidence and an improper restriction of juror review of relevant evidence bearing on the missing-evidence issue: The court admitted irrelevant and unreliable "shoeprint" evidence to suggest how some of the missing evidence might have been disposed of; improper barring by the jury foreman of a requested reread and examination of testimony and photos concerning shoeprint evidence purportedly connecting Mr. Weatherton to the offense; and the improper introduction into deliberations of "expert" testimony by a juror undercutting the significance of the missing blood spatter and gun residue on Fred's person.

Third, the trial court unfairly allowed Nelva Bell's demeanor and credibility to be bolstered by providing tag-team support for her on the witness stand; restricted impeachment of Ms. Bell concerning her drug purchases and sales; improperly undercut the testimony of Mr. Weatherton's eyewitness identification expert by (1) not allowing him to fully convey the reliability of the DOJ study on which he relied, and (2) instructing the jury to disregard his testimony about the irrelevance of eyewitness witness certainty; overlooked the prosecutor's permitting

destruction of the core of the crime scene without notice to the defense (thereby hampering the ability of the defense to show the inaccuracy of Ms. Bell's version of events and the darkness pervading the room when the crimes were committed) and then being allowed a misleading jury view of what was left of the crime scene; burdening Mr. Weatherton with a juror who decided he was guilty as soon as Ms. Bell testified; and burdening Mr. Weatherton with visible and audible physical restraints, reinforcing Ms. Bell's view of him as dangerous, and presented him as a present danger to those in the courtroom.

In a case this close, it is reasonably probable that any of the above-mentioned errors could have prevented Mr. Weatherton from being given more favorable verdict. Many of the errors urged in this brief are sufficiently important to justify reversal in and of themselves. However, if this Court finds more than one error, but concludes that each error, standing alone, can be deemed harmless despite the factors discussed above, then this Court must also consider the cumulative effect of the errors. (*Williams v. Taylor* (2000) 529 U.S. 362, 399; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907;

People v. Duran, *supra*, 16 Cal.3d 282; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233.)

Fifth, Eighth, and Fourteenth Amendment due process and reliability concerns require meaningful appellate review in capital cases. (See *Parker v. Dugger* (1991) 498 U.S. 308, 321.) Absent a consideration of the cumulative impact of errors, meaningful appellate review would not be possible.

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill*, *supra*, 17 Cal.4th at p. 844.) In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of a the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Each error is sufficiently prejudicial to warrant reversal of Mr. Weatherton's convictions and death sentence. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors described in this brief.

CONCLUSION

For the foregoing reasons, the judgment against Mr. Weatherton must be reversed.

Dated: June 6, 2011

Respectfully submitted,

_____

MICHAEL R. SNEDEKER
Attorney for Appellant
FRED WEATHERTON

CERTIFICATE OF WORD COUNT

After conducting a word count on this opening brief, I have determined there are a total of 98,481 words in a Times New Roman 13-point font.

DATED: _____

Respectfully submitted,

_____
MICHAEL R. SNEDEKER

Attorney for Appellant
FRED WEATHERTON

DECLARATION OF SERVICE BY MAIL

Re: *People v. Fred Weatherton*, Cal. Supreme Court No. S106489; Riverside Co. Super Ct. No. INF 030802

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. I served a true copy of the attached

APPELLANT'S OPENING BRIEF

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

Steven Parnes, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Clark Head, Esq.
901 H St 6th FL
Sacramento, CA 95814

Riverside County Superior Court
46-200 Oasis Street
Indio, CA 92201

District Attorney
Riverside County
82675 Hwy 111 4FL
Indio, CA 92201

Angela M. Borzachillo,
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92186

Fred Weatherton
PO Box T-52846
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on June 8, 2011, sealed and deposited in the United States mail at Portland, Oregon, Multnomah County, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 8, 2011, in Portland, Oregon.

_____
MICHAEL SNEDEKER