SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **FRED LEWIS WEATHERTON,** **Defendant and Appellant.**

CAPITAL CASE

Case No. S106489

SUPREME COURT
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Riverside County Superior Court
Case No. INF030802
Honorable James S. Hawkins, Judge

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STATEMENT OF THE CASE

On April 20, 2000, the Riverside County District Attorney filed an information charging appellant Fred Lewis Weatherton, Jr. in Counts 1 and 2 with the murders of Samuel Ortiz and Latanya Roberson (Pen. Code, § 187); in Count 3 with the attempted murder of Nelva Bell (Pen. Code, §§ 664/187), and in Count 4 with the robbery of Ortiz (Pen. Code, § 211). The information further alleged as to Counts 1 and 2 that Weatherton committed the murders during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)); that Weatherton committed multiple murders (Pen. Code, § 190.2, subd. (a)(3)); as to each count that Weatherton personally discharged a firearm causing death or great bodily injury (Pen. Code, §§ 12022.53, subd. (d), 1192.7, subd. (c)(8)), and that Weatherton had seven prior convictions under the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). (2 CT 330-333.)

Jury selection began on October 29, 2001. (4 CT 1155.) The jury was sworn on January 3, 2002. (37 CT 1887.) On February 20, 2002, the jury found Weatherton guilty as charged and found the special allegations to be true. (40 CT 11577-11588.)

The penalty phase began on March 4, 2002. (40 CT 11710.) On March 7, 2002, the jury returned a verdict of death. (43 CT 12461-12471.)

On April 30, 2002, the trial court denied Weatherton's motion for modification of the verdict and sentenced to him to death. (44 CT 12732-12733.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

On the afternoon of October 31, 1998, Nelva Bell and her roommate Connie Olivolo went to Ernest Hunt's house on Nairobi Street in the Burr Tract area of Indio, where they met Hunt and Sam Ortiz. (26 RT 4101-4103, 4137-4139; 31 RT 4981, 4984-4985.) Bell's friend Latonya Roberson later arrived at Hunt's house with her one-year-old baby Jared. (26 RT 4140-4141, 4165.)

Prior to arriving at Hunt's house, Bell and Olivolo had purchased $20 worth of rock cocaine from Bell's cousin Joanne Norris and they smoked it with Hunt, Roberson, and Weatherton, who was Bell's friend of more than a year who she called Boo-Boo, who arrived at some point in the evening. (26 RT 4141-4143, 4298; 31 RT 4982-4988, 5033-5035.) After smoking the rock, Olivolo, Bell, Ortiz, and Weatherton left with someone named Chris in a white truck. (31 RT 4990.) They dropped Ortiz off at a nearby house and then to drove to La Quinta. (31 RT 4990-4991.) Sometime during the drive, Weatherton told Olivolo that she should sleep with one of his friends in exchange for either more rock cocaine or money to purchase more rock cocaine. (31 RT 4991-4992.) Weatherton made Olivolo uncomfortable as "he was bent on how to get money" because "he wanted more drugs and he was going to get it any way he could." (31 RT 4993-4996.) Olivolo left the group in La Quinta and went home. (31 RT 4997.)

Bell later returned to Norris's with Weatherton, where she purchased another rock of crack cocaine on credit. (31 RT 5035-5037.) Bell and Weatherton returned a second time and purchased another rock on credit,

but Norris told Bell that she would not extend any further credit to her. (31 RT 5040-5044.)

At some point during the evening, after Weatherton and Bell had returned to Hunt's house, Weatherton was outside of the house and attempted to enter through an unlocked side door. (26 RT 4146-4147.) Hunt retrieved a knife from the kitchen and told Weatherton, "Boo-Boo, didn't I tell you don't come back here?" (26 RT 4147-4148.) Weatherton replied, "I bet you won't be saying that tomorrow." (26 RT 4148.)

Roberson was sufficiently alarmed by Weatherton's behavior to ask Bell to stay the night with her so that they could warn Hunt's sister in the morning that "if something happened to Ernest, Boo-Boo [is] going to be the one that done it." (26 RT 4148-4151.) At about 10:00 p.m., Roberson and Bell took Roberson's baby and went to the nearby house where Roberson was staying with Ortiz. (26 RT 4149-4153; 28 RT 4581.) When Roberson and Bell returned to Ortiz's house with the baby, Weatherton was sitting in a tree outside. (26 RT 4152-4153.)

Weatherton returned to Norris's house alone sometime around 10:00 p.m. (31 RT 5044.) There were a group of young men "hanging out" in front of Norris's house, "gambling and just [being] obnoxious" and Weatherton told Norris, "[Y]ou know, if you need me to, I will take care of them for you, you know." (31 RT 5045-5046.) Weatherton pulled up his shirt and showed Norris what appeared to be a gun, covered by a white sock, stuck in his waistband. (31 RT 5046-5047.) Norris told Weatherton that "it wasn't that serious." (31 RT 5047.) Weatherton, who was making Norris uncomfortable because he "just didn't look like himself[,]" told Norris he wanted some rock cocaine, but that he did not have any money, and Norris sold Weatherton some rock cocaine on credit. (31 RT 5048.) Norris remembered that, earlier in the week, Weatherton had told her that

"things had been bad for him" and that he needed money to attend an upcoming family reunion. (31 RT 5048-5049, 5057.)

There were two beds in the front room of Ortiz's house and Bell and the baby slept in one of the beds while Ortiz and Roberson slept in the other. (26 RT 4153-4156.) Sometime after sunrise, Bell woke up and heard Weatherton outside saying, "Tonya, Tonya, I just found Ernest dead." (26 RT 4156, 4178.) Ortiz opened the door, but then tried to close it at Bell's urging. (26 RT 4156.) Weatherton, who was wearing an Army jacket and fingerless gloves and carrying a long black gun, kicked the door open and demanded, "Where the money at?" (26 RT 4156-4157, 4174-4175.)

Roberson told Weatherton, "I don't have no money[,]" to which Weatherton replied, "Bitch, I ain't playing with you." (26 RT 4157-4158.) When Roberson crossed herself and said, "On my mother," Weatherton shot her in the forehead, causing her to fall down moaning. (26 RT 4158, 4172.)

Weatherton then turned his attention to Ortiz, who said, "Boo-Boo, you can have my money." (26 RT 4158-4159.) Weatherton demanded to know, "Nigger, where is it?" and Ortiz replied that his wallet was under his bed. (26 RT 4159, 4181.) Weatherton ordered Ortiz to lie on the floor while Weatherton retrieved Ortiz's wallet. (26 RT 4159-4160, 4181.) Once Weatherton retrieved some money from under the bed, he put his gun to Ortiz's head and shot him. (26 RT 4160, 4181.)

Roberson continued moaning and Weatherton shot her again, this time in the throat. (26 RT 4160, 4172.) Bell, who was holding the baby, pleaded with Weatherton, "Boo-Boo, don't shoot me. I won't tell nobody." (26 RT 4160-4161.) Weatherton ignored Bell's pleas and ordered her to put the baby down. (26 RT 4160-4161.) Bell laid the baby on the bed and Weatherton shot her in the back. (26 RT 4161, 4171.) After being shot in

the back, Bell laid down beside Roberson, where Weatherton stood over her and shot her in the head. (26 RT 4161.) Bell was covering her face with her hand and the bullet passed through her wrist and into her mouth. (26 RT 4161.)

Bell held her breath and "played dead" while Weatherton kicked her leg two or three times. (26 RT 4164.) Apparently satisfied that Bell was dead, Weatherton left through the front door. (26 RT 4164-4165.)

Baby Jared looked at his mother, who was still on the floor moaning, and cried, "Momma, momma." (26 RT 4165-4167.) Bell climbed onto the bed to pacify the baby. (26 RT 4166.)

Vernon Neal, who lived nearby on Burr Street, left for work in the early morning of November 1, 1998. (27 RT 4329-4332.) On the way, Neal stopped at the home of Roberson's brother Eric to share some catfish he had caught the previous evening. (27 RT 4332-4336.) After talking to Eric, Neal drove to Ortiz's house to find Roberson. (27 RT 4347-4351.)

Neal parked outside Ortiz's house and called Roberson's name. (27 RT 4350-4352.) Bell could hear Neal outside calling Roberson's name. (26 RT 4167-4168; 27 RT 4351-4352.) When Neal received no response, he approached the house and found the door open, from where he saw Roberson sitting on the floor with her back against the sofa and heard a sound like loud snoring. (27 RT 4352.)

Neal entered the house and yelled at Roberson and asked what was wrong. (27 RT 4352.) Neal then saw Baby Jared sitting on the bed and noticed Ortiz lying face down on the floor. (27 RT 4352-4353.) When Neal turned around and saw Bell raise up from behind the television, he asked her, "What happened?" and she told him, "We been shot." (26 RT 4168-4169; 27 RT 4353, 4355.) When Neal asked her if she knew who

shot them, Bell said, "[N]o," as she was afraid "he might be in with" Weatherton because Neal used to date Roberson.[1] (26 RT 4169-4170.)

Neal rushed out and got in his car to drive back to Eric's house, where Eric called 9-1-1. (26 RT 4173; 27 RT 4353, 4355-4356.) Neal then drove back to Ortiz's house. (27 RT 4356.) He stopped about halfway up the dirt road leading to Ortiz's house after he saw what he thought was a person moving towards some tamarisk trees near the house. (27 RT 4356-4358.) Neal got out of his car and called Bell's name without any response.[2] (27 RT 4358-4359.)

After a few minutes, Neal drove through an opening in the tamarisk trees, where he saw Weatherton walking east toward McDaniel Lane. (27 RT 4359-4362.) Neal pulled over and Weatherton got in the car, where Neal told him that something had happened to Roberson.[3] (27 RT 4362, 4364.) Weatherton did not respond to this information. (27 RT 4362.) This encounter was observed by Indio police officer Rody Johnson, who had staged nearby and was awaiting the arrival of additional officers after receiving a call from dispatch that someone had been shot at the location. (28 RT 4525-4533.) Johnson saw a black male wearing a blue, black, and white jacket standing between two houses on McDaniel Lane get into a green car that pulled up beside him. (28 RT 4528-4532.)

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[1]Neal indicated that, at the time of the murders, he had been having an "off and on again relationship" with Roberson for less than a year. (28 RT 4463.)

[2]Sometime after Neal left to call 9-1-1, Bell heard someone she thought was Weatherton outside calling her name and tried to crawl back to the position Weatherton had left her in order to play dead. (26 RT 4173.)

[3]Although at trial Neal recalled telling Weatherton only that something had happened to Roberson, when interviewed by police on November 1, 1998, Neal stated that he told Weatherton that Roberson had been shot. (28 RT 4468-4469.)

Neal made a U-turn and started to drive to back to Ortiz's house, but Weatherton said he did not want to go up there and asked to be dropped off at Norris's house down the street. (27 RT 4363-4364.) Neal asked Weatherton to get out of the car because he saw Eric walking up the road toward Ortiz's house and wanted to give him a ride. (27 RT 4364-4365.) Weatherton got out of the car and Neal picked Eric up and drove back to Ortiz's house. (27 RT 4364-4365.)

Neal and Eric went inside the house, where Neal picked up Baby Jared. (27 RT 4365.) Neal asked Bell, "Damn, who did this to you?" and she said, "Boo-Boo did it." (27 RT 4365.)

Neal drove to his house on Burr Street to drop Baby Jared off with Neal's mother. (27 RT 4365-4367.) Neal then went to work to inform his employer that he would not be in that day and then he returned to the Burr tract. (27 RT 4368-4369.) When he returned, Neal pulled alongside Officer Johnson's patrol car and directed him to Ortiz's house. (27 RT 4366-4367, 4369; 28 RT 4535-4539.)

Officer Johnson, now joined by Indio police officer Donald Studdard, entered Ortiz's house, where they found a "bloody mess." (28 RT 4539-4540; 29 RT 4590-4591.) When Johnson and Studdard entered, they found Ortiz dead, Roberson barely alive, and Bell severely injured. (28 RT 4540-4542; 29 RT 4591-4592.)

While awaiting the arrival of paramedics, Officer Johnson spoke to Bell, who was "grossly disfigured" by the gunshot wounds to her face and wrist. (28 RT 4542-4545.) Despite her injuries, Bell appeared coherent and able to understand and answer Johnson's questions. (28 RT 4545.) Johnson asked Bell who shot her and she told him, "Boo-Boo." (26 RT 4174; 28 RT 4546; 29 RT 4592-4593.) Johnson then asked Bell if Weatherton acted alone and she said there was no one else with him. (28 RT 4546.) When Johnson asked why Weatherton did this, she told him,

"[T]o rob us." (28 RT 4546.) Finally, Bell indicated to Johnson that Weatherton used a "big gun." (28 RT 4547.)

Officer Studdard spoke to Eric Roberson, who directed him to Hunt's residence, where Eric believed Weatherton was located. (29 RT 4593-4594.) Studdard and another officer later detained Weatherton in front of Hunt's house. (29 RT 4595.)

Officer Johnson, who was an experienced man tracker, was provided with a photocopy of the bottom of the shoes Weatherton was wearing at the time of his arrest. (34 RT 5493-5495, 5504, 5507-5511.) Johnson searched the area around the front door of Ortiz's house for Weatherton's shoe prints, but the area had been contaminated by other people walking through the area. (34 RT 5505-5506, 5511-5512.) Johnson then returned to the area where he had seen Weatherton get in Neal's car and was able to follow Weatherton's shoe prints south from the vicinity of Hunt's house to the stand of tamarisk trees near Ortiz's house. (34 RT 5513-5518.) The ground around the tamarisk trees was covered with fallen tamarisk needles and Weatherton's shoe prints were not visible there. (34 RT 5519-5521.) Johnson found more of Weatherton's shoe prints to the west of the prints leading from Hunt's house to the tamarisk trees; these prints headed north, away from Ortiz's house. (34 RT 5521-5522.) The shoe prints leading from Hunt's house to the trees were close together, indicating that Weatherton was walking when he made the prints, while the prints heading north were more widely spaced, with deeper toe impressions, indicating that Weatherton had been running. (34 RT 5522-5524.) A police expert comparing the exemplars of Weatherton's shoe prints with the shoe prints identified by Johnson and photographed by police later concluded that the shoe prints Johnson tracked were similar in sole design, size and wear to the exemplars of Weatherton's shoes. (34 RT 5524, 5562-5589, 5648-5677.)

Police obtained a warrant to search Hunt's house. (30 RT 4913-4914.) Police found a crack pipe in the kitchen and two crack pipes in the north bedroom. (30 RT 4916-4919.) Police also found a blue, black and white jacket with a crack pipe in the pocket and other clothing belonging to Weatherton in the north bedroom. (30 RT 4919-2922.)

Weatherton was transported to the Indio police station, where his hands were tested for gunshot residue. (30 RT 4772-4779.) Although the tests did not reveal the presence of gunshot residue on Weatherton's hands, jacket or wristwatch, which were also tested, the negative test results did not definitively establish that Weatherton did not fire a weapon. (30 RT 4794-4805, 4815.) Further, Weatherton's hands were not bagged prior to testing to prevent contamination and he was placed in a holding cell with a sink for approximately an hour prior to the test being conducted, and hand washing, hand wiping, and even perspiration can remove gunshot residue. (30 RT 4773-4774, 4796-4797, 4820.) Moreover, if someone fired a weapon while wearing gloves, the gunshot residue would be likely to collect on the gloves and not the person's hands. (30 RT 4795-4796.)

Ortiz was pronounced dead at the scene. (28 RT 4547.) Bell and Roberson were both transported to the hospital. (26 RT 4175-4176; 28 RT 4548-4549.) Roberson arrived unresponsive and in a "non-salvageable condition" and was pronounced dead in the emergency room at 8:45 a.m. (32 RT 5129-5136.)

Bell was alert and talking and was treated for her injuries. (26 RT 4175-4176; 32 RT 5137-5144.) The bullet that hit Bell in the back exited through her shoulder. (26 RT 4177.) Her right wrist was shattered and required surgery, after which Bell experienced arthritis and difficulty flexing the wrist. (26 RT 4177.) The bullet that struck Bell's mouth split her tongue and struck her teeth, also requiring surgery and her teeth being pulled. (26 RT 4176-4177.)

Autopsies performed on Ortiz and Roberson determined that Ortiz died as a result of a gunshot wound to the head and that Roberson died as a result of gunshot wounds to the head and neck, which exited through her chest. (32 RT 5206-5209, 5212-5215, 5244-5245, 5249-5250.)

Comparative analysis of a bullet fragment recovered from Roberson's gurney at the hospital and two bullet fragments found in Ortiz's house indicated that the bullets were fired from the same gun. (30 RT 4863-4869, 4890-4893; 31 RT 4959-4961.) Comparative analysis of bullet fragments recovered from Bell's mouth and the bodies of Roberson and Ortiz was inconclusive. (30 RT 4863-4869, 4875-4879; 31 RT 4960-4963.)

Police interviewed Bell at the hospital on November 2, 1998. (30 RT 4872.) Bell was shown a photographic line-up that included Weatherton's photograph and she identified Weatherton as the person who shot her. (30 RT 4872-4874.) Bell indicated that she was "100 percent positive" of her identification. (30 RT 4874.)

Olivolo visited Bell at the hospital a couple of days after Bell underwent surgery. (31 RT 4998.) During this visit, Bell told Olivolo that Boo-Boo had shot her. (31 RT 4999.)

Neal's brother Curtis, who lived with Neal in the Burr tract, was interviewed by police on November 2, 1998. (35 RT 5763-5764; 36 RT 5938.) Weatherton was a distant cousin of Curtis's and the two would hang out together almost every day and sometimes get high together. (35 RT 5765-5766.) Curtis told police about an incident on October 24, 1998, when he and Weatherton talked about robbing some drug dealers and Weatherton had Curtis occupy Hunt while Weatherton retrieved a gun he had buried somewhere near the front door of Hunt's house.[4] (38 CT 10965-

[4]At trial, Curtis, who was serving a term in state prison and did not want to testify, claimed that he could not remember the October 24, 1998 (continued...)

10968; 36 RT 5938.) Weatherton told Curtis that "he would not leave any witnesses and he would take them out." (36 RT 5938.) Weatherton retrieved what Curtis believed to be a gun in a blue bag and the two started to look for drug dealers, but a car came up and, after contacting the person in the car, Weatherton and Curtis abandoned the plan. (36 RT 5939.)

Although police never found the gun used to commit the murders, the Burr tract was in close proximity to the All American Canal and a person could stand at the fence and throw a gun into the canal. (36 RT 5964; 38 RT 6083.) Police divers searched the canal, but did not find the gun. (36 RT 5943-5947.)

At trial, Bell had no doubt that Weatherton was the person who had shot her, Ortiz, and Roberson. (26 RT 4181, 4321.)

2. Defense Evidence

Weatherton's defense focused on highlighting the lack of physical evidence connecting him to the murders and questioning the reliability of Bell's identification of him as the shooter. With respect to the physical evidence, the clothing and shoes worn by Weatherton at the time of his arrest were tested for blood and carpet fibers by police with negative results. (39 RT 6225-6238.) Also, the fence around the All American Canal was six feet high with three layers of barbed wire on top and the canal itself was anywhere from 57 to 65 feet from the fence. (40 RT 6430, 6436-6438.) The representative of the Coachella Valley Water District who testified about the canal had seen it demonstrated that someone could stand

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(...continued)
incident or telling police about the October 24, 1998 incident. (35 RT 5776-5771.) Even viewing a videotape of his interview with police did not aid his recollection. (35 RT 5781-5783.) However, Curtis did remember meeting someone named Buster while in state prison and that Buster, who was from Indio, had talked to Weatherton and threatened Curtis if he testified against Weatherton. (35 RT 5771-5774.)

at the fence and throw something into the center of the canal. (40 RT 6435, 6444.) However, the current was not fast and he believed that a gun would sink into the 6 to 12 inch layer of sand at the bottom of the canal, rather than float away. (40 RT 6436, 6439.) Nonetheless, if a gun were to float away, there was no barrier in the canal to prevent it from travelling all the way to Lake Cahuilla. (40 RT 6440.)

Hunt denied having a party at his house on October 31, 1998, although he admitted that Roberson and Bell were at his house and left together. (38 RT 6089-6091.) Hunt also denied that anyone smoked crack at his house on October 31, 1998. (38 RT 6092-6093.) According to Hunt, Weatherton did not do anything on October 31 to cause Hunt to be afraid of Weatherton and Hunt did not pull a knife on Weatherton or tell Roberson that he was afraid of Weatherton. (38 RT 6093, 6099-6102, 6107.) Hunt also denied telling police that he saw Weatherton come in the house and change his jacket on the morning of November 1, 1998. (38 RT 6103-6106.) However, Hunt did admit that Weatherton did not seem upset when he told Hunt that Roberson and Bell had been shot. (38 RT 6109-6110.)

The physician who treated Bell in the emergency room described her as being "not entirely cooperative" and suspected that she was under the influence of a chemical substance not prescribed by a physician. (35 RT 5701-5704.) A drug screen performed on Bell in the emergency room was positive for cocaine. (35 RT 5704-5706.)

Psychologist Stephen Pittel testified about crack cocaine and its effects on a user. (42 RT 6804-6808, 6815-6817.) According to Pittel, not only could crack cocaine cause paranoia in a chronic user, but it could cause a chronic crack cocaine user to make a source attribution error and be so focused on a particular person being evil that they might attribute any evil act to that person. (42 RT 6809-6815, 6838-6846, 6865-6866.)

Forensic psychologist Robert Shomer testified about the unreliability of eyewitness identification. (41 RT 6608-6619.) Although Shomer could not determine whether a particular eyewitness was accurate in a particular case, research suggests that, as a general matter, eyewitness identifications are inaccurate. (41 RT 6619-6620.) According to Shomer, confidence and certainty are not an indication of how reliable an eyewitness identification is. (41 RT 6621-6622, 6656-6657.) Although there was overwhelming evidence that, all things being equal, a person can recognize people with whom they have repeatedly interacted over a long period of time, it was nonetheless possible for a person to misidentify a person with whom they are familiar. (41 RT 6647-6650, 6653.) In Shomer's opinion, a person can be confident and completely sincere in their identification of someone they are familiar with and still be mistaken. (41 RT 6659.) Additionally, the presence of a weapon can make an identification less reliable because the witness will tend to focus on the weapon. (41 RT 6654-6656.)

3. Prosecution's Rebuttal

Psychologist Ebbe Ebbesen testified about memory and eyewitness identification. (44 RT 7144-7174.) Ebbesen pointed out that there is no generally agreed upon theory of memory. (44 RT 7170-7174.) Ebbesen also warned that conclusions from psychological research on eyewitnesses could not be generalized to actual eyewitnesses in actual crimes. (44 RT 7208-7209.) However, unlike Shomer, Ebbesen believed that the research did indicate that an eyewitness's confidence in their identification was a good predictor of accuracy. (44 RT 7177-7183.)

Psychopharmacologist Ronald Seigel discussed the effects of cocaine and crack cocaine. (44 RT 7243-7262.) According to Seigel, cocaine use could produce visual hallucinations, but those hallucinations tend to be in the form of "snow lights" or flashing white lights in the visual field. (44 RT 7263-7264.) According to Seigel, if four people shared seven $20 rocks

of crack cocaine, each would ingest 147 milligrams of cocaine, which, if consumed over the eight-hour period between 2:00 p.m. and 10:00 p.m., would still allow a user to get to sleep by midnight. (44 RT 7280-7285.) A person doing this three to four times a week would consume approximately 588 milligrams of cocaine, making that person a "very low dose crack user" who, at 6:00 to 7:00 a.m. the following morning, would not be so impaired that they would be unable to correctly recognize a familiar person, would not hallucinate, and would not be paranoid. (44 RT 7286-7294.)

B. Penalty Phase

The prosecution presented evidence of Weatherton's lengthy criminal history, beginning on December 23, 1969, when a police officer on patrol in Los Angeles saw a black and green 1969 Ford Mustang stopped at a stop sign and noted that the license plate was on the hot sheet of stolen vehicles. (57 RT 8598-8601.) The officer made a U-turn and pursued the car. (57 RT 8601-8605.) The pursuit ended when the Mustang collided with a car driven by a 50-year-old woman and caused the second car to flip over. (57 RT 8605-8606.) The driver of the second car was taken to the hospital. (57 RT 8608.) Weatherton, who was driving the Mustang, exited the car and ran five or six steps before being arrested at gunpoint. (57 RT 8606-8607.) Weatherton was later questioned by police and, after waiving *Miranda*,[5] he explained that he got out of Torrance court on another auto theft case and did not have money for a cab or bus, so he found a car with the keys in it and took it. (57 RT 8614.) Weatherton was ultimately convicted of auto theft. (57 RT 8616.)

At 11:00 p.m. on July 5, 1972, Melvin Guin and his brother Masselon got out of their car at a café and whiskey store in Los Angeles when

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[5]*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 1627, 16 L.Ed.2d 694].

Weatherton and Purcy Davis approached them with sawed-off shotguns. (57 RT 8636-8637, 8689-8691.) Weatherton stuck a gun in Melvin's stomach, while Davis put a gun to Masselon's head. (57 RT 8636-8637.) Weatherton and Davis led the brothers to a nearby parking lot and told them to take everything out of their pockets. (57 RT 8637, 8692.) Weatherton and Davis told the Guins to run because they were going to "blast" them. (57 RT 8638, 8693.) When the Guins started running, Davis fired his gun and Weatherton may have fired his. (57 RT 8693-8694.) Masselon was hit in the back. (57 RT 8639-8640.)

Shortly thereafter, at 1:05 a.m. on the morning of July 6, 1972, Weatherton and Purcy Davis entered a nearby bowling alley with sawed-off shotguns. (57 RT 8618-8619, 8626-8627, 8680-8681.) They told the bowling alley's manager and security guard to put up their hands and freeze and took the security guard's gun. (57 RT 8619, 8627, 8681-8682.) Weatherton took money from the bowling alley manager, while his partner went into the adjoining bar and took money from the register and jewelry from the patrons. (57 RT 8620-8622, 8627-8628, 8650-8657, 8681-8682.) Weatherton was ultimately convicted of armed robbery for the Guin and bowling alley robberies. (57 RT 8706-8707.)

On January 21, 1994, Weatherton entered a Los Angeles church and asked the 77-year-old minister to buy a car radio. (57 RT 8728, 8741-8742; 58 RT 8768-8769, 8775.) The minister told Weatherton that he did not have any money and Weatherton left, only to return with a gun. (57 RT 8731, 8742-8743.) Weatherton told the other people in the church, including several children, to get on the floor. (57 RT 8742-8743; 58 RT 8765-8767.) Weatherton demanded the minister's money and jewelry and the minister gave him money and a gold watch. (57 RT 8731-8732, 8743-8745.) Weatherton was arrested and the minister's gold watch was taken from him during booking. (57 RT 8744-8745; 58 RT 8772-8773.)

On September 19, 1994, Weatherton and another man bought alcohol at a Circle K in Riverside County, asking the assistant manager if he was alone at the store. (56 RT 8524-8528, 8540-8542, 8559-8561; 57 RT 8589-8591.) They returned several hours later while the assistant manager was talking to a female friend. (56 RT 8528-8529, 8543-8546.) Weatherton brought some alcohol to the front counter and, when asked to pay for it, pulled out a gun and demanded the money in the cash register. (56 RT 8529-8530.) Weatherton pressed the gun into the assistant manager's friend's back and told him to put the money in a bag and that he would shoot her if anything happened. (56 RT 8549-8550.) When the assistant manager tried to get a bag from beneath the counter to put the money and alcohol in, Weatherton leaned over the counter and pointed the gun at him. (56 RT 8531-8532.) Weatherton and the other man left with $170 in cash and checks and the alcohol after telling the assistant manager he "better not do something stupid[.]" (56 RT 8532-8533, 8535.) Weatherton was arrested the next morning with a .22 revolver and the keys to a car stolen from Los Angeles in his pocket. (56 RT 8562-8568; 57 RT 8574-8585, 8587-8588.) Weatherton was subsequently convicted of robbery in this case. (56 RT 8593-8594.)

Weatherton had numerous other convictions, including auto theft on November 23, 1966; auto theft on November 14, 1969; an escape from USC Medical Center while in custody on November 20, 1973; being a felon in possession of a firearm on December 30, 1981; armed robbery on December 30, 1981; armed robbery on August 1, 1985; and the December 2, 1985 robbery of Camilla Doyle. (57 RT 8594-95, 8707-8708.)

Weatherton also had a history of violent behavior while in custody. On November 29, 1990, Weatherton was in another housing unit at Tehachapi State Prison without permission when he got into a fight with another inmate. (57 RT 8716-8719, 8721-8722.) During the 40-second

fight, Weatherton struck the other inmate with his fists 10 to 15 times. (57 RT 8720.)

On September 14, 2000, deputies conducted a search of Weatherton's cell at the Indio jail and found several razor blades that had been removed from inmate safety razors. (58 RT 8777-8779.)

On April 15, 2001, deputies investigated a fight in a holding tank at the Indio jail. (58 RT 8788.) The victim, who had a swollen right eye, scratches on his left ear, and bruises, told deputies that Weatherton had punched him several times in the face because he flushed the toilet more than once. (58 RT 8784, 8789-8792.) Weatherton had no injuries. (58 RT 8793.)

Finally, the victims and their families discussed the very personal consequences of Weatherton's actions. Sam Ortiz's brother, Joe, discussed the Ortiz family and the effect of Ortiz's murder. Ortiz was the oldest of four children. (58 RT 8794-8795.) Ortiz had a 27-year-old daughter, a 25-year-old son, and an 18-year-old son. (58 RT 8795.) Ortiz was not only close with Joe, but also with Joe's children; Ortiz helped Joe's 15-year-old son get in shape for football as a high school freshman. (58 RT 8796-8798.) Ortiz had lived with Joe and his family in La Quinta for a couple of years, but had started drinking and argued with Joe. (58 RT 8796, 8798-8799.) Ortiz had only lived in the Burr tract for one-and-a-half to two months before his murder and Joe never got the chance to make up with him after the fight that caused Ortiz to move out. (58 RT 8796, 8799.) Ortiz's death not only affected Joe and his children, but "devastated" Ortiz's mother, who required medication for depression after Ortiz's murder. (58 RT 8803-8804.)

Roberson's half-sister, Paulette Webb, discussed Roberson's family and the effect her murder had on it. According to Webb, Roberson was particularly close with her brother, Eric, who died of a massive heart attack

four months after Roberson was murdered. (58 RT 8807-8808, 8813.) Eric was so devastated by Roberson's death that he could not bring himself to tell Webb about what he saw at the crime scene and she was convinced that Roberson's death contributed to Eric's. (58 RT 8813-8815, 8819.) Roberson's one-year-old son Jared lived with Eric until his death, when Jared came to live with Webb, and then, 14 to 15 months later, went to live with his biological father. (58 RT 8813, 8815.) Jared needed psychiatric help; he screamed and cried in his sleep and cried uncontrollably while awake. (58 RT 8818.)

Bell provided insight into the effects the shooting had on her life. Bell had to wear glasses because of the bullet wound to her face. (58 RT 8822.) She had trouble chewing food because of the wound to her tongue. (58 RT 8823.) Bell, who was right handed, could not use her right hand for long periods of time because of the bullet wound to her wrist. (58 RT 8822-8823.) In addition to the physical effects, Bell continued to suffer psychologically. Bell had no social life and did not go out much because her "nerves [were] so shot[.]" (58 RT 8826.) She had to sleep with a nightlight. (58 RT 8824.) Bell received counseling, but it did not help much. (58 RT 8825.)

Weatherton, who represented himself at the penalty phase of the trial, presented no evidence and did not testify. (58 RT 8827-8829.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCLUDED THE PROPOSED THIRD PARTY CULPABILITY EVIDENCE BECAUSE IT FAILED TO LINK A THIRD PARTY TO THE CRIMES

Weatherton contends that the trial court improperly excluded evidence of Vernon Neal's jealousy towards Roberson; that Neal had gotten into a fight with Roberson and Ortiz in Ortiz's house about a month prior to the murders; that Neal had offered conflicting explanations as to why he had

gone to Ortiz's house on the morning of November 1, 1998, to look for Roberson; and evidence of Neal's motive for "sneaking up" to Ortiz's house before discovering the victims. Weatherton claims that this evidence was admissible as evidence of third party culpability showing that Neal could have committed the charged offenses, as well as being admissible to impeach Neal's trial testimony. (AOB 58-97.) However, the excluded evidence was inadmissible as third party culpability evidence or for any other purpose because it did not link Neal to perpetrating the crimes.

A. The Trial Court Properly Excluded Evidence of Third Party Culpability

On July 14, 2000, the prosecution filed a trial brief seeking to exclude evidence of third-party culpability on the part of Ernest Hunt and Vernon Neal. (3 CT 654-658.) On September 8, 2000, Weatherton filed his opposition. (3 CT 795-797.)

The matter was argued on December 19, 2001 , and the hearing immediately focused on Vernon Neal. (21 RT 3482-3564.) Weatherton's counsel argued that Neal was a viable alternative suspect in the case, being romantically involved with Roberson and having previously fought with Ortiz over his relationship with Roberson. (21 RT 3488-3489.) He also pointed to the fact that Neal was in the area around the time of the murders and argued that his behavior both immediately before and after discovering the crime was suspicious. (21 RT 3490-3498.) The prosecutor responded that the most Weatherton could show was that Neal may have had a motive and the opportunity to commit the crimes, but that this was legally insufficient to establish third-party culpability. (21 RT 3508-3510.) The trial court noted that much of the evidence Weatherton believed established Neal's culpability, with the exception of Neal's alleged prior argument with Ortiz, would be admissible at trial for other purposes and therefore elected to take the matter under submission in order to see what the evidence at

trial actually established. (21 RT 3563-3564.) However, the trial court ordered that Weatherton not mention third party culpability or any prior argument between Neal and Ortiz in opening statement. (21 RT 3564.) Later, during the defense case, the trial court finally settled the matter and ruled that there was not enough evidence to permit Weatherton to put on evidence of third party culpability. (39 RT 6200, 6221.)

The law is well-settled as to the admissibility of evidence of third party culpability:

> [T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. [Citations.] . . . "the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." [Citation.] "Our holding [in *Hall*] did not, however, require the indiscriminate admission of any evidence offered to prove third-party culpability. The evidence must meet minimum standards of relevance: 'evidence 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.' [Citation.] We also reaffirmed that such evidence is subject to exclusion under Evidence Code section 352. [Citation.]" [Citation.]

(*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368, citing *People v. Hall* (1986) 41 Cal.3d 826.)

As this Court has observed, a trial court's determination regarding the admissibility of evidence of third-party culpability is like any other ruling regarding the admissibility of evidence under Evidence Code sections 350 and 352. (*People v. Priest* (2007) 40 Cal.4th 1179, 1242.) A trial court has

broad discretion in determining the admissibility of evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 196.)

> A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].

(*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see also *People v. Priest*, *supra*, 40 Cal.4th at p. 1242 [reviewing a trial court's exclusion of evidence offered to show third-party-culpability for abuse of discretion].)

Weatherton contends that the trial court improperly precluded him from presenting evidence that Neal, and not Weatherton, committed the crimes. (AOB 79-88.) Weatherton claims that the evidence showing Neal's culpability was:

> 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.

(AOB 88.)

As Weatherton's own characterization of the proffered evidence demonstrates, the most that Weatherton could show was that Neal may have had a possible motive and may have had the opportunity to commit the crimes. However, this showing is legally insufficient to raise a reasonable doubt of Weatherton's guilt. (See *People v. Hall*, *supra*, 41 Cal.3d at p. 833 ["[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[.]"].) What was entirely absent from Weatherton's offer of proof was any evidence linking Neal to the commission of the crimes. (See *ibid.* ["[T]here must be direct or

circumstantial evidence linking the third person to the actual perpetration of the crime."].) Bell, the only eyewitness to the crimes, testified that Neal entered Ortiz's house **after** the shootings. (26 RT 4168-4169.) Although Bell testified that when Neal asked her who had committed the offenses, she lied and told him that she did not know because she was afraid "he might be in with" Weatherton, her fears were based solely on her knowledge that Neal and Roberson used to date (26 RT 4169-4170), which is the same evidence of Neal's motive that is legally insufficient to raise a reasonable doubt as to Weatherton's guilt under *Hall*. Moreover, Bell's initial fear was that Neal might be acting in league with Weatherton, and not that Neal might be the person who shot Bell and her friends, instead of Weatherton. The suggestion that Weatherton and Neal may have acted in concert would not tend to exculpate Weatherton, but would only inculpate Neal. Moreover, there was no physical evidence linking Neal to the perpetration of the offenses. Although Weatherton posits that the absence of physical evidence linking Neal to the crime is explained by the failure of the police to look for it (AOB 84-85), this presupposes that there was some physical evidence implicating Neal to find and this supposition is without a scintilla of support in the record. Finally, Neal had Roberson's brother call 9-1-1 and he directed the police to the house when they arrived (27 RT 4353-4354, 4355-4358, 4366-4367), which is hardly the behavior to be expected if he were in fact the guilty party

The idea that Neal, and not Weatherton, committed the crimes cannot survive even casual scrutiny given the state of the record. Although Weatherton presented the testimony of Dr. Shomer that it was possible for someone to misidentify a person with whom they are familiar, Weatherton never presented any evidence that Bell **was** mistaken. Indeed, even Dr. Shomer admitted that "there is overwhelming evidence that all other things being equal . . . you can recognize people with whom you have repeatedly

interacted over a long period of time." (41 RT 6647-6648.) Weatherton was well-known to Bell. Prior to the shootings, Bell considered Weatherton a friend. (26 RT 4143.) She had known Weatherton for over a year, had seen him many times and had even celebrated Weatherton's 50th birthday at her house. (26 RT 4143; 27 4298.) Moreover, Bell had been with Weatherton at Hunt's house only hours before the shootings and had seen him in the tree outside Ortiz's house before retiring for the evening. (26 RT 4141-4142, 4152-4153.)

Bell also had ample opportunity to observe Weatherton at the time of the shootings. Weatherton spent enough time inside Ortiz's house to confront all three of the occupants individually, to converse briefly with each, to crawl on the floor to retrieve Ortiz's wallet from beneath the bed, and to shoot each of the three victims. (26 RT 4156-4165.) Although the record does not indicate exactly how long Weatherton spent inside Ortiz's house, logic dictates that he could not have accomplished all of this without spending at least several minutes inside and under Bell's direct observation.

In order for Bell to mistake Neal for Weatherton as Weatherton suggests, she would have had to be more than simply confused; she would have had to be utterly delusional. Bell would have had to look at Neal, but see Weatherton. When Neal spoke to the victims inside the house, she would have had to hear Weatherton's voice. She would have had to hallucinate Ortiz calling his killer Boo-Boo (26 RT 4158-4159), unless one is prepared to believe that Ortiz shared Bell's delusion and also misidentified the shooter. Moreover, one would have to accept that Neal was entirely nonplussed when both Ortiz and Bell called him Boo-Boo (26 RT 4158-4161), as the shooter responded to the name Boo-Boo and was in no way confused by the use of the name, which Neal would surely have been. Finally, one would have to accept that for no apparent reason, Bell was somehow magically restored to her senses when Neal entered the

house and discovered the victims, as she clearly recognized him as Neal and not Weatherton at this point. (26 RT 4169-4170.) The rather fanciful chain of suppositions required to support Weatherton's theory of Neal as the killer is entirely without logical or evidentiary support and did not merit the introduction of evidence of third party culpability.

Finally, there is no evidence that Bell was ever confused or uncertain about what she had seen. Although Bell initially told Neal she did not know the identity of the shooter, this was not because she was uncertain or confused as to who the shooter was, but because she **was** certain that Weatherton was the shooter; she was afraid Neal "might be in with" Weatherton since Neal and Roberson used to date. (26 RT 4169-4170.) However, when Neal returned to the house with Roberson's brother, Bell identified Weatherton as the shooter. (27 RT 4365.) When the police arrived at the house, Bell identified Weatherton as the shooter without any confusion or hesitation. (26 RT 4174; 28 RT 4546; 29 RT 4592.) Bell identified Weatherton in a photographic lineup the day after the shootings and was "100 percent positive" of her identification. (30 RT 4872-4875.) Further, even at the time of trial, Bell remained certain that Weatherton was the shooter. (26 RT 4181; 27 RT 4321.) Whether or not it is possible for someone to misidentify a person who is well-known to them, as Dr. Shomer testified, there is simply no evidence that this is what in fact occurred in this case.

B. The Excluded Evidence of Third Party Culpability Was Not Admissible for Other Purposes

Weatherton also contends that several pieces of evidence about Neal's relationship with Roberson that were excluded as part of the trial court's ruling on third party culpability were independently admissible for other purposes and that the trial court improperly excluded this evidence. (AOB 73-79, 89-95.) As discussed above, evidence about Neal's relationship

with Roberson, which at most provided Neal with a possible motive but in no way connected him with the actual commission of the crimes, was legally insufficient to warrant its introduction as evidence of third party culpability. Moreover, as will be demonstrated, the trial court properly concluded that this evidence was not admissible for any other purpose.

First, Weatherton claims that the trial court improperly excluded evidence that would have impeached Neal's explanations as to why he went to Ortiz's house on the morning of November 1, 1998. (AOB 73-74.) LaBritta Ross testified at an Evidence Code section 402 hearing that Roberson told her that Neal was "always harassing her and following her[,]" put sugar in her gas tank, and called the police to report that Roberson was doing drugs in her motel room, but when the police searched the room, no drugs were found (38 RT 6155, 6158-6160). Weatherton contends that this evidence was inconsistent with Neal's trial testimony that he went to Ortiz's house that morning to look for Roberson because she wanted to borrow money from him for her child's birthday party (27 RT 4347, 4375). (AOB 73-74.)

At trial, Weatherton's counsel argued that Roberson's statements about Neal were admissible to show Roberson's state of mind. (39 RT 6204.) The trial court rejected this argument and found Roberson's statements to Ross inadmissible. (39 RT 6210-6214, 6221.) Weatherton now contends that Roberson's statements to Ross about Neal's alleged harassment were admissible circumstantial evidence showing Roberson's state of mind with regards to Neal and that this state of mind was relevant to show that Neal's proffered explanation as to why he was looking for Roberson on the morning of November 1, 1998, was unlikely. (AOB 91-95.) However, the trial court's ruling was correct.

> Statements of a decedent narrating threats or brutal conduct by some other person may also be used as

> circumstantial evidence of the decedent's fear—his state of mind—when that fear is itself in issue or when it is relevant to prove or explain the decedent's subsequent conduct; and, for that purpose, the evidence is not subject to a hearsay objection because it is not offered to prove the truth of the matter stated.

(*People v. Lew* (1968) 68 Cal.2d 774, 781, fn. 3; see also *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.)

While Weatherton argues that the excluded evidence of Roberson's statements to Ross that Neal was harassing her was direct evidence of her attitude towards Neal, it would appear that such statements would more properly be characterized as circumstantial evidence of Roberson's state of mind. Insofar as Roberson's state of mind was concerned, it did not matter if Neal were actually harassing her, had actually called the police to report that she was using drugs in her motel room, or had actually put sugar in her gas tank; it mattered only that Roberson believed these things. From her belief about these alleged events, one could then presumably infer that Roberson's attitude toward Neal was a negative one, at least at the point in time when she made these statements to Ross. Circumstantial evidence of a declarant's state of mind is not hearsay because it is not offered for its truth, but only for its effect upon the state of mind of the declarant. (*People v. Lew*, *supra*, 68 Cal.2d at p. 781, fn. 3; see also *People v. Ortiz*, *supra*, 38 Cal.App.4th at pp. 389-390.)

The problem with Weatherton's proffered evidence is not one of hearsay, but of relevance. Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Kelly* (1992) 1 Cal.4th 495, 523.) The test for relevance is whether the evidence "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent or motive." (*People v.Garceau* (1993) 6 Cal.4th

140, 177, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118. A trial court is vested with broad discretion in determining the relevance of evidence, "but lacks discretion to admit irrelevant evidence." (*People v. Benavides* (2005) 35 Cal.4th 69, 90.) A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*Ibid.*; *People v. Heard* (2003) 31 Cal.4th 946, 972.)

Circumstantial evidence of a declarant's state of mind "must be relevant to be admissible—the declarant's state of mind must be in issue." (*People v. Ortiz*, *supra*, 38 Cal.App.4th at p. 389, citing Evid. Code, § 210.) What the trial court rejected here was the notion that Roberson's state of mind with respect to Neal was at issue in the trial. The only theory of relevance Weatherton offers is that if Roberson believed these negative things to be true about Neal, then it was unlikely that she had invited him to participate in her child's birthday party as he testified and that he must have had some other purpose for looking for Roberson. (AOB 73, 92-93, 95.) However, even assuming that the excluded statements showed that Roberson harbored a negative attitude toward Neal, they did not either directly or indirectly contradict Neal's testimony about the birthday party.

Ross testified at the Evidence Code section 402 hearing that, during the last six months before Roberson's murder, "[Roberson and Neal] broke up; they get back together. They break up; they get back together." (38 RT 6162.) This indicates that even if Roberson was upset with Neal at a particular point in time, she did not necessarily stay upset with him or stop seeing him or associating with him. Moreover, the incident at the motel occurred as much as three years prior to Roberson's murder and the incident with the car possibly six months before. Given that Roberson continued to see Neal long after these events occurred, they hardly cast doubt on Neal's testimony that he was looking for Roberson in anticipation of her child's birthday party, as the two seemingly had since reconciled

over these events. Indeed, even assuming that this evidence could show that Roberson was still upset with Neal, it would hardly be unreasonable for Roberson to put her own feelings aside and include Neal in the party for her child's sake. Further, Neal testified that Roberson wanted to borrow money for the party and even a still-upset Roberson could be expected to put her personal feelings aside to ensure that she had sufficient resources to give her child a first birthday party. Accordingly, the trial court properly excluded the evidence. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 10 [finding evidence offered to impeach witness's testimony properly excluded where evidence "plainly had little, if any, tendency in reason to prove that . . . [witness] testified untruthfully."].)

Similarly, Weatherton contends that it was improper to preclude Ross from testifying that Neal had come to her house to purchase drugs (38 RT 6157-6158) and Yolanda Harmon from testifying that she was aware that Neal was using drugs (38 RT 6181). He claims this evidence was relevant to impeach Neal's statement to the police during his November 1, 1998, interview with Investigator Cervello that he was looking for Roberson because he knew she would be getting a welfare check and did not want her to spend the money on drugs. Weatherton reasons that evidence showing that Neal was a drug user would cast doubt on his professed desire that Roberson not spend her money on drugs. (AOB 74.) However, the discussion of Neal's statement to Investigator Cervello about Roberson's welfare check occurred outside the presence of the jury during a sidebar and an Evidence Code section 402 hearing (27 RT 4391-4393, 4411-4414) and not during his trial testimony. Accordingly, there was no statement about Roberson spending her money on drugs before the jury to be impeached.

Next, Weatherton claims that evidence that Neal broke into Ortiz's house sometime prior to the murders and fought with Ortiz and Roberson

should have been admitted to impeach Neal's testimony that he was not jealous of Roberson and her relationship with Ortiz and to show that he gave conflicting explanations about his motives for going to Ortiz's house on the previous occasion. (AOB 74-78.) During an Evidence Code section 402 hearing, Neal testified about an incident that occurred at least a month before the murders in which he went to Ortiz's house looking for Roberson because Roberson owed him some money. (28 RT 4405.) Neal "hit the door" and entered to find Ortiz, Roberson, and Roberson's baby. (28 RT 4405.) Roberson tried to hit Neal with a golf club and he left, at which time she begged him for a ride home. (28 RT 4405-4406, 4418-4420.) Harmon testified at an Evidence Code section 402 hearing that Neal told her about the incident, that he had been looking for Roberson because he was worried about her and "because he . . . wanted to talk to her[,]" that "he got into an argument" with Ortiz, and that "somebody [] tried to hit him[.]" (38 RT 6177-6179.)

During cross-examination while testifying before the jury, Neal denied being jealous of Roberson. (28 RT 4433.) Weatherton's counsel questioned Neal about the first time he went to Ortiz's house and Neal testified it was because Roberson owed him money and not because he was jealous. (28 RT 4434-4435.) When Weatherton's counsel asked Neal if he got into a fight at Ortiz's house, the trial court sustained an objection that the question was beyond the scope of the trial court's ruling on third party culpability. (28 RT 4435-4442.)

The proffered evidence was properly excluded. Neal testified that he went to Ortiz's house to get money owed to him by Roberson. Neal told Harmon that he wanted to talk to Roberson and that he was worried about her. These statements are not inconsistent. Neal did not testify that his **only** reason for going to Ortiz's house on the prior occasion was money. Concern for Roberson's well-being and a desire to obtain the money owed

to him are certainly not incompatible motives. Moreover, Neal did not specify to Harmon what he wanted to talk to Roberson about; collecting the debt Roberson owed him would be an obvious topic of conversation. Evidence of the fight was not relevant to impeach Neal's testimony about his reason for going to Ortiz's house on that occasion because it "plainly had little, if any, tendency in reason to prove that . . . [Neal] testified untruthfully." (See *People v. Rodriguez*, *supra*, 20 Cal.4th at p. 10.)

Finally, Weatherton contends that the trial court improperly precluded him from questioning Neal's motive for "sneaking up" to Ortiz's house, which he claims would have impeached Neal's testimony that he went to Ortiz's house to discuss Roberson's child's birthday party. (AOB 78-79.) In the first instance, Weatherton's characterization that Neal was "sneaking up" to Ortiz's house is not supported by the record. Neal testified at trial that he parked some distance away from the house because he was in a hurry and there was a lot of "junk" in the way. (27 RT 4349-4351.) Neal heard loud noises that sounded like music or a television and yelled Roberson's name three times so as to be heard above the noise. (27 RT 4349-4352.) Yelling someone's name three times is hardly an effective method of sneaking up on them. Additionally, in his testimony at the Evidence Code section 402 hearing, Neal again indicated that he parked a distance away from the house because he "couldn't get up there all the way," and that he only listened outside the house to determine if someone was up, because if no one was up he was going to leave. (28 RT 4404-4417, 4422.) Neal specifically denied that he was eavesdropping or snooping around. (28 RT 4417, 4423.) Although Neal did say that he "accidentally" yelled Roberson's name and that he would not have done so had he not heard sound coming from inside the house (28 RT 4422), his characterization of his yelling of Roberson's name as accidental hardly indicates some nefarious purpose in Neal's actions. Indeed, it is difficult to

imagine how someone accidentally yells a name three times. While it may be unclear from the record what exactly Neal meant by his use of the word "accidentally," during the Evidence Code section 402 hearing, however, it is not inconsistent with any of his prior testimony. Finally, although Weatherton seeks to cast suspicion on Neal's testimony about parking and approaching the house, he does not point to any contradictory evidence that would have impeached this testimony. Again, his claim of evidentiary error is without merit. (See *People v. Rodriguez*, *supra*, 20 Cal.4th at p. 10.)

C. The Trial Court's Evidentiary Rulings Did Not Unconstitutionally Restrict Weatherton's Right to Cross-Examine Neal

Weatherton argues that the trial court's evidentiary rulings were not only erroneous, but violated his constitutional rights to confront and cross-examine witnesses against him and to present a defense. (AOB 89-90, 95-96; 3 CT 795.) Weatherton's claims of constitutional error are as meritless as his claims of state-law evidentiary error.

In the first instance, Weatherton failed to make a timely and specific objection in the trial court on federal constitutional grounds, thereby forfeiting any claim of federal constitutional error on appeal. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Weatherton's "bare reference" to a "constitutional right to put on a defense" during the hearing on the prosecutor's motion (21 RT 3551), and to "various federal constitutional guarantees (due process, confrontation of witnesses, presentation of a defense, and reliable death judgment)" in his moving papers (3 CT 795), were insufficient to preserve the claim. (See *ibid.* ["[T]here was a bare reference to the "confrontation rule" (capitalization deleted) in moving papers submitted by defendant. But that was all. And that was not enough.].)

However, even assuming Weatherton's claim of federal constitutional error was properly preserved for appeal, it is without merit. Weatherton's argument is merely an "attempt to inflate garden-variety evidentiary questions into constitutional ones[.]" (See *People v. Boyette* (2002) 29 Cal.4th 381, 427.)

> "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.]"

(*People v. Boyette*, *supra*, 29 Cal.4th at pp. 427-428, quoting *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Similarly, the constitutional right to confrontation and cross-examination "does not 'prevent the trial court from imposing reasonable limits on defense counsel's inquiry based on concerns about harassment, confusion of the issues, or relevance' [citations]." (*People v. Brown* (2003) 31 Cal.4th 518, 545.)

As discussed above, the trial court properly excluded Weatherton's proffered evidence of third party culpability. There was simply no evidence to directly or circumstantially connect Neal to the crimes and therefore evidence of third party culpability was of no relevance to the question of Weatherton's guilt and its exclusion did not implicate Weatherton's rights to confront and cross-examine witnesses or to present a defense. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1243.) In *Prince*, this Court found that evidence that the boyfriend of a murder victim was jealous because she was an exotic dancer was inadmissible to show third party culpability because the evidence did no more than demonstrate a possible motive. (*Id.* at pp. 1239-1243.) Appellant's proffered evidence regarding Neal, like that rejected by this Court in *Prince*, did nothing more than demonstrate that Neal may have had a possible motive. Accordingly,

like the evidence in *Prince*, the proffered evidence regarding Neal was inadmissible. (See *id.* at pp. 1242-1243.)

D. Even Assuming the Trial Court Improperly Excluded the Proffered Evidence of Third Party Culpability, Any Error was Harmless

Finally, even assuming that the trial court did abuse its discretion in excluding evidence of third party culpability, any error was harmless. The erroneous exclusion of evidence of third party culpability will not result in reversal where it is not reasonably probable that the defendant would have obtained a more favorable verdict had the excluded evidence been admitted. (See *People v. Hall*, *supra*, 41 Cal.3d at pp. 835-836 [applying *Watson*[6] harmless error standard to erroneous exclusion of third-party-culpability evidence].) Here, the evidence of Weatherton's guilt was overwhelming. As discussed above, Bell not only witnessed Weatherton commit the crimes, but consistently and unequivocally identified Weatherton as the shooter. Moreover, Bell never saw Neal in Ortiz's house until after she and the others had been shot by Weatherton. Weatherton's theory of Neal as the shooter simply cannot be reconciled with Bell's testimony, even accepting Dr. Shomer's theory that it was possible for someone to mistake a person well known to them, as Weatherton was well known to Bell.

Moreover, two independent witnesses testified that Weatherton was in possession of a handgun shortly before the murders. Only hours before the killings, Weatherton was at Norris's house and showed her what appeared to be a gun, covered by a white sock, stuck in his waistband, which he indicated he was willing to use to "take care" of a group of young men who were hanging around outside Norris's home. (31 RT 5044-5048.) Curtis Neal had also seen Weatherton a few days before the murders with what he

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[6]*People v. Watson* (1956) 46 Cal.2d 818, 837.

believed to be a gun in a blue bag after Weatherton talked about robbing drug dealers and said that he would not leave witnesses. (36 RT 5938-5939.)

In addition to having a weapon, Weatherton's need for money was also well-established, supplying a motive for the robbery that preceded the killings. Some days before the murders, Weatherton told Norris that "things had been bad for him" and that he needed money to attend an upcoming family reunion. (31 RT 5048-5049, 5057.) Weatherton also hatched a plot with Curtis Neal to rob and murder some drug dealers, but abandoned the plot without carrying it out. (36 RT 5938-5939.) Weatherton went to Norris's house three times on the evening preceding the killings, twice with Bell and once by himself, to buy rock cocaine on credit because he did not have any money. (31 RT 5035-5037, 5040-5048.) Indeed, Weatherton was apparently so desperate to purchase more rock cocaine that, hours before the shootings, Weatherton told Bell's roommate Olivolo that she should sleep with one of his friends in exchange for either more rock cocaine or money to purchase more rock cocaine. (31 RT 4991-4992.) Weatherton made Olivolo uncomfortable because "he was bent on how to get money" because "he wanted more drugs and he was going to get it any way he could." (31 RT 4993-4996.)

In addition to Bell's eyewitness testimony, two people seeing him with a gun, and his desperate need for money and drugs, there were Weatherton's shoe prints which were found leading from the vicinity of Hunt's house to the stand of tamarisk trees near Ortiz's house and on the other side of the tamarisk trees, headed north. (34 RT 5513-5518, 5521-5522.) The shoe prints heading away from the trees were more widely spaced, with deeper toe impressions, indicating that Weatherton had been running away from the direction of Ortiz's house (34 RT 5522-5524), which would be expected of someone who had just shot three people.

Given the state of the evidence, Weatherton was not only a logical suspect in the murders; he was the only logical suspect. Even had the jury heard the excluded evidence about Vernon Neal, it is not reasonably probable that the jury would have ignored the overwhelming evidence of Weatherton's guilty. Third party culpability evidence would not have changed the outcome of the case. (*People v. Hall, supra*, 41 Cal.3d at pp. 835-836.)

II. WEATHERTON WAS NOT PREJUDICED BY THE TRIAL COURT'S ORDER THAT HE BE RESTRAINED DURING TRIAL

Weatherton contends that the trial court improperly ordered that he be restrained during the trial without a finding of manifest necessity and that ordering the use of restraints was prejudicial because the jury was aware that Weatherton was restrained. (AOB 98-110.) The trial court, relying on then-valid Court of Appeal precedent that use of the stun belt required only a showing of good cause, ordered the use of the stun belt or, if Weatherton preferred, a leg brace, without making a finding a manifest necessity. However, the record does not demonstrate that the jury was aware of Weatherton's leg brace or that the use of the leg brace negatively affected Weatherton during the trial and the use of the leg brace was harmless under any standard.

On October 5, 2001, the prosecution filed a motion asking that the trial court order that Weatherton be restrained with either conventional restraints or a stun belt during trial. (4 CT 1042-1044.) On October 29, 2001, Weatherton filed an opposition to the prosecution's motion. (5 CT 1314-1315.) Weatherton stipulated to wearing a leg brace[7] during juror time qualifications until the motion could be heard. (6 RT 509.)

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[7]The leg brace was a restraint worn by Weatherton underneath his clothing that would lock in the extended position when Weatherton stood, thereby restricting his ability to walk or run. When Weatherton stood up, a (continued...)

The motion was heard on November 26, 2001, at which time the prosecution presented evidence in support of its position that Weatherton should be restrained during trial. Riverside County Sheriff's Department correctional corporal Fernando Rodriguez testified that, on October 2, 2001, he was escorting Weatherton from the courtroom. (10 RT 1114-1116.) Weatherton seemed upset and Rodriguez asked if he was okay. (10 RT 1116.) Weatherton said that he was upset about what happened in court that day and explained that he was not receiving information that he was hoping to get from the prosecution. (10 RT 1116-1117.) Weatherton then added "kind of offhandedly" that, if he did not receive the information, "he might go off in court" and deputies "might have to come up and drag him out of court." (10 RT 1117.) Weatherton was agitated and pacing back and forth when he made the statement, but afterward he "kind of laughed and left it at that." (10 RT 1117.)

Rodriguez then testified about several incidents that occurred during Weatherton's incarceration in the Riverside County Jail. Razor blades were found concealed underneath the mattress in Weatherton's cell. (10 RT 1124.) On February 26, 2000, Weatherton was involved in an incident in which several inmates were fighting in a jail housing unit. (10 RT 1123.) On May 30, 2000, Weatherton was the victim of a battery committed by another inmate. (10 RT 1123-1124.) On April 15, 2001, Weatherton slapped or hit another inmate who flushed the toilet while Weatherton was watching television, which ultimately caused a disturbance in the jail housing unit between the Hispanic and Black inmates. (10 RT 1124-1125.)

(...continued)
button on the brace had to be pressed in order to allow him to bend his knee and resume his seat. (6 RT 498-499, 509.)

The prosecution also presented evidence that Weatherton was convicted in 1974 of attempting to escape from county jail. (10 RT 1130.) The escape attempt was apparently made while Weatherton was receiving medical treatment at a local hospital. (10 RT 1131.)

The trial court found that there was good cause to require Weatherton to wear a stun belt during the trial. (10 RT 1151.) The trial court explained,

> 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 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.)

After the trial court ruled, Weatherton objected to the use of the stun belt as violating his rights under the Sixth Amendment and his right to a fair trial. (10 RT 1152.) Weatherton complained that wearing the stun belt required him to sit uncomfortably and caused him back pain and that, given a choice, he would prefer to wear a leg brace. (10 RT 1140-1141.) Consequently, the trial court gave Weatherton the option of choosing to be restrained with a leg brace. (10 RT 1152.) Weatherton ultimately chose to wear a leg brace instead of the stun belt. (11 RT 1182-1183.) Weatherton expressed no discomfort, either physically or mentally, from wearing the leg brace .

As the United States Supreme Court has explained,

> [T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court

> determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.

(*Deck v. Missouri* (2005) 544 U.S. 622, 629 [125 S.Ct. 2007, 161 L.Ed.2d 953].)

Similarly, Penal Code section 688 provides that,

> [n]o person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

Nonetheless, "a 'trial court has broad power to maintain courtroom security and orderly proceedings.'" (*People v. Stevens* (2009) 47 Cal.4th 625, 632.) Consequently, in order to minimize the likelihood of courtroom violence or other disruption, a trial court has the discretion to order a criminal defendant be placed in physical restraints. (*People v. Duran* (1976) 16 Cal.3d 282, 291.) In order to justify the placement of a criminal defendant in physical restraints during trial, there must be a showing of "a manifest need for such restraints" and the "showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record[.]" (*Ibid.*) "The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Ibid.*)

In this case, the trial court, relying on the decisions of the Court of Appeals in *People v. Garcia* (1997) 56 Cal.App.4th 1349, and *People v. Mar* (2000) 77 Cal.App.4th 1284, found good cause to order that Weatherton wear a stun belt during trial. (10 RT 1151-1152.) However, subsequent to the trial court's determination, this Court decided *People v. Mar* (2002) 28 Cal.4th 1201, 1215-1220, in which this Court found that use of the stun belt required the same showing of manifest necessity as any

other type of restraint and rejected *Garcia's* application of the lesser good cause standard.

In applying *Garcia's* good cause standard, the trial court gave "little weight" to the evidence of Weatherton's violent behavior in the county jail or to his 1974 escape attempt. (10 RT 1151.) Instead, the trial court focused on Weatherton's prior record of violent criminal activity and the violent nature of the charged offenses to support its good cause determination. (10 RT 1151.) However, while these factors may have supported a finding of good cause, this Court has held that, with respect to application of the manifest necessity standard, a criminal defendant's "record of violence, or the fact that he is a capital defendant, cannot alone justify his shackling." (*People v. Hawkins* (1995) 10 Cal.4th 920, 944, overruled on other grounds in *People v. Blakely* (2000) 23 Cal.4th 82, 89.) It appears from this record that the trial court believed that the evidence presented did not demonstrate a manifest necessity justifying shackling and only ordered the use of the stun belt because, as the trial court noted, "[i]t is easier to find good cause to use a stun belt." (10 RT 1145.) In ordering the use of the stun belt, the trial court relied in good faith on the decision of the Court of Appeal in *Garcia* establishing the good cause standard for use of the stun belt, which was valid precedent at the time of the trial court's ruling. Nonetheless, under this Court's subsequent decision in *Mar*, the trial court's determination that Weatherton should be required to wear a stun belt or, alternatively, a leg brace based upon something less than a showing of manifest necessity was incorrect. (See *People v. Mar*, *supra*, 28 Cal.4th at pp. 1215-1220.)

However, the trial court's determination that good cause, as opposed to manifest necessity, supported its finding that Weatherton be required to wear the stun belt or leg brace during trial was harmless. This Court has left open the question of whether the erroneous decision by a trial court to

order a defendant to wear a stun belt or some other type of restraint that is not visible to the jury during trial is subject to harmless error analysis under the *Chapman* standard for errors implicating federal constitutional rights or whether the *Watson* standard for errors of state law applies. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1225, fn. 7; see also *People v. Howard* (2010) 51 Cal.4th 15, 29-30.) In finding that the wearing of visible restraints by a criminal defendant implicates the Due Process Clause, the United States Supreme Court in *Deck* identified three "fundamental legal principles" of concern in the case of shackling: 1) the presumption of innocence and the fairness of the factfinding process; 2) the ability of a defendant to participate in his own defense, and 3) the dignity of the judicial process. (*Deck v. Missouri*, *supra*, 544 U.S. at pp. 630-632.) In the case of restraints which are not visible, the first and third factors identified by the Supreme Court in *Deck* which focus on the effect of the restraints on jurors or other outside observers of the judicial process are not implicated to the same degree, if at all, as in the case of visible restraints. Arguably, only the second factor is potentially implicated because it focuses on the defendant, who is aware of the presence of the restraints regardless of whether they are visible to jurors or other outside observers.

This Court in *Mar* suggested, without deciding, that the unique psychological effect of the stun belt on a defendant might nonetheless implicate the federal constitution regardless of the fact that the stun belt is worn underneath the clothing and is not visible to the jury. (See *People v. Mar*, *supra*, 28 Cal.4th at p. 1225, fn. 7, citing *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1308.) In doing so, this Court further suggested that restraints which are not visible to the jury other than the stun belt may not implicate the federal constitution and their improper application would be subject to harmless error analysis under the *Watson* standard. (See *People v. Mar*, *supra*, at p. 1225, fn. 7, citing *People v.*

Jackson (1993) 14 Cal.App.4th 1818, 1827-1830, and *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.) This Court in *Mar* identified certain unique attributes of the stun belt, including the possibility of accidental activation and possible health risks posed to individuals with certain medical conditions that not only demanded special attention from trial courts considering the stun belt's use, but could also "impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226-1230.) These attributes are not shared by a more traditional type of restraint such as the leg brace Weatherton was allowed to choose. There is no indication that a leg brace causes any pain or discomfort and it will only "activate" if the wearer stands and attempts to walk (6 RT 499), giving the wearer a degree of control that is not afforded by the stun belt. Consequently, regardless of whether this Court would find that use of the stun belt implicates the federal constitution, the more traditional forms of less visible restraint, such as the leg brace used in this case, do not implicate the factors identified as important to due process by the United States Supreme Court in *Deck*. Accordingly, any error in the application of a leg brace should be reviewed under *Watson* as an error of state law.

Nonetheless, regardless of the harmless error standard applied, any error in ordering that Weatherton be restrained during trial was harmless. In the case of errors implicating federal constitutional rights, reversal is warranted only where it cannot be shown that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23–24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Under *People v. Watson*, *supra*, 46 Cal.2d at pp. 836–838, reversal is warranted for an error of state law only where it is reasonably probable that the defendant would have obtained a more favorable result absent the error. As *Watson* is a less demanding

standard than *Chapman*, an error that is harmless under *Chapman* will also be harmless under *Watson*. (See *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) As will be demonstrated, any error in requiring Weatherton to wear a leg brace during trial was harmless beyond a reasonable doubt.

In the first instance, while Weatherton argues that the jury must have been aware of the presence of the leg brace because of the noise produced when Weatherton stood (AOB 108), the record establishes quite the opposite. While discussing the leg brace, which Weatherton had stipulated to wearing during juror time qualifications, the trial court explained,

> Well, when he stood up to greet the jury, there was a[n audible] click on the leg brace. I mean I could hear it up here. I am sure the jury could hear it **if they were alerted to what was happening. They might not have even realized it**.

(10 RT 1142, emphasis added.)

As the trial court's comments demonstrate, the noise produced by the leg brace was hardly of such a character as to inescapably command the attention of the jury and make the presence of the leg brace readily apparent. Even Weatherton's own counsel described the noise produced by the brace as being unobtrusive, noting, "It kind of clicks a little bit when they stand up, but it is not too bad." (6 RT 499.)

Even had one or more jurors heard the clicking noise produced by Weatherton's leg brace upon standing, it is impossible to say that they would have immediately associated it with Weatherton. As Weatherton did not take the witness stand, he was presumably seated at counsel table for the majority of the trial and standing only at the opening and closing of proceedings and at recesses, when everyone in the courtroom would also be standing. It is purely speculative to conclude that jurors would have isolated the clicking noise to Weatherton in particular, given that it could originate from anywhere or anyone in the courtroom. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1214 ["Although the prosecutor stated

that the [leg brace] restraint was 'rather obvious' because it caused a 'noise' when defendant walked, there is no indication in the record that defendant walked in the presence of the jury or that the jury was otherwise made aware that defendant was wearing the device."].)

Moreover, even assuming the jurors could isolate Weatherton as the source of the clicking noise, there is no reason to believe that they would necessarily conclude that Weatherton was restrained. Unlike handcuffs or leg chains, the leg brace is not the sort of restraint that is commonly seen in television and films and it is unlikely that the average lay juror would even know what a leg brace was. Indeed, it would be more likely that a juror would assume that Weatherton was wearing some sort of orthopedic device that was producing the noise, as orthopedic leg braces are far more likely to be within the scope of a lay juror's life experience than a leg brace restraint. (See *People v. Slaughter*, *supra*, 27 Cal.4th at p. 1214 ["Nor is it apparent that if the jury was aware of the [leg brace] device, it would conclude that its purpose was to restrain defendant rather than to treat a medical condition such as polio."]

Where, as here, there is no evidence that the jury was aware that Weatherton was restrained during trial, this Court observed in *People v. Tuilaepa*, *supra*, 4 Cal.4th at pp. 583-584, "We have consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury." Moreover, even the psychological impacts of the stun belt identified by this Court in *Mar* were negated by the fact that Weatherton was offered the leg brace as an alternative restraint and that he did not take the witness stand. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1271; *People v. Lomax* (2010) 49 Cal.4th 530, 562.)

Neither does the possibility that one or more of the jurors may have seen Weatherton's restraints during the jury visit to the crime scene establish prejudice. While the trial court noted that when Weatherton got

out of the car in which he was transported to the jury visit, "there was a chain visible across his waist about where his belt would be" (43 RT 7008), the trial court also noted that getting out of the car was entirely Weatherton's decision and that any restraints would not be visible to the jury unless he chose to do so. (40 RT 6537.) Placing a defendant in a vehicle during a jury visit to conceal the presence of restraints is a course suggested by this Court in order to mitigate any potential prejudice. (See *People v. Lang* (1989) 49 Cal.3d 991, 1026.) Moreover, the use of restraints at a jury view does not require the same strict showing as restraints used in the courtroom. (*People v. Roberts* (1992) 2 Cal.4th 271, 306-307.) Moreover, even assuming one or more jurors saw the chain described by the trial court at some point during the jury visit when Weatherton was outside of the car, a brief view of a defendant in restraints by one or more jurors is generally not considered prejudicial error. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 988-989; *People v. Duran*, *supra*, 16 Cal.3d at p. 287, fn. 2.)

Consequently, any error in ordering that Weatherton be restrained with a stun belt or leg brace during the trial was harmless under both *Chapman* and *Watson*.

III. THE TRIAL COURT PROPERLY LIMITED WEATHERTON'S QUESTIONING OF BELL ABOUT PROVIDING DRUGS TO TERESA CECENA

Weatherton contends that, when cross-examining Bell about providing drugs to Teresa Cecena, he should have been permitted to question Bell regarding a discrepancy between Deputy Anderson and her as to whether Deputy Anderson searched her bedroom and about promises of leniency from the prosecution. (AOB 111-121.) He further claims that the exclusion of this evidence implicated his federal constitutional rights to present a defense, to confront and cross-examine witnesses, and to a

reliable determination of the capital charges. (AOB 120.) Weatherton is mistaken.

On December 19, 2001, the prosecution addressed the trial court regarding an incident it had disclosed to the defense in which a sheriff's deputy learned that, sometime in October, 2001, Bell provided drugs to a woman named Teresa Cecena. (21 RT 3565-3567.) The prosecutor then moved to exclude this evidence at trial. (21 RT 3568-3569.)

The trial court conducted an Evidence Code section 402 hearing on the motion. (23 RT 3694.) At the hearing, Riverside County Sheriff's Deputy Justin Anderson testified that, in October 2001, he contacted Cecena and observed that she was under the influence of drugs. (23 RT 3718-3719.) Anderson asked Cecena where she got the drugs and she gave him the name Nellie and an address, but Anderson could not find anyone named Nellie at the address Cecena provided. (23 RT 3719.)

Anderson contacted Cecena again one to two weeks later and found her in possession of a small amount of what she said was methamphetamine. (23 RT 3719-3721.) Anderson asked her where got the drugs and she told him Nellie and gave a different address. (23 RT 3721.) As a favor to Cecena for providing him with information unrelated to this case, Anderson dropped the drugs in the gutter and stomped on them. (23 RT 3721.)

A couple of days later, Anderson went to the address Cecena provided and contacted Bell, who identified herself as Nellie. (23 RT 3722-3723.) Anderson explained why he was there and asked for her consent to search her apartment, which Bell provided. (23 RT 3723.) Anderson did not directly ask Bell if she provided drugs to Cecena and Bell avoided the subject. (23 RT 3723.) Although Bell was initially cordial, as Anderson began moving from the living room to the bedroom, she appeared to get nervous and asked that he obtain a search warrant. (23 RT 3723-3724.)

When Bell asked that he obtain a search warrant, Anderson decided to leave. (23 RT 3724.) As he was leaving, Bell told Anderson that she was in "some type of a witness protection program" and called the district attorney's office. (23 RT 3724.)

Anderson later had a meeting with the prosecution to clarify what happened with Bell. (23 RT 3727-3728.) The prosecutor told Anderson "to go about [his] business and do whatever [he] would have done normally." (23 RT 3727.) Anderson did not pursue the matter further because he had "enough problems of [his] own" without getting involved in Weatherton's case. (23 RT 3727-3728.)

The prosecutor, Investigator Cervello, and Cynthia Galvan, a victim/witness advocate with the district attorney's office, also testified about the incident. Bell admitted to all three that, on two occasions, she had provided $20 worth of drugs to Cecena. (23 RT 3698, 3712-3713; 25 RT 3978.) Neither the prosecutor, Cervello, nor Galvan made any promises of immunity, leniency, or other special treatment to Bell. (23 RT 3699, 3704-3705, 3715-3717; 25 RT 3979.)

Finally, Bell testified that she had twice obtained drugs for Cecena. (25 RT 3982; 26 RT 4087.) Bell also denied that anyone had promised her any kind of special treatment for providing drugs to Cecena or that she was testifying in hopes of receiving some special treatment. (26 RT 4090-4092.)

At the conclusion of the Evidence Code section 402 hearing, the trial court held that Bell could be questioned as to whether she provided drugs to Cecena, but not about any promises of leniency. (26 RT 4097.) At trial, Bell testified that she twice obtained rock cocaine for Cecena during the Fall of 2001. (26 RT 4178-4180; 27 RT 4288-4289, 4297-4298, 4325.)

As discussed in Argument I, subdivision (A), *ante*, a trial court has broad discretion in determining the admissibility of evidence. (*People v. Williams*, *supra*, 16 Cal.4th at p. 196.)

> A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].

(*People v. Rodriguez*, *supra*, 20 Cal.4th 1, 9-10.)

In the first instance, Deputy Anderson's Evidence Code section 402 testimony about the search of the bedroom was not actually inconsistent with Bell's testimony on the point. Deputy Anderson testified that he started to search Bell's bedroom, but did not complete his search before she asked that he obtain a search warrant. (23 RT 3724.) Similarly, when Bell was asked if she told Deputy Anderson to get a search warrant when he started walking to her bedroom, she responded, "No. **They started.** It was two of them. He said that he could search it – I told him he could do what he wanted, you know, he could get a search warrant." (26 RT 4085, emphasis added.) Both Bell and Anderson testified that a search of Bell's bedroom took place. Whether this was a completed search or not is a matter of semantics, and not proper impeachment. (See *People v. Rodriguez*, *supra*, 20 Cal.4th at p. 10 [finding evidence offered to impeach witness's testimony properly excluded where evidence "plainly had little, if any, tendency in reason to prove that . . . [witness] testified untruthfully."].)

Similarly, there was no evidence produced at the Evidence Code section 402 hearing to show that Bell had been promised or received any leniency for providing Cecena with drugs. Everyone involved, including the prosecutor, Cervello, Galvan, and Bell herself, testified at the hearing that there were no promises of leniency made and that no leniency was

provided. (23 RT 3699, 3704-3705, 3715-3717; 25 RT 3979; 26 RT 4090-4092.) As the trial court explained,

> In reality, I don't think it is a viable case anyway since the drugs were destroyed. There is no one to testify that there was actually drugs or not, and you have to rely on an admission without much of a corpus, if any.

(26 RT 4096.) However, as Deputy Anderson indicated, he destroyed the drugs that Bell furnished Cecena before he had contacted Bell or knew that Bell was a witness in Weatherton's case. (23 RT 3729.) Anderson destroyed the drugs as a favor to Cecena for providing him information. (23 RT 3721.) Any benefit to Bell arising from the destruction of physical evidence in a potential case against her was purely incidental. Accordingly, there was simply no evidence of leniency for Weatherton to present.

Weatherton's claims of federal constitutional error in the trial court's ruling are similarly without merit. In the first instance, Weatherton failed to make a timely and specific objection in the trial court on federal constitutional grounds, thereby forfeiting any claim of federal constitutional error on appeal. (See *People v. Alvarez*, *supra*, 14 Cal.4th at p. 186.) Moreover, even assuming Weatherton's claim of federal constitutional error was properly preserved for appeal, it is without merit. Weatherton's argument is merely an "attempt to inflate garden-variety evidentiary questions into constitutional ones[.]" (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 427.) "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.]" (*Id.* at pp. 427-428.) Similarly, the constitutional right to confrontation and cross-examination,

> "does not 'prevent the trial court from imposing reasonable limits on defense counsel's inquiry based on concerns about harassment, confusion of the issues, or relevance' [citations]."

(*People v. Brown*, *supra*, 31 Cal.4th at p. 545.) As demonstrated above, the evidence Weatherton claims was improperly excluded simply did not exist and the trial court's ruling did not implicate Weatherton's federal constitutional rights.

Finally, even assuming the trial court's evidentiary ruling was improper, any error was harmless. A trial court's erroneous exclusion of evidence will only result in reversal where it is reasonably probable that the defendant would have obtained a more favorable outcome had the evidence been admitted. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 837.) Here, the evidence from the incident with Cecena most likely to impact Bell's credibility, i.e. that she had twice provided Cecena with rock cocaine, was admitted at trial. (26 RT 4178-4180; 27 RT 4288-4289, 4297-4298, 4325.) It is not reasonably probable that, even had Weatherton been permitted to delve deeper into the specifics of the incident, that any evidence more damaging to Bell's credibility would have been unearthed. Moreover, as discussed in Argument I, subsection (D), *ante*, the evidence of Weatherton's guilt was simply overwhelming. Any error was harmless. (See *ibid.*)

IV. THE TRIAL COURT PROPERLY FOUND THAT JUROR NUMBERS 1 AND 11 DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING THE GUILT PHASE OF THE TRIAL

Weatherton contends that the trial court improperly denied his motion for new trial based on jury misconduct at the guilt phase of the trial. Although he alleged numerous acts of misconduct by multiple jurors in his motion in the trial court, he focuses in this appeal on the acts of two jurors. First, he claims that, while the trial court correctly found that Juror Number 1 committed serious misconduct by expressing his opinion about the case to several other jurors outside of deliberations, the trial court erred in finding this misconduct not to be prejudicial. Secondly, he challenges the trial

court's finding that Juror Number 11 did not commit misconduct by discussing her training as a correctional officer when considering the blood evidence during deliberations. (AOB 122-228.) The trial court's findings are both legally and factually correct.

A. Factual Background Regarding the Juror Misconduct Allegations[8]

The jury returned their verdicts in the guilt phase of the trial on February 20, 2002. (40 CT 11577.) On February 23, 2002, the trial court received an anonymous phone message regarding one of the jurors. (52 RT 8037-8039.) The trial court played the message for the prosecutor, Weatherton, and Weatherton's counsel in open court. (52 RT 8037-8038.) In the message, the caller, a male, stated that he overheard a young man wearing a juror's badge say that "this guy should be getting the death penalty, because that's what he wants." The caller did not specify when this incident occurred. (52 RT 8037-8038.) The trial court noted that there were only three men on the jury, Jurors Numbers 1 and 5 and Alternate Juror Number 5, and all parties agreed that the trial court would inquire of the three male jurors regarding this matter. (52 RT 8039.)

At a hearing on February 27, 2002, the prosecutor informed the court that an attorney who was not otherwise involved in Weatherton's case had been approached in the courthouse by Juror Number 3, who wanted to discuss the case. (54 RT 8195-8196.) The attorney refused and reported the contact to the prosecutor and Weatherton's counsel, who in turn reported the contact to the court. (54 RT 8196.)

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[8]Of the multiple allegations of misconduct litigated in the trial court, Weatherton focuses on just two. Accordingly, respondent has limited his discussion to the facts and arguments relating to the claims that are now before this Court.

During the hearing, the court inquired of Juror Number 3, who indicated that she was "concerned that Mr. Weatherton is not getting a fair trial with the jurors." (54 RT 8197.) Juror Number 3 began to discuss deliberations, but was interrupted by the prosecutor, who asked to be heard on the matter. (54 RT 8197-8198.) Juror Number 3 was excused and discussion was had on how to proceed. (54 RT 8198.) Juror Number 3 then returned and was questioned by the court. (54 RT 8231.) The court asked if Juror Number 3 thought "some other juror failed to follow the Court's orders and engaged in some misconduct[,]" and Juror Number 3 said, "Yes." (54 RT 8232.) Juror Number 3 indicated that Juror Numbers 1 and 5 discussed the penalty, with Juror Number 1 saying, "He should get the death penalty[,]" and Juror Number 5 saying, "I agree." (54 RT 8233-8235.) This incident occurred toward the end of deliberations, but before the jury reached its guilt phase verdict. (54 RT 8250.)

The trial court then questioned each of the other jurors in turn. Each one of the jurors, including Juror Numbers 1 and 5, denied recalling that any of the other jurors ever discussed penalty or punishment during deliberations and expressly indicated that they had not made up their minds as regards to punishment. (54 RT 8251-8285, 8299-8300.)

The trial court then questioned the alternate jurors. Alternate Juror Number 1 indicated that she heard several jurors, most of whom she could not identify, discussing the penalty in the hall, in the elevator, and on the balcony. (54 RT 8287-8289.) She was able to identify Juror Number 1 as the person most involved in these discussions. (54 RT 8289.) Sometime during deliberations, Juror Number 1 called her at home and left a message that he had "interesting news[.]" (54 RT 8289.) Alternate Juror Number 1 believed that Juror Number 1 had also called Alternate Juror Number 6, who was now seated as Juror Number 8, and an alternate juror with red hair. (54 RT 8289-8290.) Alternate Juror Number 1 also stated that she

had discussed the case with her husband because "I can't keep anything – what we say between each other is between us." (54 RT 8290.) Alternate Juror Number 4 had given Juror Number 1 a ride home sometime before deliberations during which Juror Number 1 said that he felt Weatherton was guilty. (54 RT 8294-8295.) Alternate Juror Number 4 told Juror Number 1 that they could not make that determination until they heard all of the evidence. (54 RT 8295.) Alternate Juror Number 2 and 5 did not recall any of the other jurors discussing penalty or punishment. (54 RT 8292, 8298.) Juror Numbers 8 and 1 were then reexamined and both denied having any telephone conversations about the case. (54 RT 8307-8309, 8314-8315.)

On February 28, 2002, Weatherton, who now represented himself,[9] made a motion for a mistrial in the guilt phase based on jury misconduct. (55 RT 8417.) The trial court indicated that it could not declare a mistrial in the guilt phase because it had already recorded the jury's verdict and that the proper vehicle to address his claims of jury misconduct was a motion for new trial, and that the trial court would require that the prosecution be given notice and an opportunity to respond. (55 RT 8418.)

In the interim, in the presence of the prosecutor, Weatherton and his counsel, the trial court reexamined several of the jurors. Alternate Juror Number 4 stated that she had conversations in the car with Juror Number 1 "a couple of times" prior to deliberations in which Juror Number 1 told her that "his first vote was going to be guilty, and he was going to see where everybody was going, what everybody's thought was." (55 RT 8395-8399.) Alternate Juror Number 4 believed that Juror Number 1's mind was

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[9]The trial court granted Weatherton's request for self-representation on February 25, 2002. Clark Head, one of the attorneys who represented Weatherton at trial, was appointed as standby counsel. (40 CT 11668.)

made up. (55 RT 8398.) Juror Number 1 called Alternate Juror Number 4 during deliberations to tell her he was having an argument with Juror Number 3. (55 RT 8399.)

The trial court then reexamined Juror Number 1, first telling him that "[i]t is pretty clear to me that you were basically talking to everybody about the case during the whole time prior to deliberations. So that's no longer a question in my mind." (55 RT 8400.) Juror Number 1 denied making up his mind about Weatherton's guilt prior to deliberations and denied telling other jurors that he thought Weatherton was guilty. (55 RT 8401.) Finally, Juror Number 3 was reexamined. She remembered Juror Number 1 talking to Juror Number 8 a couple of days after the trial began and telling her he felt Weatherton was guilty. (55 RT 8410.) At the conclusion of the hearing, the trial court dismissed Juror Numbers 1 and 3 and Alternate Juror Numbers 1 and 4. (55 RT 8423.) Alternate Juror Numbers 2 and 5 were then sworn and seated as jurors for the penalty phase of the trial. (55 RT 8423-8424.)

Weatherton filed a motion for new trial on May 4, 2002, and attached the declarations of Juror Numbers 3 and 8 and Alternate Juror Numbers 1 and 4. (40 CT 11712-11727; 43 CT 12521-12549.) The motion and declarations detailed several allegations of jury misconduct, including the two raised in the instant appeal: the allegation that Juror Number 1 prejudged the case and improperly discussed the case with other jurors outside of deliberations and the allegation that Juror Number 11 improperly discussed training she had received as a corrections officer regarding gunshot residue and blood spatter evidence. (60 RT 9020-9023.)

The hearing on the motion for new trial began on May 15, 2002, after the penalty phase had concluded. (60 RT 9017.) After a lengthy hearing on the authenticity of the juror declarations, the trial court found the declarations to be authenticated and then proceeded to consider their

admissibility under Evidence Code section 1150.[10] (60 RT 9023-9103, 9104-9119.) As the declarations consisted of some 258 numbered paragraphs (43 CT 12521-12549), the trial court ruled on the admissibility of each paragraph individually. (61 RT 9125-9245; 62 RT 9248-9301.)

Beginning on March 20, 2002, each of the jurors who provided declarations appeared to testify at the hearing. After being granted use immunity by the trial court, Alternate Juror Number 1 testified that she heard Juror Number 1, on the first day of trial state that he "would vote for guilty because he believed there was no denying Nelva Bell's testimony." (63 RT 9359-9363, 9367.) She believed Juror Number 3 and Alternate Juror Number 6 were also present when the statement was made. (63 RT 9363.) Alternate Juror Number 1 heard Juror Number 1 state that Weatherton was guilty from two to five more times, including on an elevator, possibly with Alternate Juror Number 6. (63 RT 9363.) On the day that Alternate Juror 1 was excused from the jury, she spoke to Juror Number 1 outside the courtroom, who told her that he had denied talking about the case or hearing anyone else talk about the case "because he was covering for everyone else, as he would assume that everyone else was covering for him." (63 RT 9374-9375.) On cross-examination, Alternate Juror Number 1 admitted that she had a "pretty poor memory" and had to

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[10]Evidence Code section 1150, subdivision (a), 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 to or dissent from the verdict or concerning the mental processes by which it was determined.

write things down, but did not write down the statements made by Juror Number 1. (63 RT 9415-9416.) Consequently, she was "having trouble recalling all these facts." (63 RT 9416.)

Former Juror Number 8 testified that she did not hear any of the other jurors discuss the case or say that appellant was guilty or that they would vote guilty prior to deliberations. She did recall Juror Number 1 saying that appellant was guilty in the deliberation room when taking an initial vote. (65 RT 9507-9509.) The balance of Juror Number 8's testimony related to the circumstance under which she was excused from the jury during deliberations on the occasion of her grandfather's death (64 RT 9499-9516). (See Argument VIII, *post.*)

Juror Number 3 testified that she heard discussions about the case between Juror Number 1 and Alternate Juror Numbers 1 and 6.[11] (64 RT 9519-9520.) Juror Number 3 related an incident that occurred later in the trial while she was having lunch with Juror Number 1 and Alternate Juror Numbers 1 and 6. (64 RT 9522-9523.) During lunch, Juror Number 1 stated, without any explanation, that "he was going to vote guilty no matter what." (64 RT 9523.) Juror Number 3 also described an incident that occurred during deliberation in which Juror 11, who was a correctional officer, claimed to have training with firearms and explained to the other jurors "how the blood would splatter or not splatter during the shooting of a gun." (64 RT 9525-9527.) According to Juror Number 3, Juror Number 11

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[11]Although Juror Number 3 was represented by counsel at the hearing and was admonished by the trial court about the possibility that her testimony could subject her to contempt of court or criminal prosecution for violating her oath as a juror and advised of her right against self-incrimination, Juror Number 3 proceeded to testify without invoking her Fifth Amendment rights or receiving a grant of immunity from the court. (64 RT 9518-9519.)

also explained that, based on her training, some guns do not leave gunshot residue. (64 RT 9527.)

The prosecutor then placed on the record an excerpt of a tape recording of the interview between Juror Number 3 and Weatherton's investigator. On the tape, Juror Number 3 stated with respect to Juror Number 1,

> "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."

(65 RT 9633.) When asked to explain what she meant by "just in case," Juror Number 3 said,

> "We didn't discuss it no more after that so I, I am assuming just in case we all said not. . . . 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."

(65 RT 9633.)

After being granted use immunity by the trial court, Alternate Juror Number 4 testified that, while driving Juror Number 1 home, Juror Number 1 "consistently said that the defendant was guilty." (65 RT 9637-9639.) During these rides, Juror Number 1 said "he would listen to the others, what they had to say, but he still was going to hold guilty initially." (65 RT 9648-9649.) Alternate Juror Number 4 also indicated that on two occasions while having lunch with Juror Numbers 1 and 3, Juror Number 1 discussed the case; on the first occasion he said that he was going to vote guilty and on the second occasion he said that Weatherton was guilty. (65 RT 9640-9642.) Juror Number 1 also called Alternate Juror Number 4 during deliberations to complain about the way in which deliberations were being

conducted. (65 RT 9642-9643.) Alternate Juror Number 4 stated that Juror Number 1 said "he would listen to what the others said, but he felt it was guilty, because he had to believe what Nelva Bell said. [The prosecutor] was very forceful and very strong in what she said." (65 RT 6643.)

Alternate Juror Numbers 2 and 5 and Juror Numbers 2, 4, 5, 6, 7, 9, 10, 11 and 12, all testified and denied hearing any of the other jurors discussing the case outside of the jury room. (66 RT 9743-9744, 9761-9763, 9790-9791, 9823-9824, 9829-9830, 9839-9840, 9845-9846; 9869-9870, 9891; 68 RT 9991-9992.) Alternate Juror Number 6 remembered Juror Number 1, Juror Number 3, and Alternate Juror Number 1 talking on the balcony and someone bringing up something about a witness, but she stopped listening at that point. (68 RT 9995-9998.) She also remembered Juror Number 1 saying he thought Juror Number 3 was mad at him because he thought Weatherton was guilty. (68 RT 9999-10000.) Juror Number 5 did recall Juror Number 11 discussing her knowledge of firearms and how blood might spatter from a gunshot wound, but did not recall her discussing gunshot residue. (66 RT 9768-9775, 9879-9880.) Juror Number 11 testified that, during deliberations, one or more of the other jurors assumed "there was no way that there couldn't have been any blood on the clothes of the person that shot all these people," and she responded that "it is not like we see on the movies where there is a huge amount of blood when somebody's shot[.]" (66 RT 9792-9793.) Juror Number 11 referred to her training with firearms and said, "[W]hat I have seen is not what we see in the every day world as far as the amount of blood." (66 RT 9798.) She then admonished the other jurors to "consider all of the evidence presented to us, that we can't assume by just movies and what we see that that's the way it is." (66 RT 9793- 9796.) Juror Number 11 denied saying that gunshot residue did not always emit from a gun or discussing her training regarding gunshot residue. (66 RT 9797.)

Finally, after being granted use immunity by the trial court, Juror Number 1 denied hearing any of the other jurors discussing the case outside of the jury room. (67 RT 9916-9917.) Juror Number 1 also denied saying on the elevator that Weatherton wanted the death penalty. (67 RT 9921-9922.) However, Juror Number 1 did admit discussing the case with Juror Number 3 and Alternate Juror Number 4, but could not recall the specifics of those discussions. (67 RT 9923-9924.) Juror Number 1 explained that he had previously denied having such conversations because they were "unimportant" and he did not want to get himself and the other jurors in trouble. (67 RT 9927-9928, 9934.) On cross-examination, Juror Number 1 indicated that he did not form an opinion that Weatherton was guilty until he watched a videotape of Bell in the hospital at the conclusion of the guilt phase and that it was not until this point in the trial that he expressed his opinion to Juror Number 3 and Alternate Juror Number 4. (67 RT 9958-9964.) His best recollection was that he said that he was "leaning toward guilty, but [] wasn't sure yet, and that [he] was eager to start discussions with the other jurors to see what they felt." (67 RT 9964.) Juror Number 1 never said that he was going to vote guilty no matter what. (67 RT 9965.) Juror Number 1 participated in the jury's deliberations and listened to the read back of Bell's testimony. (67 RT 9962.)

After hearing the testimony of the jurors and the arguments of the parties, the trial court found that no prejudicial jury misconduct occurred and denied Weatherton's motion for new trial. (68 RT 10038-10120.) As will be demonstrated, the trial court's denial of Weatherton's motion was proper.

B. The Trial Court Properly Conducted the Inquiry into Weatherton's Allegations of Juror Misconduct

A criminal defendant may move for a new trial on certain specified grounds, including jury misconduct. (Pen. Code, § 1181, subds. (2)-(3);[12] see also *People v. Ault* (2004) 33 Cal.4th 1250, 1260.)

> "When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible. (See Evid. Code, § 1150, subd. (a).) If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. [Citations.] A trial court has broad discretion in ruling on each of these questions and its rulings will not be disturbed absent a clear abuse of discretion. [Citation.]" [Citation.]

(*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467.)

Where jury misconduct is found, the determination of prejudice "presents a mixed question of law and fact 'subject to an appellate court's independent determination.'" (*People v. Tafoya* (2007) 42 Cal.4th 147,

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[12] Penal Code section 1181 pertinently 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:
>
> ...
>
> 2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property;
>
> 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[.]

192, quoting *People v. Danks* (2004) 32 Cal.4th 269, 303.) An appellate court must accept the trial court's factual findings and credibility determinations where supported by substantial evidence. (*People v. Tafoya, supra,* 42 Cal.4th at p. 192.)

Weatherton's challenge on appeal is limited to the trial court's determination that neither Juror Number 1 nor Juror Number 11 committed prejudicial misconduct. (AOB 192-228.) Accordingly, respondent will discuss each juror in turn.

1. The Allegations Concerning Juror Number 1

Penal Code section 1122 provides that jurors must not "'converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them'" and the violation of this duty is "serious misconduct." (*In re Hitchings* (1993) 6 Cal.4th 92, 118.) The prosecutor did not contest that Juror Number 1 violated his oath by expressing an opinion as to Weatherton's guilt prior to deliberations. (68 RT 10068.) Similarly, the trial court found that Juror Number 1 committed "serious misconduct[.]" (68 RT 10118.) Weatherton does not challenge the finding that Juror Number 1's behavior constituted misconduct. Accordingly, the only question on appeal with respect to Juror Number 1 is whether the misconduct was prejudicial.

Jury misconduct raises a rebuttable presumption of prejudice. (*In re Hamilton* (1999) 20 Cal.4th 273, 295.) As this Court has explained,

> This presumption aids parties who are barred by statute from establishing the actual prejudicial effect of the incident under scrutiny [citations] and accommodates the fact that the external circumstances of the incident are often themselves reliable indicators of underlying bias [citation].

(*Ibid.*)

However,

> whether an individual verdict must be overturned for jury misconduct or irregularity """is resolved by reference to the substantial likelihood test, an objective standard."""" [Citations.] Any presumption of prejudice 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. [Citations.]
>
> The standard is a pragmatic one, mindful of the "day-to-day realities of courtroom life" [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]. It is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." [Citation.] Moreover, the jury is a "fundamentally human" institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] "[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias." [Citation.]

(*In re Hamilton*, *supra*, 20 Cal.4th at p. 296, original italics.)

The trial court here found that the evidence did not demonstrate a substantial likelihood the Juror Number 1 was actually biased. The trial court reasoned as follows:

> 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 [Juror Number 1] 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 [Juror Number 1] testified that that reinforced his initial premature voicing of an opinion based on the evidence, having re-heard a couple of months later the re-reading of Nelva Bell's testimony, in light of just having it heard a couple days before the hospital testimony.
>
> Also, [Juror Number 3] said that she remained steadfast in her opinion of not guilty throughout the trial except in the end, never once articulated any evidence or opinion that anything [Juror Number 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 10119.)

The trial court's ruling is supported by substantial evidence. The trial court expressly found Juror Number 3's tape recorded statement to be "the most compelling evidence" on the point.[13] (68 RT 10118.) In that tape recorded statement, Juror Number 3 stated that Juror Number 1 "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." (65 RT 9633.)

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[13]Throughout his argument, Weatherton challenges the trial court's factual findings and finds particular fault with the trial court's reliance on the tape recording of Juror Number 3. (AOB 192-200.) However, this Court must "'accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.'" (*People v. Danks*, *supra*, 32 Cal.4th at p. 304, quoting *People v. Nesler* (1997) 16 Cal.4th 561, 582.) A reviewing court "confront[s] a cold record without the trial court's benefit of observing firsthand the appearance and demeanor of the witness" and must give deference to the trial court's credibility determinations. (*People v. Lewis* (2001) 26 Cal.4th 334, 359.) Here, Weatherton stipulated to the accuracy of Juror Number 3's statements on the tape recording. (65 RT 9634.) The trial court's finding that this was the most credible evidence presented on the subject of Juror Number 1's statements was entirely consonant with the trial court's role as the trier of fact at the hearing and is entitled to this Court's deference on appeal.

In *People v. Allen* (2011) 53 Cal.4th 60, 72-73, this Court found that a juror's statement that, "'[w]hen the prosecution rested, she didn't have a case[,]'" was "subject to some interpretation" and was not "an 'unadorned statement' that he had conclusively prejudged the case." The statement that Juror Number 1 intended to vote guilty "the first time . . . just in case" was similarly ambiguous and failed to demonstrate that Juror Number 1 had conclusively prejudged Weatherton's guilt. One can infer from the fact that Juror Number 1 referred to a first vote that Juror Number 1 believed that there would be multiple votes taken before a verdict was reached. Juror Number 1 gave no indication as to how he would vote on subsequent occasions. Juror Number 3's belief, expressed on the tape recording, that Juror Number 1 intended to vote guilty on the first vote "because he wanted to discuss it" (65 RT 9633), while speculative, is nonetheless logical. A jury's "straw vote" is "a type of 'deliberations,' in that each juror—having considered the evidence and arguments independently—is setting forth his or her opinion, albeit without accompanying reasons or explanations." (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 912; see also *People v. Allen*, *supra*, 53 Cal.4th at p. 75.) Juror Number 1's initial vote of guilty would certainly communicate his initial views on the state of the evidence to the jury.

Moreover, merely having an initial view on the state of the evidence does not amount to prejudicial misconduct. As this Court explained in *Allen*,

> Although section 1122 requires jurors not to form an opinion about the case until it has been submitted to them, "it would be entirely unrealistic to expect jurors not to think about the case during the trial. . . ." [Citation.] A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations.

...

> The reality that a juror may hold an opinion at the outset of deliberations is, as we have [citation], reflective of human nature. It is certainly not unheard of that a foreperson may actually take a vote as deliberations begin to acquire an early sense of how jurors are leaning. We cannot reasonably expect a juror to enter deliberations as a *tabula rasa*, only allowed to form ideas as conversations continue. What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination.

(*People v. Allen*, *supra*, 53 Cal.4th at pp. 73, 75.)

Here, the record demonstrates that Juror Number 1, at most, expressed an opinion of the state of the evidence prior to deliberations. However, the record further reflects that Juror Number 1 participated in deliberations and the read backs of testimony. As in *Allen*, Juror Number 1's statements "did not establish that he had ignored further evidence, argument, instructions, or the views of other jurors." (*People v. Allen*, *supra*, 53 Cal.4th at p. 73.)

Further, just as there is no evidence that Juror Number 1 had conclusively prejudged the case, there was no evidence that Juror Number 1's improper expression of his opinion influenced any of the other jurors. Alternate Juror Numbers 2 and 5 and Juror Numbers 2, 4, 5, 6, 7, 9, 10, 11 and 12, all testified and denied hearing any of the other jurors discussing the case outside of the jury room. (66 RT 9743-9744, 9761-9763, 9790-9791, 9823-9824, 9829-9830, 9839-9840, 9845-9846; 9869-9870, 9891; 68 RT 9991-9992.) Juror Numbers 3 and 8 initially voted not guilty, indicating that they were not swayed by anything they may have heard Juror Number 1 say prior to deliberations. (43 CT 12534.) Regardless of what any of the other alternate jurors may have heard Juror Number 1 say, they did not participate in the guilt phase verdict.

Accordingly, the trial court's determination that Juror Number 1 did not commit prejudicial misconduct was proper.

2. The Allegations Concerning Juror Number 11

> "It is not improper for a juror, regardless of his or her educational or employment background, 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."

(*People v. Steele* (2002) 27 Cal.4th 1230, 1265.)

Here, the trial court found that Juror Number 11 did not commit misconduct, reasoning as follows:

> 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.
>
> [One of the jurors] 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.
>
> [Another juror] 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 . . . the discussion of the evidence regarding guns.

(68 RT 10060-10061.)

The evidence at trial was uncontested that no blood was found on Weatherton's clothing at the time of his arrest. The meaning of this evidence, or rather absence of evidence, was open to interpretation. Weatherton cites no evidence that was directly contradicted by Juror Number 11, but claims that he could have presented expert testimony showing that it was "highly likely" that the shooter would have contacted blood spatter. (AOB 227.) Even accepting for the sake of argument Weatherton's unproven assertion, it would not foreclose the possibility that Weatherton could have shot the victims without contacting any blood spatter.

As this Court explained in *Steele*, where the evidence is "susceptible of various interpretations" and the views asserted by the jurors are "not contrary to, but [come] within the range of, permissible interpretations of that evidence[,]" then "[a]ll the jurors, including those with relevant personal backgrounds, [are] entitled to consider this evidence and express opinions regarding it." (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1265-1266.)

> "[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citations.] "It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" [Citations.] A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that

> jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. "Jurors are not automatons. They are imbued with human frailties as well as virtues." [Citation.]

(*People v. Steele*, *supra*, 27 Cal.4th at p. 1266.) Given the absence of any expert testimony on the interpretation of blood spatter evidence, Juror Number 11's opinion, even if informed by her training as a corrections officer, was as valid as that of any other juror. (See *People v. Steele*, *supra*, 27 Cal.4th at pp. 1266-1267.)

In re Malone (1996) 12 Cal.4th 935, the principle case relied on by Weatherton, is distinguishable. In *Malone*, a juror opined that polygraph evidence offered by the defendant was unreliable, based on her professional study of psychology. (*Id.* at p. 963.) This Court found this to be improper, noting that "[a] juror . . . should not discuss an opinion explicitly based on specialized information obtained from outside sources." (*Ibid.*)

Here, as the trial court noted, Juror Number 11 only offered her opinion to question another juror's "automatic[] assum[ption] that there should be blood splattering out[.]" (68 RT 10061; see also 66 RT 9792-9793.) In so doing, Juror Number 11 offered that "it is not like we see on the movies where there is a huge amount of blood when somebody's shot[.]" (66 RT 9792-9793.) Juror Number 11 referred to her training with firearms and said, "[W]hat I have seen is not what we see in the every day world as far as the amount of blood." (66 RT 9798.) She then admonished the other jurors to "consider all of the evidence presented to us, that we can't assume by just movies and what we see that that's the way it is." (66 RT 9793- 9796.) Indeed, Dr. Ercoli, who treated Bell in the emergency room, testified that Bell's injuries caused her to lose some blood, but not a significant amount (35 RT 5720-5721), which was wholly consistent with Juror Number 11's observation. These are statements of common sense

which are entirely consistent with the evidence produced at trial and hardly amount to assertions of special expertise.

However, even assuming Juror Number 11's opinion on the evidence was improper under *Malone*, there was no prejudice. As this Court noted in *Malone*, the presumption of prejudice may be rebutted "by showing the externally derived information was substantially the same as evidence and argument presented to the jury in court" and "therefore not inherently likely to have exercised an improper influence on any of the jurors." (*In re Malone, supra*, 12 Cal.4th at p. 964.) Again, Dr. Ercoli testified that Bell, who was shot twice, including once in the face, did not lose a substantial amount of blood, which was entirely in accordance with Juror Number 11's assertion that the "huge" amount of blood seen in gunshot wounds in movies was not necessarily representative of reality. Moreover, Juror Number 11's opinion did not contradict any evidence actually offered at trial. The trial court properly denied Weatherton's motion for new trial based on jury misconduct.

V. THE TRIAL COURT PROPERLY EXERCISED IT DISCRETION ON WHEN TO HEAR WEATHERTON'S MOTION FOR NEW TRIAL

Weatherton contends that the trial court improperly delayed ruling on his motion for mistrial and motion for new trial until the conclusion of the penalty phase and that this delay had "the inevitable effect of skewing the trial court toward preservation of the verdicts already obtained." (AOB 229-235.) Weatherton is mistaken. The trial court heard and ruled on Weatherton's motion for new trial before judgment, which is all that Penal Code section 1182 requires.

Weatherton, who represented himself, made a motion for a mistrial in the guilt phase based on jury misconduct on February 28, 2002. (55 RT 8417.) The trial court indicated that it could not declare a mistrial in the guilt phase because it had already recorded the jury's verdict and that the

proper vehicle to address his claims of jury misconduct was a motion for new trial, and that the trial court would require that the prosecution be given 10 days notice and an opportunity to respond. (55 RT 8418.) This would require that the motion be heard sometime after the penalty phase of the trial had begun. Weatherton then made a motion for new trial and the trial court indicated that the case would proceed until the prosecutor had proper notice and the motion could be briefed and argued. (55 RT 8422.)

The trial court did not identify the specific authority under which Weatherton was required to provide the prosecutor with 10 days notice of his new trial motion, other than to refer to the California Rules of Court and local court rules. (55 RT 8418.) The trial court may have been referring to California Rules of Court, rule 4.111(a).[14]

Weatherton is correct that this Court has previously held that a trial court is required to hear a motion for new trial made even on the day of sentencing and has characterized the requirement of notice to the court and prosecutor to be one of a professional duty of a defense attorney (AOB 232-233). (See *People v. Braxton* (2004) 34 Cal.4th 798, 807, fn. 2.) Given this Court's observation in *Braxton* and California Rules of Court, rule 4.111(a)'s express reference to pretrial motions, there is some question whether the rule and the 10-day notice requirement apply to motions for new trial.

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[14] California Rules of Court, rule 4.111(a) provides:

> Unless otherwise ordered or specifically provided by law, all pretrial motions, accompanied by a memorandum, must be served and filed at least 10 court days, all papers opposing the motion at least 5 court days, and all reply papers at least 2 court days before the time appointed for hearing. Proof of service of the moving papers must be filed no later than 5 court days before the time appointed for hearing.

However, Weatherton also cites no authority for the proposition that a trial court is required to hear a motion for new trial as soon as it is made. Penal Code section 1182 merely requires that the application for new trial be determined before judgment. (Pen. Code, § 1182 ["The application for a new trial must be made and determined before judgment[.]"].) Weatherton's motion for new trial was briefed and heard at the conclusion of the penalty phase and prior to judgment as required under Penal Code section 1182. Although Weatherton claims that allowing the penalty phase to proceed before ruling on the motion for new trial skewed the trial court in favor of denying the motion, he fails to offer any explanation as to why this would be the case. As discussed in Argument IV, *ante*, the motion for new trial was denied because Weatherton failed to show that the jurors committed prejudicial misconduct, and not because the motion was heard after, and not before, the penalty phase. The timing of when to hear and rule on the new trial motion was a proper exercise of the trial court's discretion.

VI. ANY REFUSAL OF THE FOREMAN TO TRANSMIT REQUESTS FOR READ BACKS MADE BY JUROR NUMBER 3 DURING THE GUILT PHASE DELIBERATIONS DID NOT VIOLATE PENAL CODE SECTION 1138

Weatherton contends that the jury foreman improperly refused to transmit requests for read backs made by Juror Number 3 during the guilt phase deliberations to the trial court in violation of Penal Code section 1138. (AOB 236-247.) However, because the requests for read backs the foreman allegedly failed to make were never presented to the court, Weatherton's claim is properly one of jury misconduct, which has not been fairly presented in either the trial court or in this Court and is forfeited.

As part of his motion for new trial, Weatherton attached a number of declarations, including the declaration of Juror Number 3. (43 CT 12533-12544.) In paragraph 12 of her declaration, Juror Number 3 stated,

"[W]hen I requested [the foreman] request of the court certain items of testimony or evidence he refused to do as I asked." (43 CT 12534.) In paragraph 74, Juror Number 3 claimed,

> 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 state he believe officer Rody [sic]."

(43 CT 12539.) In paragraph 75, she stated, "This was not the first time the foreman refused to bring the yellow form to the bailiff." (43 CT 12539.) For purposes of Weatherton's new trial motion, the trial court found these paragraphs to be inadmissible evidence of the jurors' mental processes under Evidence Code section 1150 because they related to the juror's subjective belief that the foreman was too controlling and demonstrated only the ordinary give-and-take of the deliberative process. (61 RT 9165-9166, 9240-9241.)

Even accepting the truth of Juror Number 3's allegations, they do not make out a violation of the trial court's statutory obligation to provide read backs. Penal Code section 1138 pertinently provides that "[a]fter the jury have retired for deliberation, if there be any disagreement between them as to the testimony . . . **they [the jury] must require the officer to conduct them into court.**" (Pen. Code, § 1181, emphasis added.) Neither Weatherton now, nor Juror Number 3 in her declaration, asserted that the trial court denied a request to read back testimony. Because the requests for read backs Juror Number 3 complained of were never made to the court, there was no violation of Penal Code section 1138. (See *People v. Cox* (2003) 30 Cal.4th 916, 968 ["Because the jury here never made a request to have the testimony reread, there was no statutory violation."], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 418.)

If the jury foreman prevented Juror Number 3's requests for read backs from being transmitted to the court, then Weatherton's challenge

would properly be one of misconduct on the part of the foreman. Indeed, the single case Weatherton cites involving a jury foreman's failure to transmit a request for a read back to the court, *Caterpillar Tractor Co. v. Boyett* (1984) 674 S.W.2d 782, 793, (AOB 244) considered the claim to be one of jury misconduct. However, Weatherton does not now present his claim in terms of jury misconduct, but rather as a violation of Penal Code section 1138. (AOB 236-247.) Moreover, just as Weatherton has not presented a claim of jury misconduct on appeal, neither did he specifically challenge the alleged actions of the jury foreman with respect to Juror Number 3's desired read backs in the trial court as juror misconduct, thereby forfeiting any challenge to those actions on appeal. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1250 ["A claim of prejudicial misconduct is waived when the defendant fails to object to a juror's continued service and fails to seek a mistrial based upon prejudice."].) Weatherton's claim fails.

VII. THE TRIAL COURT WAS NOT BIASED AGAINST WEATHERTON AND PROPERLY EXERCISED ITS DISCRETION

Weatherton cites numerous acts or omission on the part of the trial court which he characterizes as showing that the trial court was biased against him. They include allegations that the trial court: 1) treated jurors who reported alleged jury misconduct less favorably at the hearing on the new trial motion than those who did not report misconduct; 2) made biased introductory remarks to jurors as they took the stand at the hearing on the new trial motion; 3) spoonfed testimony to Juror Number 1 at the hearing on the new trial motion; 4) allowed the jurors to remain in the courtroom while other jurors testified; 5) expressed anger toward jurors who reported misconduct; 6) relied on the prosecution for guidance during the hearing on the motion for new trial, and 7) improperly postponed ruling on his motion for new trial until after the penalty phase of the trial was concluded.

(AOB 248-261.) Weatherton's claim is fatally flawed because the record shows the trial court acted properly towards the juror and in conducting the hearing regarding juror misconduct.

It should be noted that subsequent to the guilty verdicts, Weatherton filed a motion to disqualify the trial judge pursuant to Code of Civil Procedure section 170.1. (41 CT 11861-11862.) In that motion, the only claim of bias Weatherton raised was the trial court's delay in deciding his motion for mistrial and new trial prior to the conclusion of the penalty phase indicated bias against him on the part of the trial court. (41 CT 11861-11862.) Consequently, his failure to raise the other claims of alleged judicial bias he now asserts forfeits those claims on appeal. (See *People v. Lewis* (2006) 39 Cal.4th 970, 994.)

However, even assuming Weatherton's claims of judicial bias were preserved for review, they are without merit. "'The Supreme Court has long established that the Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge.' [Citation.]" (*People v. Freeman* (2010) 47 Cal.4th 993, 1000; see also *People v. Cowan* (2010) 50 Cal.4th 401, 455.) In order to succeed on a claim of judicial bias under the Due Process Clause, a defendant must show that "the probability" of judicial bias exists. (*People v. Freeman*, *supra*, 47 Cal.4th at p. 1005; *People v. Cowan*, *supra*, 50 Cal.4th at p. 456.) The mere appearance of bias is insufficient to establish a due process violation. (*People v. Freeman*, *supra*, 47 Cal.4th at p. 1005; *People v. Cowan*, *supra*, 50 Cal.4th at p. 456.) In making this determination, a reviewing court "'asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" (*People v. Freeman*, *supra*, 47 Cal.4th at p. 1005, quoting *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 881 [129 S.Ct. 2252, 173 L.Ed.2d 1208].) However, the Due

Process Clause "operates only as a 'fail-safe' and only in the context of extreme facts." (*People v. Freeman*, *supra*, 47 Cal.4th at p. 1006; *People v. Cowan*, *supra*, 50 Cal.4th at pp. 456-457.) Consequently, this Court has only recognized those concerns identified in the prior decisions of the United States Supreme Court: "pecuniary interest, enmeshment in contempt proceedings, or the amount and timing of campaign contributions[.]" (*People v. Freeman*, *supra*, 47 Cal.4th at p. 1006; *People v. Cowan*, *supra*, 50 Cal.4th at p. 457.)

With respect to the sole claim of judicial bias raised in the trial court, i.e. that the trial court's delay in deciding Weatherton's motion for mistrial and new trial until the conclusion of the penalty phase indicated a bias against him on the part of the trial court, this claim fails to implicate any of the concerns identified by this Court in *Freeman*. (See *People v. Freeman*, *supra*, 47 Cal.4th at p. 1006.) Moreover, as discussed in Argument V, *ante*, there is no merit to the claim that the trial court was required to decide the motion for mistrial and new trial prior to the conclusion of the penalty phase. The trial court ultimately conducted a lengthy hearing on Weatherton's allegations of juror misconduct, examining each of the jurors, including those who had been dismissed from the jury and the alternates. Weatherton's claim that the trial court's decision not to conduct this inquiry earlier demonstrates bias is without merit.

Weatherton's other allegations of judicial bias fare no better. First, Weatherton claims that the trial court was biased in its disparate treatment of juror witnesses during the hearing on his motion for mistrial and new trial. (AOB 250-252.) He claims that jurors who reported misconduct were treated like "criminals" and "threatened" with prosecution for perjury or contempt of court for failing to "promptly report instances of juror misconduct." (AOB 250.) Weatherton's claim is not supported by the record. Juror Number 3 and Alternate Juror Numbers 1 and 4, who

reported the misconduct of Juror Number 1, did not merely fail to promptly report such misconduct; they each admitted to participating in the improper discussions about the case with Juror Number 1 outside of deliberations. As discussed in Argument IV, *ante*, Penal Code section 1122 provides that jurors must not "'converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them'" and the violation of this duty is "serious misconduct." (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118.) Moreover, the trial court did not threaten these, or any jurors, with criminal prosecution, but merely noted before each juror testified that it anticipated that the jurors would be asked questions about violating the admonition of Penal Code section 1122 or testifying differently than the declarations provided to Weatherton's investigator, that such testimony could subject them to criminal liability for contempt of court or perjury, and informed them of their Fifth Amendment rights and the presence of counsel in the courtroom to advise the jurors should they so desire. (63 RT 9333-9335; 64 RT 9518-9519; 65 RT 9635-9636.) The trial court then granted use immunity to Alternate Juror Numbers 1 and 4 on request. (63 RT 9359-9360; 65 RT 9637-9638.) Had the trial court been attempting to bully the jurors into silence to prevent them from testifying about the alleged misconduct as Weatherton seems to suggest (AOB 250-252), the court would hardly have offered them immunity from the very "threat" it was allegedly holding over their heads. The trial court's willingness to grant immunity to these alternate jurors affirmatively demonstrates that the court's admonition was merely a scrupulous effort to protect the rights of the jurors and in no way interfered with the trial court's ultimate objective: to get to the bottom of the allegations of misconduct and protect Weatherton's right to a fair and impartial jury.

Weatherton next claims that the trial court's introductory remarks to Alternate Juror Number 2 and Juror Numbers 5, 9, and 11, prior to their testimony at the hearing on the new trial motion, demonstrated bias, as the remarks indicated to the jurors how the court expected them to testify. (AOB 252-253.) In opening remarks to these four jurors, the trial court thanked them for returning to court for the purpose of testifying at the hearing and explained that the court had already examined four other jurors who had admitted violating their oath as jurors and disobeying the court's instructions. (66 RT 9737-9739.) The court explained that it had appointed attorneys for those jurors to advise them of their Fifth Amendment rights. (66 RT 9739.) The court then explained their Fifth Amendment rights to these four jurors and indicated that the court would make attorneys available to these jurors, as it had to the four jurors who admitted to committing misconduct. (66 RT 9739-9740.) The court stated,

> I don't want to frighten or scare you, this may not involve you, because on the other ones I did have declarations already stating that they had violated the Court's orders, instructions, and a jury oath. Based on the questions that I have already asked you and your answers, that may not be the case with you. But just in case that you think there is going to be an answer that you are going to give that might incriminate you or subject you to prosecution, I do have independent lawyers here to speak with you.

(66 RT 9740.) The court told the four that other jurors had exercised their Fifth Amendment rights and that he had granted them use immunity. (66 RT 9740.) The court then briefly outlined the sorts of violations of the jury instructions that were the subject of the inquiry. (66 RT 9741.) The jurors were then sworn and examined. (66 RT 9742-9814.)

Weatherton claims the trial court improperly told the jurors "he thought they were not involved with potential criminal conduct[,]" thereby indicating to the jurors that they should testify accordingly. (AOB 252-

253.) However, the trial judge never told the jurors that he thought them innocent of any violation of their oaths, but instead stated that the misconduct "may not involve" the testifying jurors, since they had not previously provided declarations admitting to violations of the court's instructions. This was an entirely accurate characterization of the state of the evidence; the trial court had no evidence before it that any of these four jurors had violated their oaths. Moreover, California law presumes that jurors have followed the trial court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) While this presumption had been rebutted with respect to the jurors who offered declarations admitting to violating the trial court's admonition not to discuss the case, no such evidence had been offered with respect to these four jurors. Accordingly, the trial court was legally required to presume that the jurors had followed instructions until such time as this presumption was rebutted. Moreover, had the trial court truly intended to lead the jurors to testify that they had not violated their oaths or otherwise been unprepared to accept the possibility that they had not followed the trial court's instructions, it would not have gone to the lengths of advising them of their Fifth Amendment rights, making counsel available to them, and explaining the possibility of use immunity.

Weatherton's claim that the trial court "spoonfed" testimony to Juror Number 1 is similarly deficient. (AOB 253-254.) Prior to Juror Number 1 testifying a the hearing on the new trial motion, the trial court explained,

> I should tell you, [Juror Number 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 incase because you w anted 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 9910.) While Weatherton contends that these prefatory remarks constituted the trial court "making clear what it wants to hear" (AOB 254), it is more accurate to say the trial court was making clear what it wanted to hear **about**. In order to make an informed decision about the potential exercise of his Fifth Amendment rights, the trial court had to give Juror Number 1 some basic information about the direction the questioning could be expected to take. As a result, Juror Number 1 did exercise his Fifth Amendment rights and was granted use immunity by the trial court. (67 RT 9913-9916.) Moreover, had the trial court actually been trying to feed Juror Number 1 testimony unfavorable to Weatherton's claim of jury misconduct, the trial court would presumably have relied heavily on such testimony, instead of noting that Juror Number 1's credibility was questionable and need not even be considered except insofar as it corroborated the statements of Juror Number 3 and Alternate Juror Number 4 as to whether the improper discussions about the case actually occurred. (68 RT 10118.)

Weatherton also claims that the trial court demonstrated its bias against him by overruling his request to have the juror witnesses excluded from the courtroom during one another's testimony (66 RT 9742). (AOB at 255-256.) However, a motion to exclude witnesses is within the discretion of the trial court and a trial court has the discretion to permit witnesses to remain in the courtroom during other witness's testimony. (*People v. Garner* (1961) 57 Cal.2d 135, 155; Evid. Code, § 777.) There is nothing in the record that indicates the trial court's decision was anything other than a proper exercise of its discretion.

Weatherton also focuses on two statements of the trial court as improper expressions of anger towards Alternate Juror Number 1 and 4 and Juror Number 3 for exposing the misbehavior of Juror Number 1. (AOB 255-256.) First, when discussing whether the trial court would grant use immunity to Alternate Juror Number 1, the court stated,

> Well, first of all, she took an oath as a juror and she's already told me in open court that she violated that oath. And she told me if I left her on the jury she would continue to violate it. She thought that that was okay with her. It's a juror like this that caused us a lot of problems and taxpayers a lot of money. So I don't have a whole lot of sympathy for her.

(63 RT 9340-9341.) Shortly thereafter, the trial court added,

> 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.)

As the quoted statements clearly demonstrate, the trial court was expressing understandable frustration with a juror who not only admitted discussing the case when instructed not to, but, after her violation of the court's instructions was discovered, baldly insisted that she would continue to discuss the case with her husband. (54 RT 8490.) The court was in no way criticizing Alternate Juror Number 1 or any juror for coming forward with information about Juror Number 1's misconduct. Further, any possible frustration on the part of the trial court was directed toward Alternate Juror Number 1's behavior and not toward Weatherton. Finally, despite any possible frustration with Alternate Juror Number 1's behavior, the trial court ultimately did grant Alternate Juror Number 1 use immunity to allow her to testify fully regarding the allegations underlying Weatherton's new trial motion. (63 RT 9359-9360.)

Finally, Weatherton claims the trial court improperly identified with the prosecution and relied on the prosecution for guidance in making its

rulings during the hearing on the new trial motion. (AOB 257-259.) Weatherton ignores the fact that ours is an adversarial system of justice and that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (*Herring v. New York* (1975) 422 U.S. 853, 862 [95 S.Ct. 2550, 45 L.Ed.2d 593].) It was incumbent on the trial court to ascertain the positions of the parties on the legal and factual questions before the court, just as it was incumbent on the parties to argue their positions to the court. To say that the trial court "favored" the prosecution any time it made a ruling favorable to the position advocated by the prosecution because it had first inquired as what the prosecution's position was on the issue is only logical if one assumes that the rulings made were improper. However, as demonstrated throughout Respondent's Brief, Weatherton cannot demonstrate that any ruling of the trial court was improper. The fact that any particular ruling, properly supported by the law and facts, may have favored the prosecution's position was merely incidental and in no way indicative of any bias. To the contrary, it merely demonstrates the trial court's rulings were proper.

As the above demonstrates, none of Weatherton's claims of judicial bias implicate any of the due process concerns identified by this Court in *Freeman*. (See *People v. Freeman*, *supra*, 47 Cal.4th at p. 1006.) Weatherton fails to identify any factor at work in the case that could be expected to influence the trial court to be biased against him, but merely identifies statements or rulings of the trial court he disagrees with and suggests that they could only be explained by the existence of bias on the part of the trial judge. However, as respondent has shown, the facts do not support even an appearance of bias on the part of the trial court and Weatherton's claim is without merit.

VIII. THE TRIAL COURT PROPERLY DISCHARGED JUROR NUMBER 8 WITHOUT A HEARING WHEN HER GRANDFATHER DIED

Weatherton contends that the trial court improperly discharged Juror Number 8 when her grandfather died because it did not conduct a hearing and examine Juror Number 8 regarding her ability to perform her duties as a juror. (AOB 262-270.) However, the trial court's decision to discharge Juror Number 8 was proper because the court had sufficient facts to make a determination without a hearing.

On February 19, 2002, during the jury's guilt phase deliberations, the trial court indicated that the court clerk had received a call from Juror Number 8, whose grandfather had died. (48 RT 7775.) Juror Number 8 indicated to the court clerk that, because of the death in her family, she would not be in court for two weeks. (48 RT 7775-7776.)

Weatherton's counsel opposed replacing Juror Number 8 with an alternate juror. (48 RT 7775-7776.) As the wake for Juror Number 8's grandfather was not until February 21, 2002, the trial court agreed to ask Juror Number 8 to come to court for a hearing on the necessity for her absence. (48 RT 7778.) Although the court clerk told the court that she had "already told [Juror Number 8] she was excused[,]"[15] the court instructed the clerk to contact Juror Number 8 and ask her to come to court. (48 RT 7779.)

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[15]Despite Weatherton's assumption that the court clerk told Juror Number 8 that she was excused from further service on the jury (AOB 263), the bare statement "I already told her she was excused" is ambiguous as to whether the clerk had communicated to Juror Number 8 that she was excused from further service on the jury or merely excused for the two weeks surrounding her grandfather's funeral. Moreover, Weatherton failed to seek any clarification of this statement at trial. However, it is clear from the trial court's willingness to summon Juror Number 8 back to court to inquire further that the trial court had not, at this time, excused the juror.

The clerk left a voice mail message on Juror Number 8's cell phone telling her "it was pretty important that she get in touch with me and to get in here." (48 RT 7787.) The trial court indicated that it would wait to see if Juror Number 8 called back. (48 RT 7787-7788.)

Juror Number 8 had still not called back after the morning recess. (48 RT 7789-7790.) Weatherton's counsel continued to object to replacing Juror Number 8 with an alternate juror, arguing that there had not been a sufficient evidentiary showing to support removing Juror Number 8 from the jury and arguing that doing so would violate his constitutional rights. (48 RT 7790.) The trial court then dismissed Juror Number 8 and randomly replaced her with Alternate Juror Number 6.[16] (48 RT 7791-7793.)

> Under [Penal Code] section 1089, a court may discharge a juror who, "upon . . . good cause shown to the court is found unable to perform his or her duty. . . ." We review a trial court's decision to discharge a juror for good cause "for abuse of discretion. [Citations.] The juror's inability to perform the functions of a juror must appear in the record as a 'demonstrable reality' and will not be presumed. [Citation.] The trial court's finding [that] 'good cause' exists will be upheld on appeal if substantial evidence supports it. [Citation.]" [Citation.]

(*People v. Zamudio* (2008) 43 Cal.4th 327, 349.)

In *Zamudio*, this Court found that it was not an abuse of discretion to excuse a juror whose father was dying and had been given two weeks to live. (*Id.* at pp. 347-350.) In rejecting the appellant's challenge to the dismissal of this juror, this Court noted that,

> "[w]e have in the past rejected similar claims in similar circumstances. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1028–1030, 108 Cal.Rptr.2d 291, 25 P.3d 519 [juror's

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[16]Although Juror Number 8 was not examined in court before being excused, she did provide a declaration and testimony during the hearing on Weatherton's motion for new trial (38 CT 12522-12525; 64 RT 9498-9516). (See Argument IV, *ante*.)

> father near death after suffering stroke]; *People v. Ashmus* (1991) 54 Cal.3d 932,] 986–987, 2 Cal.Rptr.2d 112, 820 P.2d 214 [death of juror's mother]; *In re Mendes* (1979) 23 Cal.3d 847, 852, 153 Cal.Rptr. 831, 592 P.2d 318 [death of juror's brother].)" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1409–1410, 58 Cal.Rptr.3d 368, 157 P.3d 973 (*Leonard*) [death of juror's father-in-law].)

(*People v. Zamudio*, *supra*, 43 Cal.4th at p. 349.)

While Weatherton does not contest that the death of a relative may constitute good cause for dismissal under Penal Code section 1089, he contends that, because Juror Number 8 was not examined by the court, there was insufficient evidence that Juror Number 8 was unable to perform her functions as a juror because of her grandfather's death to support the court's finding of good cause. (AOB 269-270.) However, if "the facts clearly establish a sufficient basis on which to reach an informed and intelligent decision," then no hearing is required. (*In re Mendes* (1979) 23 Cal.3d 847, 852, overruled on other grounds in *People v. Cottle* (2006) 39 Cal.4th 246, 254, fn. 2.)

In *Mendes*, this Court upheld a trial court's decision to excuse a juror whose brother died on the second day of trial without first conducting a hearing on her ability to serve as a juror. (*In re Mendes*, *supra*, 23 Cal.3d at pp. 851-852.) In so doing, this Court explained that,

> [W]e are satisfied that the 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 court's instructions and the jury's deliberations. In our view, a hearing would have been pointless and perhaps callous.

(*Id.* at p. 852.) The trial court in this case was equally warranted in concluding that the death of her grandfather would cause Juror Number 8 to be unable to perform her duties as a juror. (See *id.*)

Weatherton seeks to distinguish *Mendes* by noting that, in that case, the juror asked to be excused, while here the juror asked for a two week bereavement period. (AOB at 269.)

> "However, in cases involving the death or impending death of a juror's relative," this Court has "rejected the view that a specific request for discharge is necessary to establish good cause; 'no such request is required. [Citation.]'"

(*People v. Zamudio*, *supra*, 43 Cal.4th at p. 349.) Indeed, in *Mendes*, this Court merely "infer[red] that [the juror], after advising the trial judge of the loss of her brother, asked to be excused from jury duty." (*In re Mendes*, *supra*, 23 Cal.3d at p. 852.) Here, no inference was necessary; the juror expressly informed the court that she would require two weeks for bereavement. As in *Mendes*, the trial court here could presume that, even if it compelled Juror Number 8 to remain on the jury during this period, grief over her grandfather's death would interfere with her ability to perform her duties as a juror. (See *ibid.*) The trial court did not abuse its discretion in discharging Juror Number 8.

IX. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT 28 INDIVIDUALS IN A DEPARTMENT OF JUSTICE STUDY WHO WERE FOUND TO HAVE BEEN MISIDENTIFIED WERE EXONERATED WITH DNA

Weatherton contends that the trial court improperly precluded Shomer, Weatherton's expert witness, from testifying that the 28 individuals in a Department of Justice study who were exonerated after being misidentified were exonerated based on the use of DNA evidence. (AOB 271-275.) He further claims that the exclusion of the fact it was DNA evidence that exonerated these individuals implicated his federal constitutional rights to compulsory process and due process. (AOB 273-274) Weatherton is mistaken because the trial court properly exercised its discretion to exclude information regarding DNA evidence.

During an Evidence Code section 402 hearing prior to testifying at trial, Shomer, one of Weatherton's expert witnesses, discussed a Department of Justice study of 28 individuals who had been exonerated with DNA evidence. (41 RT 6570.) According to Shomer, six of those 28 individuals had been identified by persons who knew them. (41 RT 6570.)

The trial court was concerned that mention of DNA evidence in discussing the study had the potential to bias the jury. (41 RT 6593-6594.) Weatherton's counsel argued that it was necessary to discuss DNA evidence to establish that the 28 individuals were, in fact, innocent. (41 RT 6595-6596.) However, since the prosecutor did not dispute that the 28 individuals in the study were wrongfully convicted, the trial court concluded that it did not matter how it was determined that the individuals in the study were factually innocent and therefore the fact that the individuals in the study were exonerated with DNA evidence was irrelevant. (41 RT 6595-6598.) The trial court ruled that Shomer could discuss the Department of Justice study, but could not mention DNA. (41 RT 6607.)

Shomer then testified before the jury about "a sample of people who let's say were convicted and then exonerated on some kind of biological grounds." (41 RT 6623.) The prosecutor objected and the trial court struck this testimony. (41 RT 6624, 6633.) Shomer then testified about the Department of Justice study without further objection. (41 RT 6633-6636.)

As this Court has explained,

> "Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. [Citations.] The test of relevance is whether the evidence 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' [Citation.] The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. [Citation.] We review

> for abuse of discretion a trial court's rulings on the admissibility of evidence. [Citations.]" [Citation.]

(*People v. Cowan* (2010) 50 Cal.4th 401, 482.)

> A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].

(*People v. Rodriguez, supra*, 20 Cal.4th 1, 9-10.)

Here, the innocence of the 28 individuals identified in the Department of Justice study was not in dispute. Evidence that their innocence was established with DNA would have done nothing more than prove a fact about which there was no controversy. Accordingly, the trial court properly ruled that mention of DNA in the study was irrelevant. (See *People v. Price* (1991) 1 Cal.4th 324, 417 [evidence properly excluded where offered to prove a fact not disputed by prosecution].)

Weatherton's claims of federal constitutional error in the trial court's ruling are similarly without merit. In the first instance, Weatherton failed to make a timely and specific objection in the trial court on federal constitutional grounds, thereby forfeiting any claim of federal constitutional error on appeal. (See *People v. Alvarez, supra*, 14 Cal.4th at p. 186.) Moreover, even assuming Weatherton's claim of federal constitutional error was properly preserved for appeal, it is without merit. Weatherton's argument is merely an "attempt to inflate garden-variety evidentiary questions into constitutional ones[.]" (See *People v. Boyette, supra*, 29 Cal.4th at p. 427.)

> "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.]"

(*Id.* at pp. 427-428.) Similarly, the constitutional right to confrontation and cross-examination,

> "does not 'prevent the trial court from imposing reasonable limits on defense counsel's inquiry based on concerns about harassment, confusion of the issues, or relevance' [citations]."

(*People v. Brown*, *supra*, 31 Cal.4th at p. 545.) As demonstrated above, the evidence Weatherton claims was improperly excluded was irrelevant and the trial court's ruling did not implicate Weatherton's federal constitutional rights.

Finally, even assuming the trial court's evidentiary ruling was improper, any error was harmless. A trial court's erroneous exclusion of evidence will only result in reversal where it is reasonably probable that the defendant would have obtained a more favorable outcome had the evidence been admitted. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 837.) Here, the important aspect of the Department of Justice study for Weatherton's purposes was that six innocent people had been misidentified by people who knew them, which the jury heard. It is simply not possible that the jury could have questioned whether these people were actually innocent absent mention of DNA because all parties simply assumed that they were innocent. In addition, the jury heard no contrary evidence or argument challenging these six individuals' innocence. Moreover, as discussed in Argument I, subsection (D), *ante*, the evidence of Weatherton's guilt was simply overwhelming. Any error was harmless. (See *ibid.*)

X. CALJIC NO. 2.92 PROPERLY INSTRUCTED THE JURORS THAT THEY COULD CONSIDER CERTAINTY AS A FACTOR IN EVALUATING EYEWITNESS IDENTIFICATION TESTIMONY

Weatherton contends that the trial court improperly instructed the jury during the guilt phase according to CALJIC No. 2.92 that it "should consider . . . [t]he extent to which the witness is either certain or uncertain of the identification" in evaluating eyewitness identification testimony.

Weatherton argues that the trial court effectively instructed the jury to disregard the opinion of the defense expert, Shomer, that there was no correlation between a witness's certainty of their identification and the identification's accuracy. (AOB 276-281.) The jury was properly instructed on how to evaluate an eyewitness identification witness's testimony.

During a hearing regarding jury instructions at the close of the guilt phase of Weatherton's trial, the trial court indicated its intention to instruct the jury according to CALJIC No. 2.92, Factors to Consider in Proving Identity by Eyewitness Testimony. (45 RT 7426-7427.) Weatherton's counsel objected to the instruction, arguing that, while the instruction identified factors to be considered, it did not explain how the jury should weigh those factors. (45 RT 7427-7429.) Weatherton's counsel noted particularly that "[w]e produced testimony that indicated that certainty is something . . . that may weigh against the accuracy of it." (45 RT 7428.) The prosecution responded that it had introduced evidence "that accuracy does equal certainty" and that the question was one of "believing or not believing conflicting expert testimony[,]" which the jury could weigh "whatever way they want to weigh it depending on who they believe and what they think is important." (45 RT 7428.) The trial court ultimately gave CALJIC No. 2.92 over Weatherton's objection.[17] (45 RT 7430.)

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[17]The trial court instructed the jury according to CALJIC No. 2.92 as follows:

> Eyewitness testimony has been received in this 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
>
> (continued...)

As this Court has explained,

> Defendant is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the

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(...continued)

> bear upon the accuracy of the witness's identification of the defendant, including, but not limited to, any of 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 the observation;
>
> The witness's 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;
>
> The cross-racial or ethnic nature of the identification;
>
> The witness's 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 between the alleged criminal act and the witness's identification;
>
> Whether the witness had prior contacts with the alleged perpetrator;
>
> The extent to which the witness is either certain or uncertain of the identification;
>
> Whether the witness's identification is in fact the product of her own recollection and any other evidence relating to the witness's ability to make an identification.

(40 CT 11745-11746; 46 RT 7529-7530.)

> evidence. [Citation.] The instruction should not take a position as to the impact of each of the psychological factors listed; it should also list only factors applicable to the evidence at trial, and should refrain from being unduly long or argumentative. [Citation.]

(*People v. Johnson* (1992) 3 Cal.4th 1183, 1230, citing *People v. Wright* (1988) 45 Cal.3d 1126, 1141, 1143.) "CALJIC No. 2.92 normally provides sufficient guidance on the subject of eyewitness identification factors." (*People v. Johnson, supra*, 3 Cal.4th at pp 1230-1231.)

The dissent in *Wright* raised the identical concern to the instruction's so called "certainty factor," stating the inclusion of the certainty factor was misleading because it reinforced a common perception, contradicted by various scientific studies, of a correlation between certainty and the accuracy of an eyewitness's identification. (*People v. Wright, supra*, 45 Cal.3d at p. 1159, dis. opn. of Mosk, J.) A majority of this Court rejected the same issue raised by Weatherton that the inclusion of this factor, without further explanation, rendered the instruction deficient. (*Id.* at pp. 1141-1143.) Instead, the majority concluded that CALJIC No. 2.92 "effectively inform[s] the jury [of the appropriate factors] without improperly invading the domain of either jury or expert witness" and that the effect of any particular factor "is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate." (*Id.* at p. 1143.)

In *Johnson*, this Court rejected the identical challenge to the inclusion of the certainty factor in CALJIC No. 2.92 where a defense expert "testified without contradiction that a witness's confidence in an identification does not positively correlate with its accuracy." (*People v. Johnson, supra*, 3 Cal.4th at pp. 1231-1232.) As this Court explained, "The trial court was not required—indeed, was not permitted—to instruct the jury to view the evidence through the lens of [the expert's] theory." (*Id.* at p. 1232.) The

instruction identified certainty as a factor that the jury should consider in its overall evaluation of eyewitness identification testimony. Nothing in the instruction indicated that there was a positive correlation between certainty and accuracy or required the jury to find that a certain identification was also an accurate one. Similarly, nothing in the instruction indicated what, if any, weight to give to any particular factor, including an eyewitness's certainty. Had the jury found Shomer's testimony that certainty and accuracy are unrelated to be persuasive, they were free to afford certainty little weight in evaluating Bell's identification.

Weatherton seeks to distinguish *Johnson* based on the fact that, in that case,

> "the jury was instructed that it should consider '[t]estimony of any expert regarding acquisition, retention, or retrieval of information presented to the senses of an eyewitness.'"

(*People v. Johnson*, *supra*, 3 Cal.4th at p. 1232). (AOB 278.) While Weatherton is correct that no such language was included in the version of CALJIC No. 2.92 given to the jury in this case, it is a distinction without a difference. The jury was instructed according to CALJIC Nos. 2.80, 2.81, 2.82, and 2.83, the standard jury instructions on the evaluation of expert testimony. (40 CT 11743-11744.) This Court, of course, presumes "that jurors are intelligent persons capable of understanding and correlating all jury instructions that are given." (*People v. Phillips* (1985) 41 Cal.3d 29, 58.) The standard instructions on expert testimony, when combined with CALJIC No. 2.92, had the same practical effect as the quoted language in *Johnson*. Even though expert testimony was not expressly identified in CALJIC No. 2.92 as a factor to be considered in evaluating eyewitness identification testimony, the language of the instruction did indicate that the factors the jury could consider were not limited to those expressly set forth in the instruction, and the jury would have understood that consideration of

the expert testimony provided by Shomer and Ebbesen was permitted. As this Court found in *Wright* and *Johnson*, CALJIC No. 2.92 properly identified certainty as a factor for consideration in the evaluation of eyewitness identification testimony. There was no error.

XI. THE PROSECUTION WAS UNDER NO OBLIGATION TO PREVENT THE DEMOLITION OF THE HOUSE IN WHICH THE SHOOTINGS OCCURRED

Weatherton contends that the prosecution violated his right to due process when it allowed the house in which the shootings occurred to be demolished by its owner. He further claims that the trial court erred in denying his motion for sanctions[18] based on this destruction of evidence. (AOB 282-289.) However, the trial court's denial of the motion was proper because no readily apparent exculpatory evidence in the possession of the police was destroyed and the prosecution had no authority to prevent the home's owner from disposing of his property as he saw fit.

On July 13, 2000, Weatherton filed a motion seeking sanctions based on the prosecution's failure to prevent the demolition of the house in which the shootings occurred. (2 CT 573-579.) On September 12, 2000, the prosecution filed its opposition to Weatherton's motion. (3 CT 805-810.)

The motion was heard on January 4, 2002. (25 RT 3911.) During the hearing, evidence was presented that Richard Twiss, an investigator with the Riverside County District Attorney's Office, was approached by Dwight Harmon, the owner of the house in which the shootings occurred, roughly six months after the shootings. (25 RT 3913-3915, 3923-3924.) Harmon said that he "didn't want any more problems on the property" and

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[18]As sanctions for the alleged misconduct, Weatherton sought dismissal of the special circumstance allegations and reduction of the charges of first degree murder to second degree murder. (2 CT 575, 578-579.)

asked if he could demolish the building. (25 RT 3913-3914.) Twiss arranged to visit the house with a deputy district attorney and a forensic technician, who made a videotape of the scene before it was demolished. (25 RT 3914-3915.) At this time, there was a further discussion with Harmon about demolishing the house and someone from the District Attorney's Office told him that he could proceed with the demolition, although Twiss could not remember who that was. (25 RT 3915.) Harmon demolished the house sometime thereafter. (25 RT 3915, 3923-3924.)

Weatherton argued that, with the destruction of the house, there was no way to duplicate the lighting conditions that would have existed at the time the shootings occurred and that the lighting conditions were important to the consideration of Bell's identification of Weatherton as the perpetrator. (25 RT 3958-3961, 3966-3968.) The prosecution responded that Weatherton had not shown that the demolition of the house was the product of bad faith on the part of police or that exculpatory evidence had been destroyed, that Bell could be cross-examined regarding the lighting conditions at the time of the shootings, and that the prosecution had no authority to prevent Harmon from demolishing his own property. (25 RT 3962-3966, 3967-3969.) The trial court, after considering the evidence presented at the hearing and the arguments of counsel, denied the motion for sanctions. (25 RT 3969.)

As this Court has explained:

> 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." [Citations.] 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." [Citations.] 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." [Citation.] In such case, "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." [Citations.]

(*People v. Roybal* (1998) 19 Cal.4th 481, 509-510.)

In reviewing a trial court's determination, this Court considers "whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling." (*Id.* at p. 510.)

Here, the record supports the trial court's ruling in every particular. The evidence at issue is the house in which the shootings occurred. In the first instance, the only potentially exculpatory evidence that Weatherton identifies as being destroyed in the demolition of the house is the ability to replicate the lighting conditions at the time of the shootings, blood spatter and bullet shell patterns, and the possible source of the music Vernon Neal testified that he thought he heard when he approached the house. (AOB 287-288.) Of these, only the lighting issue was raised by Weatherton in the trial court. However, in each instance, the exculpatory nature of the evidence was hardly apparent. Indeed, as far as establishing the presence of exculpatory evidence within the house, Weatherton offers nothing more than the conclusory statement that "[t]he crime scene is *always* a critical source of evidence" and vague suggestions as to how evidence therein would have benefitted him at trial. (AOB 287-289, original emphasis.) Further, he gives no explanation of why other readily available evidence, including Bell's testimony regarding the lighting conditions at the time of the shooting, as well as the testimony of the numerous police investigators who viewed the crime scene and the photos and video of the crime scene taken by police, would not and did not provide this supposedly essential

information. Again, due process does not require that the readily available evidence be a perfect substitute for the lost evidence, but merely "comparable." (See *California v. Trombetta* (1984) 467 U.S. 479, 489-490 [104 S.Ct. 2528, 81 L.Ed.2d 413].)

Finally, and perhaps most importantly, Weatherton offers no authority for the novel proposition that due process requires the prosecution to preserve the entire crime scene in situ, possibly until the time of trial. As this Court has observed, "Due process requires the state preserve evidence *in its possession* where it is reasonable to expect the evidence would play a significant role in the defense." (*People v. Alexander* (2010) 49 Cal.4th 846, 878, emphasis added.) The prosecution in this case could hardly be said to be in possession of the house in which the shootings took place. To the contrary, the evidence at the hearing established the property belonged to Dwight Harmon. (25 RT 3913, 3923.) The prosecution simply had no legal authority to prevent Harmon from demolishing his own property. While demolition of the entire structure, as in this case, is the most extreme sort of modification to a crime scene possible, the absurdity of a rule requiring the prosecution to preserve an entire crime scene in perpetuity can perhaps best be demonstrated by considering what other actions such a rule would have precluded Harmon from taking on his own property. Under the rule proposed by Weatherton, had Harmon wished to rent the house to other tenants, he would have been precluded from first performing any painting or repairs, as these would have destroyed blood and bullet shell evidence, or altering the window coverings, as this would have affected the ability to replicate the exact lighting conditions. The new tenants would not have been able to replace any of the furniture, as this would have altered the appearance of the crime scene. Weatherton's due process rights did not require Harmon to effectively turn his property into a museum for Weatherton's possible use at trial. Indeed, such government-imposed

restrictions on Harmon's utilization of his property might even constitute a taking implicating Harmon's own due process rights. (See e.g. *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 123-124 [98 S.Ct. 2646, 57 L.Ed.2d 631].)

Accordingly, because the house where the shootings occurred did not contain readily apparent exculpatory evidence in the prosecution's possession, the prosecution was under no obligation to preserve the house against the owner's wishes. (See *People v. Alexander*, *supra*, 49 Cal.4th at p. 878.) Consequently, the trial court's denial of Weatherton's motion for sanctions was proper.

XII. THE TRIAL COURT PROPERLY GRANTED THE PROSECUTION'S MOTION TO HAVE THE JURY VISIT THE CRIME SCENE

Weatherton contends that the trial court improperly granted the prosecution's motion for the jury to visit the crime scene. He claims that the trial court improperly abdicated its discretion by allowing the jurors to decide whether a jury visit would take place. (AOB 290-299.) However, the record amply demonstrates that the trial court did far more than simply poll the jury regarding the utility of a jury site visit and that it did not abuse its discretion in granting the motion for the jury visit.

On January 22, 2002, the prosecutor made a motion pursuant to Penal Code section 1119 for the jury to visit the crime scene and the trial court conducted a hearing on the motion. (34 RT 5443, 5596-5603.) When the trial court noted that the house in which the shootings took place had been demolished,[19] except for the foundation, the prosecutor explained that her intent was to establish both the interior dimensions of the house, which could be seen from a view of the foundation on which the house had stood,

[19]As discussed in Argument XI, *ante*, the house in which the shooting occurred was demolished by its owner prior to trial.

and the distances between the crime scene, Hunt's house, and the All American Canal. (34 RT 5596-5598.) Weatherton objected, arguing that the prosecution could not show that the conditions for a jury visit would be substantially similar to those under which the witnesses made the observations testified to at trial. (34 RT 5598-5602.) After considering the arguments of counsel, the trial court ruled as follows:

> I think [the motion] should be denied without prejudice unless you can show me something. I don't see much benefit from going out there versus the problems of going out there, the change in circumstances of the place and having [Weatherton] shackled, so that's what I think.

(34 RT 5603.)

The trial court revisited the request for a jury visit at a hearing on January 28, 2002. (37 RT 6019-6029.) The court explained that, since first considering the motion, it had visited the scene and found that,

> it is a lot smaller than you think when you look at the aerial photographs and stuff. In fact, I drove right past it and came to the end of the road thinking I had not reached Ernest Hunt's house yet. I went right on by.

(37 RT 6022.)

The trial court then suggested asking the jury whether they felt a visit to the scene would be helpful and having them write their responses on a piece of paper. (27 RT 6027.) The prosecutor agreed with this procedure, explaining,

> I don't think the Court is going to abrogate its discretion. I think it would take the jury's vote, so to speak, into consideration, but I don't think that the Court is going to say that that's going to control it, it's just going to add information.

(37 RT 6028.) Weatherton's counsel responded that "I don't have a position on that [procedure]. I don't know what to think." (37 RT 6028.)

Prior to a lunch break on January 29, 2002, the trial court, without objection, asked the jurors to consider whether a visit to the scene would be beneficial and to indicate their answers as either a "yes" or a "no" on a piece of paper without their names or juror numbers. (38 RT 6110.)

The trial court revisited the issue at a hearing on January 31, 2002, and heard further argument from the parties. (40 RT 6516-6532.) The trial court noted that "a lot of [the jurors] think that a visit would be beneficial" and noted its concern that jurors might be tempted to visit the site on their own. (40 RT 6519.) The trial court also considered the possibility of prejudice stemming from the fact that, if Weatherton were to chose to accompany the jury on a site visit, he would be shackled, but noted that Weatherton could elect to remain in the car where the jurors could not see any shackles. (40 RT 6518.) The trial court also remarked that there were relationships between locations at the crime scene that "people who have not been there can't register" and indicated that its belief that the photographs, diagrams, and testimony regarding the scene were not entirely clear regarding the scale and orientation of relevant locations and objects. (40 RT 6522-6529.) The trial court ultimately granted the motion for the jury visit. (40 RT 6532.) The jury site visit took place on February 6, 2002. (43 RT 6981-6987.)

The authority for a trial court to order a jury visit to the crime scene is found in Penal Code section 1119, which provides:

> 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.

(Pen. Code, § 1119.)

> A court's ruling on a party's motion for a jury view is reviewed for abuse of discretion [citation], i.e., whether the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice [citation].

(*People v. Lawley* (2002) 27 Cal.4th 102, 158.)

Weatherton does not challenge the propriety of the trial court taking the jurors' views on the utility of the jury site visit into consideration when ruling on the prosecution's motion, but instead argues that the trial court abdicated its decision-making authority to the jury entirely through the device of the straw poll. (AOB 294-295.) The record does not support this assertion.

In the first instance, under Evidence Code section 664, it is presumed that an "official duty has been regularly performed." (Evid. Code, § 664.) As this Court has observed with respect to Evidence Code section 664,

> As an aspect of the presumption that judicial duty is properly performed, we presume, nonetheless, in other proceedings that the court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process. [Citations.]

(*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Far from rebutting the presumption that the trial court properly performed its obligations under Penal Code section 1119 in ruling on the motion, the record here instead demonstrates that the trial court engaged in a careful and nuanced analysis of the merits of the motion before making its

ruling. In the first instance, the trial court conducted three separate hearings on the issue. (34 RT 5596-5603; 40 RT 6516-6532.) Both parties were able to argue the merits of the motion at length and to respond to the questions posed by the trial court. The very fact that the trial court heard argument and questioned the parties regarding the points they raised undermines Weatherton's assertion that the trial court simply placed the decision on the jury site visit in the hands of the jurors. The jurors' belief that the site visit would be of value was certainly a factor considered by the trial court in ruling on the motion, but it was hardly the only factor.

Weatherton utterly ignores the trial court's concerns that there were relationships between locations at the crime scene that "people who have not been there can't register" and that the photographs, diagrams, and testimony regarding the scene were not entirely clear regarding the scale and orientation of relevant locations and objects. (40 RT 6522-6529.) This was no idle speculation on the part of the trial court; the court, on its own initiative, visited the site prior to ruling on the motion and noted that it was smaller than it seemed in the aerial photos and diagrams. (37 RT 6022.) Indeed, this Court has previously upheld a trial court's decision to permit a jury site visit for similar reasons. (See *People v. Davis* (2009) 46 Cal.4th 539, 610-611 [trial court in capital murder case did not abuse its discretion in allowing jury site visit where "[t]he court reasoned that the probative value of seeing the locations in person could not be duplicated by photographs or witness testimony, and that the viewings would allow the jury to better gauge the distances involved between the locations at issue"].)

Weatherton's principle objection to the jury visit is that the conditions at the scene had changed substantially since the shootings; the house in which the shootings occurred had been demolished. Certainly, a 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" to be tested during the jury visit. (*People v. Jones* (2011) 51 Cal.4th 346, 378.) The record reflects that the trial court here did take this into consideration when ruling on the motion. (34 RT 5603; 37 RT 6023-6027; 40 RT 6522-6523, 6529-6531.) However, while the house may have been gone, the surrounding area and the other relevant locations, including Hunt's house, the tamarisk trees, and the All American Canal were still in the same locations. (37 RT 6026-6027.) The jury was, of necessity, forced to rely on the crime scene video, photos, and witness testimony regarding the interior of the now-demolished house, but the larger scene was available to them for viewing and it was not an abuse of discretion to find that such a viewing was of sufficient value to merit granting the prosecution's motion.

Similarly, the trial court was well within its discretion in its assessment of the possible prejudice to Weatherton from a jury site visit. Weatherton identifies two sources of possible prejudice:[20] his belief that the foundation of the house, as seen by the jury, appeared smaller than the standing structure and the necessity of his being shackled during the jury visit. (AOB 297-298.) The trial court considered both in making its ruling. (34 RT 5603; 40 RT 6518, 6522-6523.) Even accepting, as the trial court apparently did, that the foundation appeared smaller than the standing

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[20]Weatherton also contends that the prosecutors improperly "mingl[ed]" with the jurors at the house's foundation. (AOB 294, 298.) At trial, Weatherton's counsel unsuccessfully moved for a mistrial, claiming that he was "uncomfortable" with the prosecutors standing on the foundation "for quite a while" near where "most of the jurors were standing[,]" even though the prosecutors did not speak to any of the jurors. (43 RT 7007-7008.) Weatherton does not now challenge the trial court's ruling denying a mistrial on this basis or challenge his counsel's admission that no improper communication between the prosecutors and the jury occurred. Consequently, this feature of the jury site visit is of no moment is assessing whether the trial court abused its discretion in ordering the jury visit in the first instance.

structure, the dimensions of the house were not at issue and evidence regarding the house itself was provided primarily through the crime scene video, photos, and witness testimony. (See e.g. *People v. Perkins* (1937) 8 Cal.2d 502, 515 [finding no abuse of discretion in allowing jury site visit where "[a]lthough there had been some changes in the building, the changes were not material to the contentions of the defendant".].) With respect to the issue of Weatherton being shackled, as discussed in Argument II, *ante*, even assuming one or more jurors saw the chain, as described by the trial court, at some point during the jury visit when Weatherton was outside of the car, a brief view of a defendant in restraints by one or more jurors is generally not considered prejudicial error. (See *People v. Cunningham*, *supra*, 25 Cal.4th at pp. 988-989; *People v. Duran*, *supra*, 16 Cal.3d at p. 287, fn. 2.) There was no error as the trial court properly exercised its discretion in ordering that the jury visit the crime scene.

XIII. THE TRIAL COURT'S DISCOVERY ORDERS DID NOT RESULT IN THE WITHHOLDING OF *BRADY* MATERIAL

Weatherton contends that the trial court's orders limiting his discovery of statements made by non-testifying witnesses to written statements and limiting his discovery of samples of Bell's blood taken by the hospital to those in the prosecution's possession amounted to *Brady* violations.[21] (AOB 300-305.) Weatherton's claim fails as he cannot identify any *Brady* material that was not disclosed.

Weatherton made numerous requests for pretrial discovery. (1 CT 49-50, 54-55, 59-62, 129-141; 4 CT 973-995.) Item 14 of the September 12, 2001 discovery request filed by Weatherton himself asked for

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[21] *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215].

> [a]ll statements of any and all witnesses, whether or not testifying, made to any Law Enforcement Agency personnel whether oral, written or in any way recorded relative to the crime including but not limited to the current or most recent addresses and telephone number of all witnesses interviewed in the course of the investigation.

(4 CT 984-985.)

The prosecutor objected, arguing that she had no obligation to provide information regarding non-testifying witnesses unless those witnesses provided material exculpatory evidence required to be disclosed under *Brady*. (4 Pretrial RT 629.) As the prosecutor noted, she had no way of knowing if a police officer may have interviewed someone who did not provide exculpatory information without creating a police report of the contact. (4 Pretrial RT 629.) The trial court proposed to order the prosecutor to disclose,

> "[a]ll statements of any and all witnesses made to Law Enforcement Agency personnel whether written or in any way recorded relative to the crime including but not limited to the current or most recent address and telephone numbers."

(4 CT 984-985; 4 Pretrial RT 637, 640.) Weatherton's counsel responded to the trial court's modified grant of discovery by stating, "That would satisfy me[,]" and "That's fine." (4 Pretrial RT 637, 640.)

Item 31 asked for,

> [c]opies of all toxicology reports, scientific tests, comparisons and evaluations or reports taken by hospital personnel, emergency medical personnel, Law Enforcement Agencies or laboratory personnel during the investigation of this case, *for the victim* NELVA BELL and an opportunity to examine and, where appropriate, test any and all specimens of hair, blood, saliva of NELVA BELL.

(4 CT 990, original italics.)

The prosecutor objected to being ordered to provide access to biological samples taken from Bell at the hospital when she was treated for

her injuries. (1 RT 35.) The prosecutor noted that she had no control over whether the hospital preserved or destroyed any samples taken and had no idea whether such samples even existed. (1 RT 35.) The trial court indicated that it would grant the request with the modification that it applied only to samples in the possession of the prosecution. (1 RT 37-38.) Weatherton's counsel agreed with the modification, noting that he would obtain any samples in the hospital's possession through his subpoena power. (1 RT 36-37.)

In the first instance, Weatherton's counsel not only failed to object in the trial court to the modification to discovery that he now finds odious, but expressly agreed to the limitations. (4 Pretrial RT 637, 640; 1 RT 36-37.) Weatherton's failure to object to any lack of discovery forfeits the claims on appeal. (See *People v. Seaton* (2001) 26 Cal.4th 598, 641.) However, even assuming Weatherton's claims were properly preserved for appeal, they are without merit.

Weatherton does not challenge the trial court's rulings limiting discovery of the statements of non-testifying witnesses to written statements and the discovery of biological samples taken from Bell at the hospital to those samples in the possession of the prosecution as violating California law relating to discovery in a criminal case. (AOB 302.) Instead, he claims that the limitations placed on the prosecution's discovery obligations violated his due process rights under *Brady*. (AOB 302-305.)

As this Court has explained,

> In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [Citation.] The high court has since held that the duty to disclose such evidence exists even though there has been no request by the accused [citation], that the duty encompasses impeachment evidence as well as

> exculpatory evidence [citation], and that the duty extends even to evidence known only to police investigators and not to the prosecutor [citation]. Such evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" [Citation.] In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." [Citations.]

(*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

With respect to the trial court's order excluding the oral statements of non-testifying witnesses from the prosecution's discovery obligation, the trial court's order can in no way be construed as a license to withhold *Brady* material because it happens to come in the form of an oral statement made by a non-testifying witness. As the prosecutor noted during the hearing on discovery, any exculpatory oral statements of a non-testifying witness would have to be turned over under both Penal Code section 1054.1, subdivision (e),[22] and *Brady*, regardless of the trial court's order. (4 Pretrial RT 639.) The trial court's order only excluded oral statements of non-testifying witnesses that were not exculpatory from the prosecutor's discovery obligation.

Moreover, Weatherton does not identify a single item of *Brady* material that was not disclosed because of the trial court's order. (AOB 305.) Instead, Weatherton conclusorily alleges that "[w]hatever qualities

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[22]Penal Code section 1054.1, subdivision (e), provides:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (e) Any exculpatory evidence.

made these people undesirable witnesses for the prosecution meant that they may have had exculpatory value for petitioner." (AOB 305.) In order to establish a *Brady* violation, Weatherton must show:

> "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." [Citation.]

(*People v. Salazar*, *supra*, 35 Cal.4th at p. 1043, quoting *Strickler v. Greene* (1999) 527 U.S. 263, 281–282 [119 S.Ct. 1936, 144 L.Ed.2d 286], fn. omitted.) Weatherton here does nothing more than speculate that some *Brady* material might have existed. However, without identifying any such material, there is no evidence for this Court to apply the test of *Brady* and its progeny to. There was no *Brady* violation.

Weatherton's challenge to the trial court's exclusion of biological samples in the possession of the hospital from the prosecution's discovery obligations also fails, though for slightly different reasons. First, as Weatherton's counsel noted at the discovery hearing, any materials in the hospital's possession could be obtained by subpoena. (1 RT 36-37.) As Dr. Ercoli, the trauma surgeon who treated Bell in the emergency room, testified at trial, a drug screen was ordered for Bell as part of a routine blood and urine panel run on all trauma patients. (35 RT 5704.) This drug screen came back positive for the presence of cocaine, although, as a qualitative test, the drug screen could not determine the quantity of cocaine in Bell's system. (35 RT 5705, 5738, 5760.) Weatherton argues that he was improperly precluded from having access to the blood sample taken at the hospital for the blood and urine panel and that quantitative testing of the sample could have established the amount of cocaine Bell had ingested and that her level of impairment could have been extrapolated from that information. (AOB 304-305.) Weatherton then suggests that the blood

sample might have been destroyed by the hospital, but blames the prosecution for any such destruction.[23] (AOB 304-305.)

> Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence. [Citations.] Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it "'by the exercise of reasonable diligence.'" [Citations.]

(*People v. Salazar*, *supra*, 35 Cal.4th at pp. 1048-1049.)

Here, Weatherton was obviously aware of the drug screen because Dr. Ercoli was Weatherton's witness and his testimony about the drug screen was the product of direct examination by Weatherton's counsel. It was not the prosecution's responsibility to do so. (See *People v. Salazar*, *supra*, 35 Cal.4th at pp. 1048-1049.) The trial court properly modified the expansive discovery requests made by Weatherton and this did not result in a *Brady* violation.

Finally, Weatherton also notes that the trial court limited discovery of Bell's medical records to those generated as the result of her hospitalization for her injuries. (AOB 301-302.) However, he fails to make a legal argument challenging the propriety of this ruling or otherwise explain the relevance of this ruling to his argument. Accordingly, any challenge to this

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[23]Insofar as Weatherton contends the prosecution was responsible for not ensuring that the hospital preserved the sample, such a claim is not a claim under *Brady*, but under *California v. Trombetta*, *supra*, 467 U.S. 479. As Weatherton does not argue *Trombetta*, respondent will limit his response to the claim actually presented.

portion of the trial court's ruling on discovery is waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

XIV. THE TRIAL COURT PROPERLY ADMITTED OFFICER JOHNSON'S TESTIMONY ABOUT THE SHOE PRINTS HE FOUND AT THE CRIME SCENE

Weatherton contends that the trial court improperly admitted evidence that Weatherton's shoe prints indicated that he was walking when travelling south from Hunt's house, but running when travelling north away from the crime scene, because the evidence was irrelevant, unreliable, and more prejudicial than probative. (AOB 306-310.) However, Weatherton has forfeited this claim by failing to object on the same grounds in the trial court and, regardless, the shoe print evidence was properly admitted.

At a pretrial hearing, Weatherton's counsel objected to any mention by the prosecutor during opening statement of shoe print evidence because there was an inadequate foundation for Officer Johnson's opinion about the shoe prints and the conclusions to be drawn from them. (23 RT 3738-3739.) The trial court overruled the objection. (23 RT 3739.)

Weatherton's counsel renewed his objection to Johnson's proposed testimony as lacking foundation, both for his opinion as to whether the shoe prints were made by someone walking or running and for his use of a diagram depicting the shoe prints which was prepared shortly before trial from memory and without resort to the photographs taken of the shoe prints. (26 RT 4072-4073.) The trial court overruled Weatherton's objection. (26 RT 4074.)

Immediately prior to Johnson taking the stand at trial to testify about his search for shoe prints at the crime scene, Weatherton's counsel objected that there was an inadequate foundation for Johnson's testimony, that Johnson would offer an improper conclusion, and that Johnson's diagram of the location of the prints at the crime scene was prepared three years

after the fact. (34 RT 5502-5503.) The trial court again overruled Weatherton's objections. (34 RT 5503.)

Officer Johnson testified that he was an experienced man tracker and was provided with a photocopy of the bottom of the shoes Weatherton was wearing at the time of his arrest. (34 RT 5493-5495, 5504, 5507-5511.) Johnson searched the area around the front door of Ortiz's house for Weatherton's shoe prints, but the area had been contaminated by other people walking through the area. (34 RT 5505-5506, 5511-5512.) Johnson then returned to the area where he had seen Weatherton get in Neal's car and was able to follow Weatherton's shoe prints south from the vicinity of Hunt's house to the stand of tamarisk trees near Ortiz's house. (34 RT 5513-5518.) The ground around the tamarisk trees was covered with fallen tamarisk needles and Weatherton's shoe prints were not visible there. (34 RT 5519-5521.) Johnson found more of Weatherton's shoe prints to the west of the prints leading from Hunt's house to the tamarisk trees; these prints headed north away from Ortiz's house. (34 RT 5521-5522.) The shoe prints leading from Hunt's house to the trees were close together, indicating that Weatherton was walking when he made the prints, while the prints heading north, away from the crime scene, were more widely spaced, with deeper toe impressions, indicating that Weatherton had been running. (34 RT 5522-5524.) A police expert comparing the exemplars of Weatherton's shoe prints with the shoe prints identified by Johnson and photographed by police later concluded that the shoe prints Johnson tracked were similar in sole design, size and wear to Weatherton's shoes. (34 RT 5524, 5562-5589, 5648-5677.)

The trial court properly admitted Johnson's testimony about the shoe prints found at the crime scene. In the first instance, Weatherton has forfeited his objection to the shoe print evidence. Evidence Code section 353, subdivision (a), provides that,

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion;

"[A] 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable." (*People v. Seijas* (2005) 36 Cal.4th 291, 302.) The grounds Weatherton now asserts- relevance, reliability, and prejudice versus probative value – are not the grounds asserted in the trial court. (RT 3738-3739; 26 RT 4072-4073; 34 RT 5502-5503.) Accordingly, the objections to the evidence Weatherton now asserts are not properly preserved for appeal.

However, even assuming Weatherton's objections are properly presented on appeal, they are without merit.

> A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].

(*People v. Rodriguez*, *supra*, 20 Cal.4th 1, 9-10.)

The trial court's ruling was not an abuse of discretion. First of all, the shoe print evidence was relevant. Evidence Code section 210 defines relevant evidence as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Certainly the presence of shoe prints similar to Weatherton's walking to and running from the direction of Ortiz's house was relevant to show that Weatherton was the shooter. Insofar as Weatherton claims that Johnson's testimony that the shoe prints headed south appeared to have been made by someone walking and those headed north appeared to be

made by someone running was unreliable because Johnson did not precisely measure the prints to make this determination, the reliability of the testimony goes to its weight and not its admissibility. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 670, fn. 35.) Finally, while Weatherton conclusorily alleges that the probative value of the shoe print evidence was substantially outweighed by the possibility of undue prejudice, confusion of issues, and misleading the jury, he utterly fails to identify any prejudice, confusion, or potential for misleading the jury presented by the evidence. (AOB 310.) The evidence was properly admitted.

Finally, even assuming the trial court's evidentiary ruling was improper, any error was harmless. A trial court's erroneous admission of evidence will only result in reversal where it is reasonably probable that the defendant would have obtained a more favorable outcome had the evidence been admitted. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 837.) Here, Johnson did not testify that the shoe prints were Weatherton's or that Weatherton ran from Ortiz's house; he merely testified that the shoe prints appeared similar and that they appeared to him to have been made by someone running. Weatherton was free to put on his own expert to challenge Johnson's conclusions and chose not to do so. Moreover, Weatherton raised the identical challenges to the reliability of Johnson's testimony and conclusions in his arguments to the jury. (46 RT 7632-7636.) Further, as discussed in Argument I, subsection (D), *ante*, the evidence of Weatherton's guilt was simply overwhelming. Any error was harmless. (See *ibid.*)

XV. THE TRIAL COURT PROPERLY PERMITTED BELL TO HAVE SUPPORT PERSONS PRESENT DURING HER TESTIMONY

Weatherton contends that the trial court improperly permitted Bell's victim/witness advocate and her court-appointed attorney to be present during her trial testimony and that their presence "substantially influenced"

her demeanor before the jury. (AOB 311-315.) Weatherton's claim fails because there is nothing in the record to show that these individuals in any way influenced Bell in her testimony or demeanor.

At the preliminary hearing, the prosecution moved under Penal Code section 868.5 to permit Bell's pastor, who was not otherwise a witness in the case, to sit with Bell at the witness stand for support. (1 CT 173.) Weatherton's counsel objected, arguing that the pastor's presence could influence Bell's testimony in violation of Weatherton's rights to due process and confrontation. (1 CT 173, 177.) The trial court overruled Weatherton's objection, but cautioned the pastor not discuss Bell's testimony with her. (1 CT 174, 177-178.) Bell's pastor sat at the witness stand with Bell during her preliminary hearing testimony for "moral support." (1 CT 179-180.)

During a pretrial hearing, Cynthia Galvan, who was the victim/witness advocate assigned to Bell by the Riverside County District Attorney's Office, testified regarding a phone call she had received from Bell informing her that the police were at her house accusing her of selling drugs. (25 RT 3970-3980.) At the conclusion of Galvan's testimony, she asked the trial court to "confirm . . . that I can stay present in the courtroom while Nelva testifies, as her advocate." (25 RT 3980.) The trial court agreed, without objection, and Bell took the stand. (25 RT 3980-3981.)

Weatherton's counsel asked Bell if she had obtained crack cocaine for Teresa Cecena in October 2001. (25 RT 3982.) Bell asked, "Could I get a lawyer?" and the trial court stopped the proceedings and directed the court clerk to contact a conflicts attorney to represent Bell. (25 RT 3982-3985.)

On the first day of the guilt phase trial, after opening statements, Weatherton's counsel objected to Galvan, Bell's victim/witness advocate, being present in the courtroom because she was now a witness regarding the telephone call she had with Bell when the police came to Bell's house

to question her about selling drugs. (26 RT 4072.) Weatherton's counsel argued that Galvan's presence would violate Weatherton's right to due process and a fair trial because there was a danger that Galvan would be influenced by Bell's testimony about the incident. (26 RT 4076.) The prosecutor noted that she did not intend to call Galvan as a witness.[24] (26 RT 4076.) The trial court overruled Weatherton's objection. (26 RT 4078.)

The court then turned its attention to Bell's testimony. The conflicts attorney indicated that Bell would testify fully, but that he wished to be present when Bell was questioned regarding supplying drugs to Cecena. (26 RT 4069-4070.) Bell first testified outside the presence of the jury, with her attorney present in the courtroom. (26 RT 4083.) At the conclusion of this hearing, the trial court asked Bell, "Your lawyer here, Mr. Lehman, do you want him here inside the courtroom with you when you testify this afternoon in front of the jury?" (26 RT 4093.) Bell said that she did and the trial court asked, "Is it enough that he sits in the audience, or do you want him sitting right next to you?" (26 RT 4093.) Bell said, "Next to me." (26 RT 4093.) The trial court agreed, without objection. (26 RT 4093-4094.)

Penal Code section 868.5, subdivision (a), pertinently provides that:

> Notwithstanding any other law, a prosecuting witness in a case involving a violation of Section 187 . . . shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, one of whom may be a witness, at the preliminary hearing and at the trial[.]

Here, Bell's pastor was present for support during the preliminary hearing and her victim/witness advocate provided support during the trial.

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[24]Galvan did not testify at trial.

Bell's attorney was also present during her trial testimony. Respondent will consider Weatherton's objections to each in turn.

Although appellant objected in the trial court to the presence of Bell's pastor as a support person during her preliminary hearing testimony (1 CT 173, 177), he does not renew this objection on appeal, instead focusing his argument on Bell's victim/witness advocate and her attorney. (AOB 311-315.) Moreover, as this Court observed in *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529,

> [I]rregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination.

As this Court recently explained in *People v. Myles* (April 26, 2012, S097189) ___Cal.4th___, 274 P.3d 413, 139 Cal.Rptr.3d 786,

> Absent improper interference by the support person, however, no decision supports the proposition that defendant advances here, that the support person's mere presence infringes his due process and confrontation clause rights.

Nothing in the record of the preliminary hearing indicates that Bell's pastor acted inappropriately or otherwise did anything to influence Bell's testimony and prejudice appellant at the preliminary hearing. (See *ibid.*; see also *People v. Stevens* (2009) 47 Cal.4th 625, 641.) Accordingly, under *Pompa-Ortiz*, even could appellant's argument on appeal be construed to include a challenge to the presence of Bell's pastor during her preliminary hearing testimony, it must be rejected.

Galvan, Bell's victim/witness advocate, was properly permitted to act as Bell's support person during the trial. Weatherton utterly fails to make any showing that Galvan acted inappropriately or otherwise did anything to influence Bell's trial testimony and prejudice Weatherton at the trial. (See

People v. Stevens, *supra*, 47 Cal.4th at p. 641.) Instead, he merely assumes that "[i]t was highly likely that [Bell's] demeanor was substantially influenced" by the presence of her support person. (AOB 314.) However, such influence cannot be presumed, but must be affirmatively demonstrated. (See e.g. *People v. Stevens*, *supra*, 47 Cal.4th at p. 641.) Weatherton's challenge to Galvan's presence is without merit because there is no evidence it influenced Bell in any manner.

Finally, with respect to Bell's attorney being present during her testimony, Weatherton failed to offer any objection in the trial court. (26 RT 4093-4094.) Weatherton's failure to object forfeits the claim on appeal. (See *People v. Stevens*, *supra*, 47 Cal.4th at p. 641 ["Defendant did not object to the support person's presence at trial, and he therefore waived any claim of error from this procedure."].)

Moreover, Lehman was not merely a support person provided under Penal Code section 868.5; he was Bell's court-appointed attorney.

> When it appears that a witness may give self-incriminating testimony, the court has a duty to ensure that the witness is fully apprised of his or her Fifth Amendment rights.

(*People v. Schroeder* (1991) 227 Cal.App.3d 784, 788.) A trial court may discharge this duty "by appointing counsel to advise the witness[.]" (*Ibid.*) Weatherton's counsel made clear his intention to question Bell at trial about her activities in obtaining drugs for Cecena, causing Bell to request counsel. (25 RT 3982.) As Weatherton intended to seek a direct admission of criminal activity from Bell while under oath in open court, he can hardly complain of the presence of a criminal defense attorney to advise her regarding her right not to incriminate herself.

Additionally, even viewing Lehman's role at trial as a support person, rather than as an attorney, Weatherton utterly fails to make any showing that he acted inappropriately or otherwise did anything to influence Bell's

trial testimony. (See *People v. Stevens, supra*, 47 Cal.4th at p. 641.) Weatherton's challenge to Lehman's presence during Bell's testimony is without merit.

XVI. THE JUVENILE COURT ACTED APPROPRIATELY IN LIMITING DISCLOSURE OF A JUVENILE CASE FILE TO WEATHERTON

Weatherton contends that the juvenile court inappropriately limited disclosure of a juvenile case file relating to Bell's guardianship over a minor. (AOB 316-319.) However, California law limits disclosure of juvenile case files and the juvenile court's limitations on disclosure were appropriate.

On November 29, 2001, Weatherton filed a petition for the disclosure of juvenile court records relating to a child under Bell's guardianship. (37 CT 10839A-10839D.) The petition was heard in the juvenile court on December 20, 2001, with the parties present and the Department of Social Services (DSS) represented by County Counsel. (27 RT 3617.)

Counsel for DSS indicated that Bell had guardianship over a child pursuant to a juvenile court order and identified the relevant juvenile case file sought by Weatherton as "a couple of pages" of "emergency response information" collected by Child Protective Services (CPS) with respect to her guardianship, which did not result in DSS filing a petition with the juvenile court. (27 RT 3618-3620.) According to Weatherton's counsel, the CPS action was initiated after the physician who treated Bell's gunshot wounds reported to CPS that she was under the influence of a chemical substance when he saw her in the hospital. (27 RT 3620-3632.) Weatherton's counsel indicated that he believed that Bell may have made statements about using cocaine during the CPS investigation which would be relevant for impeachment purposes at his trial. (27 RT 3620-3623.)

Counsel for DSS opposed the release of the juvenile case file to Weatherton. (27 RT 3624.) Consequently, the juvenile court conducted an

in camera review of the file and disclosed two sentences from a narrative report by a social worker of a November 18, 1998 interview with Bell: "Denied habitual drug use[,]" and "[i]t was a one-time incident." (27 RT 3630, 3632-3635.) The juvenile court ordered a copy of the juvenile case file be placed in a sealed envelope for later inspection by an appellate court. (27 RT 3638-3639.)

The juvenile court acted properly in addressing Weatherton's petition to disclose the juvenile court file. As this Court has observed,

> "'[T]he right of an accused to obtain discovery is not absolute.' [Citation.] '[The] court retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest.' [Citation.] This may be particularly true when the information sought is not directly related to the issue of a defendant's guilt or innocence. [Citation.]"

(*People v. Avila* (2006) 38 Cal.4th 491, 606, quoting *People v. Luttenberger* (1990) 50 Cal.3d 1, 21.)

> "[J]uvenile case files are confidential by operation of law, and inspection thereof is limited to certain enumerated individuals and/or agencies. [Citations.]"

(*People v. Avila*, *supra*, 38 Cal.4th at p. 606.) Welfare and Institutions Code section 827 and California Rules of Court, rule 5.552 provide for the confidentiality of juvenile case files, identify those individuals and agencies entitled to review juvenile case files without a court order, and set forth the procedure for petitioning the juvenile court for the disclosure of juvenile case files to persons not otherwise entitled to review them without a court order.

The Child Protective Services records sought by Weatherton were "juvenile case files" within the meaning of Welfare and Institutions Code § 827, subdivision (e), and California Rules of Court, rule 5.552(a), and therefore their release was subject to the provisions of the section.

Moreover, neither Weatherton nor his counsel were individuals authorized to review juvenile case files without the prior authorization of the juvenile court. (See Welf. & Inst. Code, § 827, subd. (a)(1); Cal. Rules of Court, rule 5.552(b)); see also *People v. Avila*, *supra*, 38 Cal.4th at pp. 606-607.) Accordingly, Weatherton was required to show by a preponderance of the evidence that the juvenile case file relating to Bell's guardianship was both necessary and substantially relevant to his defense. (Cal. Rules of Court, rule 5.552(e)(6).) Here, the juvenile court determined that Weatherton had made that showing with respect to two sentences from the social worker's narrative report: "Denied habitual drug use[,]" and "[i]t was a one-time incident." (27 RT 3632-3635.)

> "Parties who challenge on appeal trial court orders withholding information as privileged or otherwise nondiscoverable 'must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record.' [Citation.]"

(*Ibid.*, quoting *People v. Price*, *supra*, 1 Cal.4th at p. 493.)

Here, the record demonstrates that the juvenile court conducted a careful and measured review of the records in question and actually released a certain portion of those records to Weatherton for use at trial. (27 RT 3632-3635.). The juvenile court did not abuse its discretion by protecting the balance of the records from disclosure under Welfare and Institutions Code section 827.

XVII. THE TRIAL COURT PROPERLY DENIED WEATHERTON'S MOTIONS TO QUASH THE PETIT JURY PANEL AND TO DISTRIBUTE A QUESTIONNAIRE TO ASCERTAIN THE RACIAL COMPOSITION OF THE PETIT JURY PANEL

Weatherton contends that the trial court improperly denied his motion to distribute a questionnaire to ascertain the racial composition of the petit jury panel, which he claims would have produced data he needed to support his motion to quash the petit jury panel for systematically excluding

African-American prospective jurors. (AOB 320-325.) However, the trial court properly determined that, even assuming the proposed questionnaire would establish underrepresentation of African-Americans on the petit jury panel, Weatherton could not show that any discrepancy was the product of systematic exclusion. Accordingly, distribution of the proposed questionnaire was unnecessary and the trial court properly denied both the motion to distribute the questionnaire and the motion to quash the petit jury panel.

On July 13, 2000, Weatherton filed both a motion to quash the petit jury panel as not being a representative cross-section of the community and a motion to distribute a juror questionnaire to collect statistical information to support his challenge to the composition of the petit jury panel. (2 CT 552, 565-568.) The proposed questionnaire sought information on prospective jurors' age, race, education, and income. (2 CT 551.) At a hearing on September 15, 2000, the trial court granted Weatherton's motion to distribute the proposed questionnaire. (3 CT 850; 2 Pretrial RT 243.)

On August 9, 2000, the prosecution filed its opposition to Weatherton's motion to quash the petit jury panel. (3 CT 767-772.) The motion was heard on October 24, 2002. (6 RT 436.) At the hearing, the parties stipulated to the introduction of a report on the racial demographics of the Indio Palm Springs Judicial District. (6 RT 436-437.) Weatherton then presented the testimony of Royann Nelson, the Regional Court Administrator for the Desert branch of the Riverside Superior Court who oversaw the jury selection process for the court. (6 RT 444.) Nelson explained that the jury pool was drawn from Department of Motor Vehicles and voter registration records. (6 RT 446-447.) Information regarding race and national origin was not included on the list. (6 RT 459.)

The lists of names were then sent to a company in Utah which eliminated duplications between the lists and printed and mailed the jury

summons. (6 RT 447-449.) When the court notified the company that a certain number of jurors would be needed on a particular date, the company would use a computer to apply the Marsaglia forma, a process used nationwide to randomly select prospective jurors, to randomly select the appropriate number of names from the lists provided. (6 RT 448-450, 456, 459-460.) Once the summonses were sent, a staff of five people at the court reviewed any claims of exemptions from jury service based on guidelines set forth in the Code of Civil Procedure. (6 RT 467-471.)

After hearing the evidence, the trial court ruled that Weatherton had not made a prima facie showing of deliberate systematic exclusion of African-American jurors. (6 RT 494.) In so ruling, the court determined that there was no need for the proposed questionnaire because, even assuming the questionnaire established a disparity between the numbers of African-Americans in the community and on the jury panel, Weatherton could not identify any improper or discriminatory feature of the court's jury selection process that would account for any such discrepancy. (6 RT 494.)

Both the federal and state constitutions guarantee a criminal defendant the right to "a jury drawn from a representative cross-section of the community." (*People v. Anderson* (2001) 25 Cal.4th 548, 566.) In order to satisfy the representative cross-section requirement, a jury pool must be drawn in such a fashion as to "not systematically exclude distinctive groups in the community." (*Ibid.*)

> In order to 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]; see also *People v. Anderson, supra*, 25 Cal.4th at p. 566.) Only if the defendant establishes a prima facie case does the burden shift to the prosecution to "'provide either a more precise statistical showing that no constitutionally significant disparity exists or a compelling justification for the procedure that has resulted in the disparity in the jury venire.'" (*Ibid.*)

The trial court found, and respondent does not dispute, that African-Americans are a distinctive group for purposes of the first prong of the *Duren* test (6 RT 494). (See *People v. Bell* (1989) 49 Cal.3d 502, 526 ["Blacks are a cognizable group within the meaning of *Duren*."].) However, as the trial court properly concluded, Weatherton failed to establish a prima facie case based on his failure to satisfy *Duren's* third prong: the systematic exclusion of African-Americans in the jury selection process. (6 RT 494.)

As this Court has explained, "[M]erely . . . offering statistical evidence of a disparity" is insufficient to establish systematic exclusion under *Duren's* third prong. (*People v. Burgener* (2003) 29 Cal.4th 833, 857.) A defendant must also show "that the disparity is the result of an improper feature of the jury selection process." (*Ibid.*) However, as this Court has previously explained with respect to the Riverside County Superior Court's process of selecting jurors:

> Riverside County relies on voter registration lists and Department of Motor Vehicle (DMV) records of registered drivers and holders of identification cards, which are merged into a master list. We have held that such a list "'"shall be considered inclusive of a representative cross-section of the population"' where it is properly nonduplicative." [Citation.]

(*Ibid*; see also *People v. Sanders* (1990) 51 Cal.3d 471, 496, fn. 9.)

Weatherton presented no evidence to challenge the conclusion that the process described by Nelson as being employed by the Riverside County

Superior Court to randomly select prospective jurors from the list compiled from DMV and voter registration records was in any way discriminatory toward African-Americans. Indeed, Weatherton did not at trial and does not now identify any constitutional infirmity in the process of random juror selection employed by the Riverside County Superior Court. Instead, he argues that, under *Duren* and contrary to this Court's prior opinions, systematic exclusion can be presumed from the existence of a statistical disparity between the number of African-Americans in the community and the number selected for jury service and that he therefore should have been allowed to proceed with the distribution of his proposed questionnaire to the prospective jurors in order to determine the racial composition of that group for purposes of comparison with demographic information for Riverside County. (AOB 323-325.) Weatherton's argument is based on a misunderstanding of *Duren* and its third prong.

In *Duren*, the United States Supreme Court found that the defendant had made the necessary showing of a systematic exclusion of women from the jury pool to establish a prima facie case. (*Duren v. Missouri*, *supra*, 439 U.S. at p. 366.) In reaching this conclusion, the Supreme Court did not find that it was enough to present statistics establishing underrepresentation of women in the jury pool; while such a showing could satisfy *Duren's* second prong, it was not sufficient by itself to satisfy *Duren's* third prong. (*Ibid.*) Instead, the defendant in *Duren* presented statistics establishing that,

> a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicat[ing] that the cause of the underrepresentation was systematic-that is, inherent in the particular jury-selection process utilized.

(*Ibid.*) Moreover, these statistics "established when in the selection process the systematic exclusion took place." (*Duren v. Missouri*, *supra*, 439 U.S. at p. 366, emphasis added.)

As this Court explained,

> Neither the Supreme Court's acceptance [in *Duren*] of statistical evidence that the underrepresentation in that case was not a chance occurrence, nor the court's statement that "systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section" [citation], supports the proposition that in a Sixth Amendment representative cross-section challenge statistical evidence that disparity is not a chance occurrence is adequate to meet the defendant's burden in all situations. Were statistical evidence of recurring disparity alone adequate to establish a prima facie violation of the cross-section guaranty, the third prong of the *Duren* test would be surplusage. By including as an element of a prima facie case a demonstration that the disparity is caused by "systematic exclusion" of members of the underrepresented group, the Supreme Court clearly intended to require more.
>
> The context in which the quoted statement and the court's holding in [*Duren*] were made - that of a state in which the jury selection criteria being applied were not neutral - must be considered in understanding the meaning of "systematic disproportion" as the court used that phrase. The selection criteria which were in use in the State of Missouri when the *Duren* challenge was made permitted members of a cognizable class, women, to claim exemption from jury service. Thus, the defendant in that case met all three prongs of the test: (1) the class was cognizable, (2) it was underrepresented, and (3) a constitutionally impermissible basis for excusing those class members had been identified as the probable cause of the disparity. The statistical evidence tended to show the causal relationship between the disparity and the impermissible feature. The defendant thus made out a prima facie case as to the third prong by showing both of the elements we hold are required. Defendant in the case at bench did neither.
>
> The Supreme Court has noted in a recent decision, albeit in another context, that in positions requiring special qualifications

> gross statistical disparities have little probative value in establishing a prima facie pattern or practice of discrimination. In such cases it cannot be assumed that "'that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded.'" [Citations.] This observation would appear to apply with equal force to a jury selection system.

(*People v. Bell*, *supra*, 49 Cal.3d at p. 529.)

The statistics Weatherton sought to present performed neither of the crucial functions identified by the Supreme Court in *Duren*. Weatherton's proposed questionnaire would only identify the racial composition of the prospective jurors in the jury pool for his trial. A comparison of this data with other demographic information would at most provide information as to a single jury panel: the one from which Weatherton's jury would be selected. It would be impossible to determine from this single sample whether any statistical discrepancy observed was the product of systematic exclusion, random chance, or some other factor. Attempting to do so would be akin to attempting to determine whether a dice was loaded based on a single throw. Moreover, a single sample would provide no insight into how the process of juror selection could possibly be operating to systematically exclude African-Americans. The defendant in *Duren* was able to show that systematic exclusion was occurring through the operation of Missouri's system of exempting particular jurors. (*Duren v. Missouri*, *supra*, 439 U.S. at pp. 366-367.) Not only did Weatherton here fail to do so, but he failed to even suggest how such a showing might be made. Accordingly, a statistical snapshot showing that African-Americans were underrepresented on one particular venire (even assuming Weatherton could ultimately show underrepresentation) would have been insufficient to establish systematic exclusion of African-Americans from Riverside County juries. (See *ibid.*) Given that Weatherton could not establish *Duren's* third prong, even with the data he proposed to collect with his

questionnaire, the trial court correctly determined that it was unnecessary to determine whether African-Americans were underrepresented under *Duren's* second prong and properly denied Weatherton's motion to quash the petit jury based on his failure to make a prima facie case. (See *People v. Anderson*, *supra*, 25 Cal.4th at p. 567 ["[W]e need not resolve the issue [of underrepresentation], because, as the trial court ruled, defendant failed to establish a prima facie case under *Duren's* third prong by showing that the disparity was caused by the systematic exclusion of Blacks from Indio/Palm Springs juries."].) Accordingly, the trial court properly denied Weatherton's motion to quash the petite jury panel and to distribute his questionnaire.

XVIII. THE TRIAL COURT PROPERLY DENIED WEATHERTON'S REQUEST FOR PRETRIAL DISCOVERY OF INFORMATION REGARDING THE RIVERSIDE COUNTY DISTRICT ATTORNEY'S DEATH PENALTY CHARGING PRACTICES

Weatherton contends that the trial court improperly denied his request for discovery of information regarding the Riverside County District Attorney's death penalty charging practices. Weatherton contends that he was entitled to discovery of this information in order to demonstrate discriminatory sentencing practices in violating of international law. (AOB 326-329.) The trial court properly denied Weatherton's requests.

On July 13, 2000, Weatherton filed a motion seeking discovery of the following:

> [1] The Riverside County District Attorney's death penalty charging guidelines, procedures, and practices in this case;
>
> [2] The Riverside County District Attorney's charging guidelines, procedures, and practices in death eligible cases over the past 10 years;

[3] The disposition of all death eligible multiple murder and robbery-murder cases handled by the Indio Branch in the past 10 years; and

[4] The disposition of all other death eligible multiple murder and robbery-murder cases handled by the Riverside County District Attorney's Office.

(2 CT 581.) In support of his discovery request, Weatherton's counsel attached his own declaration listing the names and races of defendants charged with the death penalty in Eastern Riverside County since 1989 and asserting that 80% of those cases involved African-American defendants. (2 CT 585.) The prosecution filed its opposition to Weatherton's discovery request on August 9, 2000. (3 CT 744-749.)

The motion was heard on October 17, 2001, at which time Weatherton, after noting two additional cases that had not been included in his counsel's declaration, argued that a statistical disparity as to the number of death penalty cases filed was sufficient to establish a plausible justification for the trial court to grant the requested discovery. (2 RT 135-139.) The prosecution challenged this assertion, arguing that, under *People v. McPeters* (1992) 2 Cal.4th 1148, 1169-1171, overruled on other grounds in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107, Weatherton's bare showing of a statistical disparity without more was insufficient to establish the plausible justification necessary to entitle him to the discovery sought. (2 RT 139-144.) The trial court agreed with the prosecution and, relying on *McPeters*, denied Weatherton's discovery request. (2 RT 148.)

"[A] party moving to compel discovery must provide . . . a 'plausible justification for the information and/or material he seeks. [Citations.]" (*People v. Ashmus* (1991) 53 Cal.3d 932, 979-980, overruled on other grounds in *People v. Yeoman, supra*, 31 Cal.4th at p. 117.) A trial court's

ruling on a motion to compel discovery is reviewed for an abuse of discretion. (*People v. Ashmus*, *supra*, 53 Cal.3d at p. 979.)

The trial court did not abuse its discretion in denying Weatherton's request for discovery. As this Court explained in *McPeters*,

> "Apparent disparities in sentencing are an inevitable part of our criminal justice system." [Citation.] "[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." [Citation]. 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." [Citation.]
>
> "Many circumstances may affect the litigation of a case chargeable under the death penalty law. These include factual nuances, strength of evidence, and, in particular, the broad discretion to show leniency. Hence, one sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty." [Citation.]
>
> Although a defendant seeking discovery is "not required to meet the standard of proof requisite to the dismissal of a discriminatory prosecution" [citation], discovery is not a fishing expedition. A motion for discovery must "'describe the requested information with at least some degree of specificity and . . . be sustained by plausible justification.'" [Citation.]

(*People v. McPeters*, *supra*, 2 Cal.4th at pp. 1170-1171.)

In *McPeters*, the defendant sought to justify a discovery request almost identical to the one at issue in this case by citing a study prepared by the local public defender purporting to compare death penalty and non-death penalty cases in Fresno solely based on the race of the victim. (*Id.* at

p. 1170.) This Court found the defendant's showing to be wanting, explaining,

> No "plausible justification" was offered by the defense in this case. Defendant showed no more than the barest form of "apparent disparity." His presentation ignored readily available, case- specific data that could, if favorable, have supplied a plausible justification for further inquiry. We are directed to no authority that requires the kind of wide-ranging foray sought by defendant based on such a meager showing. No right of defendant, constitutional or otherwise, was infringed by the denial of his discovery motion.

(*Id.* at p. 1171.)

As in *McPeters*, Weatherton's counsel's declaration "showed no more than the barest form of 'apparent disparity.'" (See *ibid.*) As the trial court noted,

> [*McPeters*] suggests that you should show things like disparity in strength of evidence in the cases, defendant's criminal history in each of those cases, the manner in which the crimes were committed, other factors that might show a lopsided filing practice, I would assume. And you haven't done any of that.

(2 RT 146.)

Here, the declaration provided by Weatherton's trial counsel examined a number of death penalty cases filed in Riverside County based on a single dimension: the race of the defendant. (2 CT 585.) Weatherton made no effort to account for other non-racial factors that could explain the apparent statistical discrepancy he identified in his trial counsel's declaration. This was legally insufficient to establish a plausible justification for the requested discovery. (See *People v. McPeters*, *supra*, 2 Cal.4th at p. 1171; see also *In re Seaton* (2004) 34 Cal.4th 193, 202-203.) Moreover, insofar as Weatherton claims that such discovery was necessary to establish systemic racial discrimination in the administration of the death penalty in violation of international law, as discussed in Arguments XXIV

and XXV, *post*, this Court has consistently rejected such challenges to California's death penalty statute. Accordingly, the information Weatherton sought would not have aided his defense or otherwise shown that racial discrimination played any role in the decision to charge him with the death penalty. The trial court did not abuse its discretion in denying Weatherton's discovery request. (See *People v. Ashmus*, *supra*, 53 Cal.3d at p. 979.)

XIX. CALIFORNIA'S PROCESS OF JUROR DEATH QUALIFICATION IS CONSTITUTIONAL

Weatherton contends that the process of juror death qualification in California and in his own case violate the federal constitution. (AOB 330-341.) However, as the United States Supreme Court has explained, "[T]he Constitution does not prohibit the States from 'death qualifying' juries in capital cases." (*Lockhart v. McCree* (1986) 476 U.S. 162, 173 [106 S.Ct. 1758, 90 L.Ed.2d 137].) The many decisions of this Court to have considered the question are in accord. (*People v. Mills* (2010) 48 Cal.4th 158, 170-172; *People v. Mickey* (1991) 54 Cal.3d 612, 662; *People v. Kaurish* (1990) 52 Cal.3d 648, 674; *People v. Melton* (1988) 44 Cal.3d 713, 732.) Weatherton does not present any valid reason to revisit these holdings.

XX. THE JUROR DEATH QUALIFICATION PROCESS IN THIS CASE DID NOT IMPROPERLY RESULT IN THE EXCLUSION OF AFRICAN-AMERICANS FROM SERVING AS JURORS

Weatherton contends that the juror death qualification process unfairly excludes African-Americans in Eastern Riverside County from serving on juries in death penalty cases and that in this case the juror death qualification process resulted in all potential African-American jurors being disqualified based on their opposition to the death penalty. (AOB 342-347.) He reasons that the opposition of the five African-American potential

jurors to the death penalty was based on the fact that a majority of death penalty prosecutions occurring in Eastern Riverside County involved African-American defendants and that, "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." (AOB 346.) Weatherton's argument does not bear scrutiny.

In the first instance, Weatherton does not contend that the dismissal of the African-American potential jurors from service based on their opposition to the death penalty was anything other than a straightforward application of California's death qualification process, which both this Court and the United States Supreme Court have previously found to be constitutional. (See Argument XIX, *ante*.) Weatherton does not suggest that the African-American jurors' views on the death penalty were utilized as a direct proxy for racially discriminatory exclusion of these particular African-American potential jurors from the jury. Instead, he links the unwillingness of these five African-American potential jurors to consider the death penalty to the prosecution of African-Americans for capital offenses in other cases in Riverside County and then extrapolates from this a general unwillingness of African-Americans in Riverside County to consider the death penalty. (AOB 345-347.) However, each of these suppositions is completely unsupported by any evidence in the record. There is simply no reason to conclude that race was a factor in the attitudes of the African-American potential jurors in this case or that the prosecution of African-Americans for capital offenses in other cases in Riverside County affected the pool of African-American potential jurors qualified to serve on a capital jury in Riverside County.

Moreover, as the United States Supreme Court explained in *Lockhart*, potential jurors unwilling to consider the death penalty,

> or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement. [Citation.]

(*Lockhart v. McCree*, *supra*, 476 U.S. at pp. 176-177.)

As *Lockhart* demonstrates, an unwillingness to consider the death penalty is a valid, non-discriminatory basis for the exclusion of a potential juror regardless of that potential juror's racial or ethnic background. (*Lockhart v. McCree*, *supra*, 476 U.S. at pp. 175-176.) While African-Americans have been found to be a "distinctive group" for fair-cross-section purposes (*id.* at p. 175), the trial court in this case did not simply excuse a group of African-American potential jurors; it excused a group of potential jurors who expressed their unwillingness to consider the death penalty and who also happened to be African-American. The African-American potential jurors in this case were excused for their unwillingness to consider the death penalty and for no other reason. There was no error.

XXI. THE TRIAL COURT PROPERLY DISMISSED JUROR NUMBER 2

Weatherton contends that the trial court improperly found that Juror Number 2's religious belief that death could only be imposed based on the testimony of two eyewitnesses was good cause to dismiss him from the jury. (AOB 348-354.) Weatherton is mistaken and the dismissal of Juror Number 2 was proper.

During a break in Bell's trial testimony, Juror Number 2 provided the trial court a note which read:

> 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 testifying. I thus

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, ["]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. If you direct that I immediately be called back for service on another jury, I will not have a problem with that. If called to serve on another jury for another murder, I do not have a problem with that as long as there will be two eyewitnesses to the crime.

I'm a firm believer in law and order and do support the death penalty except for this one specific exception.

(27 RT 4312-4314.)

On January 8, 2002, the trial court inquired of Juror Number 2, outside the presence of the other jurors with Weatherton and his counsel present. Juror Number 2 was asked if there was a circumstance in which he could envision voting for death and the juror said that, if there was enough corroborating evidence, he could consider that to be a second eyewitness and vote for death. (27 RT 4305-4306.) The prosecutor then asked if, assuming the juror believed Bell's testimony but found insufficient corroborating evidence, he could vote for death. (27 RT 4306-4307.) Juror Number 2 said, "No." (27 RT 4307.) The trial court then asked if the juror's religious beliefs would permit him to follow an instruction that the testimony of a single witness was sufficient to prove a fact and the juror said that he "would have a difficult time with that." (27 RT 4308 .) The parties did not ask any questions of the juror. (27 RT 4308.)

At the conclusion of the hearing, the trial court, over Weatherton's objection, dismissed Juror Number 2 and replaced him with Alternate Juror Number 3. (27 RT 4309-4320.)

> Under [Penal Code] section 1089, a court may discharge a juror who, "upon . . . good cause shown to the court is found unable to perform his or her duty. . . ." We review a trial court's decision to discharge a juror for good cause "for abuse of discretion. [Citations.] The juror's inability to perform the functions of a juror must appear in the record as a 'demonstrable reality' and will not be presumed. [Citation.] The trial court's finding [that] 'good cause' exists will be upheld on appeal if substantial evidence supports it. [Citation.]" [Citation.]

(*People v. Zamudio, supra*, 43 Cal.4th at p. 349.)

It is well-settled that "the jury must follow the court's instructions, 'receiv[ing] as law what is laid down as such by the court.'" (*People v. Engelman* (2002) 28 Cal.4th 436, 442, quoting Pen. Code, § 1126.) This Court has held that, in every criminal case, an instruction must be given that the testimony of a single witness is sufficient to prove any fact. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885.) Juror Number 2 expressly and unequivocally indicated that the uncorroborated testimony of a single witness, even if he believed that witness, would not be sufficient for him to vote for death because of his belief in the Old Testament's requirement of two eyewitnesses. (27 RT 4306-4307.) "A juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of Penal Code section 1089." (*People v. Williams* (2001) 25 Cal.4th 441, 448.) Consequently, the trial court was well within its discretion to dismiss Juror Number 2.

Weatherton challenges this assertion, noting that Juror Number 2 indicated he could vote for death based on the testimony of a single eyewitness if there was sufficient corroborating evidence, which would satisfy the Old Testament's requirement of a second eyewitness. (AOB 352-354.) He claims that a "juror is entitled to demand more than proof beyond a reasonable doubt before imposing death" and that the requirement of corroboration Juror Number 2 would impose was wholly appropriate.

(AOB 352.) However, Juror Number 2's requirement of sufficient corroborating evidence was one of biblical theology, and not California law. As this Court has held, the prosecution is required to prove guilt beyond a reasonable doubt and "no higher standard applies even in a capital trial." (*People v. Riel* (2000) 22 Cal.4th 1153, 1182.) Juror Number 2's inability to follow the trial court's instructions was good cause for his dismissal. (See *People v. Williams*, *supra*, 25 Cal.4th at p. 448.)

XXII. THE CONSTITUTION DOES NOT REQUIRE APPLICATION IN A CAPITAL CASE OF A HIGHER STANDARD OF PROOF THAN PROOF BEYOND A REASONABLE DOUBT

Weatherton contends that proof beyond a reasonable doubt of a defendant's guilt in a capital case is constitutionally insufficient and that proof of the defendant's guilt beyond all doubt is required. (AOB 355-375.) However, as this Court has held, the prosecution is required to prove guilt beyond a reasonable doubt and "no higher standard applies even in a capital trial." (*People v. Riel*, *supra*, 22 Cal.4th at p. 1182; see also *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-175 [108 S.Ct. 2320, 101 L.Ed.2d 155].).) Indeed, it would be impossible to ever meet a standard of proof beyond all doubt, as suggested by Weatherton, given that California law recognizes that "everything relating to human affairs is open to some possible or imaginary doubt." (Pen. Code, § 1096.) Weatherton's challenge to the adequacy of California's requirement of guilt beyond a reasonable doubt is without merit .

XXIII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE INTERNATIONAL LAW

Weatherton contends that California's death penalty statute and his own death sentence violate customary international law. (AOB 376-382.) However, this Court has consistently held that international law does not prohibit a sentence of death where, as here, it was rendered in accordance

with state and federal constitutional and statutory requirements. (*People v. Thomas* (2012) 53 Cal.4th 771, 837; *People v. Fuiava* (2012) 53 Cal.4th 622, 733; *People v. Blacksher* (2011) 52 Cal.4th 769, 849; *People v. Gonzales* (2011) 51 Cal.4th 894, 958; *People v. Nelson* (2011) 51 Cal.4th 198, 227.) Weatherton does not present any valid reason to revisit these holdings.

XXIV. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE INTERNATIONAL LEGAL PROHIBITIONS AGAINST RACIAL DISCRIMINATION

Weatherton contends that California's death penalty statute and his own death sentence violate international legal prohibitions against racial discrimination and cites a number of international legal instruments and studies in support of his contention. (AOB 383-399.) However, this Court has consistently rejected the notion that systemic racial discrimination which violates international legal norms is present in California's administration of the death penalty. (*People v. Martinez* (2003) 31 Cal.4th 673, 703; *People v. Bolden* (2002) 29 Cal.4th 515, 567; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Weatherton does not present any valid reason to revisit these holdings.

XXV. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Weatherton presents a number of arguments challenging the constitutionality of California's death penalty statute. (AOB 400-410.) As Weatherton acknowledges, these claims have been repeatedly rejected by this Court. As Weatherton offers no valid basis for revisiting this Court's prior holdings rejecting these claims, this Court should again reject each of the constitutional challenges presented.

A. California's Capital Statutes Adequately Narrow the Class of Eligible Offenders

Weatherton contends that California's death penalty statute violates the Eighth Amendment because it fails to meaningfully distinguish between those defendants subject to capital punishment and those defendants not subject to capital punishment. (AOB 401.) However, as this Court has observed,

> California's death penalty statute does not fail to narrow the class of offenders who are eligible for the death penalty, as is required by the Eighth Amendment, nor has the statute been expanded "beyond consistency with" the Fifth and Fourteenth Amendments. [Citations.]

(*People v. Salcido* (2009) 44 Cal.4th 93, 166; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Demetrulias* (2006) 39 Cal.4th 1, 434.)

B. The Weighing of Mitigating and Aggravating Factors is Adequate

Weatherton contends that the Constitution requires that the jury find beyond a reasonable doubt: 1) the existence of an aggravating factor or factors; 2) that the aggravating factors outweigh the mitigating factors, and 3) that death is the appropriate sentence. (AOB 401-402.) However,

> [t]he death penalty law is not unconstitutional because it does not require juror unanimity on the aggravating circumstances or provide a specific burden of proof for aggravating factors. Nor is the law unconstitutional because it does not require that the jury find that aggravating factors outweigh mitigating factors or that death is the appropriate penalty under any specific burden of proof. [Citation.]

(*People v. Blacksher*, *supra*, 52 Cal.4th at p. 848; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.)

C. Penal Code Section 190.3 Factors Provide Adequate Guidance and Are Constitutional

Weatherton contends that factor (a) under Penal Code section 190.3, which requires penalty phase jurors to consider the circumstances of the present offenses leads to the arbitrary and capricious imposition of the death penalty. (AOB 403-404.) However, "[t]he 'circumstances of the crime' factor stated in section 190.3, factor (a) does not foster arbitrary and capricious penalty determinations. [Citation.]" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1248; see also *People v. Virgil*, *supra*, 51 Cal.4th at p. 1288; *People v. Williams* (2008) 43 Cal.4th 584, 648.)

Weatherton contends that factor (b) under Penal Code section 190.3, which requires penalty phase jurors to consider criminal activity involving force or violence, is unconstitutional because application of factor (b) does not require the jury to unanimously find beyond a reasonable doubt that the criminal activity occurred. (AOB 404-405.) As discussed in Argument XXV(B), *ante*, this Court has consistently rejected the claim that the constitution requires jury unanimity or a particular burden of proof on aggravating factors. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 848; *People v. Lewis*, *supra*, 46 Cal.4th at p. 1319; *People v. Burney*, *supra*, 47 Cal.4th at pp. 267-268.)

Weatherton contends that factor (c) under Penal Code section 190.3, which requires penalty phase jurors to consider prior felony convictions, is unconstitutional because application of factor (c) does not require the jury to unanimously find that Weatherton committed the prior felony. (AOB 405.) As discussed in Arguments XXV(B) and (D), *ante*, this Court has consistently rejected the claim that the constitution requires jury unanimity or a particular burden of proof on aggravating factors. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 848; *People v. Lewis*, *supra*, 46 Cal.4th at p. 1319; *People v. Burney*, *supra*, 47 Cal.4th at pp. 267-268.)

D. CALJIC No. 8.85 Adequately and Correctly Instructs the Jury on the Penalty Phase Sentencing Factors

Weatherton raises several challenges to CALJIC No. 8.85, the pattern jury instruction setting forth penalty phase sentencing factors:

> 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.

(AOB 406.) However, this Court has previously found that "CALJIC No. 8.85 is both correct and adequate." (*People v. Bramit, supra*, 46 Cal.4th at p. 1248, quoting *People v. Valencia* (2008) 43 Cal.4th 268, 309.)

A trial court is not required to delete inapplicable sentencing factors from the instruction. (*People v. Bramit, supra*, 46 Cal.4th at p. 1248; *People v. Watson* (2008) 43 Cal.4th 652, 701; *People v. Perry* (2006) 38 Cal.4th 302, 319.) The sentencing factors set forth in CALJIC No. 8.85 are not unconstitutionally vague and arbitrary. (*People v. Famalaro* (2011) 52 Cal.4th 1, 43; *People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Earp* (1999) 20 Cal.4th 826, 899.) The use of the adjectives "extreme" and "substantial" in factors (d) and (g) do not unconstitutionally limit the mitigating factors the jury may consider. (*People v. Bramit, supra*, 46 Cal.4th at p. 1249; *People v Perry, supra*, 38 Cal.4th at p. 319; *People v. Smith* (2005) 35 Cal.4th 334, 374.) Finally, there is no constitutional requirement that the jury be instructed regarding a burden of proof as to sentencing factors. (*People v. Virgil, supra*, 51 Cal.4th at pp. 1277-1278; *People v. Young* (2005) 34 Cal.4th 1149, 1233; *People v. Earp, supra*, 20 Cal.4th at p. 899.) Weatherton's challenges to CALJIC No. 8.85 are without merit.

E. The Absence of Written Findings as to Mitigating and Aggravating Factors is Constitutional

Weatherton contends that the constitution requires the jury to make written findings as to the aggravating and mitigating factors relied on in the jury's penalty determination. (AOB 406-407.) However, "[t]he absence of written findings reflecting the jury's consideration of the sentencing factors does not violate a defendant's constitutional rights." (*People v. Gonzales* (2011) 51 Cal.4th 894, 957; see also *People v. Jackson* (2009) 45 Cal.4th 662, 700-701; *People v. Stanley* (2006) 39 Cal.4th 913, 965.)

F. Intercase Proportionality Review is Not Constitutionally Mandated

Weatherton contends that the absence of intercase proportionality review in California's death penalty law is unconstitutional. (AOB 407-408.) However, "[i]ntercase proportionality review is not constitutionally required." (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 957; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50–51 [104 S.Ct. 871, 79 L.Ed.2d 29] ; *People v. Murtishaw* (2011) 51 Cal.4th 574, 597.)

G. No Disparate Sentence Review is Required in Capital Cases

Weatherton contends that a capital defendant in California is constitutionally entitled to the same sort of disparate sentence review available to non-capital defendants under California's determinate sentencing law. (AOB 408.) However, this Court has routinely rejected the notion that capital defendants are constitutionally entitled to disparate sentence review. (*People v. Thomas* (2011) 51 Cal.4th 449, 507; *People v. Bunyard* (2009) 45 Cal.4th 846, 861; *People v. Lewis* (2006) 39 Cal.4th 970, 1067.)

H. Weatherton's Punishment is Commiserate with His Heinous Crimes

Weatherton contends that the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment. (AOB 408-409.) However, this Court has repeatedly held that California's death penalty statute does not constitute cruel and unusual punishment. (*People v. McWhorter*, *supra*, 47 Cal.4th at p. 379; *People v. Brasure* (2008) 42 Cal.4th 1047, 1072; *People v. Moon*, *supra*, 37 Cal.4th at p. 47.)

I. There Are Not Constitutional Errors to Cumulate

Weatherton contends that the constitutional defects he identifies in Argument XXV(A)-(J), *ante*, when considered together, demonstrate that California's death penalty law 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 relative few offenders subjected to capital punishment.

(AOB 409-410.)

Weatherton's argument fails for the simple reason that, as discussed in Argument XXV(A)-(J), *ante*, this Court has soundly and repeatedly rejected each of Weatherton's constitutional challenges to the death penalty. (See *People v. Eubanks*, *supra*, 53 Cal.4th at p. 154 ["Having concluded that none of defendant's challenges to our state's capital sentencing scheme have merit, we reject this general claim as well."].)

XXVI. THERE WAS NO CUMULATIVE ERROR WARRANTING REVERSAL OF THE JUDGMENT

Weatherton contends the cumulative effect of the trial court's alleged errors undermined the fundamental fairness of his trial and the reliability of his death sentence, therefore the guilty verdicts and death judgment should be reversed. (AOB 411-414.) As explained in the responses to Weatherton's individual claims (above), the trial court did not commit any

errors, so there were no errors to accumulate. Accordingly, the cumulative error doctrine does not apply. (See *People v. Booker* (2011) 51 Cal.4th 141, 195; *People v. Jennings* (2010) 50 Cal.4th 616, 691; *People v. Beeler* (1995) 9 Cal.4th 953, 994 ["[i]f none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the . . . verdict"].)

Moreover, even assuming the trial court had erred in some respect, Weatherton has failed to show that he was in any way denied due process or a fair trial. (See *People v. Booker*, *supra*, 51 Cal.4th at p. 195 ["To the extent that there are a few instances in which we found or assumed the existence of error, we concluded that no prejudice resulted. We reach the same conclusion after considering their cumulative effect"]; *People v. Mincey* (1992) 2 Cal.4th 408, 454 ["[a] defendant is entitled to a fair trial, not a perfect one"].) "[A] defendant is entitled to a fair trial but not a perfect one." (*Schneble v. Florida* (1972) 405 U.S. 427, 324 [92 S.Ct. 1056, 31 L.Ed.2d 340].) Therefore, Weatherton's claim of cumulative error should be rejected.

CONCLUSION

For the forgoing reasons, respondent respectfully asks that the judgment be affirmed.

Dated: May 30, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 43, 043 words.

Dated: May 30, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Weatherton***
No.: **S106489**

I declare:

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

On June 1, 2012, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 1, 2012, at San Diego, California.

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Declarant

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Signature

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