IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

The Honorable James S. Hawkins, Presiding

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

California Consitution

United States Constitution

STATUTES

RULES

MISCELLANEOUS

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STATEMENT OF THE CASE AND FACTS

Mr. Weatherton has no objection to respondent's statement of the case. (Respondent's Brief ["RB"] p.1.) He will address errors and omissions in respondent's statement of the facts, i.e., the placing of decedent Sam Ortiz in a truck riding with Nelva Bell and Mr. Weatherton to take Ms. Olivio home, see RB 2, in the course of responding to each argument.

ARGUMENT

I. THE TRIAL COURT WRONGLY BLOCKED APPELLANT FROM PRESENTING EVIDENCE POINTING TO VERNON NEAL AS THE PERPETRATOR OF THE CRIMES AT BENCH AND IMPEACHING NEAL'S CREDIBILITY AS A PROSECUTION WITNESS.

A. Overview

Evidence pointing to Vernon Neal as the perpetrator of the crimes at bench was wrongly excluded from Mr. Weatherton's trial. Evidence that someone other than the defendant committed the crime cannot constitutionally be excluded if it is capable of raising a reasonable doubt as to the defendant's guilt. (*Holmes v. South Carolina* (2006) 547 U.S. 319; *People v. Hall* (1986) 41 Cal.3d 826; *People v. McWhorter* (2009) 47 Cal.4th 318, 367–368; *People v. Page* (2008) 44 Cal.4th 1, 38.)

The decision whether to exclude third party culpability evidence cannot be based on the perceived strength of the prosecution case. The probative value of the proffered defense evidence must be independently evaluated. (*Holmes v. South Carolina*, *supra*, 547 U.S. at pp. 328–330.) Thus, third party culpability evidence must be admitted if on its own it would be capable of raising a reasonable doubt as to the defendant's guilt. (*Ibid.*; see also *Page*, *supra*, at p. 38.)

Respondent relies primarily on what respondent sees as the "overwhelming" strength of the case against Mr. Weatherton, as shown by Ms. Bell's emphatic and unqualified identification of him. Respondent is utterly convinced that Ms. Bell accurately identified Mr. Weatherton, and writes, "the idea that Neal, and not Weatherton, committed the crimes cannot survive even the most casual scrutiny given the state of the record." (RB 22.) After summarizing the number of times she identified him, and the certainty of her identification, respondent concludes: "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." (RB 23.)

Not so; she would only have to have been terribly mistaken. But what better word than "delusional" to describe Ms. Bell's conviction that Mr. Weatherton had somehow engineered a police attack on her from his jail cell in an effort to discredit her in October of 2001? This was a delusional belief held by Ms. Bell even when free of the drugs that admittedly made her paranoid, and made her see people who were not there. (26 RT 4144–4146; 31 RT 5013; Arg. III, *post.*)

The truth was that Riverside County Sheriff's Deputy Justin Anderson had pressed his informant Teresa Cecena to tell him where she

bought her drugs, and Ms. Cecena gave him the name of Ms. Bell. The prosecution railed at Ms. Cecena, and called her a "lying, high prostitute" (23 RT 3575), but Ms. Bell ultimately admitted selling cocaine to Ms. Cecena on two different occasions. (26 RT 4086–4089.)

Ms. Bell's utter conviction that Mr. Weatherton was the man who shot her made her a powerful witness[1] but also a dangerous one. In a comprehensive review of research on the question of eyewitness identification done over the past 30 years, the Oregon Supreme Court recently concluded,

> [W]itnesses' self-appraisal of their certainty regarding identifications they have made, especially when elicited after they have received confirming feedback from suggestive police procedures, is a poor indicator of reliability. At the same time, jurors can find such statements persuasive, even when contradicted by more probative indicia of reliability.

(*State v. Lawson* (2012) 352 Or. 724, 291 P.3d 673 at p. 695.)

Prosecution witness Ebbe Ebbesen argued that the research examining the reliability of eyewitness identification was useless in the real world (see RT 7211–7212; RB 13), but mounting evidence from the real world confirms the research showing that even very confident eyewitnesses

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[1] The trial court recalled years later that her loud affirmation of Mr. Weatherton's guilt was like "channeling the voice of God." (70 RT 10201.)

can be mistaken. As of the end of 2012, eyewitness misidentification has contributed to 72 percent of the 302 wrongful convictions revealed by DNA evidence. (Innocence Project, *Facts on Post-Conviction DNA Exonerations* <http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php> [as of Feb. 27, 2013]; see also Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) [76 percent of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification].) No other factor comes close to creating so many wrongful convictions.

Courts around the country are beginning to notice that the applicable law governing the admissibility and characterization of eyewitness identification is at best incomplete, and inconsistent with what has become an overwhelming body of research. In *United States v. Greene* (4th Cir. 2013) 704 F.3d 298, the court observed that "The highest courts of two states have recently called into question the *Manson* test,[2] based on the last 35 years of social science research into the reliability of eyewitness identifications. (See *State v. Henderson* (N.J. 2011) 208 N.J. 208, 27 A.3d 872; *State v. Lawson* (2012) 352 Or. 724, 291 P.3d 673.) In both instances,

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[2] *Manson v. Brathwaite* (1977) 432 U.S. 98.

the courts provided defendants greater protections than *Manson* prescribes." (*United States v. Greene*, *supra*, 704 F.3d at p. 305, fn. 3.)

After a thorough inquiry involving the appointment of a special matter and a wide range of expert testimony from the defendant and the State, the New Jersey Supreme Court found "convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised," adding, "Study after study revealed a troubling lack of reliability in eyewitness identifications." (*Henderson*, 27 A.3d at p. 877.) The problem was urgent, the court noted in its unanimous opinion: "At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials." (*Id.* at p. 879. See also *Minor v. United States* (D.C. 2012) 57 A.3d 406.)

In *Lawson*, a unanimous Oregon Supreme Court noted that since 1979, when that court's controlling case on eyewitness identification was decided, "there have been more than 2,000 scientific studies conducted on the reliability of eyewitness identification." (291 P.3d at p. 685.) In reviewing that research, the court stated,

> [W]e believe that it is imperative that law enforcement, the bench, and the bar be informed of the existence of current scientific research and literature regarding the reliability of eyewitness identification because, as an evidentiary matter, the reliability of eyewitness identification is central to a

> criminal justice system dedicated to the dual principles of accountability and fairness.

(291 P.3d at p. 685.)

The court concluded that the factors it had previously used in assessing the reliability of eyewitness identifications—factors based on *Manson*—were "incomplete and, at times, inconsistent with modern scientific findings." (291 P.3d at p. 746. See also *United States v. Brownlee* (3d Cir. 2006) 454 F.3d 131, 142 [noting that "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable" and "while science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings," internal quotations marks and citations omitted]; *United States v. Moore* (5th Cir. 1986) 786 F.2d 1308, 1312 [stating that "the conclusions of the psychological studies are largely *counter-intuitive*, and serve to explode common myths about an individual's capacity for perception," internal quotation marks omitted]; *State v. Guilbert* (Conn. 2012) 49 A.3d 705, 720–721 [noting "widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror" which "tracks a near perfect scientific consensus"].)

One of the chief problems is the persuasive power of a confident eyewitness who has no doubt of the accuracy of his or her testimony. In hundreds of the most serious cases across the United States, eyewitnesses who were absolutely positive of their identification have been mistaken.[3]

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[3] In *People v. Wright* (1988) 45 Cal.3d 1126, Justice Mosk observed in dissent,

> The same instruction [CALJIC No. 2.92] also tells the jury, again without explanation, to consider "The extent to which the witness is either certain or uncertain of the identification." This portion of the CALJIC charge is even more misleading. The average juror doubtless takes it as confirming the widespread lay belief that the more certain an eyewitness is of his identification, the more likely the identification is correct. Yet that belief is apparently mistaken: as we explained in *McDonald* (37 Cal.3d at p. 369), there is in fact a "lack of correlation between the degree of confidence an eyewitness expresses in his identification and the accuracy of that identification. Numerous investigations of this phenomenon have been conducted: the majority of recent studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative—i.e., the more certain the witness, the more likely he is mistaken. (Wells & Murray, *Eyewitness Confidence, in Eyewitness Testimony: Psychological Perspectives*, pp. 159–162.) Indeed, the closer a study comes to reproducing the circumstances of an actual criminal investigation, the lower is that correlation (*id.* at pp. 162–165), leading the cited authors to conclude that 'the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings.' (*Id.* at p. 165; see also Deffenbacher, "Eyewitness Accuracy and Confidence: Can We Infer Anything about their Relationship?" (1980) 4 Law & Human Behav. 243.) The average juror, however, remains unaware of these findings: "A number of researchers using a

The influential document that became controversial in this trial (see Arg. IX), the Department of Justice's *Convicted by Juries, Exonerated by Science*, documented 26 cases of wrongful convictions. The purpose of this 1996 document, which was entirely achieved, was to make known to the world the power of DNA testing in a criminal law context. Worth noting here is that as to every single one of the 26 exonerations, the wrongful convictions were supported by eyewitness identifications.

The convergence of research and historical fact has led the New Jersey Supreme Court to require that jurors be instructed as follows:

> Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

> variety of methods have found that people intuitively believe that eyewitness confidence is a valid predictor of eyewitness accuracy." (Wells & Murray, *supra*, at p. 159, citing five recent studies.) Thus rather than correcting this common misconception of jurors, the CALJIC instruction actually reinforces it.

(*Wright*, 45 Cal.3d at p. 1159 (dis. opn. of Mosk, J.).)

Justice Mosk wrote these words in 1988. In the 25 years since they were written, their truth has been repeatedly confirmed via hundreds of studies and hundreds of defendants convicted by sincere eyewitnesses who were later shown to have been mistaken.

(Model Jury Charge (Criminal), Identification: Out-of-Court Identification (2007); see *State v. Romero* (N.J. 2007) 191 N.J. 59, 922 A.2d 693, 703.)

Jurors have great difficulty in distinguishing between accurate and inaccurate eyewitnesses.[4] Mistaken eyewitnesses no less than accurate eyewitnesses are telling what they believe to be the truth, and thus the cognitive faculties jurors usually deploy in making credibility judgments about lying witnesses do not work well in this context.[5] Research also

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[4] See Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony* in The Handbook of Eyewitness Psychology: Memory for People (Lindsay et al. eds., 2007), pp. 453, 475–487.

[5] This also explains why cross-examination—the great engine for uncovering truth—often sputters in the face of an honest but mistaken eyewitness. In this case, it is clear that the testimony of Ms. Bell became more and more forceful and insistent during cross-examination, when she was not struggling with an uncertain memory of the details of what happened. As both the DNA exonerations and empirical study show, cross-examination cannot protect against wrongful identifications. See Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination* (2007) 36 Stetson L. Rev. 727; Wells, *Eyewitness Identification: Systemic Reforms* (2006) Wis. L. Rev. 615 ["Cross-examination, a marvelous tool for helping jurors discriminate between witnesses who are intentionally deceptive and those who are truthful, is largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken."]; *State v. Clopten* (Utah 2009) 223 P.3d 1103, 1110 [because eyewitnesses may express almost absolute certainty about identifications that are inaccurate, research shows the effectiveness of cross-examination is badly hampered].

shows jurors, and most people, have some fundamental misconceptions about eyewitness memory and how it works.[6]

In this case, how could Ms. Bell be wrong? According to her testimony, she had known Mr. Weatherton for a while, and had been friendly with him. (See AOB 12.) Earlier that evening, the two of them rode in a truck to take Connie Olivio home, and then went together over to Joann Norris's house to get more drugs. However, as respondent writes, "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.)." (RB 3.)

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[6] See, e.g., Boyce et al., *Belief of Eyewitness Identification Evidence*, in The Handbook of Eyewitness Psychology: Memory for People (Lindsay et al. eds., 2007) p. 501; Loftus et al., Eyewitness Testimony: Civil and Criminal (4th ed. 2007); Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications* (1983) 7 Law & Hum. Behav. 19; Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence* (1990) 14 Law & Hum. Behav. 185–191; Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence* (2006) 46 Jurimetrics 177; Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts* (2006) 20 Applied Cognitive Psychol. 115.

This paragraph, reasonably construed, meant that Hunt's anger would dissipate by the following day. This reading is supported by the undisputed fact that Mr. Weatherton regularly slept on Mr. Hunt's property, used Mr. Hunt's house for necessities, and was allowed by Mr. Hunt to keep his clothing in the house's north bedroom. (27 RT 4764.) It is further supported by Ernest Hunt's direct testimony and interviews of him on the following day. Mr. Hunt did not say anything to the police resembling Nelva Bell's testimony about how he felt, denied ever waving a knife at Mr. Weatherton, did not remember being made afraid by anything Mr. Weatherton did, and had never stopped regarding Mr. Weatherton as one of his friends. (38 RT 6093, 6102.)

Ms. Bell's fear of Mr. Weatherton, however, was likely born of this exchange or something like it. She testified that LaTonya was afraid for Mr. Hunt's life, that Mr. Hunt was too scared of Mr. Weatherton to take a bath, and that LaTonya asked her to stay the night with her and go with her in the morning to see Miss Katie and tell her that if something happened to Mr. Hunt, it would be Mr. Weatherton who did it. (26 RT 4152.)

LaTonya apparently left her baby with Nelva while she went up to Sam Ortiz's house. Ernest Hunt exploded into a rage when he learned that LaTonya had left his house and her child behind; he was "trippin' and

acting crazy," and told Nelva to immediately go get LaTonya and tell her to fetch her child. (26 RT 4191–4192.) According to Nelva, she and LaTonya came back for the child together and returned with the child to Sam Ortiz's house. (AOB 16–17.)

Nelva Bell testified that she was asleep when she suddenly heard a voice yelling, "LaTonya, Tonya, Tonya, Tonya, Ernest is dead!" (AOB 18–19; 11/13/98 hospital interview, People's Exh. 71; transcript of interview, 40 CT 1543.) Why would Mr. Weatherton yell LaTonya's name so often? Why would he expect to advance his interests by telling everyone that Ernest Hunt was dead? The shooting occurred early in the morning, in a room with a small window, closed curtain and little light. Ms. Bell was roused from sleep and dreams. She was a serious abuser of cocaine, and used it anywhere from daily (42 RT 6945–6946) to three times a week (27 RT 4222).

Dr. Pittel's testimony, and Dr. Shomer's testimony, left no doubt that such a person could have "source attribution errors." (41 RT 6653 et seq., 41 RT 6714; 42 RT 6838–6841.) Dr. Ebbesen recognized that eyewitnesses could be absolutely certain but be mistaken; the issue in his mind was the frequency of such errors. (44 RT 7215–7216, 7225.) Dr. Siegel, though minimizing the effects of crack cocaine, testified that women react much

more intensely to cocaine than do men. (44 RT 7321.) It is entirely possible that Nelva Bell's circuitry could have crossed, and hardened into the powerful conviction of Mr. Weatherton's guilt that so impressed the trial court and the jurors, even though she was wrong.

Mr. Weatherton cannot explain why Ms. Bell became convinced that Mr. Weatherton was a deadly enemy of his benefactor Ernest Hunt, or why she wrongly identified him as the shooter. We do know, however, that Ms. Bell was still under the influence of cocaine when the crime took place (she later tested positive for cocaine at the hospital [32 RT 5124]); that she was under very high stress and in a life-threatening situation when she woke up—a condition that both the prosecution and defense experts agreed could distort the reliability of a witness's recollection (41 RT 6651–6652; 44 RT 7200); that the conditions were dark (an ill-lit room with the sun barely risen) as well as desperate, and her eyes were on a "big black gun," (26 RT 4174–4175), and that she admits not knowing much of anything that happened other than an unshakeable certainty that Mr. Weatherton did it.[7]

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[7] Nelva Bell's statement, after she was repeatedly contradicted by her own inconsistent testimony: "We just stopped to get high, and if you talking about—you know what I mean, I'm going to—to speak—I'm not really sure everything and I don't want nothin' to come back on me, you know what I mean? Now, time frame—I'm not—don't know the time frame and don't know the—*I do know for a fact who shot us, not anything else.*" (26 RT 4192–4193, emphasis added.)

We also know that Ms. Bell had an admitted tendency to get "paranoid," (26 RT 4144–4146, 27 RT 4275, 31 RT 5013, and see policemen where there were none, and that she accused Mr. Weatherton of orchestrating her arrest for selling cocaine after he had been in jail for nearly three years. (See AOB, Claim III; Arg. III, *post*; 25 RT 3972; 27 RT 4289.) In light of both theory, in the form of substantial amounts of research performed over decades, and practice, in the form of hundreds of wrongful eyewitness identifications that sent innocent people to prison or to death sentences, the unshakeable certitude of both Ms. Bell and respondent is misplaced.

Respondent also argues that Ms. Bell's identification of Mr. Weatherton was corroborated. Corroboration evidence, however, as the trial court recognized, was extremely weak. After the prosecution's case had concluded, the following exchange took place during the out-of-court discussion of whether or not Dr. Shomer's testimony should be admitted:

> THE COURT: The reason I am letting it in is because you have no corroborating evidence, and the other cases that I read like Sandoval, Walker, Sanders, McDonald, all those cases had some corroboration like fingerprints. In fact, I think even in Sanders they knew the defendants beforehand, but they still had corroborating evidence.
>
> MS. CARTER: Well, I would remind the Court there is corroborating evidence in this case. I realize it does not probably rise to the level of an indisputable fingerprint.

THE COURT: Remind me because—

MS. CARTER: The walking footprints to the scene and the running footprints from the scene that come back to the defendant based upon not only what Michelle Merritt tells us about probably, but also based on what Rody Johnson told us about looking at where he knew the defendant was standing. Furthermore—

THE COURT: It is almost like saying you wouldn't be surprised to find my fingerprints in my house, because I live there.

MS. CARTER: He doesn't live down at the other place. He lives at Ernest Hunt's house, and those footprints were walking toward and running away from Ernest Hunt's house. Furthermore, that is consistent with and corroborated by what Mr. Vernon Neal tells us by seeing something, someone flashing across there, and then would be running in that direction and over to find that lo and behold, there stands the defendant. I realize it is not the same thing as a fingerprint, but it is corroborating evidence, your Honor.

THE COURT: It would be nice for corroboration purposes if you had blood, fingerprint, gunshot residue, clothing, a weapon.

MS. CARTER: It would be great, but unfortunately I don't.

(41 RT 6598–6599.)

According to respondent, "two independent witnesses testified that Fred Weatherton was in possession of a handgun shortly before the murders." (RB 33.) Respondent is here extrapolating from possibilities to certainties.

Curtis Neal testified that Mr. Weatherton once bought a toy gun, and he wondered why a grown man would do such a thing. (36 RT 5934.) He also testified that when Mr. Weatherton was "bullshitting" about robbing drug dealers he had a blue bag with him that might have had a gun in it, but Neal never saw what was in the bag, and he had never, ever seen Mr. Weatherton with a real gun. (37 CT 10966–10967.)

Joanne Norris testified that Mr. Weatherton had something that looked like a gun hidden by a sock at the time he was asking her if she needed help dealing with the "youngsters" that were hanging around outside her house chasing away customers. She, too, had never seen Mr. Weatherton with a gun before, and told the officer that what she saw might not have been a gun. (31 RT 5080–5082.)

According to respondent, Mr. Weatherton's "need for money was well-established." (RB 34.) He was sleeping in an abandoned automobile outside Ernest Hunt's house; it is a reasonable inference that he needed money. As Curtis Neal noted, however, LaTonya Roberson and Sam Ortiz could not have been shot for their money, because they didn't have any. (AOB 39–40; 37 CT 10981–10982.) Respondent states that the perpetrator looked through Sam Ortiz's wallet (RB 4; see 26 RT 4159–4160), but the

presence of $40.00 in Sam Ortiz's wallet after he was shot (see AOB 33) cuts against money as the motive for the crime.

Respondent then points to footprint evidence, and says that Mr. Weatherton's shoe prints showed him running from the scene of the crime, "which would be expected of someone who had just shot three people." (RB 34.) Respondent is here describing what respondent wishes the evidence shows rather than what it actually shows. Appellant has summarized the reasons why the chart made from memory by Officer Johnson three years after he walked around the crime scene was meaningless, and why the six random photographs of shoe prints taken "somewhere round the crime scene" were irrelevant; see AOB 34–36; 306–311. Given that Mr. Weatherton lived within a few yards of all the photographs, it was no more surprising to the trial judge that Mr. Weatherton's footprints were there than that the trial court's fingerprints would be found inside his own house. (41 RT 6598–6599.)

Respondent does not dispute any of Mr. Weatherton's factual description of how the random shoe prints were gathered and identified without any notice taken of shoe prints that did not resemble Mr. Weatherton's, or the substance of Michelle Merritt's testimony, or how Officer Johnson made up his chart three years after he visited the scene of

the crime. The weakness of this evidence led the prosecutor to abandon the footprints as probative evidence by closing argument, and shift to a version of events that had Mr. Weatherton burying the clothes and weapon and ill-gotten goods in some unknown hole in the desert rather than throwing anything towards the canal. (See 47 RT 7699–7700.)

The footprint "evidence" in this case was concocted years after the fact, and was worthless. Even if admissible, its weight was minimal. It purported to support Vernon Neal's testimony that he saw Mr. Weatherton "flash" through a row of tamarisk trees to the canal, and to support the notion that Mr. Weatherton threw the "long black gun" he had used to kill the victims into the canal. (RB 4.)

A look at the photographs showing the problems posed by this scenario indicates how unlikely it was. (See, 1 SCT 263, 265, 267.)[8] Assuming, however, that Mr. Weatherton could have made such a long and accurate toss, why was the gun not found when police investigators dragged the canal? Respondent writes that "if a gun were to float away, there was no barrier in the canal to prevent it from traveling all the way to Lake Cahuilla. (40 RT 6440.)" (RB 12.) The laws of physics are clear. Big black guns do

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[8] The photographs also show the fence was bordered bvy pure sand – prime country for locating at least fragments of footprints, if there were any to be found.

not float. There was six to twelve inches of sand in the bottom of the canal in the areas with which we are concerned. The Indio police dragged the canal, to no avail. (AOB 31–33.)

The question of where the gun went begs the question of what happened to the army jacket, and fingerless gloves, and whatever may have been taken from the decedents. Mr. Weatherton was arrested on the morning of the crime not long after its commission. When he was first seen by Officer Johnson just after 7 am, he was wearing the same clothes he had worn the night before, including a blue, black and silver jacket. Everything about him and his clothes was analyzed. No incriminating evidence was found. No army jacket or fingerless gloves, let alone a big black gun or currency, were ever found.

Ms. Bell remained adamant that Mr. Weatherton wore an army jacket, when he was doing the shooting. (26 RT 4174–4175.) Where did it go? What about the fingerless gloves? And any ill-gotten goods or money? These things could not possibly have been have been thrown into the canal; as respondent writes, "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.)" (RB 11–12.)

Respondent rests after having come up with an "explanation" of how Mr. Weatherton supposedly disposed of the gun, and nowhere tries to explain what happened with the other missing material.

As noted, the prosecutor evidently recognized the weakness of the footprint–to–canal-fence theory, and argued in closing that Mr. Weatherton had 25 minutes to dispose of the weapon and clothing (6:40 a.m.–7:05 a.m.), and probably used that time to bury it all somewhere, "who knows where," in the desert. (47 RT 7699–7700.) See also, prosecutorial speculation that he must have buried the clothing and gun "somewhere in the desert area." (41 RT 6601.) Respondent does not acknowledge this part of the prosecutor's closing argument.

In sum, if Mr. Weatherton were the perpetrator, he had precious little time to do anything after the shootings. Vernon Neal was only a few minutes behind LaTonya as he followed her from her house to Sam Ortiz's house; he drove straight to his house with a child who lived at Eric Roberson's house and stayed there for an hour before returning to the scene of the crime. According to Nelva Bell, Vernon Neal came in not long after she was shot. Vernon testified that he saw Mr. Weatherton almost immediately after getting into his car to drive away; Officer Johnson saw Mr. Weatherton in his blue, black and white jacket at about 7:05 a.m.

Mr. Weatherton was picked up at his house by the police shortly thereafter. There is no physical evidence and no meaningful corroboration of Ms. Bell's identification of Mr. Weatherton as the perpetrator.

B. Evidence Pointing to Vernon Neal Was Enough to Raise a Reasonable Doubt as to Mr. Weatherton's Guilt

Respondent echoes the prosecutor in arguing that evidence of motive *and* opportunity are legally insufficient to establish reasonable doubt: "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." (RB 19, 21; see 21 RT 3508–3510.)

There are no cases in California or anywhere else holding that evidence of both motive and opportunity are legally insufficient to be presented as third-party culpability evidence. In *Hall*, this Court held that evidence of motive *or* opportunity would not suffice (41 Cal.3d at p. 833), but the presence of the two together can indeed raise a reasonable doubt about whether or not Mr. Weatherton was guilty of the crimes at bench.

The question is to be resolved case by case on the basis of the factual record, but a look at cases involving evidence of jealous lovers is instructive. In *People v. Prince* (2007) 40 Cal.4th 1179, defendant argued on appeal that it was error to exclude six witness statements showing

jealousy and relationship problems between the victim and her boyfriend. However, defense counsel repeatedly failed to proffer direct or circumstantial evidence linking the suspect to the crime, despite telling the court he would do so. As a result, there was only evidence of motive, no evidence of opportunity, and nothing else linking the suspect Burns to the killing; this Court affirmed the trial court. (*Id.*, 40 Cal.4th at p. 1241.)

In *People v. Adams* (2004) 115 Cal.App.4th 243, the court applied *Hall* in reaching the conclusion that the trial court had not erred in refusing to allow a defendant to present evidence of the existence of a violent relationship between a murder victim and her former boyfriend, Rick Kallerup. The court reasoned, "Kallerup's history of violence toward [the victim], without direct or circumstantial evidence linking Kallerup to the actual perpetration of the crime, was inadmissible under Evidence Code section 1101." (*Adams, supra*, 115 Cal.App.4th at p. 253.) In so concluding, the court carefully reviewed the evidence proffered by the defendants purporting to link Kallerup to the scene of the crime (beer cans, cigarettes), and showed that it actually had no connection with Kallerup, and there was no evidence that Kallerup was anywhere near the scene of the crimes near the time the crime happened. (*Ibid.*)

In *People v. Yeoman* (2003) 31 Cal.4th 93, 140, this Court found that the trial court's exclusion of third-party culpability evidence was proper where neither the third-party "nor his accomplice was seen in the vicinity of [the victim's] house at or about the time of the killing." On the other hand, "testimony that an unidentified person unlike defendant in appearance had left the murder site close to the time of the crime was highly relevant" and therefore admissible. (*Id.*, 31 Cal.4th at p. 141.)

The case at bench was not an abstract failure to investigate every possible lead, as was the case in *People v. Page*, *supra*, 44 Cal.4th at p. 34; or a case like *People v. Pride* (1992) 3 Cal.4th 195, where the victim's husband, who had a generic "motive," was not shown to be anywhere near the crime scene at the time the crime was committed. (*Id.*, 3 Cal.4th at pp. 237–238.) Here, there is evidence that not long before the victims were killed at Sam Ortiz's house, Vernon Neal kicked in the door to Sam Ortiz's house and got into a fight with both the deceased, presumably to stop LaTonya from drug use—even though Vernon Neal was a known drug user himself. (38 RT 6157–6158, 6163, 6181.) There is evidence of Vernon lying about his feelings for LaTonya, and lying about why he was searching for her throughout the night—even to the point of going to the house of an enemy sleeping with LaTonya, a man with whom he had previously been in

a fight, and doing this instead of showing up on time for the first day of a new job. (See AOB 64–79.)

Vernon Neal had more than a general motive—he had a demonstrated willingness to kick in the door of Sam Ortiz's house when LaTonya was inside sleeping with Sam. He had more than an abstract opportunity—he was there on the scene no later than a few minutes after the crimes were committed, and had been looking for LaTonya throughout the night. Unlike Mr. Weatherton, Vernon had an opportunity to dispose of the instruments and fruits of the crime; he could have taken them all back to his house, where he stayed for an hour before returning to the crime scene. The evidence so showing could have raised a reasonable doubt as to whether Mr. Weatherton committed the acts for which he was convicted. It was error to not allow him to present it to the jury. (*Hall, supra; Holmes, supra.*)

C. The Evidence at Issue Was Relevant Evidence Undermining Vernon Neal's Credibility

How was Vernon Neal's testimony important to the prosecution's case? He was not only the purported "discoverer" of the bodies no later than minutes after the crime took place, but he was the origin of the prosecution's theory that Mr. Weatherton ran through the tamarisk trees towards the canal in order to dispose of the murder weapon; he told the police of seeing someone flashing along while he was driving his car away

from the scene of the crimes. (27 RT 4358; 28 RT 4471.) Officer Johnson began looking for footprints of Mr. Weatherton where he thought Mr. Weatherton was seen by Vernon Neal. (34 RT 5513.) According to his brother Curtis, Vernon told the police that he saw Mr. Weatherton heading for the canal, and that Mr. Weatherton had a gun. (See 37 CT 10969–10970.) When the trial court pressed the prosecutor to itemize corroboration in this case, the prosecutor quoted one witness—Vernon Neal. (41 RT 6598–6599.) He was a valuable witness for the prosecution.

Respondent argues that the problem with LaBritta Ross's testimony is not that it is hearsay,[9] but that it is irrelevant. (RB 26.) He states that "even if Roberson was upset at Neal at a particular point in time, she did not necessarily stay upset with him or stop seeing him or associating with him." (RB 27.) Respondent further asserts that Neal and Roberson "seemingly had reconciled over these events." (RB 27–28.)

There is evidence of LaTonya and Vernon breaking up and getting back together, but there is no evidence at all of reconciliation after Vernon Neal had forced open the door to Sam Ortiz's house because LaTonya was inside with him. There, Vernon got into a "little melee" that featured a golf

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[9] No one challenged the trustworthiness of either LaBritta Ross or Yolanda Harmon when they related what they had been told by LaTonya and Vernon Neal.

club being swung at him—an incident that he felt he had to explain to Yolanda Harmon. Vernon Neal said at the 402 hearing that LaTonya eventually asked him for a ride home that night (27 RT 4405–4406), but the jury should have been allowed to disbelieve that happy ending[10] — especially since LaTonya returned to Sam's house, and was found there again by Vernon Neal in the early morning of November 1, 1998.

In sum, the excluded evidence was relevant to impeach Vernon's testimony by (1) undermining both his explanation as to why he was looking for LaTonya all night and casting doubt on his characterization of his feelings for LaTonya, and (2) providing evidence of a motive to falsely cast blame on appellant.

D. The Errors in Restricting the Presentation of Evidence Were Prejudicial

Respondent states that Mr. Weatherton was "the only logical suspect" in this case (RB 33), but Vernon Neal is a much more logical suspect. He was stalking LaTonya all night long. He looked for her at her house, and then at Ernest Hunt's house. (28 RT 4464.) Early that morning, he went to her house, and learned from her brother that she had gone to Sam Ortiz's house, about 15 minutes before he arrived. (27 RT 4375; 28 RT

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[10] Yolanda Harmon testified that Vernon told her he "tried" to get LaTonya to come away with him. (38 RT 6179.)

4493.) He then headed over to Sam Ortiz's house, even though he was late for work on the first day of his new job. This is not the behavior of an indifferent man.

His proffered reasons were contradictory (either to give her money so she could have a birthday party for her child, or to keep her from blowing her welfare check on drugs), and each implausible; he was a known drug user himself. His jealousy was attested to by LaBritta Ross, a close friend of the deceased. Finding a loved one in bed with another has long provoked outbursts of unrestrained violence. The perpetrator overlooked $40.00 in Sam Ortiz's wallet; an unlikely error if the perpetrator had been motivated by a need for money.

As counsel argued to the jury, Ms. Bell was convinced that Ernest Hunt was in mortal danger from Mr. Weatherton, and attributed these sentiments to the deceased LaTonya Roberson—but such enmity was unlikely. It was undercut by Mr. Hunt's having given Mr. Weatherton permission to sleep on his property and use his house, and was denied under oath by Mr. Hunt. No one has explained why anyone would seek to gain entrance into the crime scene by falsely saying that "Ernest Hunt is dead." According to Nelva's hospital testimony, the perpetrator cried out the name of LaTonya over and over and over. (40 CT 11543.) Vernon Neal testified

that this is exactly what he yelled out when he approached the house. (AOB 27; 27 RT 4351–4352.)

Finally, respondent's assertion that the evidence is "overwhelming" is not only unsupported by this record, but it is belied by the jury's behavior. One juror was undecided, while three jurors initially voted to acquit. One of them (Juror No. 8) was removed by the trial court, but contentious deliberations continued. A verdict was reached after 11 hours of deliberations and many rereads of testimony. Not long thereafter, a seated juror and two alternates approached defense counsel with complaints about the deliberations, leading to hearings on juror misconduct that lasted nearly as long as the trial itself.

Aside from the merits of those claims (see Args. IV–VII, *post*), they support Mr. Weatherton's analysis of the record by suggesting that the evidence against Mr. Weatherton was far from overwhelming. This case was contentious, and very close. The trial court's refusal to allow evidence pointing at Vernon Neal as the perpetrator of the crimes at bench and undermining Vernon Neal's credibility was prejudicial error.

II. THE TRIAL COURT'S UNDISPUTED ERROR IN SUBJECTING MR. WEATHERTON TO PHYSICAL RESTRAINTS WAS PREJUDICIAL.

Respondent acknowledges that the trial court, relying on precedent that was subsequently overruled by this Court, ordered the use of restraints without making a finding of manifest necessity, and thus that the shackling order was error. (RB 35, 39.) Respondent argues that this error does not require reversal because (1) the record does not demonstrate that the jury was aware of the leg brace, and (2) the error was harmless. Respondent is wrong on both counts.

A. The Jury Knew That Mr. Weatherton Was Restrained

In cases where this Court, and federal courts, have found no evidence in the record indicating that the jury was aware of physical restraints, there has been no finding of prejudice. (See, e.g., *People v. Lightsey* (2012) 54 Cal.4th 668; *People v. Letner* (2010) 50 Cal.4th 99, 154–156; *People v. Ervine* (2009) 47 Cal.4th 745, 773–774; *People v. Cleveland* (2004) 32 Cal.4th 704, 740 ["'We have consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury'"]; *Unites States v. Mejia* (9th Cir. 2009) 559 F.3d 1113, 1117 ["'When the jury never saw the defendant's shackles in the courtroom, we have held that the shackles did not prejudice the

defendant's right to a fair trial'"]. See also *Packer v. Hill* (9th Cir. 2002) 291 F.3d 569, 583, overruled on other grounds, *Early v. Packer* (2002) 537 U.S. 3 [holding that defendant who was improperly placed in a leg brace for security reasons suffered no prejudice where no jurors interviewed after trial recalled seeing the brace].)

Here, unlike any of these cases, the trial court itself weighed in to make the record clear that when Mr. Weatherton stood up to greet the jury, there was an audible click on the leg brace. The court stated,

> 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 that the jury could hear it if they were alerted to what was happening. They might not have even realized it.

(10 RT 1142.)

Mr. Weatherton's restraints were not only audible in the courtroom, they were visible to the jury at the jury viewing of the crime site. (43 RT 7008.) Respondent states that it was possible that the jury did not locate Mr. Weatherton as the source of the sound, and says that "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." (RB 42.) The case law, however, does not require that the jury be bowled over by the restraints. If the jury was aware that a determination had

been made that the accused had to be physically restrained, then a good portion of the damage caused by the use of restraints had been done.

In *Holbrook v. Flynn* (1986) 475 U.S. 560, 568–569, the high court observed that shackling, like prison clothing, is an indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy. Therefore, "[i]n the presence of the jury, [the defendant] is ordinarily entitled to be relieved of handcuffs, or other unusual restraints, so as not to mark him as an obviously bad man or to suggest that the fact of his guilt is a foregone conclusion." (*Stewart v. Corbin* (9th Cir. 1988) 850 F.2d 492, 497.)

As this Court wrote in *People v. Duran* (1976) 16 Cal.3d 282,

> [T]he shackling of a criminal defendant will [cause] prejudice in the minds of the jurors. When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged.

(*People v. Duran* (1976) 16 Cal.3d 282, 290; see also *People v. Tuilaepa* (1993) 4 Cal.4th 569, 583–584.)

Respondent speculates that the jury may not have located the sound in the person of Mr. Weatherton, but it's far more likely that since the sound consisted of the brace locking when Mr. Weatherton stood up, that the jury

knew very well from whence the sound came; after all, the trial court's comment was made just after Mr. Weatherton stood up for the purpose of greeting the jury, at a time when the jury's attention was almost certainly on him. The most reasonable conclusion on this record is that the jury was well aware that Mr. Weatherton was restrained during his trial.[11]

When the defendant's erroneous shackling was known to the jurors in the courtroom, habeas relief is likely. (See *People v. Duran*, *supra*; *Rhoden v. Rowland* [II] (9th Cir. 2002) 172 F.3d 633, 636–637 [citing cases]; *Dyas v. Poole* (9th Cir. 2003) 317 F.3d 934, 937, cert. den., 540 U.S. 937 [defendant who concededly was unconstitutionally shackled during trial showed prejudice from the shackling when at least one juror saw the shackles in the courtroom during trial, the defendant was charged with a

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[11] The trial court, in an attempt to mitigate the impact of jurors' awareness of the physical restraints, gave an instruction confirming that Mr. Weatherton had been restrained:

> The fact that physical restraints have been placed on the defendant must not be considered by you for any purpose. They are not evidence and must not be considered by you. You must not speculate as to why restraints have been used in determining the issues in this case. Disregard this matter entirely.

(46 RT 7516; 59 RT 8893–8894.)

Such instructions have never been thought to eliminate the inevitable prejudice caused by the apparent need to physical restrain the accused, and respondent does not argue otherwise.

violent offense which increased the risk that the shackles branded her as having a violent nature, and the evidence of guilt was not overwhelming].)

In *People v. Sanchez* (2011) 200 Cal.App.4th 70, the court distinguished the presence of armed officers in the courtroom: "While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. [Citation omitted]." (*Id.*, 200 Cal.App.4th at p. 75.) This Court made a similar distinction in *People v. Stevens* (2009) 47 Cal.4th 625, 633–634.

It may be that a leg brace won't create the same sense of anxiety as does the stun belt (see *People v. Mar* (2002) 28 Cal.4th 1201, 1224), but it has every bit as much an impact on the presumption of innocence. Respondent asserts that because the leg brace did not impair Mr. Weatherton's ability to think clearly in the same manner as a stun belt, it did not implicate the factors identified as important to due process by the supreme court in *Deck v. Missouri*; "accordingly, any error in the application of a leg brace should be reviewed under *Watson* as an error of state law." (RB 41.)

Respondent is wrong. In *Deck v. Missouri* (2005) 544 U.S. 622, the high court identified three values that are undermined by shackling made evident to the jury. The primary factor, one affected by any form of observable restraint, is the damage done to the presumption of innocence.

> [T]he criminal process presumes that the defendant is innocent until proved guilty. *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895) (presumption of innocence "lies at the foundation of the administration of our criminal law"). Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. Cf. *Estelle, supra*, at 503, 96 S.Ct. 1691. It suggests to the jury that the justice system itself sees a "need to separate a defendant from the community at large." *Holbrook v. Flynn* (1986) 475 U.S. 560, 569.

(*Deck, supra*, 544 U.S. at p. 630.)

Mr. Weatherton was the only African-American in the courtroom for much of the trial, and he was also the only person under physical restraint in the courtroom. The dignity of the proceedings was not undone as much as it would have been had there been visible chains around Mr. Weatherton, and his ability to communicate with counsel was not as impeded as it would have been by chains, but the limits on his physical movements marked him as dangerous, as different from everyone else in the courtroom.

B. The Error Was Prejudicial

Finally, in evaluating the prejudicial impact of unlawful restraints the strength of the case is a legitimate factor to consider, along with the nature

of the charges and the nature of the restraints. Here, the case was close, both in theory and in practice.

1. Theory

A direct eyewitness identification was countered by the lack of any physical evidence that would reasonably be expected when the accused was arrested near the crime shortly after its occurrence. The crime scene was dark, the eyewitness was under stress. She was a chronic user of cocaine who was under the influence of drugs, and who had a paranoid view of Mr. Weatherton that continued years later, when she blamed him for causing her to be detained for the sale of cocaine even though he had long been incarcerated in jail.

2. Practice

The jury was torn. Its initial ballot included three votes for acquittal. It asked for several rereads, and deliberated over 11 hours for several days before reaching its verdict. It was entirely reconstructed after a burst of misconduct caused two seated jurors and two alternates to be dismissed.

Contrary to respondent's claim, there was nothing "overwhelming" about the evidence against Mr. Weatherton in this case. The acknowledged error in subjecting him to physical restraints was prejudicial, and requires that his conviction and sentence be set aside. The unlawful shackling, by

suggesting that he was dangerous and violent and needed to be separated from the community, prejudiced Mr. Weatherton, both on the issue of guilt or innocence, and the question whether, if guilty, he should be put to death.

III. THE TRIAL COURT PREJUDICIALLY ERRED IN PREVENTING MR. WEATHERTON FROM QUESTIONING NELVA BELL ABOUT HER SALES OF COCAINE, AND RESISTANCE TO HER APARTMENT BEING SEARCHED.

Mr. Weatherton sought to impeach Nelva Bell's statements to her advocate Cynthia Galvan that the police had searched her whole apartment, and to the trial court that the police looked anywhere they wanted—evidence which came before the jury—by calling Riverside County Deputy Sheriff Justin Anderson to testify, as he had at a section 402 hearing, that Ms. Bell told him to get a warrant, and had not allowed him to search her whole apartment. The trial court did not permit Mr. Weatherton to introduce that testimony and also refused to allow any exploration by Mr. Weatherton of where Ms. Bell got the crack cocaine that she sold to Ms. Cecena. Finally, the court also refused to allow any evidence showing a promise or delivery of leniency. (26 RT 4097.)

Respondent notes that "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." (RB 47.) The fact that she was never arrested and faced no criminal charges at all, however, for the repeated violations of Health and Safety Code section 11352, is vivid and eloquent evidence that she actually received leniency. Mr.

Weatherton should have been allowed to ask Ms. Bell if she was ever arrested or tried for her sales of cocaine.

Respondent states that Anderson's testimony and Bell's testimony about the search of her apartment were not actually inconsistent; "both Bell and Anderson testified that a search of Bell's bedroom took place." (RB 47.) This shows a misunderstanding of the record. Bell testified that Anderson "could do what he wanted." (26 RT 4085.) She told Cynthia Galvan that the police had searched her entire apartment. (25 RT 3975.) But Deputy Anderson was clear that he could *not* do what he wanted:

> A. We moved from the living room back toward her bedroom, and she appeared to be getting nervous and asked us to go get a warrant. At that time she became upset.
>
> Q. Did she let you search her whole apartment?
>
> A. No.

(24 RT 3724.)

Deputy Andersen also testified at the section 402 hearing that he let Ms. Cecena go because the amount of drugs she had was very small, and she was a useful source of information. (24 RT 3721.) He was, however, interested in her source. When asked by the trial court why he followed up by going to Ms. Bell's apartment after destroying the drugs he found on Ms.

Cecena, he answered, "My intention was to find the larger quantity and possibly someone selling it." (24 RT 3731.)

Respondent states that "whether this was a completed search or not is a matter of semantics and not proper impeachment." (RB 42.) According to Deputy Anderson, it was a matter of fact. Ms. Bell was allowed to falsely minimize every part of her involvement. She presented her crimes to the jury as disinterested acts of charity. (26 RT 4180; 27 RT 4225, 4290.) Mr. Weatherton should have been allowed to impeach her with Anderson's testimony that she evaded his questions about whether or not she sold cocaine, and demanded that he get a warrant before continuing to search her house. Deputy Anderson could also have testified about her demeanor, which became hysterical (see 23 RT 3723–3725), and whether as she claimed, he truly asked her about "a guy named Stanley," and if she had a lot of guns in her apartment. (See Ms. Bell's testimony at 26 RT 4082.)

Finally, Mr. Weatherton was not allowed to explore where Ms. Bell got her cocaine, which may well have led to evidence that she sold cocaine to more than one person, on more than two occasions. Refusing such questions helped respondent to minimize Ms. Bell's involvement, and limit it only to those acts for which a law enforcement officer had already obtained evidence of her criminal activities. For the reasons set forth in his

opening brief, at pp. 119–121, Mr. Weatherton was prejudiced by the trial court's refusal to allow him to impeach the most critical witness against him.

IV. PREJUDICIAL JURY MISCONDUCT REQUIRES REVERSAL OF MR. WEATHERTON'S CONVICTIONS AND SENTENCE OF DEATH.

A. Juror No. 1 Committed Prejudicial Misconduct

There is no doubt that, as the trial court stated, Juror No. 1 committed "serious misconduct." (68 RT 10118; RB 60.) As respondent notes, "the only question on appeal with respect to Juror No. 1 is whether the misconduct is prejudicial." (RB 60.)

Respondent insists that the trial court's ruling that it was not prejudicial be deferred to by this Court, even in the weight it gave to Juror No. 3's psychological speculations about why Juror No. 1 had prejudged the case, because "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.)" (RB 62, fn. 13.)

Respondent omits the context of this quote, which was limited to the initial determination of whether or not misconduct occurred—a question already settled in this case. The full quote from *Nesler* reads as follows:

> *In determining whether misconduct occurred*, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] *Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact*

subject to an appellate court's independent determination. [Citations.]"

(*People v. Nesler* (1997) 16 Cal.4th 561, 582, emphasis added.)

Accordingly, the Court's task is to make an independent determination of prejudice based on the facts as found by the trial court if they are supported by substantial evidence, giving those facts the weight the Court believes they deserve in light of controlling law.

1. The "Most Compelling Evidence"

In his opening brief, Mr. Weatherton demonstrated that the trial court's reliance on Juror No. 3's recorded statement was misplaced, and that her statement actually supports Mr. Weatherton's depiction of Juror No. 1's behavior. (AOB 192–194.) The trial court's holding that the taped statement somehow absolves Juror No. 1 of having committed prejudicial misconduct was an arbitrary and unsupported conclusion. Respondent does not challenge any of appellant's reasoning or presentation of facts, but simply urges this Court to defer to the trial court's conclusions. (RB 62–63.)

Respondent analogizes Juror No. 1's statement as quoted in Juror No. 3's taped interview[12] to the juror statement quoted by this Court in

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[12] Respondent quotes Juror No. 3 as follows: "Juror No. 1 'made a statement that um, well, no matter what happens I am going in there and vote guilty the first time I vote because just in case.'" (RB 62.) Juror No. 1's statement was made at lunchtime to a group of jurors during the

People v. Allen (2011) 53 Cal.4th 60, 72–73.[13] The timing and substance of these statements have nothing in common. Juror No. 1's statement was one of a series of blatant violations of court orders not to discuss the case outside court while it was being presented, while the statement from the juror in *Allen* was made during juror deliberations, when the strength or weakness of the case was precisely the issue to be discussed.

Respondent suggests that Juror No. 1's statement that he was going to vote guilty on the first opportunity supports an inference that he was open to changing his mind on subsequent votes. (RB 63.) That is an unreasonable stretch that is not supported by any of the other testimony by or about Juror No. 1.

Respondent then writes, "Juror No. 3's belief, expressed on the tape recording, that Juror No. 1 intended to vote guilty on the first vote 'because he wanted to discuss it' (65 RT 9633), while speculative, is nonetheless logical." (RB 63.) Respondent believes that Juror No. 1's plan to vote guilty on the initial ballot was to "communicate his initial views on the state of the evidence to the jury." (RB 63.)

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presentation of the case against Mr. Weatherton. (64 RT 9633; AOB 192–194.)

[13] In *Allen*, a juror was quoted as follows: "When the prosecution rested, she didn't have a case." The statement was made on the fifth day of juror deliberations. (*Id.*, 53 Cal.4th at p. 72.)

But that's exactly what Juror No. 1 was doing during mid-trial lunches (64 RT 9523; 65 RT 9640–9641), in the car as he rode to and from the courthouse (52 RT 8294–8295; 55 RT 8395–8398; 65 RT 9649–9652), on the telephone (54 RT 8289; 55 RT 8399–8400), and in the courtroom hallway (52 RT 8294–8295; 55 RT 8409–8410; 63 RT 9361–9396, 9371, 9417; 63 RT 9373–9375; 68 RT 9999–10003)—repeatedly expressing his view that Mr. Weatherton was guilty outside the courtroom during the presentation of evidence. Juror No. 3's psychological speculations about Juror No. 1's motives or maturity do not magically negate the reality of or minimize the prejudicial effect of Juror No. 1's misconduct.

At a minimum, read most generously to Juror No. 1, the version of Juror No. 1's statements set forth on Juror No. 3's taped interview establishes that Juror No. 1 was a biased juror. A juror who is committed by mid-trial to vote "guilty" on the initial ballot "no matter what happens" (64 RT 9633) is hardly the fair and open-minded juror constitutionally guaranteed to a criminal defendant. Such a juror is not in a position to fairly and objectively evaluate evidence and argument yet to be presented on the defendant's behalf. Further, Juror No.1's repeated assertions to other jurors of his view that appellant was guilty could only have reinforced and cemented his bias.

The trial court noted that Juror No. 1 did not consider any extraneous evidence and did not arrive at the courthouse with a prior opinion. (68 RT 10018.) True enough. The trial court also referred to Juror No. 1's testimony that Nelva Bell's compelling testimony was reinforced by the playing of her videotape, which was done during the prosecution's rebuttal case, and stated that the fact that there was a request for a re-read of testimony "indicates that the jurors still had an open mind, were still considering the evidence, and [Juror No. 1] testified that that reinforced his initial premature voicing of an opinion based on the evidence." (68 RT 10018.)

The fact that an unnamed juror requested a reread in no way shows that Juror No. 1 had an open mind. The fact that Ms. Bell's testimony was re-read, and "reinforced his initial premature voicing of an opinion," does not absolve him of bias, or show that he did not commit prejudicial misconduct. Respondent asserts that "the record further reflects that Juror No. 1 participated in deliberations and the read backs of testimony." (RB 64.) Respondent does not cite to any part of the record that so reflects, because it does not exist.

Respondent asserts that "there is no evidence that Juror No. 1 conclusively prejudged the case." (RB 64.) Respondent errs in suggesting

that "conclusive" prejudgment is the *sine qua non* of bias, but in any case respondent overlooks Juror No. 1's own sworn testimony, given after he was given immunity by the prosecution for any crimes acknowledged during his testimony:

> Q. In other words, "do not form or express any opinion on this matter until it is submitted to you." So in light of that instruction, would you say that you had formed an opinion of guilt in violation of that instruction?
>
> THE COURT: Wait a second. You asked him two questions. The first question was do you recall this instruction?
>
> THE WITNESS: Yes.
>
> THE COURT: Go ahead and ask a new question.
>
> Q. Did you violate that by forming an opinion of guilt before the case was submitted to you?
>
> A. I did form an opinion.
>
> Q. Do you know—You formed an opinion as to the defendant's guilt; is that correct?
>
> A. Yes.
>
> Q. That was before the case was submitted to you?
>
> MR. VINEGRAD: Asked and answered.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes.

(67 RT 9969.)

Juror No. 1 thus admittedly formed an opinion about Mr. Weatherton's guilt before deliberations began. There is also little doubt that, as the trial court said to Juror No. 1, "it is pretty clear to me that you were basically talking to everybody about the case during the whole time prior to deliberations and during deliberations." (55 RT 8400.) Here, "talking to everybody" consisted of the expression to many people, on numerous occasions outside the courtroom during the presentation of evidence, that Mr. Weatherton was guilty. This means that Juror No. 1 had prejudged the case.

Juror No. 1 was also an admitted, and repeated, perjurer. He was not only a perjurer himself, but assumed and evidently hoped his fellow jurors would commit perjury as well. He initially denied saying anything at all about the case to anyone prior to deliberations. He denied ever making telephone calls to anyone, and said that he was uncertain as to how he would vote until deliberations began. (55 RT 8314–8315.) He said the same thing when called back to the witness stand on the following day. (56 RT 8412–8413.)

After being granted immunity, however, he acknowledged that his prior testimony was false. He assumed that other jurors were "covering up" for him, as he was covering up for them. (68 RT 9934–9935.) His testimony

was entirely self-serving throughout these proceedings, and was all designed to obtain and then preserve Mr. Weatherton's convictions, regardless of the truth.

2. Evidence of "Influence"

The record thus shows that Juror No. 1 prejudged the case by forming an opinion before deliberations began, and that he repeatedly expressed his views to other jurors outside the courtroom, in the halls of the courthouse, on the way to and from the courthouse, and at shared meals during lunch time, including other jurors. Respondent echoes the trial court, and contends that "there was no evidence that Juror No. 1's improper expression of his opinion influenced any of the other jurors." (RB 64.)

Mr. Weatherton is not required to show prejudice by presenting this Court with affidavits from jurors about what influenced their verdicts. In fact, the law (Evid. Code, § 1150) prohibits him from doing so. As this Court wrote in *People v. Steele* (2002) 27 Cal.4th 1230:

> In *Tanner v. United States* (1987) 483 U.S. 107 [107 S.Ct. 2739, 97 L.Ed.2d 90], that court interpreted Federal Rules of Evidence, rule 606(b) (28 U.S.C.), the federal counterpart to Evidence Code section 1150, as allowing evidence of "extrinsic influence or relationships [that] have tainted the deliberations" (*Tanner v. United States, supra*, at p. 120 [107 S.Ct. at p. 2747]), but precluding evidence of a juror's thought processes and even evidence by some jurors that other

> jurors had been intoxicated and had slept through parts of the trial.

(*People v. Steele*, *supra*, 27 Cal.4th at p. 1262.)

The whole point of Evidence Code section 1150 is to avoid such contests over psychologically obscure issues of motivation and influence. The statute provides, "No evidence is admissible to show *the effect* of such statement, conduct, condition, or event upon a juror either in influencing him to assent or to dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a), emphasis added.)

Respondent says that "juror numbers 3 and 8 initially voted not guilty, indicating that they were not swayed by anything they may have heard Juror no. 1 say prior to deliberations." (RB 64.) But the first ballot was eight jurors for guilt, three for innocent, and one undecided. (65 RT 9642.) Who was the undecided vote? Who was the other juror who changed his or her mind? What changed these votes? The last holdout, Juror No. 3, changed her vote to Guilty, and immediately regretted it—what were the pressures on her that led to the switch?

We have no idea. We do know, however, that Juror No. 1 identified Juror No. 3 early in the presentation of evidence as a likely obstacle to his goal of getting Mr. Weatherton convicted and sentenced to death, and was

determined to change her vote. (AOB 198–200.) No one can say now that Juror No. 1's energetic insistence on Mr. Weatherton's guilt, and his steady attack on a juror he early identified as his chief opponent, did not have the desired effect.

There is a presumption of prejudice in a jury misconduct case primarily because of the difficulty of proving the subjective influence of misconduct. (*Hassan v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416.) There is a substantial likelihood that Juror No. 1's "serious misconduct" influenced one or more jurors during these contentious deliberations. Respondent has not, and cannot, overcome the presumption that this misconduct was prejudicial.

B. Juror No. 11 Committed Prejudicial Misconduct

Respondent does not dispute any of Mr. Weatherton's summary of the factual record as presented at AOB 216–220. His focus is on the trial court's ruling. (RB 65–67.) That ruling is at odds with the factual record, and with the applicable law.

In rejecting this claim, the trial court stated that it heard various jurors say that it was "common sense" that someone would fall back if they were shot, and "common sense" with a stabbing that you would have blood slinging around. (68 RT 10060–10061.)

According to the testimony of the jury foreman, Juror No. 5, and Juror No. 11 herself, Juror No. 11 was trying to *counter* "common sense," or what most people think and what the televison and movies show, with specialized knowledge about the behavior of blood that came from her training. (See 64 RT 9523 [Juror No. 3, AOB 178]; 66 RT 9768–9769, 9770–9771 [Juror No. 5, AOB 216–218]; 66 RT 9798–9799 [Juror No. 11, AOB 218–219].)

Respondent relies primarily on *People v. Steele* (2002) 27 Cal.4th 1230, for support. (RB 65–67.) In *Steele*, jurors who had been in the army and who had medical experience referred to their experiences in discussing the evidence; this Court held that it was proper, even inevitable, for jurors to rely on their life experiences. (*Id.*, 27 Cal.4th at pp. 1265–1267.) However, *Steele* recognized the continuing validity of this Court's holding in *In re Malone* (1996) 12 Cal.4th 935, 963, that "injecting an opinion explicitly based on specialized information obtained from outside sources was misconduct." (*Steele*, 27 Cal.4th at p. 1265.)

Juror No. 11 explicitly referred to her specialized training as support for the weight of her opinion that blood would not bounce back, or "splatter out," from the victim to the shooter. (See 68 RT 10061; 66 RT 9792–9803.) Mr. Weatherton demonstrated in his opening brief that this is not true. The

"back spatter" of blood from the victim of a close-range shooting would likely take the form of a mist that would fly back three or four feet towards the shooter. (See AOB 227.)

Respondent states that even if this were correct, "it would not foreclose the possibility that Weatherton could have shot the victims without contacting any blood spatter." (RB 66.) He cites the testimony of Dr. Ercoli that *Nelva Bell* had not lost a significant amount of blood as support for his argument that Juror No. 11 was correct, and again to support his contention that even if misconduct was committed, it was not prejudicial. (RB 67, 68.)

Respondent is missing the point. In his opening brief, Mr. Weatherton referred to trial evidence showing that the shooter of *LaTonya Roberson* was close enough to her to leave stippling on her body, or within 18–24 inches. (AOB 227; see 31 RT 4975–4977 [stippling explained]; 32 RT 5210 [stippling visible on LaTonya Roberson's forehead].)

This evidence was important to both parties in closing argument. Counsel for Mr. Weatherton argued that Nelva Bell was mistaken in her description of events because she described LaTonya being shot from across the room, while the physical evidence showed that she was shot from close up. (46 RT 7618–7619) The prosecutor countered with argument that

the smallness of the room made Ms. Bell's testimony plausible. (46 RT 7715–7716.) The parties did not dispute the physical evidence showing that the shooter of Ms. Roberson was close to her. Respondent does not mention any of this evidence and confines himself to an irrelevant discussion of Dr. Ercoli's examination of Ms. Bell.

The misconduct at issue was prejudicial. The point was a strong one for Mr. Weatherton, who was arrested shortly after the crime was committed while wearing the clothes he had worn the night before, and whose person and clothing and shoes were thoroughly tested for the presence of blood. Counsel made much of this in closing argument, and the prosecutor replied in detail. (46 RT 7596, 7618–7620, 7636–7642, 7656 [defense argument]; 47 RT 7671–7672, 7679–7681, 7712–7715, 7718, 7722 [prosecution argument].)

We know that blood spatter was a subject of contention in the jury room. (Args. IV, VI.) Had Mr. Weatherton known about the "expert opinion evidence" being provided to the other jurors by Juror No. 11 in an effort to explain why he had no blood anywhere on him, he could have presented evidence of his own showing that Juror No. 11's expertise was mistaken, that blood spatter does bounce back at such a close distance, and the shooter would very likely have been marked by blood.

Because this "testimony" came during deliberations, Mr. Weatherton never had an opportunity to correct or contest it with evidence of his own. The misconduct at issue thus violated fundamental principles of due process that require convictions to be based only on evidence presented in open court. (See *Gardner v. Florida* (1977) 430 U.S. 349, 362 ["We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."].) The presumption of prejudice has not been, and cannot be, rebutted by respondent. Mr. Weatherton's convictions and sentence should be set aside.

V. MR. WEATHERTON WAS PREJUDICED BY THE TRIAL COURT'S FAILURE TO EXERCISE ITS DISCRETION AND ITS POSTPONEMENT OF MR. WEATHERTON'S MOTION FOR A NEW GUILT PHASE TRIAL UNTIL AFTER THE PENALTY PHASE WAS COMPLETED.

Respondent asserts that Mr. Weatherton received all that the law required regarding the timing of his motion for a new trial, because "the timing of when to hear and rule on the new trial motion was a proper exercise of the trial court's discretion." (RB 70.) Mr. Weatherton's point, however, was that the trial court failed to exercise its discretion; it mistakenly believed that it had no choice but to require Mr. Weatherton to give the prosecution ten days's notice and make a motion in writing. (55 RT 8422.)

Respondent seems to recognize that the trial court's sense of the applicable law was mistaken. Respondent notes this Court's holding in *People v. Braxton* (2004) 34 Cal.4th 798, and the Court's observation that oral motions have long been approved and were the only way to bring new trial motions for decades, and that counsel should bring such motions in a timely fashion. (RB 69.) Respondent further observes that the rule of court probably referred to by the trial court (Cal. Rules of Court, rule 4.111(a)), refers specifically to pretrial motions, and concludes with a grudging concession that the trial court was probably wrong: "there is some question

whether the rule and the 10-day notice requirement apply to motions for new trial." (RB 69.)

Respondent argues that in any event there was no error because the statute (§ 1182) only requires that the motion be determined before judgment, and no harm because no misconduct occurred. (RB 70.) Respondent ignores Mr. Weatherton's argument that the trial court's misunderstanding of the law meant that it failed entirely to exercise its discretion. (See AOB 233–234; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)

It was an abuse of the trial court's discretion not to proceed with the new trial motion before proceeding to the next phase of Mr. Weatherton's trial. The prosecution declined to question the 12 jurors sitting on Mr. Weatherton's case when the trial court called them to the stand. The prosecutor did not respond to the trial court's comment that it passed on the opportunity to question and cross-examine the jurors during a timely hearing.[14] It should not have been rewarded for this failure by being allowed

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[14] The trial court told the prosecutor, "This is your opportunity to rebut the jury misconduct by Juror No. 1, and maybe others, I don't know. What do you have? You didn't ask any questions. I don't know what we could do to rebut that." (56 RT 8457.)

to go to the jurors' houses in force after the trial (68 RT 10009) and interview them after Mr. Weatherton had been sentenced to death.

Respondent writes, "Weatherton claims that allowing the penalty phase to proceed before ruling on the motion skewed the trial court in favor of denying the motion, he fails to offer any explanation as to why this would be the case." (RB 70.) But Mr. Weatherton presented two reasons: (1) the prosecutor gained the advantage of visiting each juror, together with police officers and investigators, before the jurors reappeared to testify again as witnesses; and (2) the fact that the trial, and penalty phase, had concluded with a death verdict meant effectively that the trial was over. (AOB 234–235.) The trial court's subsequent rulings inevitably would be affected by the existence of a penalty phase verdict, and all the evidence presented that led to that verdict.

The trial court, despite having had ample reason to avoid doing so, had now invested its own time and energy—and that of jurors and witnesses —in a penalty phase trial, and had a personal incentive to avoid declaring that it had wasted that time and energy by doing so. The trial court's behavior, when the post-death-verdict hearing was conducted, clearly manifested the resulting bias. (See AOB Claim VII; and Arg. VII, *infra*.)

The trial court did not know the relevant law regarding motions for a new trial, and mistakenly relied on the prosecutor for direction. It did not exercise its discretion. The delay until after a death verdict and after the jurors were released from their duties was never justified, and had an incalculable effect on the juror's testimony. The failure to exercise discretion and proceed with the misconduct hearing when the misconduct was discovered, and before a penalty phase trial, was prejudicial. There is a reasonable likelihood that had the hearing proceeded in a timely manner, Mr. Weatherton's guilt verdict would have been overturned. (*People v. Watson* (1956) 46 Cal.2d 818, 836–837.)

VI. THE TRIAL COURT ERRED IN REFUSING TO CONSIDER EVIDENCE OF THE JURY FOREMAN'S MISCONDUCT.

Respondent does not dispute the truth of Juror No. 3's declarations describing refusals by the jury foreman to request read-backs of testimony; nor did the trial court. The trial court ruled that the disputed paragraphs of Juror No. 3's declarations were not admissible due to Evidence Code section 1150. (See AOB 237–240.)

Respondent argues that the issue has been waived: "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." (RB 71.)

The fundamental issue, however, was the failure to allow evidence that would have established juror misconduct. Mr. Weatherton did not forfeit this issue at trial, and he was clear enough in his opening brief to fairly present this issue; see AOB 236–237:

> Mr. Weatherton concedes that commentary about the impact of the 'bloody footprint' dream was properly excluded. However, evidence of the fact that a bloody footprint was discussed, together with the fact that the jury foreman refused to ask that the jury be provided with testimony and/or exhibits on this topic when requested by a skeptical juror, was evidence of jury misconduct. . . .

Mr. Weatherton was prevented from proving the misconduct had occurred by the trial court's rejection of the evidence presented in Juror No. 3's declaration. The error complained of here is the trial court's wrongful application of Evidence Code section 1150 and its refusal to consider this evidence, which was evidence of jury misconduct, given the foreman's obligation to request that the assistance be given. (See Pen. Code, § 1138, and cases cited at AOB 242.)

Had the trial court held a hearing on this allegation as it should have done, (*People v. Keenan* (1988) 46 Cal.3d 478, 537), Juror No. 5, the foreman, would have been asked to confirm or deny this charge. The other jurors would have been asked about it as well. This would not have required an additional hearing; all jurors and percipient witnesses testified at length on other issues related to other charges of jury misconduct.

The trial court's ruling had the practical effect of not allowing evidence to be presented on potentially prejudicial jury misconduct. The trial court thus ruled that there was no conceivable issue even if Juror No. 3 was correct. That ruling was error. It was an essential part of the foreman's task to convey such requests to the trial court. Failure to do so was misconduct. Failure to allow Mr. Weatherton to introduce evidence

showing as much was prejudicial error. He has raised this issue fairly, and is entitled to a ruling on the merits of this claim.

VII. THE TRIAL COURT WAS BIASED AGAINST APPELLANT DURING THE JURY MISCONDUCT PROCEEDINGS.

Respondent initially notes that many of the examples provided by appellant of the trial court's bias against him took place after Mr. Weatherton filed his motion to disqualify the trial court; respondent asserts that they therefore cannot be considered: "[Mr. Weatherton's] 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.)" (RB 73.)

Lewis, however, was concerned with motions to disqualify. It is clear that Mr. Weatherton can raise the present due process claim. In *People v. Freeman* (2010) 47 Cal.4th 993, this Court, citing *People v. Chatman* (2006) 38 Cal.4th 344, addressed the issue of judicial bias and due process. (*Freeman*, 47 Cal.4th at p. 1000.) In *Chatman*, this Court explained that "a defendant who raised the [judicial bias] claim at trial may always 'assert on appeal a claim of denial of the due process right to an impartial judge.' [Citation.] While defendant may not raise the statutory claim on appeal, he may assert a constitutionally based challenge of judicial bias. [Citation.]" (*Chatman*, *supra*, at p. 363, fn. omitted.)

Here, Mr. Weatherton's motion was triggered by the trial court's lack of awareness of the relevant statutes governing motions for new trial,

and its reliance on the prosecutor for guidance. (41 CT 11861–11862.) Obviously, he could not anticipate precisely the course of events, but they revealed a tribunal so bound and determined to preserve Mr. Weatherton's convictions in the teeth of evidence showing they should have been overturned that it violated principles of fundamental fairness and due process of law.

Further, Mr. Weatherton's claim of judicial bias is a single claim. The separate instances reflecting the trial court's bias and described in this argument are record-based events supporting a judicial bias claim. Contrary to respondent's characterization, they are not separate claims which can be forfeited by not reciting them at trial as a basis for a judicial disqualification motion. Cumulatively they demonstrate that the trial court did not function as a fair and neutral tribunal at the hearing on the jury misconduct issues.

The U.S. Supreme Court has held that the objective standards implementing the Due Process Clause do not require proof of actual bias. *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 883–884.) However, there are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Id.*, citing *Withrow v. Larkin* (1975) 421 U.S. 35, 47.)

Relying on *Caperton*, this Court has summarized the legal principles applicable to review of a defendant's due process claim. "[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist '"the probability of actual bias on the part of the judge . . . [that] is too high to be constitutionally tolerable."' [Citation.]" (*People v. Freeman*, *supra*, 47 Cal.4th at 993, 996.)

As to the issues of jury misconduct and whether or not to grant Mr. Weatherton's motion for a new trial, the record demonstrates such an intolerable probability of judicial bias.

A. Disparate Treatment of "Hostile" and "Favorable" Juror Witnesses

Appellant cites several examples of obviously disparate treatment of jurors; failures to adhere to judicial admonitions by those who had filed declarations threatening to undermine the convictions were the subject of withering threats from prosecution counsel that were supported by the trial court, along with abusive questioning that caused one juror to break down in tears, while the same behavior—or much worse behavior, including acknowledgment of perjury—by jurors friendly to the verdicts was ignored by the trial court. (AOB 250–252.) Respondent seeks to justify the

threatening language from the trial court directed towards declarant jurors who had violated admonitions (RB 74–76), but does not challenge the truth or significance of the disparate treatment.

B. Spoonfeeding Desired Testimony to Juror No. 1

Respondent generally argues that the trial court was not directing Juror No. 1 what to say, but rather, directing him what to talk about—whether or not he had truly made up his mind as to appellant's guilt before deliberations began. (RB 77–78.) Respondent does not dispute appellant's discussion of how the trial court misrepresented the record in the case in attempting to lead Juror No. 1. The trial court's efforts to lead the juror were successful in the short term, with the juror echoing what the trial court had presented him. Later, however, when directly asked by appellant, he admitted that he had indeed made up his mind before deliberations. This admission may have undermined any claim of prejudice caused by the trial court's efforts but the efforts, and the trial court's inaccurate recall of the record, remain as evidence of bias. (See AOB 253–254.)

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

Respondent does not deny that jurors whose testimony and declarations threatened to undermine the verdict testified without any other witnesses in the courtroom, as had all previous witnesses during this trial, or

that jurors testifying in support of the verdict were allowed to hear each other testify—a disparate and unfair ruling to which even the prosecutor objected.[15] (AOB 255–256.) Respondent does not dispute any of the facts laid out in Mr. Weatherton's opening brief, but simply notes that it is within the trial court's discretion to so rule.

Appellant recognizes here, as he did in his opening brief, that the court had the power to allow witnesses to listen to each other's testimony, but it was an abuse of discretion in this context for the court to do so, and a vivid example of disparate treatment of similarly situated witnesses—those whose testimony supported the verdict were allowed to watch and listen to each other, while those whose testimony challenged the fairness of the deliberations each testified alone. This was a ruling that reflected judicial bias, particularly when viewed in light of the other rulings and actions described in this argument.

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[15] MS. CARTER: People object, your Honor.
The rules are the same for everybody. If you are going to be a witness, you can't sit in here. I am sure the victim's families would like to be in here, too, but those folks that are going to be called as witnesses in our case have been instructed not to come down and not to come into the courtroom because they are going to be witnesses.

(26 RT 4074, emphasis added.)

D. Overt Anger at Jurors Who Filed Affidavits Describing Misconduct

In answering appellant's claim of overt anger expressed by the trial court towards the three jurors who came forward, (RB 77–78) respondent seeks to justify the judge's remarks towards only one—Alternate Juror No. 1—even though the court's intemperate remarks quoted by appellant refer to "they" and "them" and are clearly aimed at all three offending jurors. (AOB 256–257.)

Respondent also misquotes the record to support an untrue statement. He says Alt. Juror No. 1 "baldly insisted that she would continue to discuss the case with her husband. (54 RT 8490.)" (RB 79.) The cited page, however, consists of the prosecutor and the judge talking amongst themselves about Alt. Juror No. 4 and Juror No. 1. In fact, Alt. Juror No. 1 never did behave in the manner described by respondent. The trial court believed she had, and searched through the transcript looking for the place where Alt. Juror No. 1 had said that she would keep on violating the court's injunctions not to talk about the case, to no avail: "I can't find it right now, but that's where the bear is sleeping in the cave, so to speak." (63 RT 9352–9353.)

Actually, Alt. Juror No. 1 was contrite about saying initially that she only talked about the case with her husband, because she shared everything with him, and explicitly acknowledged her mistake: "I could say that it was very important; that I had a lapse in judgment. I asked my husband, and I did wrong." (63 RT 9422.) The bear sought by the trial court existed only in its own mind, and now, the mind of respondent. This is a vivid instance of the trial court's bias, and how bias affects one's perceptions and memory.[16]

E. Reliance on Prosecution for Guidance; Identification with Prosecutorial Side

Respondent does not dispute any of appellant's factual allegations. He asserts that the trial court was bound to ascertain the position of the parties, and argues that "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,

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[16] Further, the trial court's expressed concern about how jurors like Alt. Juror No. 1 had cost taxpayers "a lot of money" (63 RT 9340–9341, 9357) indicates that the court's anger was not triggered by the alternate juror's speaking in private to her husband—which cost the taxpayers little if anything—but rather by her providing a declaration and testifying as to the misconduct of a seated juror (Juror No. 1) who had participated in the deliberations leading to conviction.

Weatherton cannot demonstrate that any ruling of the trial court was improper." (RB 80.)

Appellant's factual presentation here concerns a process, one that is not contested by respondent. (AOB 257–259.) Appellant is not complaining here about the trial court's rulings; he has done that in earlier claims. The point of this claim is that the process was badly skewed in favor of the prosecution even before any rulings were made, by how the trial court relied on the prosecutor to help him out of what the court perceived as a dilemma —how could the court get around overturning the jury verdicts when its understanding of the law was that it was required to overturn them? (See, e.g., 56 RT 8484.)

In the United States, our "adversarial system conceives of criminal procedure as a dispute between prosecution and defense before a passive umpire." (Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure* (2004) 45 Harv. Intl. L.J. 1, 17.) Mr. Weatherton was not entitled to special consideration because he was representing himself during these hearings on allegations of juror misconduct, but the trial court was not the "impartial arbiter" to which Mr. Weatherton was entitled. (*People v. Barnum* (2003) 29 Cal.4th 1210, 1225.)

Accordingly, if this Court for any reason is not persuaded that appellant's conviction must be set aside because of jury misconduct (see Arg. IV, *ante*; AOB, Claim IV), then the Court should remand the case for a new hearing on jury misconduct before an impartial judge. Further, this Court should recognize that in evaluating the jury misconduct claims raised in Arguments IV–VI, the Court should accord no deference to the findings of the trial court and should instead review the record de novo.

VIII. JUROR NO. 8 WAS WRONGLY REMOVED FROM THE JURY.

Juror No. 8 was dismissed by the court's clerk without any hearing being held and without any questioning of her by the parties or by the trial court. (AOB 262–270.) Respondent contends that "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." (RB 81.) The disagreement centers on what constitutes a sufficient factual showing, and whether a juror in good health can be dismissed without being spoken to by either the trial court or counsel.

A juror's inability to perform "must appear in the record as a 'demonstrable reality.'" (§ 1089; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052–1053.) In *People v. Allen* (2011) 53 Cal.4th 60, this Court wrote:

> Great caution is required in deciding to excuse a sitting juror. . . . [¶] Because of the importance of juror independence, review of the decision to discharge a juror involves " 'a somewhat stronger showing' than is typical for abuse of discretion review. . . ." (*Lomax, supra*, 49 Cal.4th at p. 589, 112 Cal.Rptr.3d 96, 234 P.3d 377.) The basis for a juror's discharge must appear on the record as a " 'demonstrable reality' " and "involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence" supports the court's decision. (*Ibid.*) The reviewing court does not reweigh the evidence but looks to see whether the court's " 'conclusion is manifestly supported by evidence on which

> the court actually relied.' [Citation.]" (*Id.* at pp. 589–590, 112 Cal.Rptr.3d 96, 234 P.3d 377.)

(*People v. Allen*, *supra*, 53 Cal.4th at p. 71.)

Here, the record shows that Juror No. 8 called the clerk at the end of the first day of guilt phase deliberations. The clerk reported that she said she needed to "take off the rest of this week and next" because of the death of her grandfather. (48 RT 7775.) The clerk then told her she was excused. (48 RT 7778.)

When the parties came to court and learned what had happened, counsel for Mr. Weatherton protested, and asked that the juror be brought to court for questioning. (48 RT 7778–7780.) The clerk called Juror No. 8's cell phone and called her workplace, and did not get an answer. After the morning recess of the same day Juror No. 8 was dismissed and replaced with former Alt. Juror No. 6. (48 RT 7789–7790.)

Thus, no counsel had heard from or questioned the juror. The trial court had not spoken with the juror. Respondent states that "the juror *expressly informed the court* that she would require two weeks for bereavement." (RB 83, emphasis added.) A courtroom clerk, however, is not an officer of the court. What happened was that the juror called the court clerk, who excused her without speaking with the trial court. (48 RT 7778–7779.) Neither Mr. Weatherton's counsel nor the prosecution nor the

trial court had ever heard anything directly from Juror No. 8, or had an opportunity to ask her any questions.

In all the other cases cited by the parties, the juror talked directly with the trial court. (See *In re Mendes* (1979) 23 Cal.3d 847; *People v. Cunningham* (2001) 25 Cal.4th 926, 1028–1030.) Federal cases have discussed the issue frequently. Mr. Weatherton is unable to find a case where a juror was dismissed without addressing the court and counsel unless the juror was personally unable to do so.

In *Miller v. Stagner* (9th Cir.1985) 757 F.2d 988, 995, cert. den., (1986) 475 U.S. 1048 [106 S.Ct. 1269, 89 L.Ed.2d 577], the Ninth Circuit considered and approved the constitutionality of section 1089. In *Miller*, two jurors were dismissed on the fifth day of jury deliberations and replaced with alternates over the objections of defense counsel. *Miller*, 757 F.2d at 995. The Ninth Circuit held that the substitution of the alternate jurors did not violate appellants' federal constitutional rights because the procedure followed by the trial court "preserved the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments." (*Id.*, citing *Williams v. Florida* (1970) 399 U.S. 78, 100.) That procedure involved questioning of the juror to be discharged by the federal court and by defense counsel, unless the juror suffered a heart attack or some other immobilizing event.

(See, e.g., *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426 ["Substantial evidence supports the trial court's conclusion that good cause existed for dismissing [Juror] Robles. The trial court conducted a lengthy interview with juror Robles before determining that she was unfit to continue deliberating."].)

Here, it was not shown as a demonstrable reality that the juror was so bereaved that she could not continue to serve on Mr. Weatherton's jury. Because the court improperly discharged Juror No. 8 during guilt phase deliberations, both guilt and penalty phase judgments must be reversed. (*People v. Allen*, *supra*, 53 Cal.4th at p. 79.)

IX. THE TRIAL COURT PREJUDICIALLY ERRED IN GIVING CALJIC NO. 2.92 OVER MR. WEATHERTON'S OBJECTION.

Mr. Weatherton argued in his opening brief that the standard jury instruction governing how the jury should consider eyewitness identifications (CALJIC No. 2.92) effectively deprived him of his expert testimony on this issue. His expert, Dr. Robert Shomer, testified that there was no relationship between confidence and accuracy. (41 RT 6621.)

That was a critical point in this case, because of Nelva Bell's absolute certainty that Mr. Weatherton was the shooter, and the fact that her testimony was effectively the entire case against Mr. Weatherton. The jury instruction at issue, however, told the jury that confidence in one's identification is one of the factors for the jury to consider, thus negating entirely Dr. Shomer's testimony on this point; the jury was required to follow the instructions provided it by the trial court.

Respondent, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1230, and *People v. Wright, supra*, 45 Cal.3d at p. 1141, answers that the instruction at issues does not direct the jury to place any particular value on confidence; it simply highlights the witness's certainty or uncertainty as a factor to consider in its overall evaluation of eyewitness evaluation testimony. (RB 89–91.)

Respondent further argues that 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, and that the jury, composed of "intelligent persons capable of understanding and correlating all jury instructions that are given" (*People v. Phillips* (1985) 41 Cal.3d 29, 58), would have understood that consideration of the expert testimony in this case was permitted. (RB 91–92.) But even if this is true, it does not explain why or how expert testimony specifically saying that certainty was a non-factor in assessing accuracy would not be rendered useless or irrelevant by an instruction directing the jury to consider certainty or non-certainty as a factor illuminating the question of whether or not an eyewitness identification is accurate.

The instruction at issue negated a significant portion of Mr. Weatherton's defense (see *Crane v. Kentucky* (1986) 476 U.S. 683), and violated Mr. Weatherton's rights to due process of law. In view of the fact that Ms. Bell's certainty of her identification is the lynchpin of the prosecution's case, the error requires that Mr. Weatherton's convictions and sentence be set aside.

X. THE TRIAL COURT ERRED IN PROHIBITING TESTIMONY THAT 28 WRONGFULLY CONVICTED PERSONS WERE EXONERATED BY DNA TESTING.

The issue here is the trial court's error in refusing to allow Dr. Shomer to mention that the persons exonerated in the Department of Justice's 1996 study, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, were exonerated by DNA evidence. (AOB 276–281.)

Respondent contends that ruling was not significant and the evidence at issue was irrelevant because none of the parties disputed the innocence of any of the 28 persons whose cases were analyzed by the DOJ. (RB 85–87.) Respondent does not deny that the trial court had no good reason for prohibiting Dr. Shomer from mentioning the very reason why the study was prepared—to show the power of DNA evidence, at a time when many questions remained about the use of such tests.

The trial court opined that it would open the door to the prosecutor's putting on evidence of all the hundreds of thousands of persons whose guilt was assured by DNA testing (41 RT 6594) but Mr. Weatherton would have welcomed such testimony, because it would have underscored the fact that these 28 persons were innocent. The prosecutor did not state or imply that she would ever present such evidence.

The prosecutor did say that she would not dispute the innocence of the 28 persons involved.[17] However, the jury was left with the natural question of how these 28 people came to be exonerated. Without any explanation, the certainty of innocence that was the whole point of the study at issue would vanish, and without certainty on this point, which could easily have been provided, Dr. Shomer's points about the unreliability of eyewitness testimony would be appreciably weakened.

Respondent concludes by saying that even if this was error, the case against Mr. Weatherton was "simply overwhelming." (RB 87.) To the contrary, as we have seen, the case was close both in terms of an objective appraisal of the balance of evidence presented and not presented, and in terms of its impact on the jury. The jurors' contentions with each other and the length of their deliberations confirm that the case against Mr. Weatherton was simply not overwhelming. It cannot be said beyond a reasonable doubt that the refusal to allow Dr. Shomer to present the jury with the fundamental fact that the most convincing form of proof then and now available showed the innocence of the exonerees he was discussing,

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[17] While the prosecutor kept her word and never challenged the innocence of the study's 28 exonerees, she never said anything in the presence of the jury that expressly conceded the point.

limited the impact of his testimony, and prejudiced Mr. Weatherton.

(*Chapman v. California* (1967) 386 U.S. 18, 27.)

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

Respondent creates a straw man and then vigorously pummels it, overlooking a key contention in appellant's argument:

> 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. . . . 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.

(RB 95–96.)

The heading of appellant's argument, however was, POTENTIALLY EXCULPATORY EVIDENCE WITH VALUE THAT WAS APPARENT WAS DESTROYED *WITHOUT NOTICE TO MR. WEATHERTON.* (See AOB Claim XI, at p. 282, emphasis added.) The word "notice" does not appear anywhere in respondent's reply to appellant's argument.

Respondent recognizes that Indio Police Department and the prosecutor's office learned of Dwight Harmon's intention to tear down the

house, and then dispatched an investigator and photographer to make a detailed recording of the crime scene. (See 25 RT 3951–3955.) Nothing was reported to appellant or any of his representatives. (25 RT 3935.)

Respondent generally says that appellant's list of evidence that could have been discovered and used by appellant from the crime scene is "vague." (RB 94.) However, appellant specified the type of evidence, particularly blood evidence, that could have been found there, including blood spatter and footprints, and explained how that evidence would have been very valuable. (See AOB Claim XI, at p. 288.)[18] Respondent does not try to show that this material could not have helped appellant. (RB 94–95.)

Respondent also asserts that equivalent physical evidence could have been gleaned from the testimony of Nelva Bell, and from police photographs, and states that "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.)" (RB 94–95.) But no one, and particularly not Mr. Weatherton, should rely on Ms. Bell for reports on the sort of objective facts and physical evidence available from the crime scene. She would not disagree.

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[18] See also AOB Claim VI, at p. 236, discussing role played during deliberations by a juror's apparent vision of a bloody footprint suggesting that Mr. Weatherton had been in the house and stepped in blood.

She was roused from sleep by a terrifying situation, still high on cocaine, very early in the morning in a stranger's house. The police photos and prosecution evidence were not concerned with blood patterns or spatter. There was, and is, no readily available evidence comparable to the crime scene itself.

Counsel asked for sanctions, or failing that, a modest remedy—an instruction to the jury that the lighting was dim and it was difficult to see at the time the crimes were committed. (25 RT 3959–3961.) His request was denied without comment. Courts have a large measure of discretion in determining the appropriate sanction that should be imposed because of the destruction of discoverable evidence; and whether the sanction of an adverse-inference instruction would be appropriate is a matter within the sound discretion of the trial court. (*People v. Von Villas* (1992) 10 Cal.App.4th 201; *People v. Wimberly* (1992) 5 Cal.App.4th 773.)

Here, if there is no direct evidence of bad faith, it was wanton indifference to Mr. Weatherton for the prosecutor to have made no effort at all to inform him of the crime scene's imminent destruction. Even if there is no evidence of bad faith, the trial court can impose whatever sanction is necessary to assure the defendant a fair trial. (*Von Villas*, *supra.*) Failure of the trial court to sanction the prosecutor in any way, or to inform the jury of

facts that Mr. Weatherton was precluded from presenting by the destruction of the crime scene, meant that Mr. Weatherton did not receive the fair trial to which he was entitled. His convictions and sentence must be set aside. (AOB 288–289.)

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

Appellant will rely on his argument in the opening brief, with one exception. A key point made by the trial court in support of the jury's trip to the crime scene was the likelihood that some jurors had already made that trip:

> So now I am thinking, are those people going to go, any of those people that want to see the scene going to go there without the Court's permission against my instructions? I know we assume the legal fiction they have been told not to, I wonder if the curiosity would take them out there, and we have some jurors that have been to the scene and some that have not. And I am worried about that disparity.[19]

(40 RT 6520.)

Respondent did not discuss or even acknowledge the court's worry about a disparity between jurors. He simply says that the trial court "noted its concern that jurors might be tempted to visit the site on their own." (RB 98.) Is it permissible for a trial court to make a ruling based on an assumption of juror misconduct, and in an effort to counteract that

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[19] Contrast the trial court's easy acceptance of the frailties of human nature here with its palpable anger at jurors who were threatened with criminal prosecution—not for anything they had done, but because they failed to promptly report other jurors who had violated the court's directives. (Args. IV and VII, *ante*.)

misconduct? Appellant has contended that the trial court's reasoning on this issue was flawed. (AOB 294–295.) Respondent does not answer.

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

At the outset, appellant will correct his mistake regarding the conclusion that Ms. Bell tested positive for cocaine; it was not a blood test, but a urine test that yielded this result. (See testimony of Alan Norman Fleckner, physician for the Desert Medical Regional Center, where the victims were treated, at 32 RT 5124.)

Respondent does not dispute that the duties of *Brady* compliance lie exclusively with the prosecution, including the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) Whatever the reason for failing to discharge that obligation, the prosecution remains accountable for the consequence. (*Id.* at pp. 437–438; see also *In re Brown* (1998) 17 Cal.4th 873, 880.) Respondent's theme is that Mr. Weatherton has not identified any *Brady* materials that have not been turned over. (RB 102–107.) Mr. Weatherton has no such obligation. The prosecutor does not have the final word on whether or not evidence might be exculpatory. The trial court erred in ceding this territory to respondent.

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

Respondent first asserts that appellant did not preserve the issue because he did not make a timely and specific objection on the grounds asserted on appeal, and such a failure makes those grounds 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. (23 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." (RB 109–110.) Respondent is wrong.

Counsel objected to any conclusions that Officer Johnson might draw from the footprints he observed, and to the use of a diagram solely based on Johnson' memory of what he had seen three years previously. (26 RT 4073.) As set forth in the opening brief (AOB 306–307), the core of counsel's objections was that the anticipated opinion testimony by Johnson was too unreliable to prove anything and was just pseudo-expert testimony. These objections were clearly sufficient to put the trial court on notice of the essential issue raised herein, i.e., that the evidence was too unreliable to

be probative or legally relevant, but might nonetheless improperly influence a jury. Counsel made these objections both prior to opening argument and during a 402 hearing. (*Ibid.*) The objections were overruled on their merits, or denied as premature. (23 RT 3739, 26 RT 4074.)

On the brink of Johnson's footprint testimony, counsel renewed their objections; Johnson was apparently going to testify about footprints other than those that were photographed or diagramed, making it impossible to challenge the witness:

> MR. HEAD: I would think also there might be an objection on the basis of on the grounds of independent recollection three years later as to where those prints were, and what they looked like. He has nothing to refresh his recollection with.
>
> THE COURT: All right. The objection is denied on the grounds that you listed. Okay.
>
> MR. HEAD: Do I have to go through and state all the Congressional—I mean all the Federal grounds every time I make an objection?
>
> THE COURT: Well, *I denied your motion to include it all, but if you want to do it on those constitutional amendments that you have listed in the past, I will consider that and deny it as well.*

(34 RT 5502–5503, emphasis added.)

The amendments counsel had referred to in the past included the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and their correlative sections in the California Constitution. (2 CT 590–595; 1 RT 28

et seq.) The trial court's statement that it had "denied the motion to include it all," and that it had *considered the objection on the constitutional grounds* put forth in the past and rejected it is enough to have fairly presented issues related to due process of law.

Respondent further contends that the evidence from Officer Johnson is relevant, and that

> [T]he 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.

(RB 111.)

The only "utter failure" here is respondent's failure to read Mr. Weatherton's opening brief. Mr. Weatherton will here repeat what he marked as the undue prejudice and confusion of the issues caused by the footprint testimony:

> [T]he prejudicial force of this "corroborative" evidence became apparent during guilt phase deliberations, when the apparent vision of a bloody footprint, suggesting that Mr. Weatherton had been in the house and stepped in blood, was a focal point of deliberations.
>
> Mr. Weatherton recognizes that the jury's subjective processes are not admissible for any reason pursuant to Evidence Code section 1150, but the jury's discussion of the footprints just before returning its verdict is an objective,

> verifiable fact that could have been recorded. The practical effect of Johnson's unreliable testimony and diagram was to confuse and mislead the jury.

(AOB 308.)

For the reasons set out in appellant's opening brief at AOB 306–310, Johnson's footprint testimony was unreliable. It was based on a handful of random photographs of shoe prints that resembled Mr. Weatherton's shoes taken from somewhere around the crime scene, and thee-year-old memories of Johnson of prints which, according to Johnson, showed shoes like Mr. Weatherton's shoes running towards the canal through the trees, and walking back from them.[20]

This was a convenient and contrived narrative, based largely on Vernon Neal's statements about someone "flashing" that was finally abandoned by the prosecutor during her closing argument, when the lack of any evidence in or around the canal of any "big black gun" and particularly the lack of evidence about an army jacket, or fingerless gloves, led the prosecutor to assert that Mr. Weatherton had 25 minutes to dispose of these

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[20] It is worth noting that none of the footprints reported by the prosecution were found in or near the desert area next to the canal fence where Mr. Weatherton presumably would have stood in order to throw a gun. As photographs at 1 SCT 261, 263, 265, and 267 show, this area, on the other side of the row of trees, had the same sandy surface as the rest of the area around the crime scene.

things (6:40–7:05 a.m.), and could have buried them anywhere in the desert, "who knows where." (47 RT 7700.) This assertion is an implicit abandonment of the relevance or reliability of the footprint evidence— but this evidence was apparently part of the deliberations that led to a guilty verdict.

This poisoning of the process of deliberation is exactly what is to be eliminated by the trial court fulfilling its "gatekeeper" function. An example is the recognition by this Court that polygraph test results "'do not scientifically prove the truth or falsity of the answers given during such tests.'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 817.) The statutory ban against admission of polygraph evidence "'is a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence."'" (*People v. Hinton* (2006) 37 Cal.4th 839, 890; *People v. McKinnon* (2011) 52 Cal.4th 610, 663.) Recent United States Supreme Court decisions have referred to the trial judge's "'gatekeeper' role" (*General Electric Co. v. Joiner* (1997) 522 U.S. 136, 142), or "'gatekeeping' obligation" (*Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 141.)

Under California law, trial courts have a substantial "gatekeeping" responsibility. In *People v. Prince*, *supra*, 40 Cal.4th at p. 1225, fn. 8, this

Court recognized that expert testimony based upon experience rather than technical expertise is subject to scrutiny for reliability. The Court cited *United States v. Hankey* (9th Cir. 2000) 203 F.3d 1160, 1169 [exhaustively discussing trial court's gatekeeping responsibility]; *United States v. Vesey* (8th Cir. 2003) 338 F.3d 913, 916–917 [explaining scope of court's discretion in assessing reliability and holding that trial court erred in excluding the testimony of a defense expert, a convicted drug trafficker, who would have testified concerning the usual practice in drug transactions]; and Kaye et al., New Wigmore Treatise on Evidence (2004), Expert Evidence § 9.3.3, pp. 323–325 [analyzing reliability requirement in light of *Kumho*].)

It is true that the type of expert testimony presented in this case by Officer Johnson, where expertise is derived from experience rather than technical training, does not have to qualify as "scientific" in the sense meant by *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, or *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, to be admissible. However, the trial court's "gatekeeping" function is, if anything, more important where there is no objective qualification of evidence as truly scientific.

Finally, respondent asserts that any error was harmless, because counsel made the same points challenging the reliability of Johnson's testimony and conclusions during closing argument at 46 RT 7632–7636. (RB 111.) It is true that trial counsel challenged Johnson's testimony on several points, but it is also true that the shoe prints made their way into the deliberations of Mr. Weatherton's jury.[21]

Respondent concludes by saying,"as discussed in Argument I, subsection (D), *ante,* the evidence of Weatherton's guilt was simply overwhelming." (RB 111.) As appellant has shown, the evidence against Mr. Weatherton consisted of one eyewitness identification by an impaired witness with a bias against Mr. Weatherton made at a time of maximum stress, and in fact, the jury struggled with its verdict. (See *ante*, pp. 26–28, 35–36.) The evidence was far from overwhelming.

It is reasonably probable that if the jury were not misled and distracted by this irrelevant and unreliable evidence, they would have reached verdicts more favorable to Mr. Weatherton. (*People v. Watson*,

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[21] According to testimony from several jurors, an issue of great, even decisive, importance was assertions by the new Juror No. 8, former Alt. Juror No. 6, of a dream she had about a photograph of Mr. Weatherton's footprint showing blood. (61 RT 9230; 64 RT 9529; 65 RT 9699; 68 RT 9798–9799, 10,008.) According to Alt. Juror No. 4, Juror No. 1 told her that was a pivotal moment in the jury's deliberations. (65 RT 9699.)

supra, 46 Cal.2d at pp. 836–837.) It cannot be said beyond a reasonable doubt that the verdicts were unaffected by this unreliable and prejudicial evidence. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Pulley v. Harris* (1984) 465 U.S. 37, 41.) Mr. Weatherton's convictions and sentence should be set aside.

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

Respondent points out that this Court has found there to be no error in permitting the presence of a support person, absent evidence that the support person actively did something that would have influenced the jury's opinion of the witness. (See *People v. Stevens* (2009) 47 Cal.4th 625, 641. (RB 111–116.) "'The presence of a second person at the stand does not require the jury to infer that the support person believes and endorses the witness's testimony, so it does not necessarily bolster the witness's testimony.' [Citation.]" (*People v. Stevens*, *supra*, 47 Cal.4th at p. 641.)

In this case, Ms. Galvan's presence significantly bolstered Nelva Bell with someone from the prosecutor's office, and gave her a confidence she would have lacked without such support. Having counsel right by her side as she attested to her sales of cocaine likely affected her demeanor; she thought even as she testified about her sales of cocaine to Teresa Cecena that the person responsible for her legal troubles with cocaine sales was Fred Weatherton. This confidence boost was especially harmful when considered with the trial court's refusal to allow testimony from Deputy Justin Anderson, who would have contradicted Ms. Bell's testimony in critical respects, i.e., whether or not she allowed him to search her

bedroom), and likely would have testified that her statements about him "looking for someone named Stanley," and looking for "a lot of guns" in her apartment (26 RT 4082; see Arg. III, *ante*) were not true, and were likely delusions rather than lies. Counsel's presence, and Ms. Galvan's presence, gave Ms. Bell a continuous show of official support that wrongly endorsed her testimony, and by having a significant affect on her confidence level and her demeanor, impaired Mr. Weatherton's Sixth Amendment right to cross-examination.

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

Respondent accurately summarizes the relevant law, notes that the juvenile court did release statements made by Ms. Bell denying regular drug use and saying it was a "one-time thing," and says that appellant has received all that he was entitled to receive. (RB 116–118.) Respondent has not answered or denied appellant's contention that in this case, that counsel are more suited than any court less familiar with the case to review records of Ms. Bell's actions in addition to verbatim quotes from interviews, and assign meaning to those actions in the context of her testimony against Mr. Weatherton. (AOB 316–319.)

Given the centrality of Ms. Bell to Mr. Weatherton's convictions, and the fact that any and all governmental records of her behavior could contain evidence relevant to her credibility, counsel for Mr. Weatherton should be permitted to review the juvenile court records concerning Ms. Bell and present any arguments supported by that review concerning their relevance and discoverability. If the Court declines to grant Mr. Weatherton access to the entirety of the sealed material, Mr. Weatherton requests that the Court review the sealed material examined by the trial court in camera

to determine whether Mr. Weatherton should have been granted discovery pursuant to his request.

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

Respondent summarizes proceedings in the trial court, and echoes the trial court's finding that in light of *People v. Horton* (1995) 11 Cal.4th 1068, and evidence showing there was nothing facially improper about the process used to select the jury venire, it would not matter if the questionnaire proffered by counsel showed underrepresentation of African-Americans. (RB 118–124.) As shown in the opening brief, however, it is disproportionate and not deliberately skewed treatment that is forbidden by the Sixth Amendment: "[I]n Sixth Amendment fair-cross section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section." (*Duren v. Missouri* (1979) 439 U.S. 357, 368 fn. 26; AOB 320–325.)

Respondent then argues that appellant could not have obtained the relief he sought even if his motion had been granted, because a showing of underrepresentation in one venire would not show the systematic underrepresentation that is required:

> [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. 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.

(RB 124–125.)

It may be true, as respondent asserts, that systematic underrepresentation cannot be shown with evidence of underrepresentation in a single case, but that's not why the trial court denied the motion. (See 6 RT 481.) The trial court reasoned that the statistics at issue simply didn't matter without the showing of an improper procedure. As shown in the opening brief (AOB 324–325), this was error.

At no point did the trial court rule, or imply, that even more statistics over a broader span of time would be necessary or sufficient to prevail. We cannot know what counsel would have done had his motion been granted, and underrepresentation in the particular case been established. We do know, for the reasons set out in appellant's opening brief, the trial court's belief that only a showing of facially improper methods of selection would warrant relief, was an erroneous application of *Duren*. Mr. Weatherton should have been allowed to proceed with his claim.

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

The Fourteenth Amendment to the U.S. Constitution and article I, sections 7 and 15 of the California Constitution forbid intentional racial discrimination from playing a role in a prosecutor's charging decision. (*Oyler v. Boles* (1962) 368 U.S. 448, 456, cited in *McCleskey v. Kemp* (1987) 481 U.S. 279, 291 fn. 8.) A defendant is entitled to discovery pertaining to a discriminatory-charging defense upon a prima facie showing of discrimination, which provides the requisite "plausible justification" for discovery. (*Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 302, 306–307; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 305.) In *People v. McPeters* (1992) 2 Cal.4th 1148, 1170–1171, this Court held that a statistical showing, no matter how dramatic, could not by itself provide the plausible justification required by *McCleskey*, because it would not prove the requisite discriminatory intent.

There is no practical way to show what is required by *McCleskey* without discovery of the materials asked for by appellant. (See also *Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 266.) Anyone not deeply embedded in the insular world of

criminal procedure can plainly see that race is a determining factor in Eastern Riverside County from the dramatic statistics provided by appellant. (2 CT 585 et seq.; 2 RT 136–138; 1 SCT 49.)[22] The odds of the disparity being random, i.e., caused by "discretion," are infinitesimal.

Given the requirement in *McCleskey* that racial discrimination be proven with means other than a statistical showing, there is no way for appellant to meet this requirement without the types of materials he requested from the prosecutor's office. The sorts of individual characteristics of each defendant and each offense that would apparently suffice to establish appellant's point were not readily available from anywhere other than the prosecutor's office.

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[22] The evidence shows that between 80 percent and 92 percent of those charged with special circumstances in eastern Riverside County were African-American, while the percentage of African-American residents was just over 2 percent.

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

Respondent does not address any of the reasons set forth by Mr. Weatherton for reconsidering and changing this process. Instead, respondent cites the daze law holding the process constitutional,[23] and concludes by saying that Mr. Weatherton has not presented valid reasons to revisit these holdings. (RB 129.) For the reasons set forth in his opening brief, Mr. Weatherton disagrees. Since none of his facts or reasoning were challenged by Respondent, no reply is necessary or even possible.

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[23] *Lockhart v. McCree* (1986) 476 U.S. 162, 173; *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.

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

Respondent writes, "*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." (RB 130, emphasis added.)

Respondent evidently did not read that part of the opening brief where appellant quoted Ms. Edwards-Wood. She wrote that she would not vote for death regardless of the evidence presented, because of the number of people sentenced to death who were later shown to be innocent; she also "'*felt it was imposed too often on African-Americans.*' (45 CT 13098.)" AOB 344, emphasis added.)

There is every reason to believe that a critical part of why an exceptionably low percentage of African-Americans in this jury pool were willing to impose the death penalty in eastern Riverside County is a concern about racial bias in how it was applied in the area where they live. Only a deliberately obtuse person would fail to notice this concern.

Respondent recognizes that African-Americans have been found to be a "distinctive group" for fair-cross section purposes, but says that "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." (RB 131.)

But what if the reasons for the reluctance of all five African-Americans in the jury pool to impose the death penalty were born of their experiences in eastern Riverside County, where the only people sentenced to death for years prior to appellant's trial were African-Americans, despite the fact that a minuscule percentage of residents in the area were African-American?[24]

Even though each step of the process of charging capital crimes, and selecting a jury may pass muster under the particular aspect of criminal procedure that governs it, the net effect is that the murderers then selected in eastern Riverside County for the death penalty were African-Americans, while none of the people on Mr. Weatherton's jury were African-Americans. To say that this is justifiable under the rubric of "discretion" is

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[24] The percentage of African-Americans in the Indio/Palm Springs judicial district in 1999 was 2.37 percent. (1 SCT 49.)

to bury oneself so deep into the insular folds of criminal procedure that reality is lost, and the vitally important concept of "discretion" is turned into a synonym for racism. This cannot be the law.

XXI. JUROR NO. 2 WAS WRONGLY DISMISSED FROM THE JURY.

Juror No. 2 was always clear that proof of any fact, including Mr. Weatherton's guilt of murder, could be established by one witness. In order to salvage a wrong ruling, Respondent distorts the record with selective omissions. Respondent writes, "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 would was sufficient to prove a fact and the juror said that he 'would have a difficult time with that.' (27 RT 4308)." (RB 132.)

If this were true, Mr. Weatherton would have no issue. The juror's religion would have interfered with his ability to follow the law. But this is not what the juror said. The language omitted by respondent is in italics:

[THE COURT]:	[T]hat is an instruction that the Court would give you as the law of the State of California, one witness is sufficient to prove a fact if you believe that witness. That's different than your religious beliefs. This is another question in the same form. Would you be able to follow that law?
JUROR NO. 2:	*Are we talking about guilt or innocence or—*
THE COURT:	*No, we're talking about life versus death in the second phase.*

JUROR NO. 2: I would have, without the corroborating evidence, Your Honor, I would have a difficult time with that.

(27 RT 4307–4308, emphasis added.)

The juror made it very clear that the testimony of one witness would indeed be sufficient to prove any fact, including Mr. Weatherton's guilt of murder. In his letter to the trial court he wrote, "with proof beyond a reasonable doubt, I could vote the defendant guilty, but in the penalty phase I could not vote the death penalty." (23 RT 4312–4313.) There is nothing in any of Juror No. 2's testimony that indicates a reluctance to follow the legal principles contained in any of the instructions given to the jury by the trial court.

Mr. Weatherton showed in his opening brief that it is not at all unusual for a juror who strongly supports the death penalty, as did Juror No. 2, to be concerned about a heightened level of reliability before voting for death, and that this Court has recognized residual doubt as legitimate basis for voting for a sentence of less than death, and an effective argument for certain defendants to make. (See AOB 352–354, and cases cited therein.) Respondent does not dispute any of these principles or case law. (See RB 132–134.)

The trial court based its ruling on the fact that murder is not a crime that requires corroboration as a prerequisite to conviction. (23 RT 4316.) This ruling was prejudicial error.

In *People v. Allen, supra*, this Court wrote that

> Great caution is required in deciding to excuse a sitting juror. . . .[¶] Because of the importance of juror independence, review of the decision to discharge a juror involves " 'a somewhat stronger showing' than is typical for abuse of discretion review. . . ." (*Lomax, supra*, 49 Cal.4th at p. 589, 112 Cal.Rptr.3d 96, 234 P.3d 377.) The basis for a juror's discharge must appear on the record as a " 'demonstrable reality' " and "involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence" supports the court's decision. (*Ibid.*) The reviewing court does not reweigh the evidence but looks to see whether the court's " 'conclusion is manifestly supported by evidence on which the court actually relied.' [Citation.]" (*Id.* at pp. 589–590, 112 Cal.Rptr.3d 96, 234 P.3d 377.)

(*People v. Allen, supra*, 53 Cal.4th at p. 71.)

A close look at the trial court's rationale reveals that the "evidence on which the court actually relied" was the court's review of jury instructions and statutes showing that murder is not a crime that requires corroboration. (27 RT 4315–4316.) But Juror No. 2 never said that murder would require any kind of corroboration. He never said that proof of any fact required more than one witness. His concerns were based entirely on what would support a death verdict, a "moral" and "normative" decision.

(*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Demetrulias* (2006) 39 Cal.4th 1, 41–42.) And as this Court has made clear, in making this "moral" and "normative" decision, a California juror may properly rely upon lingering doubt as a reason for not imposing death, in effect requiring proof in addition to what sufficed to establish guilt beyond a reasonable doubt. (*People v. Gay* (2008) 42 Cal.4th 1195, 1221, 1227 [recognizing "lingering doubt" as a legitimate penalty phase defense].)

Thus, respondent creates a straw man. He quotes this Court as holding that "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.)" (RB 134.) The *Riel* language was referring to the *guilt phase* testimony of the accused and his accomplice as to what happened during the crime. Contrary to respondent's assumption at RB 134 ("Juror Number 2's inability to follow the trial court's instructions was good cause for his dismissal"), there is nothing in anything that Juror No. 2 said in either his letter to the court or his testimony that indicated an inability, or even a reluctance, to capably follow every trial court instruction. The dismissal of Juror No. 2 was prejudicial error.

Had the erroneous excusal of Juror No. 2 because of his beliefs concerning the death penalty occurred during jury selection, the error would

require reversal of only Mr. Weatherton's sentence of death. (*Gray v. Mississippi* (1987) 481 U.S. 648.) But because Juror No. 2 was a seated juror and his excusal without cause occurred after the jury was sworn and the guilt phase testimony had begun, the conviction must be reversed as well.

A defendant's "valued right to have his trial completed by a particular tribunal" is "an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice." (*Crist v. Bretz* (1978) 437 U.S. 28, 36, citing *Wade v. Hunter* (1949) 336 U.S. 684, 689.) The dismissal of Juror No. 2 midway through the guilt phase trial violated California law and Mr. Weatherton's rights to a chosen impartial tribunal, due process, and a reliable judgment under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Accordingly, the entire judgment must be reversed. (*People v. Allen, supra*, 53 Cal.4th at p. 79 ["Because the court improperly discharged Juror No. 11 during guilt phase deliberations, both guilt and penalty phase judgments must be reversed."].)

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

Respondent quotes *People v. Riel*, *supra*, and cites *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172–175, in opposing this contention. *Riel*, however, did not have the issues and facts of Mr. Weatherton's case before it, and the passages cited from *Franklin v. Lyanugh were* endorsed by a plurality—not a majority—opinion in the U.S. Supreme Court.

Respondent then asserts that it would be "impossible" to ever meet a standard of poof beyond all doubt, because of section 1096's recognition of the truism that "everything relating to human affairs is open to some possible or imaginary doubt." (RB 134.) There are a considerable number of cases decided by this Court in which guilt was proven beyond all doubt. In *People v. Smith* (2003) 34 Cal.4th 591, the defendant gave a five-hour confession to committing the crime for which he was charged, as well as numerous other rapes, for which he had details that could be known only to the perpetrator. (See also *People v. Marshall* (1990) 50 Cal.3d 907, for another case in which there was no doubt as to the perpetrator's guilt.)

By dismissing the standard proposed by Mr. Weatherton as "impossible," respondent is in effect saying that the authors of the Model Penal Code have created something unreal in their latest recommendations.

The American Law Institute's Model Penal Code created the framework for the modern death penalty. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 189–194; AOB 371–373.) While one may certainly disagree with their policy recommendations, such a cavalier dismissal can only be made by someone who has not confronted the bases of the Model Penal Code recommendations.

Such a burden of proof would strengthen, not weaken, the death penalty by eliminating doubts as to the underlying guilt of persons selected for a penalty phase trial. This qualitative change in the reliability of the convictions underlying the death penalty would, however, protect appellant from being executed; it is virtually certain that no juror would have found Mr. Weatherton guilty beyond all doubt of the crimes for which he was charged.

It is within this Court's power to eliminate a chief cause of the widespread loss of support for the death penalty—uncertainty about the underlying guilt of persons sentenced to death.[25] For the reasons set forth in appellant's opening brief (AOB 355–375), Mr. Weatherton asks that this Court now recognize the post-DNA reality that there is a significant

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[25] See, e.g., Johnson, *Shifts Detected in Support for Death Penalty*, USA Today <http://www.usatoday.com/news/nation/story/2012-04-24/abolish-death-penalty-movement/54515754/1> [as of Nov. 9, 2012].

possibility of errors in capital cases that can lead, and have led, to mistaken convictions, and require that guilt be established in capital cases beyond all doubt.

XXIII. VIOLATIONS OF MR. WEATHERTON'S RIGHTS INCLUDE VIOLATIONS OF INTERNATIONAL LAW.

Respondent asserts, "this Court has held that international law does not prohibit a sentence of death where, as here, it was rendered in accordance with domestic law and with state and federal statutory and constitutional requirements." (RB 134–135.) He then cites a string of decisions by this Court[26] that make the same conclusory assertion.

For the reasons set out in Mr. Weatherton's opening brief, he asks this Court to revisit this question, and recognize that Mr. Weatherton's case is governed by international law, and particular by international law that was ratified by the U.S. Congress in the 1990s, and, for the reasons set out in appellant's opening brief, are in force today.

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[26] *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.

XXIV. RACIAL DISCRIMINATION THAT IS THE EFFECT, IF NOT THE PURPOSE, OF DOMESTIC CAPITAL SENTENCING LAW, VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT MR. WEATHERTON'S DEATH SENTENCE BE SET ASIDE.

Mr. Weatherton has shown that the criminal justice system in the United States has *accepted* racism in the context of capital sentencing as an unfortunate but inevitable byproduct of allowing sentencers discretion in the choice of what penalty to impose. (AOB 383–400.) His case is a spectacular example.

The laws regarding capital charging practices, selection of a jury pool, and selection of individual jurors together have approved the placing of African-Americans, and virtually no one else, on trial for their lives in eastern Riverside County, while methods of jury selection insure that no African-American will be on any capital jury in that area. (See Args. XVII–XX, *ante*.)

Respondent disposes of this detailed argument in one sentence. He asserts that "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," and cites *People v. Martinez* (2003) 31 Cal.4th 673, 703; *People v. Bolden* (2002) 29 Cal.4th

515, 576; and *People v. Hillhouse* (2002) 27 Cal.4th 469, 511, as authority. (RB 135.)

The first two of these cases simply make a conclusory assertion, and cite earlier cases. *Hillhouse* asserts that "[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements," and that the defendant had not shown that "his rights to due process of law and to be free from invidious discrimination on the basis of race have been violated." (*Id.*, 27 Cal.4th at p. 511.)

The cases cited by *Hillhouse* were *People v. Jenkins* (2000) 22 Cal.4th 900, 1055, and *People v. Ghent* (1987) 43 Cal.3d 739. In *Jenkins*, this Court stated that international law and domestic law were essentially the same, and that international law conferred no rights beyond those provided by domestic law. (22 Cal.4th at p. 1055.) In *Ghent*, this Court relied on the fact that the laws cited by defendant had not been made part of domestic law:

> As the People correctly point out, a treaty or international declaration or charter has no effect upon domestic law unless it either is implemented by Congress or is self-executing. (*See Hitai v. Immigration and Naturalization Service* (2d Cir. 1965) 343 F.2d 466, 468; *In re Alien Children Ed. Litigation* (D.Tex. 1980) 501 F.Supp. 544, 589–590, affd. sub nom. *Plyer v. Doe* (1982) 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786; *Sei Fujii v. State of*

> *California* (1952) 38 Cal.2d 718, 721–725, 242 P.2d 617; Rest.2d Foreign Relations Law, § 141, and com. at p. 432.)
>
> Defendant cites no authorities suggesting that the international resolutions or other materials on which he relies have been held effective as domestic law.

(*People v. Ghent*, *supra*, 43 Cal.3d at p. 779; see also *People v. Vieira* (2005) 35 Cal.4th 264, 305.)

The *Ghent* decision dates from 1987. The international authorities relied by Mr. Weatherton were ratified by the U.S. Congress in 1992 and 1994, respectively. (See AOB 379–380.) This means that they have effectively become part of our domestic law.

As Mr. Weatherton showed in his opening brief, racism cannot be established in a particular case unless there is case-specific evidence presented that proves racial bias on the part of the prosecutor, judge, jury, or legislature. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 292–299.) The studies cited by Mr. Weatherton show, however, that racism is deeply embedded in our capital sentencing system, and is an effect, if not the intent, of that system.

Respondent has not argued that the covenants against racism to which the United States has formally committed itself would tolerate the racism permitted by *McCleskey* and *Montiel*.[27] It is clear that they do not.

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[27] *People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9; see AOB 395.

The racism that results from our system of justice has been repeatedly documented with well-designed studies and with individual testimony. *McCleskey*'s requirement that a specific act of racism be photographed or recorded or documented is an effective way of tolerating, even encouraging, racism.

The covenants against racism to which the United States subscribes do not tolerate acceptance of racism, even when cloaked in the name of "discretion" or when racism is an acceptable motive if combined with more legitimate bases for decision making. Article 1 of the International Convention Against All Forms of Racial Discrimination defines "racial discrimination" as:

> [a]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

General Recommendation No. 14: Definition of discrimination (Art. 1, ¶ 1) 03/22/1993, emphasis added.)

McCleskey ordains that racism can only be proved if that is the *purpose* of a challenged act or omission, but specifically forbids the establishment of racism by showing the *effects* of a challenged practice or system independent of anyone's express intentions. In so holding, it violated

the Convention to which the United States specifically subscribed in the 1990s. This Court has the duty to enforce those conventions, which became part of domestic law after *McCleskey* was decided.

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

These contentions were presented pursuant to this Court's authorization in *People v. Schmeck* (2005) 37 Cal.4th 240, 305, of the presentation in skeletal form of arguments challenging facets of California's death penalty scheme (AOB, Claim XXV, at pp. 400–409) and require no reply to respondent. (RB 135–140.) In one instance, however, appellant will develop what he believes to be contentions previously overlooked by this Court.

A. This Court Should Reconsider and Reject its Misplaced Reliance on Two United States Supreme Court Cases as Authority for the Erroneous Proposition That California's Death Penalty Scheme Meaningfully Narrows the Pool of Persons Eligible for Death

Respondent answers appellant's failure-to-narrow argument by quoting cases in which this Court simply asserts the contrary: *People v. Salcido* (2009) 44 Cal.4th 93, 166; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; and *People v. Demetrulias* (2006) 39 Cal.4th 1, 43. (RB 136.) Following these cases back to the authority on which they rest leads to cases like *People v. Arias* (1996) 13 Cal.4th 92, 187;[28] and *People v. Stanley*

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[28] In *Arias*, 13 Cal.4th at p. 187, the Court relied on the United States Supreme Court decision in *Tuileapa* to reject the failure-to-narrow claim:

(1995) 10 Cal.4th 764, where this Court rejected the claim that California's 1978 death penalty law fails to perform the narrowing function required by the Eighth Amendment, citing *Pulley v. Harris* (1984) 465 U.S. 37, in holding "[t]his contention has been rejected by the United States Supreme Court." (*Stanley*, at pp. 842–843.) In *People v. Bacigalupo* (1993) 6 Cal.4th 457, this Court wrote, "California's 1978 death penalty statute is essentially identical to California's 1977 death penalty law the United States Supreme Court upheld in *Pulley v. Harris* [citations omitted], in that it 'requir[es] the jury to find at least one special circumstance beyond a reasonable doubt,'

"California's scheme for death eligibility satisfies the constitutional requirement that it 'not apply to every defendant convicted of a murder[, but only] to a subclass of defendants convicted of murder. [Citation.]' (*Tuilaepa v. California* (1994) 512 U.S. 967, ____, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750.)"

thereby 'limit[ing] the death sentence to a small subclass' of murders."[29] (*Id.*, 6 Cal.4th at p. 467.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 31 special circumstances[30] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in

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[29] See also *People v. Jennings* (2010) 50 Cal.4th 616, 648–649 [stating the United States Supreme Court "has held that California's requirement of a special circumstance finding 'adequately limits the death sentence to a small sub-class of capital-eligible cases'"], quoting *Harris*, 465 U.S. at p. 53); *People v. Arias* (1996) 13 Cal.4th 92, 187 [rejecting the defendant's narrowing claim and citing *Harris*, 465 U.S. at p. 53, as "upholding the 1977 death penalty law" and *Bacigalupo*, 6 Cal.4th at p. 467 as "noting essential identity of 1978 scheme"]; *People v. Whitt* (1990) 51 Cal.3d 620, 659–660 [rejecting defendant's claim there is no "meaningful" distinction between capital and noncapital murderers because of aggravating sentencing factors common to most murders by citing *Harris* and stating "California's statute satisfies the Eighth Amendment's requirement that the category of death-eligible murderers by suitably narrowed"].

[30] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now 34.

definition as to encompass nearly every murderer, per the drafters' declared intent but contrary to constitutional requirements.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1983) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500–501, 512–515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

This Court's belief that the United States Supreme Court resolved the constitutionality of the 1978 death penalty statute in *Pulley v. Harris* represents a fundamental misunderstanding of that decision. In *Harris*, the issue was "whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." (*Harris*, 465 U.S. at pp. 43–44.) The issue in *Harris* was

plainly different from the question of whether the 1978 version of the statute sufficiently narrows the pool of death-eligible murderers.

It is true that *Harris* contains the statement that the California statute, "[by requiring the jury to find at least one special circumstance beyond a reasonable doubt, . . . limits the death sentence to a small sub-class of capital murders." (465 U.S. at p. 53.) *Harris*, however, involved California's *1977* death penalty statute (see *Harris*, 465 U.S. at pp. 38–39, fn. 1), while the whole point of the Briggs initiative was to substantially expand the reach of that statute to include "all murderers."

Furthermore, *Harris* concluded only that the 1977 California statute was constitutional "[o]n its face." (See 465 U.S. at p. 53.) The Court explicitly distinguished the two laws, noting that the special circumstances in the 1978 California death penalty law are "*greatly expanded*" from those in the limited 1977 law. (465 U.S. at p. 53 fn. 13, emphasis added.)

Harris does not address, let alone resolve, the issue of whether the 1978 statute meets the Eighth Amendment's requirement that a death penalty scheme meaningfully narrow the class of offenders eligible for a death sentence.

This Court has also erroneously relied upon *Tuilaepa v. California* (1994) 512 U.S. 967 in rejecting narrowing claims; see *People v. Arias*,

supra. In *People v. Sanchez* (1995) 12 Cal.4th 1, 60, this Court rejected the claim that "the 1978 death penalty law is unconstitutional . . . because it fails to narrow the class of death-eligible murderers and thus renders 'the overwhelming majority of intentional first degree murderers' death eligible," in reliance on a mistaken belief that the United States Supreme Court in *Tuilaepa had* resolved this claim:

> [I]n *Tuilaepa v. California*, *supra*, and in a number of previous cases, the high court has recognized that 'the proper degree of definition' of death-eligibility factors 'is not susceptible of mathematical precision'; *the court has confirmed* that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, *it suitably narrows the class of death-eligible persons*, and provides for an individualized penalty determination.

(*Sanchez*, 12 Cal.4th at pp. 60–61, emphasis added. See also *People v. Arias*, *supra*, 13 Cal.4th at p. 187 [rejecting narrowing claim by stating "[i]dentical claims have previously been rejected with respect to the death penalty scheme applicable in this case and to its closely related predecessor, the 1977 law" and citing to *Tuilaepa*]; see also *People v. Beames* (2007) 40 Cal.4th 907, 933–934 [rejecting the defendant's narrowing claim by citing to *Tuilaepa*, 512 U.S. at pp. 971–972, for the proposition that "the special circumstances listed in section 190.2 apply only to a subclass of murderers, not to all murderers . . . [thus] there is no merit to defendant's contention . . . that our death penalty law is impermissibly broad."].)

The issue resolved in *Tuilaepa* was whether the aggravating factors in section 190.*3*—which in California pertain only to the death selection determination, and not the death eligibility determination—are constitutional. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 969.)

The Supreme Court in *Tuilaepa* explicitly said that it was *not* addressing any issue concerning the eligibility stage of the California scheme. (512 U.S. at p. 975 [noting the petitioners were not challenging their special circumstances—the eligibility phase in California's scheme—"so we do not address that part of California's scheme save to describe its relation to the selection phase"]; see also *id.* at p. 984 (conc. opn. of Stevens & Ginsburg, JJ.) [concluding that the sentencing factors used at the selection phase at issue in the cases were constitutional, based on "the assumption (unchallenged by these petitioners) that California has a statutory 'scheme' that complies with the narrowing requirement"]; *id.* at p. 994 (dis. opn. of Blackmun, J.) [observing "the Court's opinion says nothing about the constitutional adequacy of California's eligibility process" or its "extraordinarily large death pool" and clarifying "the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing."].)

The United States Supreme Court has never considered, let alone approved, the method of determining who is eligible for a death sentence set out in section 190.2. In rejecting prior claims that California's statute does not adequately narrow the pool of murderers eligible for a death sentence, this Court has relied on two cases from the high court that explicitly stated they were not ruling on this question, or explicitly stated that their holding was limited to the 1977 statute, and was not intended to address the "greatly expanded" 1978 statute.

This Court has said that numbers of people eligible for death under the 1977 and 1978 statutes are "*essentially identical*" (*Bacigalupo*, 6 Cal.4th at p. 467, emphasis added), while the United States Supreme Court says that the number of people eligible for a death sentence was "*greatly expanded*" by the 1978 revisions to the 1977 law. (*Harris*, 465 U.S. at p. 53 fn. 13, emphasis added.) One of these statements is wrong.

The *Tuilaepa* case did not address in any way the question of death-eligibility, or section 190.2. It was solely concerned with what factors could be considered in actually selecting someone for death—that is, section 190.3, a different statutory provision. This Court should recognize that the U.S. Supreme Court has never approved California's method of

determining who is eligible for the death penalty and reconsider this question.

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

Mr. Weatherton summarized the main errors in his opening brief (AOB 411–413.) They were substantial. As the lengthy hearing on juror misconduct showed, the deliberations were focused on issues that were the subject of the errors set forth by Mr. Weatherton. (Args. IV–VII, *ante*.) Respondent argues that no errors were committed at all, so any analysis of their effects, whether singly or cumulatively, is misplaced; and even if any errors occurred, they did not violate Mr. Weatherton's right to due process of law. (RB 140–141.)

Respondent does acknowledge that errors in this case should be considered cumulatively and not separately. (See *People v. Booker* (2011) 51 Cal.4th 152, 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"].) Given the length and contentious nature of the guilt phase deliberations in this trial, any error committed in the guilt phase must be deemed prejudicial.

CONCLUSION

For the foregoing reasons, the judgment against Mr. Weatherton must be reversed in its entirety.

Dated:_____

Respectfully submitted,

_____
MICHAEL R. SNEDEKER

Attorney for Appellant
FRED WEATHERTON

CERTIFICATE OF WORD COUNT

After conducting a word count on this reply brief, I have determined there are a total of 28,701 words in a Times New Roman 13-point font.

Dated: _____

Respectfully submitted,

_____
MICHAEL R. SNEDEKER

Attorney for Appellant
FRED WEATHERTON

DECLARATION OF SERVICE BY MAIL

Re: *People v. Fred Weatherton*, Cal. Supreme Court No. S106489; Riverside Co. Super Ct. No. INF 030802

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. I served a true copy of the attached

APPELLANT'S REPLY BRIEF

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

Steven Parnes, Esq.
California Appellate Project
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Each said envelope was then, on May 13, 2013, sealed and deposited in the United States mail at Portland, Oregon, Multnomah County, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 13, 2013, in Portland, Oregon.

MICHAEL SNEDEKER