IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff/Respondent,

v.

ROBERT LEE WILLIAMS, JR.
Defendant/Appellant.

AUTOMATIC APPEAL FROM THE JUDGMENT
OF THE SUPERIOR COURT OF RIVERSIDE

THE HONORABLE DENNIS A. McCONAGHY

CSC No. S118629
(Riverside County No. CR64075

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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STATEMENT OF THE CASE

On July 17, 1995, the district attorney for the County of Riverside filed a three count felony complaint against Appellant Robert Lee Williams, Jr. (hereinafter referred to as Robert to avoid confusion)[1] and co-defendant, Ronald Walker, alleging in Count I that on July 15, 1995, both men committed the premeditated murder of Gary Williams (hereinafter Gary).[2] It was also alleged in Count I that both men also murdered another, specifically Roscoe Williams (hereinafter Roscoe),[3] and that both used a firearm.[4] In Count II, both men were charged with the premeditated murder of Roscoe.[5] It was also alleged in Count II that both men also murdered Gary,[6] and that both used a firearm.[7] In Count III, both men were charged with the attempted premeditated murder of Conya Lofton.[8] It was also alleged in Count III that both men used a firearm,[9] and that both inflicted great bodily injury on Lofton.[10] (CT 1-2.)

On August 11, 1995, Robert, represented by Deputy Public Defender (DPD) Wright pled not guilty to all counts, denied all allegations and enhancements and waived time for preliminary hearing.[11] (CT 3-4; RPT 1-2[12].) There followed a number of requests by both men to continue the preliminary hearing into late December 1995. (CT 5-18; RPT 17-51.)

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[1] Appellant's last name and the last names of both homicide victims are Williams. They were not related. To ease confusion, Appellant Robert Williams will be referred to as Robert, Gary Williams as Gary and Roscoe Williams as Roscoe.
[2] California Penal Code § 187 (all statutory references are to California statutes unless otherwise specified).
[3] § 190.2(a)(3).
[4] §§ 12022.5(a) and 1192.7(c)(8).
[5] § 187.
[6] § 190.2(a)(3).
[7] §§ 12022.5(a) and 1192.7(c)(8).
[8] § 664/187.
[9] §§ 12022.5(a) and 1192.7(c)(8).
[10] § 12022.7(a).
[11] Walker likewise pled not guilty and denied all enhancements.
[12] The Reporter Transcript for all pretrial events shall be designated as RPT (Reporter's Pretrial Transcript). From the onset of trial on July 1, 2002, the Reporter's Transcript will be designated at RT. This is due to an error by the court reporter in overlapping the page numbering.

On December 21, 1995, an amended felony complaint was filed alleging four counts. (CT 19-21.) In Count I, charging both men with the murder of Gary, the district attorney added two new allegations in addition to the multiple murder and firearms allegations, specifically, that both men murdered Gary while engaged in robbery[13] and burglary.[14] (CT 19-21.) In Count II, charging both men with the murder of Roscoe, the district attorney added two new allegations in addition to the multiple murder and firearms allegations, specifically, that both men murdered Roscoe while engaged in robbery[15] and burglary.[16] (CT 19-21.) Count III remained as it had in the initial complaint. Count IV was added to the complaint and charged Robert with sexual penetration of Ms. Lofton.[17] (CT 19-21.) Both men pled not guilty to all counts and denied all allegations and enhancements. (CT 22.)

During the January 4, 1996 preliminary hearing, both men were held to answer on Counts I, II and III.[18] Lofton was the sole testifying witness at the preliminary hearing. (CT 23-142.)

On January 17, 1996, the date set for arraignment on the information, Robert sought and received a *Marsden* hearing[19] which was denied. The following day, a four-count information was filed. The four count information was identical to the amended complaint with the addition of a torture enhancement alleged in Count I and II as to both men.[20] Both men pled not guilty to all four counts and denied all allegations and enhancements. Also on that date, counsel for Walker moved to sever the two cases; that motion was continued. Counsel for both men also

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[13] §§§ 189, 190.2(a)(17)(A), and 211.
[14] §§§ 189, 190.2(a)(17)(G), and 460.
[15] §§§ 189, 190.2(a)(17)(A), and 211.
[16] §§§ 189, 190.2(a)(17)(G), and 460.
[17] §§§ 289(a), 667.61(c)(5), 1192(c)(34).
[18] The magistrate did not address Count IV, despite testimony from Lofton that she was sexually penetrated.
[19] Robert stated that his attorney was too busy to properly represent him, and, as a result, his right to a speedy trial was being denied. Robert's counsel, Wright, agreed: "He's right. I am too busy. I would like to get rid of a few cases." However, Wright then went on to defend his ability to represent Robert in a timely fashion. (RPT 70-79.)
[20] §§ 186.22(e)(18) and 206.

sought to set a trial date beyond 60 days. Walker agreed to waive time; Robert refused. The trial judge found good cause and the trial was set for March 11, 1996. (CT 146-48; RPT 69-88.)

On February 2, 1996, counsel for both Robert and Walker sought *Keenan* counsel. Robert's motion was continued and ultimately denied, while Walker's *Keenan* request was granted. (CT 182-84; RPT 89-91.)[21]

On February 23, 1996, Robert joined Walker's earlier motion for separate trials. The severance motion was denied the same day. Also on this date Robert sought a *Marsden* hearing, it was heard and denied. [22] (CT 184-85; RPT 104-30.)

On March 1, 1996, Robert's counsel again sought to continue the jury trial over Robert's objection. Walker agreed to waive time. The court again found good cause and continued the trial to May 6, 1996. This was the second trial date. (CT 201-02; RPT 131-39.)

On May 3, 1996, Robert sought and received another *Marsden* hearing.[23] That motion was denied. Following the *Marsden* hearing, Walker moved to again continue the trial. Robert's counsel joined the motion; however, Robert again refused to waive time. The court again found good cause and the trial was continued to October 7, 1996. This was the third trial date. (CT 257-58; RPT 143-73.)

Robert and Walker's joint Penal Code § 995 motion was heard and denied on May 24, 1996. (CT 291; RPT 174-95.)

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[21] Robert was represented by the Public Defender and Walker was represented by the Criminal Defense Panel. The court did not offer any reason as to why Robert's request for counsel was denied. (RPT 97.)

[22] Robert reiterated his lack of communication with counsel and his sense that his case was being unnecessarily prolonged due to inadequate representation. (RPT 117-27.)

[23] Robert brought the hearing to again voice concerns about continuances; Wright indicated that the continuances were an effort to obtain a second counsel and that his office was diligently working to that goal. (RPT 153-67.)

On August 30, 1996, Robert's next *Marsden* hearing[24] was held and subsequently denied on September 4, 1996. (CT 308-09; RPT 206-13.) As a result, Robert petitioned for a Writ of Habeas Corpus on September 10, 1996, claiming ineffective assistance of counsel and a lack of "undivided loyalty and faithfulness to defendant." (CT 314-19.) On October 8, 1996, the habeas petition was denied by the Court of Appeals citing "insufficient facts and lack of merit." (CT 345-47.)

Robert brought his second motion seeking *Keenan* counsel which was heard and denied following hearings on September 17 and 20, 1996. (CT 312-13; RPT 256-75, 315-39.) On September 23, 1996, Robert filed a Writ challenging the denial of *Keenan* counsel. (CT 320.)

On September 27, 1996, counsel for both men moved to continue the trial date. Robert agreed to waive time once the trial judge offered his assurance that January 27, 1997 would be a firm trial date. January 27, 1997 then became the fourth trial date. (CT 310, 320-36; RPT 346-66.)

DPD Wright, on Robert's behalf, filed a supplemental request for production and disclosure of materials on December 13, 1996. Prosecutor Ruiz agreed to turn over some of the requested materials, but requested a continuance regarding other items he was unsure about. Both Wright's delay in producing the request and Ruiz's delay in handing over discovery were admonished by the court. (CT 350; RPT 374-77.)

DPD Mara Feiger joined Wright as Robert's counsel on January 13, 1997. (CT 367-72.)

[24] At this *Marsden* hearing, Robert's fourth, he sought to relieve defense counsel so that he could represent himself. The court told him that a *Marsden* was not an appropriate motion for seeking self-representation and proceeded to lecture Robert on why self-representation was not in his interest. No further action was taken regarding self representation. (RPT 206-13.)

On January 15, 1997, on motion by counsel for both men and again over Robert's objection, the jury trial was continued to April 28, 1997. This was the fifth trial date. (CT 357-64; RPT 381-90.)

On March 21, 1997, Robert, concerned about another continuance, brought another *Marsden* motion[25] which was heard and denied on March 29, 1997. (CT 798, 818; RPT 449-55.) Also on that date, Robert moved to discover the address, phone number, and medical records of Lofton. (CT 798-817.) A month later, on April 18, 1997, Robert filed a second supplemental request for production and disclosure of materials mirroring the earlier discovery request of December 13, 1996. (CT 858-80; 883, 885-91; 894, 915-17, 920, 922-23.)

On March 31, 1997, Ruiz still had not turned over Lofton's contact information, so Feiger again moved to compel discovery. Also on that date, the prosecution admitted to the existence of taped jailhouse conversations between Walker and his girlfriend. The discovery dispute caused the court to continue the trial to July 28, 1997. This was the sixth trial date. (CT 837; RPT 472-93.)

On April 23, 1997 and continuing on through hearings on April 28 and 29, 1997, DPD Feiger's competence was called into question based on a motion filed by Ruiz.[26] Following a declaration by Feiger's supervisor the court determined that her competence was not at issue. (CT 885-93; RPT 494-504.)

From April 29, 1997 through June 6, 1997, discovery concerns were raised and litigated. (CT 894-913; RPT 530-71.)

On June 6, 1997, Robert agreed to waive time and a new trial date was set for October 10, 1997. This was the seventh trial date. (CT 914-17; RPT 573-605.)

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[25] Robert brought the motion to commend Feiger's work and to ensure the court that she be granted continuances necessary to properly represent him. In turn, the court indicated that this was not a *Marsden* hearing. (RPT 456-62.)
[26] The basis for the motion was not put on the record.

From June 6, 1997 through September 17, 1997, discovery issues were heard and litigated. In addition to Feiger's extensive discovery requests, she raised issues related to disclosure of information concerning prosecution witnesses Shields and Lofton. (CT 923-73; RPT 614-75.)

On September 18, 1997, counsel for co-defendant Walker was relieved due to a conflict of interest and Frank Peasley from the Criminal Defense Panel (CDP) was appointed. (CT 1035-43; RPT 676-99, 711-29.)

On September 29, 1997, the court ruled on each of the defense requests for discovery. The court granted discovery of Robert's arrest warrant, as well as his clothing and wallet which were seized during his arrest. The court denied the remaining requests pertaining to discovery of several other prosecution witnesses' names and contact information. (CT 1004; RPT 711-29.)

On October 7, 1997, counsel for both men again raised discovery concerns; in particular, the prosecution's withholding of the background and criminal history of Lofton. Also at that hearing, Walker's newly appointed counsel estimated he could be ready somewhere between six and twelve months, "probably closer to twelve than six." Feiger weighed in on behalf of Robert and noted that there were significant discovery matters unresolved and that another continuance would be appropriate. Robert waived time. The new trial date was set for August 3, 1998. This was the eighth trial date. (CT 1005; RPT 730-47.)

On April 3, 1998, Robert's counsel—public defenders Feiger, Cox [who substituted in for Wright], and Zagorski—declared a conflict[27]; the court appointed the CDP to represent Robert. CDP attorney Grossman appeared [the record is unclear as to whether he was then appointed counsel] on May 4, 1998. One month later, on June 2, 1998, CDP attorney Porter was

[27] Zagorski stated, "[T]his conflict comes as a result, at least, of information that we received recently from the prosecution, information we felt should have been provided much earlier in this case. And had that been provided, we would not be at a junction we are now, a conflict at this late stage of the case." (RPT 879.)

appointed as Robert's counsel and the jury trial date for both defendants was continued[28] to February 23, 1999. This was the ninth trial date. (CT 1096-1100; RPT 879, 900-09.)

Three and a half months later, Porter's motion to be relieved in "the best interests of the defendant" was granted on September 18, 1998. On October 1, 1998, CDP attorney Myers appeared for Robert only to be relieved on October 20, 1998, by CDP counsel Aquilina. (CT 1108-14; RPT 913-25.)

On November 3, 1998, the jury trial was again continued to June 14, 1999, per CDP's motion. The trial judge in granting the motion said:

> I understand why [Robert] wouldn't want to waive time. There's a couple of good reasons. One, because he's in a hurry. And two, it creates an issue that wasn't there before. But the court does find good cause, based on Mr. Porter's health problems, to continue the trial date. And also finds good cause to keep [Robert and Walker's trials] together.

This was the tenth trial date. (CT 1111-12, 1115; RPT 913-15, 926.)

Six months later, on April 23, 1999, Aquilina moved to continue the trial citing the amount of work as to both guilt and penalty phase left undone by the public defender. Robert agreed to waive time. The jury trial was set for January 10, 2000. This was the eleventh trial date. (CT 1134; RPT 947-966, 974.)

A *Marsden* hearing requested by Robert[29] was heard and denied on May 17, 1999. (CT 1136; RPT 977-96.) CDP attorney Filippone appeared as co-counsel with Aquilina on June 25,

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[28] This continuance was due to the appointment of new counsel for Robert; both men agreed to waive time. (RPT 903-09.)

[29] Robert requested Aquilina be removed as counsel due to his pattern of continuances as well as lack of agreement between Robert and Aquilina on issues concerning representation. The court replied, "So what it boils down to is in essence communication." Robert agreed. Aquilina also said, "[Robert] is partly correct." Aquilina further said, "[Robert] obviously knows his case much better than probably anybody that's been involved in the case." After further discussion between Robert, Aquilina, and the court, many of the communication issues were resolved to Robert's satisfaction, such that he withdrew his *Marsden* request. (RPT 977-96.)

1999.[30] (CT 1137; RPT 997-1000.) On August 30, 1999, Robert's *Marsden* hearing was granted as to Aquilina but not Filippone. (CT 1140-41; RPT 1022-23.)

CDP counsel Gunn was appointed as lead counsel on Robert's behalf on September 2, 1999.[31] (CT 1142; RPT 1024-29.) Robert requested a *Marsden* hearing on December 17, 1999 to relieve Gunn. (RPT 1042-50.) The trial judge set a hearing to entertain Robert's *Marsden* request for December 21, 1999.[32] (RPT 1042-66.)

On December 17, 1999, this time on DDA Ruiz's motion and forty-six months after the initial defense request for separate trials, Robert's trial was severed from co-defendant Walker's trial. (CT 1146; RPT 1034-41, 1042-50.)

On December 21, 1999, the *Marsden* hearing previously brought by Robert was heard and denied. Despite the concerns voiced by Robert during the *Marsden* hearing the trial was continued to October 2, 2000.[33] This was the twelfth trial date. (CT 1147-48; RPT 1051-66.)

With CDP Gunn as Robert's counsel, the trial readiness conference was continued a number of times.[34] (CT 1142-46, 1149-54, 1156.) The first continuance on September 2, 1999, was a result of the prosecution's protest over Gunn's appointment.[35] (RPT 1024-29.)

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[30] Filippone appeared as co-counsel with Aquilina on July 23, 1999 and August 27, 1999. (RPT 1001-04.) Aquilina appeared to have been removed because of a conflict of interest, although questions of his competence were raised. (RPT 1027-31.)

[31] On September 2, 1999, Gunn indicated that the dismissal of Aquilina did not include Filippone, and that he (Gunn) would meet with her (Filippone) to determine if Filippone could continue on the case. (RPT 1024-25.) Since Gunn subsequently sought second counsel on October 1, 1999, without again mentioning Filippone, it must be assumed that Filippone was no longer involved. (RPT 1030.)

[32] Robert sought to relieve Gunn because Gunn refused to bring a motion for discovery of the incriminating Walker statements. Robert indicated that Gunn told him, "You don't tell me what to do. I'm not going to do it because you told me to do it." The court denied Robert's *Marsden* motion, indicating that Gunn's decision was proper and not subject to Robert's orders. (RPT 1052-59.)

[33] During the *Marsden* hearing, Robert said, "I'm tired. I want to go to trial. I'm tired of sitting here. As you recall, two years ago, three years ago, I didn't want to waive no time. I wanted to go to trial then.... If I was going to lose my life, let me lose it now and not sit in here for four, five years, which looks like I ended up doing anyway. In the last two years, nothing's been done." (RPT 1051-66.)

[34] Gunn repeatedly requested continuances to seek co-counsel and replace the defense investigator. During the *Marsden* hearing on July 14, 2000, Robert protested the lack of progress by Gunn. Although there were significant delays acknowledged, the court refused to remove Gunn, stating the only concern was readiness for trial, not progress throughout the pretrial phase. (CT 1156; RPT 1079-1100.)

On July 14, 2000, following the denial of yet another *Marsden* motion to replace Gunn, Robert brought a *Faretta* motion. On August 16, 2000, the *Faretta* motion was granted. Gunn, however, was directed to remain as standby [not advisory] counsel.[36] The jury trial was continued to February 2, 2001, as Robert waived time to prepare for his self representation. This was the thirteenth trial date. (CT 1154, 1162; RPT 1094, 1103-49.)

On October 6, 2000, Robert filed a motion to compel disclosure and for production of the names and addresses of the prosecutor's witnesses, audio tapes of all interviews conducted by the prosecution, photos to be used at trial, and copies of tapes, reports, and correspondence relating to Robert's arrest and incarceration.[37] (CT 1167-71.) Discovery was repeatedly delayed due to a prolonged illness of the prosecuting attorney, which lasted from October 13, 2000 through January 12, 2001. (CT 1173-91; RPT 1158-88.)

On January 12, 2001, Robert's motion for second counsel to assist him in his *pro se* defense was denied. Robert also moved to continue the February 5, 2001 trial date to allow him to obtain the specific discovery he had requested on August 16, 2000 and again on October 16, 2000. (CT 1191; RPT 1178-88.)

On January 26, 2001, Robert filed a CCP § 170.1 challenge against the trial judge based on the court's denial of his January 12 motion for second counsel; the judge referred the challenge to the presiding judge for assignment. (CT 1198-99, 1203-04; RPT 1189-95.)

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[35] Ruiz expressed frustration over delays necessitated by appointing counsel for Robert who would later conflict out. Ruiz: "Actually, though, Judge, there is the ability of the Court to take appropriate measures to assure itself and the taxpayers that this will not be happening six months down the line or a year down the line. We have already now replaced, in essence, three sets of attorneys for Mr. Williams." (RPT 1026.) The court agreed with Ruiz: "I will echo your concerns." (RPT 1027.)

[36] "But just to make it perfectly clear, I'm not talking as advisory counsel," the court said, "I'm talking standby counsel. And 'standby' is simply that, standing by being prepared—being prepared ready to go in case there's a tactic of, well, I'm in over my head. I can't represent myself, or any other reason whatsoever. Not as in an advisory capacity where he's giving advice to [Robert], but [Robert] is representing himself. Mr. Gunn is simply standby counsel to step in, to keep us from having to continue the case any more." (RPT 1119.)

[37] Gunn indicated to the court that "What Mr. Ruiz said last time is that he would provide a list of reports, discovery. He hasn't provided that list to both Mr. Williams and to myself so we could review it." (RPT 1154.)

However, on January 31, 2001, the trial judge vacated his previous order which referred the challenge to another judge and ordered the CCP § 170.1 order stricken because "it discloses no legal grounds for disqualification." (CT 1205; RPT 1196-1212.)

Robert's earlier motion to continue was granted and the jury trial was set for April 3, 2001. This was the fourteenth trial date. (CT 1207; RPT 1196-1212.)

On February 23, 2001, Robert filed a second CCP § 170.1 judicial challenge alleging bias in denying his motion for second counsel, which was again denied by the trial judge. (CT 1208-10; RPT 1213-19.)

On March 7, 2001, Robert moved to disqualify Ruiz, claiming prosecutorial misconduct.[38] (CT 1211-15; RPT 1220-27.) Robert again moved pursuant to CCP § 170.1 to disqualify the trial judge for bias; the judge again denied the motion. (CT 1216, 1220-21; RPT 1228-52.) Robert also sought a change of venue, claiming excessive news coverage; the motion was denied on March 16, 2001. (CT 1217-19, 1236-40; RPT 1228-52.) That same day, the court granted Robert's motion to continue the jury trial to June 4, 2001.[39] (CT 1236-40; RPT 1228-52.) This was the fifteenth trial date.

On April 15, 2001, Robert filed a Writ of Mandate seeking review of the court's denial of Robert's request for the appointment of second counsel to assist him in his *pro se* defense. (CT 1192-97, 1259.) At the ex *parte* hearing on April 27, 2001, the Writ of Mandate was denied. (CT 1321.)

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[38] This motion was discussed at the next hearing on March 16, 2001. Robert alleged that Ruiz had misrepresented that the tapes incriminated Robert. The court found any misrepresentation by Ruiz to be innocent and not warranting disqualification. There was also a dispute as to tests done on Robert's clothing worn at the time of his arrest. The court cut off discussion of this motion until the next hearing. (RPT 1228-52.) The hearing on the motion to disqualify Ruiz continued on March 20, 2001, but not completed. (RPT 1253-63.) On April 2, 2001, Ruiz was not present. (RPT 1263-64.) The clothing issue was heard further on April 5, 2001. (RPT 1271-98.) Finally, on April 17, 2001, the court denied Robert's motion to recuse Ruiz. (RPT 1299-1311.)

[39] The basis of Robert's motion was that he was just appointed a new investigator (Evans). Robert also cited his ongoing concerns about Gunn as well as continuing discovery delays. Ruiz argued against any continuance, claiming that Robert was "foot-dragging" under his *Faretta* status. (RPT 1228-52.)

On April 17, 2001, Robert's earlier motion to disqualify Ruiz was heard and denied by the trial judge.[40] (CT 1258; RPT 1299-1311.)

On April 18, 2001, Robert filed a writ challenging the denial of *Keenan* counsel. (CT 1259-1320.) The writ was denied on April 27, 2001. (CT 1321.)

Two weeks later, on May 1, 2001, Gunn represented that standby co-counsel Cormicle could not be present until July and, on that basis, sought to continue the trial. Robert agreed to waive time. The new trial date was set for July 30, 2001. This was the sixteenth trial date. (CT 1336; RPT 1312-27.)

On May 18, 2001 and again on June 15, 2001, Robert moved to remove standby counsel Gunn, citing a conflict of interest; the motion was denied.[41] (CT 1337-58, 1358; RPT 1328-34.)

Defense Investigator Evans' request to be relieved was granted. (CT 1339-39A; RPT 1330-34.)[42]

On June 28, 2001, Ruiz moved to relieve Robert of his *pro per* status. The motion was granted and Gunn was appointed counsel.[43] (CT 1354-55; RPT 1335-51.)

On August 20, 2001, two months after being reappointed, Gunn declared a conflict of interest, the same conflict complained of in Robert's previous request to have Gunn relieved. Gunn was relieved and Cormicle was appointed. Cormicle moved to continue the trial; Robert

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[40] Robert stated that Ruiz told Robert's investigator (Evans) that he would not be able to view certain discovery items (Robert's clothing) until the date of this hearing. Because Robert had not viewed these items, he indicated he was unable to speak to the motion. The court subsequently denied his motion to recuse Ruiz. (RPT 1299-1311.)

[41] Robert first introduced his conflict with Gunn (as a result of a pending civil case he filed against Gunn) on June 28, 2001: "I don't feel that if he was to take my *pro per* status, or something was to happen to—my *pro per* status was taken, Mr. Gunn was to try the case, why would he actually put his best foot forward to win the case when he stands to lose the civil case, if I—if I win the criminal case?" (RPT 1336.) Gunn also indicated his concern over the potential conflict. (RPT 1336-37.) The court asked Gunn, "Do you see any reason why you would have to recuse yourself? ... And you think that you can competently represent Mr. Williams, if you were called to step up and be the first lawyer?" Gunn answered that he did not see a reason to recuse himself and could competently represent Robert. The court denied Robert's motion to recuse Gunn. (RPT 1337.)

[42] Evans stated in a letter to the court dated June 9, 2001, "I find it impossible to work with Mr. Williams." (CT 1339 A.)

[43] Ruiz alleged that Robert was engaged in "delay tactics." (RPT 1346-47.)

refused to waive time; the court, however, found good cause and, on September 20, 2001, continued the trial to March 4, 2002. This was the seventeenth trial date. (CT 1358; RPT 1363-64.)

On January 23, 2002, Cormicle again moved to push back the trial, citing a lack of discovery of FBI reports related to Gary Williams' robberies, and stated to the court that Robert had requested this discovery while representing himself, but was told the reports did not exist. Ruiz agreed such discovery did exist and was "appropriate." The new trial date was April 8, 2002. This was the eighteenth trial date. (CT 2162; RPT 1382-84.)

On February 11, 2002, Cormicle moved to discover the identities of all criminal associates of Gary Williams who may have wanted to kill him as a result of their belief that Gary was an FBI informant. Among the persons "believed to have participated with Gary in sixteen federal credit union robberies" were Robert Scott and Lofton. (CT 2164-2164G; RPT 1386-98.)

On March 21, 2002, the California Court of Appeals, in its opinion regarding the trial court's April 27, 2001 denial of Robert's request for second counsel, found the matter moot, given the significant passage of time and given that Robert was currently represented. (CT 2179.)

On March 29, 2002, Robert's *Marsden* motion[44] was heard and denied. At defense request, the trial was continued to June 3, 2002; defense counsel cited the need for additional time to develop its third-party liability theory and obtain evidence against one of the victims.[45] This was the nineteenth trial date. (CT 2185-87; RPT 1400-25.)

On April 25, 2002, Cormicle at an *in camera* hearing again argued for a continuance maintaining that he had learned that Gary Williams "had several enemies as of July 15, 1995... a

[44] Robert sought to remove Cormicle from the case for two reasons. First, because he worked closely with Gunn such that he was exposed to the conflict of interest that resulted in Gunn's removal, and second because he was on the same CDP panel as Gunn. (RPT 1400-16.)

[45] On May 1, 2002, Robert agreed to waive time in light of Cormicle's discovery requests to the prosecution. (RPT 1475-1504.)

lot of people wanted to jack up... rob, kill Gary Williams...." On May 1, 2002, the trial was continued to July 1, 2002. This was the twentieth trial date. (CT 2247-65; RPT 1475-1503.)

A *Marsden* hearing was heard and denied on June 7, 2002.[46] (CT 2278.)

On July 1, 2002, jury selection began. (CT 2286-321; RT 1001.) The first and second panels of prospective jurors were sworn, completed juror questionnaires, and ordered to return on July 22, 2002. (CT 2323-4247; RT 1008-1147.) On July 2, 2002, the third and fourth panels of prospective jurors were sworn and completed questionnaires. (CT 4248-6060; RT 1149-79.) On July 31, 2002, the prosecution struck the torture allegations from the information.[47] (RT 1669-74.)

The jury and four alternates were sworn on July 31, 2002, and both sides offered their opening statements. Prosecution witnesses Officers Kirkendall and Fountain were called and examined. (CT 6104-05; RT 1674-78, 1686-1811, 1831-1921.)

On August 1, 2002, Lofton was called and examined. (CT 6108-09; RT 1922-55.) On August 15, 19, and 20, 2002, the examination of Lofton continued. (CT 6310-15; RT 2047-2209, 2226-2314, 2362-2504.) On August 19, 2002, prosecution witness Michelle Contreras testified and, on August 28, 2002, prosecution witnesses Martin Wildeman and Robert Scott testified. (CT 6312-13, 6316-17.) The following day Scott resumed his testimony and prosecution witness Dr. Joseph Choi testified. (CT 6318-19.) On September 3, 2002, prosecution witnesses Camiel Garrison, Donald Sutton and David Orr testified, and, on September 4, 2002, prosecution witnesses Keith Yoshimura, Matthew Embernate, Phillip Riccardi and Gary Thompson testified. (CT 6320-26; RT 2844-918, 2920-3013.) Also on September 4, Lofton was recalled and

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[46] Robert protested as to Cormicle's incomplete discovery research, but the court admonished Robert and denied the *Marsden* motion, finding Cormicle to be on a reasonable schedule to be ready for trial. (RPT 1513-19.)

[47] Ruiz indicated that he had previously struck the torture allegation. (RT 52-64, 1669-74.)

testified. (CT 6320-25; RT 2920-3013.) Prosecution investigator Tony Pradia also testified that day. (CT 6325-26; RT 2920-3013.)

On September 4, 2002, the prosecution rested. (CT 6325-26; RT 3013.)

On September 9, 2002, the defense put on its case; defense witnesses Sonya Jimmons and Don Plata were called and testified, and prosecution witnesses Thompson and Lofton both were recalled and testified. The defense rested that same day. (CT 6332-33; RT 3062-145.)

On September 10, 2002, an amended information was filed which included only one multiple murder allegation and omission of all references to former co-defendant Walker. (CT 6334-35, 6375-80; RT 3188-91.) Robert waived formal arraignment, pled not guilty, and denied all allegations and enhancements. (CT 6334-35.) Following jury instruction, both sides gave their closing remarks. (CT 6334-72; RT 3191-327.) The following day the prosecutor gave his rebuttal closing and the jury commenced deliberations. (CT 6381-82; RT 3334-80.) Over the four days of deliberations there were several jury questions.[48] (CT 6383-86; RT 3397-405.)

On September 17, 2002, the jury returned guilty verdicts on all four counts: Count I [murder of Gary] was fixed at first degree, the handgun allegation was found true, and it was determined that the murder was committed while engaged in burglary and robbery; Count II [murder of Roscoe] was fixed as second degree, the handgun allegation was found true, and it was determined that the murder was committed while engaged in burglary and robbery; Count III [attempted murder of Lofton] was found to be premeditated and the handgun and great bodily injury allegations were found true; and in Count IV the jury found that Lofton had been sexually violated. (CT 6387-423.)

[48] The first jury note called for clarification of the differences between evidentiary and circumstantial evidence. The second jury note called for the definition of Penal Code § 12022(a). (CT 6384-86; RT 3397-3404.)

The penalty phase began on September 19, 2002. Also on that date a *Marsden* motion brought by Robert[49] was heard and denied. (CT 6427; RT 3443-70.)

On October 15, 2002, alternate Juror #1 replaced Juror #1.[50] (CT 6430-31; RT 3485, 3496-98.) The court pre-instructed the jury and both parties made their opening statements. (CT 6430-31; RT 3508-23.) On that date, prosecution witnesses George Frank and Erma Foster testified, and defense witnesses Abel Zaragoza, Daniel Johnson, Fantasia Williams, Victoria Windom, Donna Josey and Pearl Lee testified. (CT 6430-31; RT 3523-68.)

On October 16, 2002, both sides made their closing arguments and the jury began its penalty phase deliberations. (CT 6459.) On October 18, 2002, their third day of deliberation, the jury returned with its verdict and fixed the penalty as death. (CT 6471.) The motion for new trial was set for March 3, 2003. (CT 6471; RT 3658-63.)

Robert's *Marsden* motion was heard and denied on December 31, 2002.[51] (CT 6478.)

On January 8, 2003, Robert moved to reinstate his *Faretta* status. (CT 6479-89.) The *Faretta* hearing was heard and denied on January 31, 2003. (CT 6497; RT 3693-708.) Also on that date, Cormicle's motion to appoint independent counsel was heard and denied. (CT 6497; RT 3693-3708.)

The motion for new trial was continued several times until August 29, 2003, at which time the trial judge denied the motion and sentenced Robert to death. (CT 6498-828; RT 3709-808.)

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[49] Robert stated that Cormicle made several key strategic changes in presenting Robert's defense. Cormicle agreed that changes were made but defended his reasoning for the changes. (RT 3460-70.)

[50] Juror #1 complained of a foot infection. Cormicle opposed his removal, arguing that Juror #1 had been the holdout during the guilt phase of deliberations. Nonetheless, the court dismissed Juror #1 and substituted Alternate #1. *See* Argument XV. (RT 3485, 3496-98.)

[51] Robert once again voiced communication and strategy complaints concerning Cormicle's representation. The conversation then turned to the sleeping juror issue. (*See infra* Argument XII.) After indicating the frivolity of the *Marsden* hearing, the court discussed an ineffective assistance of counsel motion with Robert. Robert then mentioned his intention to bring a *Faretta* motion; the court told him to wait until the next hearing. (RT 3666-90.)

The record was certified by the Riverside Superior Court to the California Supreme Court on January 4, 2010. The record was filed by the California Supreme Court on September 10, 2010.

STATEMENT OF FACTS

A. Introduction

The guilt phase of Robert Williams' capital trial was dominated and inextricably compromised by three primary interrelated concerns: 1) denial of speedy trial; 2) discovery delays and obstructions; and 3) revocation of self-representation.. The first concern, the eighty-three-month delay which denied Robert his speedy trial, was primarily caused by the state's repeated discovery obstructions, the court's failure to sever Robert's case from that of co-defendant Walker for four years despite patent conflicts between the defendants, and the revolving door of defense counsel which led to numerous delays, all of which crippled Robert's ability to receive his constitutionally guaranteed speedy trial.

The second primary concern was the ongoing discovery delays and obstructions by the prosecutor regarding access to Lofton, her family, friends, and associates, as well as the materials and records related to third party culpability. The prosecutor insulated Lofton, its primary witness, from any meaningful investigation as to her credibility, her ability to make eyewitness identifications, as well as her motivations in incriminating Robert. The prosecutor also inhibited defense efforts to discover and investigate third parties who had interests in killing or harming Gary Williams.

The third dominant concern was the violation of Robert's constitutional right to self representation. Even though the trial judge initially recognized Robert's right to self representation, he failed to ultimately protect that right. In the absence of sufficient cause, the court acquiesced to the demands of the prosecutor and withdrew Robert's right to self-represent.

B. Bank Robber Gary Williams

The target of the July 15, 1995 home invasion which ultimately led to the two homicides giving rise to this capital prosecution was Gary Williams. (RT 2047.) Gary was a bank robber.[52] (RT 1688, 2390, 2526; RPT 1484.) He would mastermind robberies, scout out likely targets to rob, supply the necessary guns and stolen vehicles to accomplish the crime and then assign others to commit the robberies. (RT 2403, 2558, 2563.)

Gary's bank robbery efforts met with mixed success; some robberies were successful while others were not, which resulted in a number of Gary's minions being prosecuted and incarcerated. (RT 1704, 2419-20.) One such failed robbery [the Lake Forest robbery] had occurred four days before Gary was murdered, during which several of Gary's underlings, including Robert Scott, were arrested. Gary paid some of the bills of past robbery associates who were serving time in jail or were out on bail. (RT 2412-13, 2419-20, 2530-56.) In fact, the night of his murder, Gary gave $100 to the wife of one of those associates, who had shown up at Gary's house so she could put money on her husband's books in prison. (RT 2412-13.) That same night, Gary was also seeking to buy a gun from Walker, as his guns had been confiscated by the authorities when Scott and two others were arrested following the failed robbery. (RT 2395-2410, 2556-68, 2574-2603.) Despite defense discovery efforts, the number of "associates" who had been incarcerated as a result of Gary's various failed robberies but were now out of prison was never revealed.

Gary, in addition to robbing banks, supposedly had a number of Crip and Mexican Mafia connections. (RT 1711.) Some of the individuals who had committed Gary's robberies were members of the 60 Crip gang. (RT 1711.) These included bank robbers and killers. (RT 1711.) Gary himself claimed to be a member of the Palm Oak Crip gang. (RT 1688.) Also included in

[52] Gary served time for an October 1990 ATM robbery, for which Robert Scott was also convicted and served time. (RT 2526.)

Gary's group of associates was a made member of the Mexican Mafia named Manuel. (RT 2410, 2760.) During a past robbery, Gary had taken approximately two kilograms of cocaine and given it to Manuel. (RT 2410, 2760.)

Gary had angered others in his life, beyond known dangerous felons. Shortly before his death, Gary got into an altercation with Ramone Watson, an ex-boyfriend of Gary's current girlfriend Lofton, and the father of Lofton's child. (RT 2442-26.) Watson was angry at Gary over his relationship with Lofton and had harassed Gary at a club. (RT 2442-26.) In addition, Gary had an ex-girlfriend named Omvia Nikol Thurston or "Nikki," who was pregnant with one of Gary's several children and was furious over Gary's relationship with Lofton. (RT 2415-18.) Shortly before Gary's death, Nikki had threatened to kill Lofton and expressed her anger over Lofton having supposedly taken Gary away. (RT 2415-16, 2956.) This relationship with Nikki was only one of several Gary had with women other than Lofton. (RT 1712.)

C. Home Invasion and Murders

On July 15, 1995, four days after the failed Lake Forest robbery, three men entered Gary's residence at approximately 8:30 p.m. (RT 2063, 2077, 2094-95.) The three men immediately beat Gary and threatened harm to him and Lofton unless they revealed the whereabouts of the proceeds from the recent bank robberies masterminded by Gary. (RT 2097-2108.) The invaders were interrupted when Roscoe [Gary's father] approached the residence and called out to be let in. (RT 2143.) The suspects pulled Roscoe into the house, where both he and Gary were murdered. (RT 2144-45, 2191, 2226, 2280.) Lofton was injured during the home invasion but managed to escape through a bedroom window. (RT 2280, 2287.) The three invaders fled.[53] (RT 2315.) Robert was arrested in Las Vegas eleven days later. (RT 2612.)

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[53] According to Lofton's account three men were involved; however, the neighbor reported seeing four men driving away at the approximate time of the murders. (*See infra* section E, pp. 22-26.)

D. Conya Lofton's Testimony

Lofton, Gary's girlfriend, was the primary witness for the state. There were no other witnesses or physical evidence linking Robert to the murders.[54] She testified that on the evening of the homicides, she and Gary were driving home from dinner at about 8:00 p.m., when they passed a burgundy vehicle with tinted windows which obscured the occupants. (RT 2063.) As Lofton and Gary arrived at Gary's residence, Roscoe was sitting outside, awaiting their arrival. (RT 2066.) Also waiting was a woman named Charlotte, one of Gary's former girlfriends whom Gary gave $100 for her husband in prison. (RT 2064-65.) While Roscoe waited outside, Gary, Lofton and Charlotte entered the residence through the garage, and once inside Charlotte received the $100 from Gary and left. (RT 2069-70.)

Roscoe and Gary then conversed and Roscoe left on foot for the 7-Eleven to get some snacks, intending to return shortly. (RT 2071.) Lofton went upstairs to the master bedroom. (RT 2073.) While upstairs, she testified that the burgundy vehicle they had seen earlier pulled up and parked across the street from Gary's residence. (RT 2084-85.) Lofton saw three men exit the car and cross the street toward Gary's residence. (RT 2086.) At one point, Lofton testified that only two men exited the car. (RT 1703-21.) It was sometime after 8:00 p.m. and, though there was some illumination from a street light across from Gary's residence, Lofton, while testifying at trial, was not asked if she could discern the faces of the individuals. (RT 2086-88.) Lofton, however, would later identify the men as Appellant Robert Williams [hereinafter Suspect #1], Ronald Walker [hereinafter Suspect #2], and a third man who was never identified or prosecuted [hereinafter Suspect #3]. (RT 2090, 2103.) Lofton testified that the heavy-set man she identified as Suspect #1 was carrying a black case as he walked from the car. (RT 2091.)

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[54] Robert Scott alerted the authorities to Robert's alleged threat to Gary; however, he was not percipient to the events of July 15, 1995. (*See infra* section F, pp. 26-28.)

As the men approached, Lofton, from upstairs, heard Gary say, "Man, you didn't see me and my girl? We passed you." (RT 2089.)

Lofton heard one of the suspects reply, "Nah, nigger. I was rolling a joint." (RT 2090.)

Lofton testified she saw the men enter the garage with Gary. She could hear some "mumbled" talking and then heard the garage door closing. (RT 2095.)

Shortly thereafter Suspect #2 wearing yellow gloves but no mask, appeared in the master bedroom, confronted Lofton, and pointed a gun at her. He was soon joined by Suspect #1 who demanded Lofton's valuables. Lofton complied and gave them her jewelry. (RT 2097-98, 2105-06.)

Suspect #1 demanded Lofton tell him where Gary's money from his various robberies was hidden. (RT 2108.) She denied any knowledge. (RT 2108.) Suspect #3 then came upstairs only to be chastised by Suspect #1 and sent back downstairs to "stay on duty." (RT 2119-28.) Meanwhile, Lofton testified that, outside the hearing of the other two men, she pled with Suspect #2 to spare her life. (RT 2137-42.) Suspect #2 then said, "But Rob, that's my cousin," and told Lofton if she didn't help him "get Gary" that he was going to kill her baby. (RT 2138.) Lofton testified that Suspect #1 then re-entered the room and threatened to rape her if she did not disclose the location of the money. (RT 2143.)

At about that time, Roscoe [returning from the 7-Eleven] called out from the front of the residence for Gary to let him inside. (RT 2143.) Lofton testified that Suspect #1 told the other two men, "That's his old man. Snatch his ass in the house." (RT 2144.) Lofton heard the front door open and Roscoe being pulled inside. (RT 2144-45.) Gary and Roscoe were brought upstairs and laid face down in the hallway. (RT 2152.) They were bound and Gary's face evidenced that he had been beaten. (RT 2152-59.) Gary told the suspects that the money was in

his bathroom but after some cash was located, Suspect #1 said, "That ain't all the money... Gary just hit two banks back to back." (RT 2162-63.)

Lofton testified that Suspect #1 took her into the bathroom, pulled off her shorts and panties and inserted his fingers in her vagina.[55] (RT 2163-71.) Upon exiting the bathroom, Suspect #1 said to the others, "Do his old man in front of him." (RT 2173-77.)

Shortly thereafter Lofton testified that she heard [but apparently could not see] Roscoe coughing and gasping for air and then saw Suspect #2 with his arm at Gary's neck choking him. (RT 2191.) Lofton testified that Suspect #1 then began choking her and then cutting at her neck with a knife. (RT 2196-97, 2203-09.) At that time Lofton testified that a car's headlights were illuminated through the bedroom window and flashed on and off. (RT 2280.) The three suspects, alerted to the headlights, abruptly left the three victims and went downstairs. (RT 2280.)

Lofton, left alone upstairs, heard Roscoe gurgling "[l]ike someone is drowning." (RT 2283.) She then turned Gary over [he had been lying face down] but she couldn't tell if he was breathing. (RT 2298.) She pulled a bag that was covering Roscoe's head, but also could not determine if he was alive. (RT 2298.)

Lofton dialed 911, but, upon hearing the men coming back upstairs, left the 911 connection on, climbed out a bedroom window onto the garage roof, jumped onto the lawn, and ran from the house, where moments later police officers found her and took her to a hospital for treatment. (RT 2287-309.)

E. Concerns About Lofton's Credibility and Her Eyewitness Identification

As is evident in the foregoing, the case against Robert Williams was essentially the testimony of Conya Lofton. There were no other witnesses to the murders and no forensic evidence linking Robert or Walker to the murders. (RT 2996.) The yellow dishwashing gloves

[55] Lofton offered varying accounts of these events. (*See infra* section E, pp. 22-26.)

later recovered contained no fingerprints. (RT 2996.) The black gun case found at the residence contained no traceable forensics. (RT 2996.) The fingerprints found in the residence were determined to come from only the victims. (RT 2996.) None of the shoe prints or footprints matched any of the shoes recovered from Robert or Walker. (RT 2996.) There was no physical or testimonial corroborating evidence to support Lofton's account of events; consequently her veracity and the reliability of her identification of Robert were issues of central concern throughout the investigation, pretrial and trial.

At the time of her romantic liaison with Gary, up to and including the night of the murders, Lofton was aware that Gary was a bank and credit union robber. (RT 2390-2414.) She was aware that he kept firearms at his residence and in fact that he intended to negotiate to buy a firearm on the night of the murders. (RT 2047-49.) Lofton was also aware that Gary put money "on the books" for his minions who were incarcerated following failed robberies masterminded by Gary. (RT 2068, 2419-20.)

Prior to the night of the homicides, Lofton had never seen Suspects #1 and #3. (RT 2109-19, 2226-50.) She testified she had met Suspect #2, who she knew as "Boochie," about six months earlier at Gary's residence.[56] (RT 2079-80.) Lofton's next encounter with Suspect #2 was when he first confronted her upstairs on the night of the murders. (RT 2103.) She immediately noticed he was wearing yellow dishwashing gloves but that his face was uncovered, indicating to her that the intruders intended to kill the occupants, including her. (RT 2106.) Throughout the invasion, Lofton testified that she was in great apprehension for her life. (RT 2139.)

Later that same night at the hospital, Lofton's behavior was erratic, including "laughing" with visitors and staff, and not "mood appropriate" or "depressive," despite claiming she had

[56] "Boochie" was later identified by Lofton as Walker. (RT 2090.)

been raped. (RT 3066-74.) In addition, she requested a pregnancy test even though she alleged at one point that she had been anally penetrated, and at another point she testified that the molestation was a finger penetrating her vagina. (RT 3075.) She also inaccurately reported that the victims had been shot in the back of the head. (RT 3075.) Moreover, during Robert's trial she testified that suspect #3 had opened a vacuum cleaner bag looking for money, whereas at the preliminary hearing she said it was Walker who had opened the bag, whereas in her testimony at Walker's trial she testified it was "Rob" who had opened the bag. (RT 2380-90.) In a taped interview two days after the murders, Lofton claimed to have seen only two men exit the car and approach the house that night, rather than the three she later claimed had approached. (RT 2391-92.) The issue of how many people were involved was further confused by a neighbor's testimony that recalled four men get into four different vehicles and speed from the scene at the approximate time of the murders. (RT 2319-20.)

Lofton, during the preliminary hearing, described Suspect #1 as being shorter than 5'8" and during her trial testimony she stated she was "probably taller than [Suspect #1]." (CT 99; RT 2469.) During a taped interview three weeks after the murders, she described Suspect #1 as 5'7" and 190 pounds. (Def.'s Ex. B1; RT 2469.) Robert was 5'11¾" and weighed 275 pounds at the time. (RT 3062.) Lofton's initial photographic identification of Robert as Suspect #1 took place three days after the homicides and was not recorded. (RT 1922-55.) It took place in the hospital as she was hooked up to an I.V. and taking unknown medications. (RT 1922-55.) Lofton admitted she was under the influence of pain killers and muscle relaxants while being interviewed in the hospital and was "confused, dazed..." (CT 108-09.) She noted that she could not remember her answers to the police when they questioned her because she "had pain medicine..." (CT 93.)

There were several other inconsistencies in Lofton's various accounts. At the preliminary hearing, she testified that "Rob" removed one of his gloves after he had inserted his fingers in her vagina, but at trial she testified that he had removed his glove prior to inserting his fingers. (CT 62; RT 2170.) Lofton testified at both the preliminary hearing and at trial that she saw three men exit the vehicle parked outside Gary's house, but in a taped interview with detectives shortly after the murders, in which she admits she had a better recollection of the events, she told detectives that only two men exited the vehicle. (CT 42; RT 2086, 2123; Def's. Ex. B1.)

Lofton testified at trial that she moved Gary's "bright blue" 1989 Cavalier from the street into the garage during the evening, prior to the home invasion, and that a "dark blue" El Camino belonging to Gary's friend Chris, was parked in Gary's garage. (RT 2049-2051.) At both the preliminary hearing and at trial, the only two cars she remembers being at the house were the Cavalier and the El Camino, both of which were parked in the garage. (CT 140-41; RT 2051.) At the preliminary hearing, she testified that the only other car at Gary's residence that night was the same burgundy car she and Gary had seen earlier and from which the men alighted. (CT 40.) However, Gary's neighbor, Michelle Contreras, recalled seeing *four* cars leave Gary's house around 10:00 PM. (RT 2320.) She saw two cars leave the driveway, an El Camino, and Gary's Cavalier. (RT 2321-23.) While Lofton only claimed there was one car, the burgundy sedan, outside of Gary's house that night. Contreras testified she also saw a lowered Chevrolet truck outside the residence at approximately 10:00 PM. (RT 2324.) Contreras did recall seeing a sedan-like car outside of Gary's house; however she did not recall it being a dark color such as burgundy, but rather described it as "light in color." (RT 2325.)

Given the circumstances of the initial identification, it was not surprising that over a month later the police conducted another photographic identification with Lofton in Mississippi [she had temporarily moved there to stay with relatives], during which she was not hospitalized and presumably not on medication. (RT 2362-64.) She identified Robert as Suspect #1 during both photographic line-ups. (RT 2362-64.) However, the man she emphatically identified as Suspect #3 during this second identification was actually a man named Shawn Ford who was in prison at the time of the murders. (RT 2362-64; 3062.)

Throughout the seven years of pretrial, a significant dispute involved the prosecution's efforts to block defense access to Lofton [including her family, friends, neighbors and co-workers] and any information concerning her past. (*See supra* Statement of the Case [SOC][57], pp. 5-6.) It did eventually develop, however, that she had previously sustained a misdemeanor conviction [involving fraud] and had lied about her conviction on subsequent job applications. (RT 3117-27.)

F. Scott Focused the Investigation onto Robert

While Lofton's testimony set forth the events surrounding the murders, it was the testimony of Robert Scott who focused the investigation on Robert. Scott, a longtime friend of Gary's, was one of Gary's primary accomplices in robbing banks and credit unions. (RT 2523.)

According to Scott on July 4, 1990, eleven days before the murder, Robert supposedly threatened Gary to give him a share of the money he had stolen from banks and credit unions or else he would kill Gary and his family. (RT 2535-43.) Scott claimed to know Robert from an earlier introduction to him by Gary in 1991. (RT 2544.) After the purported threat, Gary and Scott spent the day relaxing with friends and family members, to whom they mentioned nothing

[57] For the purposes of cross-referencing via *infra* and *supra*, the Statement of the Case will hereinafter be referred to as "SOC"; the Statement of Facts will hereinafter be referred to as "SOF."

of the threat on their lives allegedly made just a few hours before. (RT 2554.) According to Scott, later that evening, he and Gary planned out another credit union robbery, with the ostensible intent to pay off Robert with part of the illicit proceeds. (RT 2557-58.)

On July 11, 1995, four days before the murders, Gary, after planning out a robbery of the Lake Forrest Federal Credit Union in Orange County, sent three accomplices, including Scott, who had just been released from prison, to commit the robbery. The robbery failed and all three were apprehended. Gary, who had watched the robbery from a distance, was not implicated or apprehended. Scott admitted that he did not tell any of the officers involved in his arrest about Robert's supposed threat or that it was the impetus behind the robbery. Scott also conceded that he did not tell the FBI agents who conducted his initial interview about the threats he claimed Robert made. (RT 2556-68, 2692-95.)

The murders occurred on July 15, 1995, and Scott testified to having found out from a phone call with his mother about the murders the next day. (RT 2559, 2567.) Scott was not only able to communicate with his mother at that time, but had "unrestricted access to [call] other people ... who [he] could talk to about anything." (RT 2716-17.)

On July 19, 1995, Scott, facing a potential eleven-year prison sentence for the Lake Forest robbery and denying he had any designs on mitigating his pending robbery charge, called a detective investigating the murders of Gary and Roscoe and claimed he had useful information concerning the murders. (RT 2559.) The investigating detective, suspicious of Scott's motives, asked him if he was looking for a deal on his case in exchange for his cooperation and testimony. (RT 2570-71.) Scott denied he was making a deal; however, he arranged for his attorney to contact the prosecutor and attempt to negotiate a deal on his pending robbery charge in return for information regarding the murders. (RT 2571, 2707, 2720.) On August 18, 1995, Scott met with

the FBI again, per his request, and told them about Robert's supposed threat and Gary's connection to the bank and credit union robbery ring as well as Gary's connection to the Mexican Mafia. (RT 2708-10.) And in a letter dated June 5, 2002, Scott sought a reduction of his eleven-year prison sentence in exchange for testifying against Robert, a motivation he admitted to while testifying at Robert's trial on August 29, 2002: "I was willing to assist you [prosecutors] in the past, and I was under the impression your office back then was going to assist me with the US Attorney and judge in the [Lake Forest robbery] case." (RT 2707, 2710-14.) Scott admitted on cross-examination that he never told anyone about the threat and never reported it to law enforcement. (RT 2603.) He further acknowledged that the first time he relayed his story to anyone was when he was in federal custody awaiting robbery prosecution. (RT 2692-93.) During that initial telephone conversation with the investigator, Scott also failed to mention the gun that played such a significant part in his later testimony about Robert's purported threat.[58] (RT 2535-43, 2715.) Curiously, Lofton testified that Gary never told her about the threat allegedly made by Robert against Gary. (RT 2421.)

In July of 1995, the same month of the murders and Scott's phone call implicating Robert, Las Vegas police received a tip from a black male that Robert, "a person... that was possibly wanted for homicides in the Moreno Valley area," was in the Las Vegas area. (RT 2612, 2654-63.) On July 26, 1995, police set up surveillance outside Robert's Las Vegas motel room. (RT 2612-20, 2654.) Shortly thereafter, Robert gave himself up peacefully to police outside his room. (RT 2684.)

This timeline clearly suggests that it was Scott's call to the police on July 19, 1995, just four days after the murders, that related the alleged threat against Gary and focused the investigation squarely on Robert.

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[58] The threat was allegedly made on July 4, 1995, by Robert and directed at Scott and Gary. (*See supra*, p. 27.)

I

DELAYS AND OBSTRUCTIONS DURING THE SEVEN-YEAR PRETRIAL VIOLATED ROBERT WILLIAMS' RIGHT TO A SPEEDY TRIAL AND COMPROMISED HIS ABILITY TO DEFEND HIMSELF IN VIOLATION OF THE SIXTH AMENDMENT

A. Introduction

Robert Williams, Jr. was arraigned on August 11, 1995, yet his trial began eighty-three months later on July 1, 2002. That seven year pretrial span, during which there were twenty different trial dates, was an arduous and frustrating journey for this capital defendant to present his case to a jury. There were a number of contributing factors to account for such a delay. First were the delays attributable to the discovery obstructions by the prosecution. Then there were the delays attributable to the trial judge's failure to sever Robert's case from Walker's case.[59] Finally, there were the delays caused by the revolving door of defense lawyers[60] which led to significant continuances with each new appointment.

The passage of seven years raises the specter of speedy trial concerns and, when examined for the causes of delay, presents a compelling case for a violation of Robert's constitutional guarantee of a speedy trial.

B. Factual Background

1. Pretrial begins

Robert, along with co-defendant Walker, was initially arraigned on August 11, 1995. (CT 3-4; RPT 1-2.) The preliminary hearing was set for September 7, 1995. (CT 3-4; RPT 1-2.) Following several continuances sought by both defendants, a new preliminary hearing date was

[59] Robert's case was joined with Walker's case from August 11, 1995 through December 17, 1999.

[60] Following the public defender, Porter represented Robert from June 2, 1998 to September 18, 1998, Myers from October 1, 1998 to a time unspecified, Aquilina from October 10, 1998 to August 30, 1999; Gunn from September 2, 1999 to August 16, 2000 and then again from June 28, 2001; and Cormicle from August 20, 2001 through trial.

set for November 15, 1995. (CT 8; RPT 17-30.) On November 9, 1995, Walker's lawyer sought and received a twenty-day continuance because he was in another trial. (RPT 32.) Robert's counsel, however, opposed the continuance, stating, "Mr. Williams prefers to have the prelim as set." (CT 15; RPT 31-36.) On November 29, 1995, Attorney Schwartz [appearing for Walker], citing commitments to another trial, sought and obtained a continuance of the preliminary hearing to December 14, 1995. (RPT 37-45.) Attorney Wright, for Robert, withdrew his opposition to the continuance stating he had been ill and unable to meet with Robert. (CT 16-17; RPT 37-45.)

During a status conference on December 14, 1995, Walker's counsel requested another continuance of the preliminary hearing, citing his work on another trial. Wright, on behalf of Robert, opposed the continuance. Nonetheless, the preliminary hearing was pushed back to December 21, 1995. (CT 18; RPT 37-45.) On that date, Walker's attorney again requested a continuance to listen to tapes that had just been provided by the state; Robert initially refused to waive time, protesting, "I don't want to waive no time. I want to come on and do this." Later at the same hearing Robert pointed out,

> The statements on the tape that [Wright] wanted to wait to be prepared for is supposed to be the same thing I didn't have for five months now, so I don't see much difference that would come out on that tape that is not already in the transcript. So what would be their reason to prolong this anymore?

Despite Robert's protestation, the court eventually convinced him to waive time, telling him that resisting the continuance would render his lawyer unprepared and ineffective. (CT 18-21; RPT 52-64.)

Following the January 4, 1995 preliminary hearing, both Robert and Walker were held to answer. (CT 23-144.) Five and one-half months had elapsed since the initial arraignment and Robert's desire to expedite the pretrial and get his case to trial was already well established.

2. Initial trial date: March 11, 1996

On January 17, 1996, during a *Marsden* hearing, Robert expressed his dissatisfaction with Wright, arguing Wright was too busy to represent him. Wright agreed, "He's right. I am too busy. I would like to get rid of a few cases." Nonetheless, Wright went on to ensure the court of his ability to defend Robert, and the *Marsden* motion was denied. (CT 146; RPT 69-82.)

The following day, both Robert and Walker were arraigned on the information and the district attorney gave notice that the death penalty would be sought. Counsel for both men sought to continue the trial date beyond sixty days. Walker agreed to waive time; Robert refused. Walker's counsel then moved to sever the cases, stating, "We cannot be ready within 60 days, and if Mr. Williams forces us to be going to trial within 60 days, I think my client would be severely prejudiced..." The severance motion was continued and the continuance motion was denied. The trial was set for March 11, 2006. (CT 147; RPT 85.)

On February 2, 1996, Walker's lawyer, continuing his argument to sever the cases, explained that his other trial commitments and lack of time to prepare for this trial required him to request a severance. He further advised the judge, "You have one [defendant] of which does not wish to waive time [Robert] and one of which does wish to waive time, is unprepared." Robert's counsel joined the severance motion. At the next hearing on February 23, 1996, the court found no prejudice in keeping the cases joined and denied the motion to sever. The court explained its ruling:

> Certainly I think, number one, it has to be said that there's a preference for joint trials.... At least based on what I know I don't know of any such *Aranda* problems or statements made by the defendants that are implicating the other, those kinds of things. So—which would be one reason for the Court to consider severance, and it is kind of a—it's a single incident involving multiple parties, but it is one kind of a common event.... So the Court frankly sees no reason or any prejudice to either defendant in a joint trial.... So the motion to, for separate trials is denied.

(CT 185; RPT 104-30.)

On March 1, 1996, Robert's counsel requested a continuance of the trial date over Robert's adamant opposition. In expressing his ongoing frustration in getting his case to trial, Robert told the judge during a *Marsden* hearing, "You always deny [my opposition to further continuance] anyway. What's the purpose of making another *Marsden*?" The court asked Robert, "I take it you want to continue to object to a trial date beyond that March 11 date; is that correct?" Robert replied, "Yes." Despite Robert's resistance, the court found good cause to continue the trial another sixty days to May 6, 1996. (CT 201-02; RPT 131-39.)

3. Second trial date: May 6, 1996

On May 3, 1996, three days prior to the trial date, counsel for Walker again moved to continue the trial date. Wright joined the motion. Wright again cited his case load and indicated he would be unprepared if the trial proceeded as scheduled. During the ensuing *Marsden* hearing, Robert said, "[O]kay. I'm not waiving no more time." The court responded,

> And I do this, that is, grant the 1050 motion [continuance] reluctantly because I know [Robert] wants a speedy trial. And, as I previously said, that the Court would like to get this trial... starting Monday morning [May 6, 1996]. However, I think it would be a shame on [Robert's] rights and on the justice system if a counsel who is not competent at the moment to go to trial was forced to go to trial...

Over Robert's objection the trial was continued five months to October 7, 1996. (CT 258; RPT 143-173.)

4. Third trial date: October 7, 1996

On August 30, 1996, Robert again voiced his concern over his lawyer's lack of progress in preparing for trial:

> I would like to see if it's possible to relieve my counsel and represent myself in this case, because I don't feel that I'm going to get a fair trial.... everything that

> [Wright] stipulated that he needed the extra 60 days for as of that time, not one of the things was completed.

The judge responded, "I fully intend to start this trial on October 7, 1996." (CT 308-09; RPT 206-252.)

In September of 1996, Wright moved to have second counsel appointed. The request was denied. (CT 310-13; RPT 256-345.)

Later that month, on September 27, 1996, defense counsel for both men again moved to continue the trial. They argued that the October 7, 1996 trial date was unrealistic citing both the failure of the prosecutor to provide necessary discovery[61] and the denial of *Keenan* counsel sought by both defendants. Robert was dismissive, stating, "I'll go ahead and waive time. It won't make any difference, but I'll go ahead and waive time." However, prior to waiving time, Robert asked the court,

> Okay. I'd just like to know that after the continuance, the January 27, ten days after that, after that is you going to continue this again, or is this it?... I heard all the different attorneys speaking, and it seems like we just making this date just because, I guess, to put it on paperwork, because it's like they're saying that, okay, we do need a date. You understand what I'm saying? But we might be ready. We might not be ready.

After the court explained the possibility of further continuances, Robert replied, "So if it does happen to be another continuance, it would be a short continuance?" Robert then agreed to waive time after the court explained its intention to proceed with trial in a timely manner. And with that assurance, the court continued the trial three and one half months to January 27, 1997. (CT 320-36; RPT 346-66.)

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[61] Specifically, Walker's counsel had not yet been given an opportunity to meet with Lofton, who was in Louisiana at the time. In addition, the court asked Ruiz why lab reports requested by defense counsel had not been turned over, to which Ruiz indicated they were "in the process of being done." (RPT 349-50.)

5. Fourth trial date: January 27, 1997

By November 15, 1996, sixteen months following the initial arraignment, the discovery concerns escalated. Prosecutor Ruiz "forgot" to turn over police reports, failed or "forgot" to turn over videotapes, as well as the prosecution's witness list and DNA test results, all of which he had been previously ordered to produce.[62] On December 13, 1996, despite admonition from the court, Ruiz again failed to turn over all the court ordered materials. At that hearing, the court urged both sides to be "fairly diligent" with discovery so as to not "eat up any unnecessary time." The court then continued the discovery motion for twenty-one days. Some of this court ordered discovery, including the videotapes, would not be turned over for nearly five years.[63] (CT 349-54; RPT 367-77.)

On January 15, 1997, Walker's lead counsel again sought a continuance citing delays in obtaining an expert as well as problems with Walker's penalty phase discovery. Robert's counsel joined the motion claiming the court's decision denying second counsel had slowed progress. Robert voiced his frustration:

> [I]t don't really make difference if I agree or not.... It seems like everyone else agrees to it. I mean, me saying no ain't helping me other times. I don't see how it's going to help me now... I mean, it don't help me none to sit here and say, no. I don't waive my time, because the thing's going to be continued.... It happened two times already.

The judge acquiesced to the defense request and the trial was continued another three months to April 28, 1997. (CT 357-67; RPT 381-90.)

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[62] Regarding police reports, Ruiz said, "I'll be able to get that done before the next date." Regarding DNA testing, Ruiz explained that he was waiting to submit an *ex parte* motion for the defendants' blood samples. Regarding a videotape of the crime scene, Ruiz said, "I just had the opportunity to review that videotape, and I'm in the process of having that copied. Counsel just needs to make arrangements for payment." Regarding the witness list, Ruiz said, "There isn't going to be any surprises there," and told the court he would provide it by the following Friday. (RPT 367-73.)

[63] *See infra* section B-20, p. 48.

6. Fifth trial date: April 28, 1997

Ruiz again resisted prosecution witness contact disclosure on March 7, 1997 by insisting that all discovery documents handed over to the defense must redact identifying information;[64] the court continued the discovery hearing so that arguments could be heard. (CT 794; RPT 419-48.)

At the next hearing on March 21, 1997, defense counsel requested a continuance of the discovery matter, citing Ruiz's discovery obstructions; the court found good cause to continue the matter for ten days.[65] And on March 28, 1997, Robert's counsel moved to continue the trial, again citing lack of discovery. (CT 819-36; RPT 449-55.)

On March 31, 1997, the prosecution admitted to the existence of taped jailhouse conversations between Walker and his girlfriend.[66] Also as of that date, Ruiz still had not turned over Lofton's address, so DPD Feiger [who had joined Wright] again moved to compel discovery.[67] The discovery dispute caused the court to continue the trial to July 28, 1997. (CT 837; RPT 472-93.)

7. Sixth trial date: July 28, 1997

On April 29, 1997, the court indicated it would grant the defense motion to compel discovery unless Ruiz could show Lofton had been threatened. (RPT 505-30.) Ruiz offered to provide a sworn statement by Lofton regarding threats she had received and represented that he would have an affidavit to that effect within two weeks. (RPT 505-30.) Ruiz, however, failed to provide proof of the alleged threats at the next hearing and the information sought by the defense

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[64] Ruiz argued that certain witness contact information, in particular Conya Lofton's, should not be disclosed to defense counsel and Robert because of death threats and potential risk to her life. (*See supra* SOC, pp. 5-6.)
[65] Regarding the requested reports, Ruiz told the court, "If they do exist, and I'm not sure that they do, they would be in the way of work done by the Department of Justice that we, the People, are not planning on introducing any results of. I'm not familiar with any results of any physical analysis or forensic testing that we're going to be introducing, so I do not see the need for a continuance... " (RPT 450-51.)
[66] These tapes purportedly contained inculpatory statements. (RPT 472-93.)
[67] *See supra* SOC, pp. 5-6.

was ordered to be turned over. (CT 894-95; RPT 505-71.) Also on April 29, 1997, Ruiz had not provided all of the Walker/girlfriend tapes and told the court that the transcript was still being completed. (CT 894-95; RPT 505-30.)

Two weeks later, on May 16, 1997, Ruiz's continued resistance to disclosure of witness contact information led to an *ex parte* hearing, causing all other discovery issues to be put over for twenty-one days. (CT 911-13; RPT 530-71.) At the subsequent hearing, the court ordered that the District Attorney investigator's declaration, which did not contain contact information concerning Lofton, be disclosed to the defense.[68] (RPT 530-71.) Also on that same date, a defense discovery memorandum listed items not yet turned over.[69] (CT 911-13; RPT 530-71.) The court once again urged cooperation between the two sides and continued the discovery hearing for three weeks. (CT 914-15; RPT 530-71.)

On June 6, 1997, counsel for both defendants moved to continue the trial citing the need to prepare in light of the discovery delays.[70] The trial date was continued to October 10, 1997. (CT 914-17; RPT 573-605.)

8. Seventh trial date: October 10, 1997

Ruiz next resisted disclosure of contact information for prosecution witness Michelle Shields alleging she had been threatened. (CT 914-37; RPT 573-605, 609-10.) Hearings on the matter were continued several times and, on July 30, 1997, Ruiz presented a declaration from his

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[68] The court agreed with Ruiz that Lofton's whereabouts should not be disclosed to defense counsel. (RPT 530-71.)

[69] The list included: (a) witness addresses and telephone numbers, along with hospital documents; (b) a witness list [turned over but no addresses], a criminal record of one prospective witness [Thurston], dispatch tapes from Las Vegas, audio tapes of Robert's jailhouse calls on July 25, 1995 to present, arrest warrants and affidavits, print results from the El Camino, photos of the Chevy Cavalier, the identity of the informant who identified David Watkins as a potential suspect, the identity of an informant who provided Robert's whereabouts in Long Beach and Las Vegas, additional police reports, lab reports, crime scene logs, and evidence lists for Las Vegas arrest, mail sent and received by Robert while in custody; (c) a copy of a videotape of crime scene prepared by forensic technicians; (d) a snakeskin wallet. (CT 911-13.)

[70] Robert initially refused to waive time. However, after conferencing with his counsel and upon recommendation of the court, he consented to a trial date of October 20, 1997. (RPT 599.)

investigator in support of his decision against disclosure of Shields' information.[71] (CT 923-354; RPT 614-50.) However, following argument the court ordered that the contact information concerning Shields be disclosed. (CT 923-54; RPT 614-50.) Prior to the judge ordering disclosure, Ruiz was granted a two-week continuance to contemplate taking a writ in response to the ruling. (CT 923-54; RPT 614-50.) On August 21, 1997, Ruiz did not take a writ and the court granted him an additional fifteen days to further respond to the court ordered disclosure. (CT 937; RPT 651-57.)

On September 5, 1997, Walker's counsel declared a conflict and sought to be relieved. Two weeks later the motion was granted. (CT 980-1003; RPT 676-99.)

Multiple defense discovery motions were heard on September 29, 1997.[72] (RPT 711-29.)

On October 7, 1997, Walker's new counsel told the court he would need an additional six to twelve months to be ready for trial. Feiger, on behalf of Robert, citing Ruiz's discovery obstructions, maintained the defense needed an additional six to twelve months to prepare for trial; the court agreed that discovery had "not been smooth." Ruiz, concerned about such a

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[71] At the June 6, 1997 hearing, the matter disclosing information regarding Shields was put over two weeks to allow Ruiz to document whether Robert's brother, Rolando, presented a threat to Shields. Ruiz resisted disclosure: "Because of [Robert's] violent history with [Shields] towards the end of their relationship, and the fact that one of his very close relatives, his brother, in fact, according to her, participated in [felonies] that she was objected to." (RPT 583). Ruiz declared that "more time is needed in the way of an offer of proof with respect to Michele Shields' desire that her address not be disclosed or her whereabouts and phone number not be disclosed." (RPT 582). Ruiz proposed to submit to the Court a copy of the report outlining Ms. Shield's allegations of behavior on Robert's part, as well as representations made by the defense counsel for Mr. Walker related to the threat to witnesses in this case." (RPT 587). The Court found that the two week continuance was necessary to ascertain whether Rolando Williams was in custody, and if so, his parole date. (RPT 588). Feiger also noted that she did not have a copy of the current investigation reports prepared by the district attorney's office related to the felonies committed by Robert and Rolando against Shields. (RPT 591). The next hearing date was June 27, 1997. Ruiz requested to continue the hearing, stating that he had been in trial for the past month, the trial having lasted longer than anticipated. (RPT 609). The next hearing date, July 25, 1997, was also continued, due to the absence of counsel for Walker. Ruiz offered that the two had miscalendered the hearing. (RPT 611).

[72] The court dismissed defense request #1 [for witnesses who subsequently refused to come forward] without prejudice. Request #2 [for documents seized at the victim's home] was denied without explanation. The court granted request #3 [Robert's clothing], #4 [Robert's wallet], and #8 [Robert's arrest warrant]. The court denied request #5 [for any information regarding a suspect identified as "Junior"] and #6 [for witness information identifying another suspect] without prejudice. Request #7 [for witness information indicating Robert's whereabouts after the murders] was also denied. (RPT 711-29.)

lengthy continuance, especially since pretrial had been underway for over two years, argued that the People had a right to weigh in on who would and should be appointed defense counsel to ensure a speedy trial. Specifically, Ruiz said,

> The court has an obligation to appoint counsel, where counsel on the case can proceed in a fashion that would not disrupt the orderly administration of justice. And a year continuance on a case like this so CDP can keep it in house, I don't believe is appropriate... that would be an abortion of justice.

Nonetheless, the court granted the motion to continue and set a "firm" trial date eight months hence on August 3, 1998. (CT 1005; RPT 730-47.)

9. Eighth trial date: August 3, 1998

At another discovery hearing on December 5, 1997, the court granted Ruiz two weeks to respond to the defense motion to compel disclosure of witness information as to multiple witnesses. (RPT 763-64.) Two weeks later, Ruiz precipitated another twenty-day delay in filing a Points and Authorities in further opposition to the defense motion to compel witness disclosure. (CT 1055-68; RPT 765-79.) Also on this date, an extended discussion ensued in which Peasley [for Walker] accused Ruiz of interference with choice of defense counsel.[73] (CT 1035-43; RPT 765-79.)

On January 23, 1998, Feiger indicated that Ruiz still had not turned over the discovery requests ordered by the judge four months earlier on September 29, 1997.[74] After addressing each of these requests, Ruiz agreed to provide the requested discovery. However, at the next

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[73] Ruiz had contacted another judge [not the trial judge] and inquired as to the availability of a defense lawyer for Walker who could expedite preparation so that the trial could go forward. Peasley argued: "Why is the District Attorney interjecting himself into this, you know, who the counsel for the defendant is? I think that's a concern." Ruiz placated the court by responding, "Since the People have a right to a speedy trial, and I'm the advocate for the People, I do have a valid interest to assert and inquire, where I don't interject myself in between that lawyer and . . . his client.... I did not attempt to have any communication that interfered with that attorney/client privilege or relationship at all." Ruiz later added, "Now let's step back a second and get a little perspective here. Why has [Peasley's motion] been filed? It's a brush-back pitch, because I got a little too close to the plate, and I [crowded] C.D.P.'s plate. Okay. We have looked at it. We have looked at it. There is no impropriety shown. There is no suggestion in the facts that there was any." (RPT 774.)

[74] *See supra* note 69.

hearing a month later, Ruiz had failed to turn over the requested discovery, and the court allowed him another fourteen days to comply. At that subsequent hearing, Ruiz still had not provided all requested discovery and was ordered to turn over all discovery that was due. Ruiz requested and was granted a one-week continuance after indicating he was considering whether to file a writ challenging the court's order that all discovery be turned over.[75] (CT 1086-88; RPT 797-857.)

Feiger and the Public Defender were conflicted from further representation of Robert on April 3, 1998.[76] Removal of the Public Defender initiated a revolving door of defense counsel.[77] (CT 1098; RPT 879-97.)

During the April 3, 1998 hearing, in which the Public Defender was conflicted out, CDP attorney Grossman—who had been asked to appear because of the apparent pending conflict—told the court he was "collaterally involved" in the case in that he had previously had one conversation with Walker. Consequently, following the dismissal of the Public Defender, Grossman, on behalf of the CDP, sought and received a thirty-one day continuance to arrange for another lawyer to represent Robert. A month later, on May 4, 1998, Grossman was granted a twenty-seven day continuance as he continued to arrange for Robert's representation. (CT 1099; RPT 900-02.)

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[75] The discovery under contention was the fact that Eddie Boykin, a person who had been interviewed and given a polygraph under suspicion of being the third party involved in the murders, was a confidential informant who had been giving information as to the whereabouts of Robert, and who had been assaulted previously by some of Robert's associates under the supposition that he was an informant. (RPT 838-45.)

[76] During the hearing, Supervising Deputy Public Defender Zagorsky stated: "[T]he court should be aware that this conflict comes as a result, at least, of information that we [the office of the Public Defender] recently received from the prosecution, information that we felt should have been provided, much earlier in this case. And had that been provided, we would not be at this juncture, we are now, conflict at this late stage in the case." (CT 1098; RPT 879-97.)

[77] Between April 3, 1998 and August 16, 2000, four different attorneys represented Robert. *See generally* RPT 879-1102.

On June 2, 1998, CDP attorney Porter was appointed. Porter asked that the trial be set seven months hence to February 23, 1999, so that he could have adequate time to prepare.[78] Robert agreed to waive time for his new lawyer to prepare. (CT 1100; RPT 903-09.)

10. Ninth trial date: February 23, 1999

Several hearings and three months later, on September 18, 1998, Porter, following his motion to withdraw due to his health concerns, was relieved. CDP representative Grossman appeared again for Robert on September 25, 1998, and assigned CDP attorney Myers as counsel. On October 1, 1998, Myers appeared and indicated CDP attorney Aquilina would be his co-counsel; the hearing was continued twenty-five days to determine how long they would need to prepare for trial. On October 20, 1998, Aquilina had not yet reviewed the case files and requested two weeks to review them and give an estimate of when he could be ready.[79] On January 22, 1999, Aquilina indicated he would be ready for trail in five months. Robert refused to waive time. The court said,

> I understand why [Robert] wouldn't want to waive time. There's a couple of good reasons. One, because he's in a hurry. And, two, it creates an issue that wasn't there before. But the court does find good cause, based upon Mr. Porter's health problems, to continue the trial date. And also finds good cause to keep the two of them [Robert and Walker's cases] together.

The new trial date was set for June 14, 1999. (CT 1108-15; RPT 913-35.)

11. Tenth trial date: June 14, 1999

On March 26, 1999, Peasley for Walker indicated he had another capital case and that might affect his availability to try this case. Aquilina for Robert cited problems in hiring an investigator as slowing his case preparation. A month later, on April 23, 1999, Aquilina moved to continue the trial date citing the amount of work as to both guilt and penalty phase left undone

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[78] Porter: "We have a death penalty seminar the second week of February. I would like to do it after that, if that's possible." (RPT 904.)

[79] Myers representation appears to have ended with Aquilina's appearance.

by the public defender.[80] Robert agreed to the continuance. The trial date was set for January 10, 2000. Walker did not waive time; the continuance was granted over his objection. (CT 1120-37; RPT 939-1000.)

12. Eleventh trial date: January 10, 2000

During a May 17, 1999 *Marsden* hearing, Robert voiced his concern over the lack of case preparation undertaken by Aquilina. Aquilina partially agreed, citing his heavy case load.[81] Robert spoke of his fear of going into trial and "having his attorney only know bits and pieces of the case." Nonetheless, Robert's *Marsden* request was denied. However, following another *Marsden* hearing three months later the trial judge granted the *Marsden* request as to Aquilina. On September 2, 1999, CDP counsel Gunn was appointed counsel for Robert. (CT 1136-42; RPT 977-1029.)

On October 1, 1999, Gunn told the court he was seeking co-counsel and would be ready for trial "within the next few weeks." (CT 1143; RPT 1030-31.) However, on October 22, 1999, Gunn informed the court that he had not yet succeeded in bringing in co-counsel, and that the current trial date was not realistic. (RPT 1032-33.) On November 22, 1999, Cormicle joined Gunn as co-counsel and they informed the court that they would not be ready by the January trial date. (RPT 1034-41.)

On November 22, 1999, Ruiz acquiesced and agreed with the earlier requests taken by both defendants that their cases be severed. (CT 1145; RPT 1034-41.) On December 17, 1999, the court, in granting the severance motion, stated,

> [I]n fact, I wish we would of thought of this at least a couple of years ago. But we didn't. Or at least we didn't talk about it. It seems like it might be the only way we're ever going to get this case to trial is to sever it and bite the bullet and

[80] Aquilina explained the incomplete nature of the work done by the public defender's office in a sealed hearing. (RPT 947-66; *supra* SOC, p. 7.)
[81] *See supra* note 27.

> actually do the case twice. And I'm prepared to do so. So I will accept the stipulation... that we sever the case at this time.[82]

(CT 1146; RPT 1042-50.) This severance occurred over four and a half years after the proceedings began on August 11, 1995, and well over three years after the initial February 2, 1996 motion to sever.

On December 21, 1999, Gunn moved to continue the January 10, 2000 trial date explaining that he already had "about eight murder trials set pending for next year, so that's the problem... " Robert at a *Marsden* hearing that same day said,

> I'm tired. I want to go to trial. I'm tired of sitting here. As you recall, two years ago, three years ago, I didn't want to waive no time. I wanted to go to trial then. I look at—like you understand, my life is on the line. If I was going to lose my life, let me lose it now and not sit here for four, five years, which looks like I ended up doing anyway. In the last two years, nothing's been done...

The *Marsden* request to replace Gunn was denied and the trial was continued *ten months* to October 2, 2000. (CT 1148-86; RPT 1051-66.)

13. Twelfth trial date: October 2, 2000

Eight months later, Robert, continually frustrated by Gunn's lack of preparation, brought a *Faretta* motion, which was ultimately granted.[83] Gunn was appointed standby counsel. For a period of over twenty-four months, since the termination of the Public Defender, Robert had been subjected to five different lawyers. When Robert was granted *Faretta* status on August 16, 2000, a new trial date was set for February 2, 2001. (CT 1156-62; RPT 1079-49.)

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[82] In a later *Marsden* hearing on July 14, 2000, the court admitted, "This case should have been to trial a good long time ago. No one is going to quibble about that. If we would have bifurcated a good long time ago, perhaps we would have had part of it to trial already and had been done. Didn't do so. That's neither here nor there. That's just a fact of life." (RPT 1090.)

[83] *See supra* SOC, p. 9.

14. Thirteenth trial date: February 2, 2001

On October 5, 2000, the court set Robert's discovery concerns over a week because Ruiz, due to illness, was not present to respond. (CT 1167-71; RPT 1150-57.) A week later, on October 13, 2000, Robert's discovery motion was again delayed as the court ordered Robert to confer with the stand-in deputy district attorney during Ruiz's continued absence. (CT 1173; RPT 1158-61.) On November 3, 2000, the court granted the stand-in DDA's request to put over the discovery hearing, once again due to Ruiz's illness. (CT 1175; RPT 1162-65.)

On November 22, 2000, Ruiz was still out due to illness and a representative from his office reported Ruiz would continue to be out for at least another month; Robert still had not received the ordered discovery [all discovery through August 16, 2000, when Robert was granted *Faretta* status] from the prosecution. Concerned over the lack of discovery during Ruiz's absence, Robert told the court, "[I]t seems like it's getting impossible to get investigation and discovery issues. And I just hope it don't be difficult when that time come to go to the next phase, as far as you understand having to fight for a continuance and not look like it's my reason why I need the continuance." (CT 1179-80; RPT 1170-74.)

On January 4, 2001, Ruiz was still out and the court suggested that Ruiz be replaced, citing both the approaching trial date of February 5, 2001, as well as Ruiz's outstanding discovery obligations. The court went on to express its concern with Ruiz's continued absence:

> I'm a little bit concerned that we're—Ruiz can try this case easily enough because he tried the companion case earlier.... But we don't know what his health is.... I don't want Davis [stand-in DDA] to think I'm trying to run the DA's office, but Davis can try this case.... Davis is a good enough lawyer. He's got enough time that he can be ready.... [Ruiz is] the best candidate to try it because he's tried the other half of it, [the Walker trial had been concluded], but I don't want to get into a position where [Robert] is caught between a rock and a hard spot because the DA's office is not ready.

(CT 1182; RPT 1175-76.)

On January 12, 2001, following over a three month absence, Ruiz appeared. However, problems with discovery continued to plague the pretrial. The prosecution had yet to provide the court ordered discovery. Ruiz acknowledged that he did not "have a problem" with Robert's discovery requests and would provide the ordered discovery in the "next couple of weeks." Referencing that Ruiz's illness had made the case "dead in the water for several weeks [from October 5, 2000 to January 12, 2001]", the court admonished Ruiz for his latest response to Robert's discovery requests: "Don't wait until we come back into court to get them to him. Just send them out to him, and then we'll keep a list of what you sent so that we can put it on the record." Despite this admonition, Ruiz refused to turn over certain taped interviews until Robert provided payment.[84] (CT 1183-91; RPT 1178-93.)

Due to the lack of discovery compliance during the three months of Ruiz's absence and the particular difficulties in being incarcerated—thus encountering multiple difficulties inherent in preparing for a capital trial[85]—Robert was granted a two month continuance, moving the trial date back to April 3, 2001. (CT 1207; RPT 1196-1212.)

15. Fourteenth trial date: April 3, 2001

Following the continuance, the court attempted to expedite the discovery by having Robert go through DA Investigator Pradia [rather that Ruiz] to receive discovery; however, Robert's phone call limitations while incarcerated once again prevented any progress.[86] (RPT 1335-51.)

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[84] One was a 1995 taped interview of Omaya Thurston, and the other was a 1995 taped interview of Debra Howard; both were potential witnesses for the prosecution. (RPT 1189-95.)

[85] Robert indicated that Evans, his investigator, had billed Robert for meetings between Evans and stand-by counsel Gunn, conducted without Robert's authorization or knowledge. (RPT 1335-51.)

[86] Robert explained that the prison's collect call system required the call recipient to press zero, however Pradia had an automated message that could not accept collect calls in this manual fashion. (CT 1208-12; RPT 1213-19.)

And a month later on February 23, 2001, Robert still had not received the requested discovery. The court's only response was to have Robert resubmit his discovery list to Ruiz. (CT 1208-12; RPT 1213-19.)

On March 16, 2001, Robert, frustrated with the failure to receive discovery, moved to disqualify Ruiz, specifically citing Ruiz's withholding of the clothing and test results on the clothing Robert was wearing at the time of his arrest. Also at this hearing, Robert, once again citing discovery concerns, moved to continue the trial. The motion was granted; the new trial date was June 4, 2001. (CT 1234-40; RPT 1228-52.)

16. Fifteenth trial date: June 4, 2001

On March 20, 2001, Robert produced documentation supporting the claim that the tests on his clothing had been withheld; the court put the matter over at Ruiz's request.[87] (CT 1241; RPT 1253-58.) On April 5, 2001, Ruiz turned over the clothing and test results. (CT 1243-44; RPT 1271-98.) Also on that date, Robert indicated that some of the tapes Ruiz provided contained no audio; Ruiz responded by promising to have copies made and to turn them over to Robert once they were paid for. (CT 1243-44; RPT 1271-98.)

On April 17, 2001, standby counsel Gunn represented that, while he had received seven boxes of discovery, "some things were missing."[88] Ruiz responded that he would make those items available to defense investigator Evans within the week. (CT 1258; RPT 1299-1311.)

On May 1, 2001, Gunn represented that second stand-by counsel Cormicle could not be present until July and therefore sought a continuance. Robert and Ruiz agreed that the trial

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[87] Ruiz explained, "I think there's going to turn out to be a misunderstanding. When the defendant made his motion to recuse me off the case, he had made allegations that clothes were seized. I thought he was talking about clothes that were seized out of his—on of his hotel rooms.... Now that I know that Mr. Williams is referring to something taken pursuant to a search warrant in September of '96, then I can start trying to narrow that down." (RPT 1256.)

[88] Gunn did not clarify exactly what was missing, but explained that Ruiz was coordinating with Investigator Evans to make "those available." Meanwhile, Robert indicated that some of the tapes turned over by Ruiz had no audio. (RPT 1299-1311.)

should be put over to late July. The new trial date was set for July 30, 2001. (CT 1336; RPT 1312-27.)

17. Sixteenth trial date: July 30, 2001

Remarkably, it was Ruiz, whose three month absence from the proceedings brought all discovery to a halt, who alleged, on June 28, 2001, that Robert was engaged in "delay tactics" and urged the court to relieve Robert of his *Faretta* status:

> [W]hen you've got a man with no compunction and the facts of this case and the brutality of the murders in this case, show [Robert] is possessed of no compunction whatsoever. Then you take that combination, a man with no compunction, and a man who says he's fighting for his life and any—any means are justified. The end justifies the means.

Robert responded with his own statement:

> If I have the case, I'm not asking for no continuance. I'm not asking for—you understand?—you to put it off. As far as our trial date stands now, I am ready to go to trial.... I feel the only reason I want to fight my case [is] because I don't want to go to trial with somebody like Mr. Gunn that don't have no knowledge of the case.... That is why I filed the motion to remove him as standby counsel, because when he was counsel he ain't doing nothing.

Nonetheless, the court revoked Robert's *Faretta* status and reinstated Gunn as lead counsel for Robert.[89] (CT 1354; RPT 1335-51.)

On July 30, 2001, the date set for trial, Gunn indicated he was not ready and would need to continue the trial date. When asked if he would waive time Robert told the court, "I don't agree to nothing." (CT 1356; RPT 1352-55.)

On August 20, 2001, Gunn asked to be relieved as counsel in part because of the lawsuit filed against him by Robert. [90] The court relieved Gunn and appointed Cormicle.[91] (CT 1359; RPT 1363.)

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[89] *See infra* Argument VI.

[90] *See supra* note 40 (concerning Robert's civil suit against Gunn). On August 20, 2001, Gunn again raised his concern that the pending malpractice suit brought against him by Robert created a conflict of interest. As such, he

A month later, over Robert's refusal to waive time, the trial was continued to March 4, 2002. (CT 1360; RPT 1374-76.)

18. Seventeenth trial date: March 4, 2002

On January 23, 2002, Cormicle requested to continue the trial due to lack of discovery of FBI reports on Gary Williams' robberies, representing to the court that Robert had requested this discovery while representing himself but was told the reports did not exist. Ruiz agreed that such discovery did exist and was "appropriate," and the court once again pushed back the trial date to April 8, 2002. (CT 2162; RPT 1382-84.)

19. Eighteenth trial date: April 8, 2002

On March 29, 2002, the trial date was continued to June 10, 2002, because Cormicle indicated he needed to resolve discovery issues regarding third-party liability with the prosecution. (CT 2185-87; RPT 1400-25.)

20. Nineteenth trial date: June 3, 2002

On April 23, 2002, the court ordered Gary Williams' probation report released to the defense. Two days later, Cormicle represented that he had just discovered information concerning numerous "FBI documents pertaining to Gary Williams." (CT 2246; RPT 1426-44.)

Cormicle stated:

> I met back on January 9, 2002 with Mr. Ruiz, expecting that I had all the discovery up to that point. And there should have been all the discovery turned over, I believe at that point, for the past six-and-a-half years. However, yet again on Wednesday of last week I'm still receiving additional reports, significant reports that should have been turned over seven years ago but were not... the report that

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asked to be removed as Robert's counsel and have Cormicle take his place. The court agreed. (CT 1359; RPT 1363-70.)

[91] Although Robert agreed to Cormicle's appointment, this was preceded by this comment by the court: "I won't lose any sleep whether you agree with me or don't agree with me." (RPT 1371.)

> I'm speaking of is a four-page report from the FBI that was in the possession of the district attorney pertaining to Robert Scott.[92]

(RPT 1426-44.) Cormicle further represented that the defense had learned that Gary Williams:

> had several enemies as of July 15, 1995... people that went down for robberies that Gary did not go down for... a lot of people wanted to jack up... rob, kidnap, kill Gary Williams as of July 15, 1995.... But what we're still getting and finding out is not only that these people wanted to have him killed, but we find out that these witnesses will be testifying for the prosecution. This new discovery is making inconsistent statements from what they previously told the Court in the Walker case...

(CT 2247; RPT 1445-74.) Cormicle moved to continue the trial, citing this late discovery and the need for more time to develop the third party issues. (CT 2249-65; RPT 1475-1504.) Ruiz opposed the continuance but did acknowledge that Gary was a gang member and that he had as many as forty associates, but that it would unduly delay the trial to allow the defense to investigate all forty. (CT 2249-65; RPT 1475-1504.) Given the discovery concerns, the court granted a short continuance of the trial date to July 1, 2002. (CT 2249-65; RPT 1475-1504.)

Several days later, during a *Marsden* hearing, Robert voiced his concern that the defense needed more time to receive discovery related to third party culpability: "Preparing to go to trial without all the documents that we know that is in the district attorney's possession, and preparing to go to trial without having the opportunity to investigate all the documents... " The *Marsden* motion was denied. (CT 2278; RPT 1504-19.)

21. Twentieth trial date: July 1, 2002

Six years and eleven months following Robert's arraignment, jury selection began on July 1, 2002. (RT 1001.)

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[92] This report supposedly contained information regarding Scott's inconsistent statements made to the FBI and his attempts at cutting a deal for himself in exchange for his testimony about Gary's robbery ring and murder. (RPT 1427-29.)

C. The Right to a Speedy Trial

The Sixth Amendment grants all criminal defendants "the right to a speedy and public trial." (U.S. Const., 6th Amend.) As "one of the most basic rights preserved by our Constitution," the right to a speedy trial provided by the Sixth Amendment is made applicable to the states by the due process clause of the Fourteenth Amendment.[93] (*Klopfer v. North Carolina* (1967) 386 U.S. 213, 226.) This right is "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself." (*United States v. Ewell* (1966) 383 U.S. 116, 120.) Limiting the possibility that the defense will be impaired "skews the fairness of the entire system." (*Barker v. Wingo* (1972) 407 U.S. 514, 532.) Convictions when the accused has been deprived of his Sixth Amendment right to a speedy trial must be reversed and remanded. (*Strunk v. United States* (1973) 412 U.S. 434, 440.)

According to the United States Supreme Court, a federal speedy trial right is triggered[94] by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." (*United States v. Marion* (1971) 404 U.S. 307, 320.) Once the federal constitutional right to a speedy trial attaches, determining whether this right has been deprived must be determined on a case-by-case basis, wherein the conduct of the court, prosecution, and defense are weighed and balanced. (*Barker*, 407 U.S. at 530.) The Supreme Court has described the speedy-trial right as "amorphous," "slippery," and "necessarily relative."

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[93] The California Constitution also adopts the Sixth Amendment in two of its provisions, but appeals in State Court can still apply federal Sixth Amendment rights through Due Process. (Cal. Const. art. I, §§ 15, 29.)

[94] By comparison, the California Constitutional right is triggered when a complaint is filed. (*People v. Lowe* (2007) 40 Cal.4th 937, 942.)

(*Vermont v. Brillon* (2009) 129 S.Ct. 1283, 1290.) Nonetheless, the Court, in *Barker*, has brought some clarity to this right in establishing factors—though not wholly inclusive—in determining whether the right to a speedy trial has been denied: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. (*Id.*) The Court has cautioned that the circumstances of each case must be considered and no one factor is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." (*Id.* at 533.) In determining which factors should weigh more heavily than others, the Court inquires "whether the government or the criminal defendant is more to blame for th[e] delay." (*Brillon,* 129 S.Ct. at 1290 (quoting *Doggett v. United States* (1992) 505 U.S. 647, 651).)

California statutory law also outlines the right of the accused to a speedy trial.[95] California codified the federal Speedy Trial Act of 1974[96] at California Penal Code sections 1381 and 1382.[97] These statutory provisions are "supplementary to and a construction of the state constitutional speedy trial guarantee." (*People v. Martinez* (2000) 22 Cal.4th 750, 766.) The potential for pretrial delays to fall within one of the California Penal Code's exclusions may well undermine many attempts to appeal on statutory speedy trial grounds.[98] In turn, the four-factor test enumerated in *Barker* remains the standard by which Sixth Amendment speedy trial violations are to be determined. (*People v. Hill* (1984) 37 Cal.3d 491, 496.)

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[95] Cal. Penal Code §§§§§ 686, 871.6, 987.05, 1050, and 1511.
[96] 18 U.S.C. § 3161. "Generally, the Act requires a trial to begin within 70 days of the filing of information or an indictment or the initial appearance of the defendant. The Act was designed to benefit defendants, but also to prevent extended delays from impairing the deterrent effects of punishment and "to assist in reducing crime and the danger of recidivism by requiring speedy trials.... " (H.R. Rep. No. 93-1021, pp. 6 – 8.)
[97] Cal. Penal Code §§ 1381-82.
[98] 18 U.S.C. § 3161(h)(2005).

1. Length of delay and presumption of prejudice

In assessing the length of the delay, a reviewing court must determine whether the length of delay was "uncommonly long." (*Doggett*, 505 U.S. at 651.) The United States Supreme Court has been reluctant to define the requisite period of delay necessary to violate this right, but has held that "there must be a delay long enough to be 'presumptively prejudicial.'" (*United States v. Loud Hawk* (1986) 474 U.S. 302, 314 (quoting *Barker*, 407 U.S. at 530).) The accused must demonstrate that the lapse of time has "crossed the threshold dividing ordinary from 'presumptively prejudicial delay.'" (*Doggett*, 505 U.S. at 651-52 (quoting *Barker*, 407 U.S. at 530-31).) At one end of the spectrum is the "customary promptness" of the state in proceeding to trial which will not lead to the presumption, while an "extraordinary" period of delay will trigger the presumption of prejudice. (*Id.* at 652.) The Court, in *Doggett*, reversed a conviction on the grounds that the defendant's right to a speedy trial was violated following an eight-year delay in which the prosecution was held accountable for six years of that delay. (*Doggett*, 505 U.S. at 654 (reversed defendant's conviction on the grounds that his right to a speedy trial was violated).) In *Loud Hawk*, the Court found a ninety-month trial delay sufficient to satisfy this presumption of prejudice. (*Loud Hawk*, 474 U.S. at 314 (the conviction was nonetheless reinstated because the other *Barker* factors weighed against prejudice to the defendant).) Once the delay is deemed sufficient to give rise to a presumption of prejudice, the other *Barker* factors are to be considered in determining if the presumption of prejudice has been rebutted. (*Loud Hawk*, 474 U.S. at 314).

2. Reason or reasons for delay

The first of those factors examines which party is more to blame for the delay: the State or the defendant. (*Doggett*, 505 U.S. at 651.) The finding of prejudice to the defendant will be

more probable should the delays be caused by "government action or inaction" and they directly or proximately led to "impairment of the ability to mount a defense." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 869 (conviction reinstated on other grounds; defendant failed to establish a Sixth Amendment right to compulsory process for obtaining witnesses).) Such was the case when the *Doggett* Court found that six of the eight years of trial delays were attributable to the state. (*Doggett*, 505 U.S. at 654).

In *Brillon*, the United States Supreme Court held that:

> Deliberate delay to hamper the defense weighs heavily against the prosecution.... More neutral reasons such as negligence or overcrowded courts weigh less heavily [against the prosecution] but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

(*Brillon*, 129 S.Ct. at 1290.)

Likewise the California Supreme Court has held that even if the state is negligent rather than deliberate in causing a delay, it will nonetheless be weighed against the state because "it is the duty of the state to bring a defendant promptly to trial." (*Hill*, 37 Cal.3d at 496 (a six-month delay, where accused had timely asserted his right to trial, deemed official negligence by the Department of Corrections, resulting in the dismissal of charges).) In addition, these obligations of the state are not excused if another government agency, rather than the prosecution itself, is responsible for the delay. (*Id.*)

3. Assertion of the right to a speedy trial

Another factor to be considered in determining whether the presumption of prejudice is to be rebutted is the conduct of the defendant. (*Doggett*, 505 U.S. at 651.) While the defendant's assertion of his right to a speedy trial is given "strong evidentiary weight," such an assertion is not required to find a Sixth Amendment violation. (*Barker*, 407 U.S. at 531-32 (defendant's

conviction affirmed because although the five-year trial delay was extraordinary and attributable to the state, defendant suffered no serious prejudice as a result of the delay and, most importantly, demonstrated no desire to expedite his trial).) The Court found this so-called "demand rule," which requires a defendant to assert his right to a speedy trial and move for dismissal to preserve his Sixth Amendment right, to be inconsistent with the Court's concept of waiver of constitutional rights. (*Id.* at 525.) Instead, a reviewing court should "indulge every reasonable presumption against waiver." (*Id.* (quoting *Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389, 393).) Rejecting the demand rule, the Court asserted that, while delay may often benefit a defendant, there are times when it can also harm his ability to defend himself. (*Id.* at 526.) In turn, a defendant's responsibility to assert his speedy trial right is but a factor to be considered in determining whether this right was violated, not a necessary element. (*Id.* at 529.)

Conversely, pursuant to the California Constitution, a defendant's failure to "timely object to the delay *and* thereafter move for dismissal of the charges" will waive his *state* right to a speedy trial. (*People v. Wright* (1990) 52 Cal.3d 367, 389 (overruled on other grounds) (emphasis added).)

4. Prejudice to the accused

The final *Barker* factor to be considered in determining if the presumption of prejudice is to be rebutted is whether the delay caused actual prejudice to the defendant. (*Doggett*, 505 U.S. at 651.) Prejudice, according to the Court, "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." (*Barker*, 404 U.S. at 532.) The Court enumerated three of these interests, namely (1) to prevent "oppressive pretrial incarceration," (2) to limit the defendant's "anxiety and concern," and (3) to minimize "the possibility that the defense will be impaired." (*Id.*) While specific, demonstrated prejudice will

surely reinforce the presumption of prejudice, no affirmative showing of specific prejudice is required. (*People v. Horning* (2004) 34 Cal.4th 871, 892 (quoting *Doggett*, 505 U.S. at 651-52).) Even though the presumption of prejudice established by an extraordinary delay can be rebutted by a lack of actual prejudice, this factor is not necessary to find a Sixth Amendment violation should the other *Barker* factors weigh in the defendant's favor. (*Barker*, 404 U.S. at 533, (conviction affirmed because the lack of actual prejudice, combined with a concession by defense counsel that the accused "did not want to be tried" during the period of delay, outweighed the extraordinary delay caused by the prosecution).) The Court in *Doggett* held: "[T]he extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim... is significant to the speedy trial analysis because the presumption that pretrial delay has prejudiced the accused intensifies over time." (*Doggett*, 505 U.S. at 651.)

Conversely, the California Supreme Court requires a weighing of "the prejudicial effect of delay against any justification for it." (*People v. Harrison* (2005) 35 Cal.4th 208, 227; *Martinez*, 22 Cal.4th at 755-56; *Hill*, 37 Cal.3d at 496 (citing *Jones v. Superior Court* (1970) 3 Cal.3d 734, 740).)

D. The Eighty-Three Month Delay Violated Robert's Right to a Speedy Trial

1. Delay triggered a presumption of prejudice

While the United States Supreme Court has been reluctant to assign a specific amount of time as "uncommonly long," the lapse of eighty-three months in Robert's pretrial "cross[ed] the threshold dividing ordinary from 'presumptively prejudicial' delay." (*Doggett*, 505 U.S. at 651-52 (quoting *Barker*, 407 U.S. at 530-31).) Robert's initial arraignment was on August 11, 1995; his trial did not begin until July 1, 2002. (RPT 1-1525.) Much like the delays in *Loud Hawk* and *Doggett*, a presumption of prejudice must arise as a result of this extraordinary eighty-three

month delay. (*Loud Hawk*, 474 U.S. at 314; *Doggett*, 505 U.S. at 654.) While the presumption of prejudice from this delay is not necessarily conclusive, it merits substantial weight in assessing whether a Sixth Amendment speedy trial violation has occurred and initiates an inquiry into the *Barker* factors in determining whether Robert's right to a speedy trial was violated. (*Doggett*, 505 U.S. at 654; *Barker* 404 U.S. at 531.)

2. Reasons for the delay

The first circumstance to consider in evaluating whether the presumption of prejudice arising from the eighty-three month delay is to be rebutted examines the reasons for the delay and to which party the delay can be attributed. (*Doggett*, 505 U.S. at 654; *Barker* 404 U.S. at 531.) The various delays in getting Robert's case to trial can be broken into three categories: delays due to the discovery obstructions and refusals of the prosecution; the delays caused by the trial judge's failure to sever Robert's case from Walker's case; and the delays due to the revolving door of defense counsel.

a. Delays caused by the discovery obstructions of the prosecutor

As set forth in the factual background section of this argument (*see supra* pp. 29-48), significant discovery concerns surfaced as early as November 15, 1996, two months prior to the January 27, 1997 trial date, as Prosecutor Ruiz failed to disclose discovery he had been ordered to produce. (*See supra* pp. 34-35.) Ruiz's failures led to a rebuke as the trial judge urged both sides to be "fairly diligent" with discovery so as to not "eat up any unnecessary time." (*See supra* p. 35.) Ruiz's discovery lapses set a pattern for the balance of the pretrial.

Discovery problems continued well into 1997 focusing on Ruiz's resistance to providing witness contact information as well as his failure to turn over taped jailhouse conversations between Walker and his girlfriend. The delays caused by Ruiz forced Feiger to successfully seek

to continue the trial date three months to July 28, 1997. (*See supra* p. 36.) These delays were solely at the instance of the State.

On May 16, 1997, the defense filed a discovery memorandum listing the items that had not been turned over by the prosecutor.[99] (*See supra* note 67.) The judge once again urged cooperation. Nonetheless, the months of June, July and August of 1997 saw Ruiz resist contact information on yet another prosecution witness. Additional defense discovery requests were heard September and October of 1997. On October 7, 1997, Feiger, citing Ruiz's ongoing discovery obstructions maintained that she needed an additional six to twelve months to prepare for trial. The judge agreed with Feiger that discovery had "not been smooth" and continued the trial date eight months to August 3, 1998. (*See supra* p. 38.) This was another delay primarily attributable to the prosecutor's unwillingness to comply with discovery.

Ruiz's pattern of discovery delay and obstruction ultimately resulted in Feiger and the Public Defender conflicting from the case. Before conflicting out, PD Supervisor Zagorsky indicated that the conflict was a result of delayed discovery provided by Ruiz, and it could have been avoided had the pertinent information been turned over to defense counsel earlier. (*See supra* notes 72-73 and accompanying text.) Consequently, the Criminal Defense Panel (CDP) was assigned to Robert's case and would control his representation for the remainder of trial,

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[99] These items were requested of Ruiz by defense counsel during various motions and letters ranging in time from December 13, 1996 to April 18, 1997 and included: 1. A copy of the videotape of the crime scene produced on or about July 16, 1995 by forensic technicians Fuller and Thorne; 2. A snakeskin wallet; 3. The address and telephone number of Lofton; 4. Unaltered copies of Lofton's subpoenaed Riverside General Hospital medical records; 5. Addresses of persons prosecutor intended to call as witness at trial; 6. Criminal record of Omyia Nikol ("Nikki") Thurston; 7. Copies of Las Vegas police dispatch tapes related to this case; 8. Copies of audio tapes of Robert's telephone calls made while incarcerated in Riverside County Jail from July 25, 1995 to present (as of May 16, 1997); 9. Arrest warrants and affidavits in support thereof prepared by law enforcement on or about July 17, 1995; 10. Latent print results from an El Camino; 11. Photos taken by ID technician Creed of a Chevy Cavalier; 12. The true identity of the informant(s) who identified David Watkins as a possible suspect or witness in this case; 13. The true identity of informant(s) who provided Riverside police with information regarding the whereabouts of Robert in Long Beach, CA subsequent to July 15, 1995 and in Las Vegas on or about July 25 and 26 of 1995; 14. Any police reports, lab reports, crime scene logs, or evidence lists pertaining to the investigation by Las Vegas police surrounding Robert's arrest; 15. Copies of any correspondence addressed to or from Robert while he had been in custody. (RPT 530-71.)

despite the continual revolving door of unprepared CDP attorneys that culminated in a rushed and inadequate trial defense for Robert. (*See supra* note 74; *supra* SOC, pp. 6-13.)

As one CDP attorney would be taken off Robert's case,[100] another would be assigned, only to grind proceedings to a halt in a fruitless attempt to get up to speed on the complexities of Robert's defense without the requisite discovery. (*See supra* pp. 40-42.) This consistent pattern of delays went ignored by the court, who failed to compel Ruiz to comply with defense counsel's repeated discovery requests. It was not until Robert became aware of his right to self-representation under *Faretta* that he was able to stop the revolving door of CDP counsel, albeit temporarily.[101] (*See supra* p. 43.) All told, this two-year period of delay between the summer of 1998 and 2000 was attributable to the State as well.

Discovery delays and obstructions again became the primary focus beginning with Robert's ten month period of self-representation beginning in August 2000. During the three months of Ruiz's absence, no discovery took place, despite several admonitions from the judge urging the State to meet its discovery obligations. (*See supra* pp. 43-44.)

The lack of discovery compliance during the months of Ruiz's absence, directly led to the trial date being continued to April 3, 2001. (*See supra* p. 44.)

On January 12, 2001, following his three-month absence, Ruiz appeared and acknowledged that he did not "have a problem" with Robert's discovery requests and would provide the ordered discovery in the "next couple of weeks." (*See supra* p. 44.) Noting that Ruiz's absence had made the case "dead in the water for several weeks [from October 5, 2000 to

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[100] Porter was relieved due to health problems. (*See supra* p. 41.) Aquilina was removed following Robert's only successful *Marsden* hearing. (*See supra* p. 42.) Gunn, after staying on as standby counsel over Robert's *pro se* objection, eventually conflicted from the case due to a civil dispute with Robert. (*See supra* note 86 and accompanying text.)

[101] Robert first became aware of his *Faretta* right on August 30, 1991 during his fourth *Marsden* hearing, when the judge informed him that a *Marsden* request was not an appropriate motion for seeking self-representation.

January 12, 2001]," the court admonished Ruiz for his latest response to Robert's discovery request: "Don't wait until we come back into court to get them to him." (*See supra* p. 44) Despite the admonition, a month later, on February 23, 2001, Robert still had not received the discovery that Ruiz had agreed to supply and once again, due to discovery delays the trial date was pushed back; this time for two months, to June 4, 2001. (*See supra* p. 45.)

The discovery process fared no better during the spring of 2001. There were delays by Ruiz in providing Robert access to his clothing and the testing of his clothing. Even though Ruiz, as of April 17, 2001, claimed to have now turned over all relevant discovery to the defense, Robert and his investigator received seven boxes of discovery materials in which, as standby counsel Gunn stated, "some things were missing." Robert complained that some of the tapes the prosecution had turned over to him had no audio. Ruiz countered by demanding payment for the production of new copies of the tapes before he would be willing to turn them over to Robert. (*See supra* p. 45.)[102]

Robert's *Faretta* status, which was revoked on June 28, 2001, was marred throughout by the State's ongoing failure to comply with its discovery obligations. That ten-month delay was at the instance of the state.

Remarkably, as late as January 23, 2002, Robert's most recent attorney, CDP attorney Cormicle, learned that Ruiz was aware of FBI reports concerning Gary Williams and his bank and credit union robbery associates and had not disclosed the reports. Cormicle also explained to the court that when Robert was still representing himself, Ruiz told him such reports did not

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[102] The tapes were not made available until March 7, 2001. On that date, Sergeant Pete Ortiz from the jail was present in court. The Court had requested Mr. Ortiz facilitate Robert's listening of the two audio tapes. Ortiz stated he would hand the tapes over to Robert's investigator, who would either transcribe or tape-record the two tapes for Robert. (RT 1220-23.) However, Robert had not yet secured an investigator. His first investigator, Mr. Monahan, had accepted appointment, but then backed out after declaring a conflict due to working in the same office as David Gunn. The second investigator accepted appointment upon notice that the funding had been granted, but had not yet come to visit Robert. (RT 1223-24.)

exist. Ruiz countered that Cormicle's attempt to discover Gary's criminal associates who may have wanted him dead was irrelevant and a "fishing expedition." As a result of this latest discovery revelation Cormicle successfully moved to continue the trial date to June 3, 2002. (*See supra* p. 47.) Once again the primary impetus for this delay was Ruiz's failure to comport with basic discovery.

Several months later, on April 23, 2002, Cormicle complained that he was just now receiving "significant reports that should have been turned over seven years ago but were not...." In response, Ruiz admitted, "As to when we ultimately obtained that, it was a number of years. I would say probably two to three years ago, but maybe even longer that that."[103] In light of these late arriving revelations, Cormicle requested to continue the trial date. The trial judge, however, granted only a short continuance until the final trial date of July 1, 2002.[104] (*See supra* p. 48.)

The twelve months from the revocation of Robert's *Faretta* status to the commencement of trial were littered with discovery delays and obstructions. While a portion of this period is attributable to Gunn's conflict with Robert as well as Cormicle's preparation, at least six of those months were a function of Ruiz's gamesmanship.

While it is not possible to ascertain with a great degree of specificity how much of the eighty-three month pretrial was due to Ruiz's discovery obstructions and failures, it is clear that the multitude of continuances directly attributable to discovery concerns generated by the State amounted to well over three years.

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[103] Ruiz continued by blaming his failure to turn this evidence over on the "revolving door of defense attorneys that we have had in this case," that this supposedly was the fault of Robert, that the prosecution had no burden to obtain evidence that was independently obtainable by the defense, and that the defense purportedly knew about Scott in the weeks following the murders. (RPT 1430-44.)

[104] Cormicle originally requested a continuance until August 1, 2002, and stated that the court's proposed shorter length of time would hamper his ability to fully prepare for trial, and that he was still in the process of receiving discovery from the prosecution. (RPT 1490-1504.)

b. Delays caused by trial court's failure to sever the cases

The trial judge's refusal to severe Robert's case from Walker's was another significant cause of pretrial delay. Due to both speedy-trial concerns and *Aranda* issues, the two cases should have been severed years before they were. When the cases were finally severed on December 17,1999, four years after the initial request to sever,[105] the judge acknowledged: "I wish we would have thought of this a couple of years ago..." (*See supra* p. 42.) It was only after four years that the court recognized that, for a number of reasons, these cases could not be jointly prosecuted. A primary reason was the number of counsel serially appointed for each man. This concern was exacerbated when counsel for either defendant conflicted from the case, thereby delaying the trial of both men. The second primary reason that the failure to grant a timely severance hindered Robert's keen desire to bring his case to trial was the decidedly opposite postures of Robert and Walker. Walker agreed to waive time again and again whereas Robert from the earliest months of pretrial was adamant that his case be tried as quickly as possible. (*See supra* pp. 31-33.) Robert's resistance to delays put him not only at odds with Walker but with his own counsel. Furthermore, as suggested by the trial judge at the time of severance, *Aranda* concerns had surfaced. The existence of recorded jailhouse conversations between Walker and his girlfriend, initially undisclosed by Ruiz, contained language that could potentially exculpate Walker but damage Robert's case. (*See supra* note 64 and accompanying text.) The court chose to look the other way as this patent conflict was ignored in favor of prosecutorial efficiency.

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[105] Counsel for Walker first moved for severance on January 18, 1996. (CT 147; RPT 85.) Robert's counsel joined the motion on February 23, 1996. The motion was denied on February 23, 1996. (CT 185; RPT 104-30.) The cases were severed on December 17, 1999. (*See supra* p. 42.)

As early as November 9, 1995, the conflicts over time waivers came to light. The pattern continued and during the first full year of pretrial there were eight conflicts over time waivers between Robert and Walker. (*See supra* pp. 31-34.)

The problems associated with keeping the cases consolidated grew even more focused when Walker's counsel conflicted from the case on September 18, 1997. (RPT 676-83.) The court indicated its "desire to get this trial done in one trial instead of two," and that a potential conflict between defendants "does not make [the court] happy." (RPT 684-85.) Robert's counsel, DPD Feiger, complained that awaiting Walker's appointment of new counsel was unnecessarily delaying Robert's motion to compel discovery, which had been joined by Walker's now-conflicted counsel.[106] (RPT 684-88.) On October 7, 1997, new counsel for Walker estimated that they could be ready sometime within the year but as Peasley [new co-counsel for Walker] said, "probably closer to 12 [months] than six." (CT 1005; RPT 730-47.)

The necessity of putting over the trial for a year in order for Walker's new counsel to prepare was a red flag that the judge's preference for a joint trial must give way to the complexities of this two defendant capital case. The court, however, once again refused to sever the trials despite Robert's ongoing insistence on his right to a speedy trial.

It would be another two years before the judge, with a significant prod from Ruiz, would recognize what should have been apparent years earlier: that these two capital defendants, with their conflicting views on getting their cases before a jury, could never be tried together.

Recognizing the sound policy goals involved in consolidating cases arising from common facts, there remains a time when these policy goals must give way to more urgent concerns. Certainly, when consolidation hinders the due process of an accused or infringes on speedy trial

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[106] Ruiz and Feiger exchanged expressions of "resentment": Ruiz for representing Robert's position and Feiger for representing Walker's. (RPT 684, 687.)

rights, it must give way. (*People v. Chapman* (1968) 261 Cal.App.2d 149, 160 ("The exercise of trial court discretion over trial consolidation and severance must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case; when reviewed by the appellate courts, it will be measured by the facts existing at the time of the motion and not those occurring afterward.") (Internal quotations omitted).)

Determining how much time Robert lost because of the judge's failure to sever his case from Walker's is not amenable to any degree of certainty. Had the cases been severed on February 23, 1996,[107] instead of nearly four years later on December 17, 1999, would Robert's insistence in getting his case to trial in 1996 or 1997 have prevailed? How much of a delay was caused by the myriad problems associated with bringing a *joint* defendant capital case to trial? The change of lawyers for both defendants, the differing timetables of preparation of each defendant for both the guilt and penalty phases, and the complexities of witness coordination are but some of the variables. What can be stated with near certainty is that had severance occurred in early 1996, Robert's trial would have commenced years earlier than it did. This delay of Robert's right to a speedy trial of at least several years does not weigh against the defense and was a significant factor in delaying Robert's trial.

c. Delays caused by the revolving door of defense counsel

The United States Supreme Court has held that the "inability or unwillingness of [assigned counsel] to move a case forward may not be attributed to the State [for purposes of assessing speedy-trial concerns] simply because they are assigned counsel." (*Brillon*, 129 S. Ct. at 1291-92.) The Court, however, acknowledged that this general rule is not absolute. For instance, the Court noted, "delay resulting from a systematic breakdown in the public defender system could be charged to the State." (*Id.* at 1292.)

[107] *See supra* note 99.

As set forth in the factual background of this argument, eight different lawyers represented Robert. There were two public defenders, Wright and Feiger, and six different lawyers from the Criminal Defense Panel. (*See supra* pp. 30-49.)

With deference to the policy considerations underlying the Court's reluctance to attribute assigned counsels' delays to the State, there must be some recognition of an indigent defendant's plight in being locked into a system that is not serving his interests. The ponderous pretrial record in Robert's case highlights two significant concerns raised by the revolving door of CDP counsel. The first focuses on the CDP alternate defense counsel system in place in Riverside County during this pretrial and the second concerns the gaps in Robert's representation during his pretrial.

Not surprisingly, there was no inquiry throughout Robert's pretrial and trial of any systematic breakdown in the CDP's role as alternate defense counsel given that it was only CDP attorneys representing Robert for the last four years of pretrial and on into trial. (*See supra* note 72; *supra* SOC, pp. 6-13.) However, with the appointment of only those lawyers under contract with the CDP, there were serious delays as each new CDP lawyer sought and received numerous trial continuances claiming significant case loads. Despite the trial court's awareness of the heavy case loads necessitating continuance after continuance, the record reflects no effort or attempt to inquire as to the availability of any counsel other than those of the CDP.

On October 7, 1997, Prosecutor Ruiz weighed in on the exclusivity of the CDP when co-defendant Walker's new CDP lawyer[108] sought yet another continuance. Ruiz said,

> The court has an obligation to appoint counsel, where counsel on the case can proceed in a fashion that would not disrupt the orderly administration of justice. And a year continuance on a case like this so CDP can keep it in house, I don't believe is appropriate... that would be an abortion of justice.

[108] Both Robert and Walker were represented by the CDP.

(CT 1005; RPT 730-47.) On another occasion, Ruiz toed [and perhaps stepped over] the line of prosecutorial impropriety in taking it upon himself to initiate an *ex parte* communication with the court to determine the availability of a non-CPD lawyer who could more expediently get the matter to trial. (*See supra* note 70 and accompanying text.)

As most of the CDP requests for continuing the trial date were made and ultimately granted, Robert adamantly fought the continuances and pressed his desire to get to trial. Following the conflict from the public defender's office on April 3, 1998, CDP attorney Grossman sought and received a continuance to arrange for a CDP attorney to represent Robert. And on June 2, 1998, CDP attorney Porter was appointed. Robert was unrepresented for a two-month period, from the time the public defender conflicted to the appointment of Porter. (*See supra* p. 40.)

Porter withdrew due to health reasons on September 18, 1998, and on October 1, 1998, CDP attorney Myers was appointed. Following Myers appointment the court set a hearing date 25 days later for counsel to determine how long it would take to prepare for trial. However, it was not until January 22, 1999, when Myers' co-counsel, CDP Aquilina, determined he could be prepared in five months, on June 14, 1999. During the four-month gap from Porter's withdrawal to Myers' and Aquilina's request for continuance, Robert was, for all intents and purposes, unrepresented: a gap attributable to the State. (*See supra* pp. 40-41.)

At a May 17, 1999 *Marsden* hearing, Robert voiced his concern over Aquilina's lack of case preparation. Aquilina agreed that, at least in part, his heavy case load was impacting his ability to prepare for Robert's capital trial. Nonetheless, despite the court's awareness of the heavy case load of this CDP conflict counsel, the *Marsden* request was denied. Not surprisingly,

three months later, Aquilina, alleging a conflict of interest, was relieved and another CDP counsel was appointed. (*See supra* p. 41.)

On December 21, 1999, following several continuances, CDP counsel Gunn again sought to continue the trial date explaining that he already had "about eight murder trials set pending for next year...." This disclosure of such a remarkable case load was the court's impetus to push back the trial date ten months to October 2, 2000, over Robert's strenuous objection. (*See supra* p. 42.)

Eight months later, Robert was appointed to represent himself. (*See supra* p. 43.) Following the June 28, 2001 revocation of Robert's *Faretta* statue, Gunn was re-appointed. (*See supra* p. 46.) Two months later, on August 20, 2001, Gunn conflicted, CDP counsel Cormicle was appointed, and, following ten months of continuances, Cormicle tried the case. (*See supra* pp. 47-49.)

CDP counsel represented Robert over the last four years of his pre-trial and trial. From the barrage of lengthy continuances requested by CDP counsel, to the heavy case loads of CDP counsel, to the resistance of the CDP to any counsel outside the CDP, the court was dogged in its determination to keep the case in the hands of the CDP, despite CDP's collective inability to move the case to trial. And while it cannot be established with any certainty how much time can be attributed to the court's decision to keep appointing CDP counsel, it is clear that months if not years were lost.

Much clearer are the gaps in actual representation during the four years of CDP representation. The two-month gap between the public defender's conflict from the case to CDP counsel Porter and the four-month gap from CDP counsel Porter to CDP counsels Myers and

Aquilina represent six months when this capital defendant went unrepresented. That gap must fit squarely on the shoulders of the State.

3. Robert's Assertion of the Right to a Speedy Trial

The next *Barker* factor focuses on whether the defendant asserted his right to a speedy trial. The transcript of Robert's pretrial is a compelling testament to his desire to bring his case to trial. From the early months of incarceration, to the severance from Walker's case, through his period of self-representation and beyond, Robert consistently and adamantly insisted that his case be heard expeditiously.

Following his arraignment, on November 9, 1995, when Walker's attorney moved to push back the preliminary hearing, Robert's counsel announced, "Mr. Williams prefers to have the prelim as set." On December 21, 1995, several weeks later, Walker's counsel again moved to continue the date set for the preliminary hearing and Robert, resisting the delay, said, "I don't want to waive no time. I want to come on and do this." (*See supra* p. 31.)

After the preliminary hearing and filing of the information, counsel for both men fought to set a trial date beyond sixty days. Walker agreed to waive time but Robert refused. Given the impasse, Walker's counsel, in moving to sever the two cases, stated, "We cannot be ready within 60 days, and if Mr. Williams forces us to be going to trial within 60 days, I think my client would be severely prejudiced..." A week later, Robert's counsel moved to continue the trial date. Robert refused to waive time. The judge found good cause and continued the trial. (*See supra* p. 32.)

On May 3, 1996, just days prior to the date set for trial, counsel for both men moved to continue the trial. In a *Marsden* hearing that same day, Robert spoke of no progress being done in case preparation and in expressing his concerns about another continuance said, "I just wanted

it to be known that this same reason they saying they want a continuance, now the same reason they wanted a continuance. And they filed it. I don't know if there's a violation of my rights to a speedy trial, but my—I'm supposed to go to trial on March the 11..." Later at that same hearing he said, "Okay. I'm not waiving no more time." Nonetheless, the court, once again, found good cause and continued the trial. (*See supra* p. 33.)

Five months later, on September 27, 1996, counsel for both defendants once again moved to continue the trial date. Ruiz opposed the continuance and stated, "[T]here are obviously concerns that I've got with respect to, given the history of Williams' refusal to waive time..." Robert, when assured by the judge that January 27, 1997 was a firm trial date, reluctantly waived time and said, "It won't make any difference but I'll go ahead and waive time." (*See supra* p. 34.)

The "firm" trial date was anything but and, on January 15, 1997, Robert's counsel again moved for a continuance. Robert disagreed with the motion and stated:

> [T]he way it sounds—the way it sounds, it don't really make a difference if I agree or not. It seems like everyone else agrees to it. I mean, me saying no ain't helping me other times. I don't see how it's going to help me now... I mean, it don't help me none to sit here and say, no, I don't waive my time, because the thing's going to be continued. You understand what I'm saying?

The motion to continue was granted. (*See supra* p. 35.)

Feiger, representing Robert, made several motions to continue the trial dates during much of 1997, maintaining that discovery from the prosecutor was not forthcoming. Believing Feiger to be doing a competent job, Robert did not oppose those continuances. (*See supra* pp. 36-39.)

Following the public defender's withdrawal, CDP counsel Porter, on June 2, 1998, was appointed and when he sought to continue the trial, Robert waived time to allow him to prepare. Following Porter's withdrawal and the appointment of Myers and then Aquilina, Aquilina moved

to continue the trial date on November 3, 1998, but Robert refused to waive time. Robert's refusal elicited the following from the judge: "I understand why he [Robert] wouldn't want to waive time. There's a couple of good reasons. One, because he's in a hurry. And, two, it creates [a speedy trial] issue that wasn't there before..." (*See supra* p. 40.)

On April 23, 1999, Robert agreed to waive time to January 10, 2000, when Aquilina claimed he had significant investigation to complete. (*See supra* p. 41.)

On December 21, 1999, the judge indicated that a new trial date needed to be set in that Aquilina had been relieved and Gunn and Cormicle just appointed. Robert complained, "I'm tired. I want to go to trial. I'm tired of sitting here. As you recall, two years ago, three years ago, I didn't want to waive no time. I wanted to go to trial then..." (*See supra* p. 42.)

Following Robert's successful *Faretta* motion on August 16, 2000, Ruiz because ill and discovery came to a standstill. As a result of discovery non-compliance, Robert successfully sought to continue the trial date to April 2, 2001. In March 2001, Robert, again citing discovery delays, successfully moved to continue the trial to June 4, 2001. (*See supra* pp. 43-44.)

After revocation of Robert's *Faretta* status on June 28, 2001, Cormicle moved to continue the trial to March 4, 2002. Robert refused to waive time. The judge found good cause and continued the trial date. (*See supra* pp. 46-47.)

On January 23, March 29, and May 1, 2002, trial dates were put over to July 1, 2002, as Cormicle sought discovery related to third-party culpability. Robert recognized the importance of such discovery and waived time. (*See supra* pp. 47-49.)

Robert's adamancy, throughout the vast majority of the eighty-three-month pretrial, that his case be brought to trial expeditiously is beyond any rational dispute.

4. Prejudice to Robert's Defense

The last of the *Barker* factors focuses on prejudice to the defendant. As noted in *Barker*, a showing of specific prejudice is not essential to a finding that the right to a speedy trial was denied in the event the other *Barker* factors are compelling. This is especially true given that determining actual prejudice, the ultimate "what if" in analyzing a potential violation to a defendant's right to a speedy trial, is often based on conjecture and cannot be determined with precision. (*Barker*, 407 U.S. at 522 ("[I]t is impossible to do more than generalize about when those circumstances exist").) Indeed, determining actual prejudice to Robert in the context of his eighty-three-month pretrial cannot be measured with any certitude. Nonetheless, in this instance, the extraordinary delay did lead to two specific and concrete losses over and above the generalized problems inevitable in such a lengthy pretrial. First, it is clear that any meaningful investigation into the third parties motivated to kill Gary Williams was dealt a severe if not fatal blow by the significant time delays. (*See infra*, Argument II.) Had this vital information been forthcoming in 1995 or 1996 or 1997 instead of 2001 and 2002, the defense would have been in a much better position to contact, question, and investigate these individuals. However, with the passage of so much time, such efforts were rendered infinitely more difficult, if not impossible.

As is manifest from the woeful pretrial process, the number, identities, and motivations of those individuals who wanted to kill or harm Gary Williams came to light very late in the arduous pretrial process. The first inkling the defense could have had of Gary's background and criminal associates was when it requested and received Gary's criminal record in early March of 1997. (RPT 392-418; CT 381-537.) While these records provided the defense with Gary's violent criminal past and the names of a few of his robbery ring associates, they did not reveal the full extent of Gary's criminal activities or the company he was keeping at the time of his

death.[109] (RPT 392-418; CT 381-537.) The next time that any defense counsel even touched on potential third-party culpability evidence was when the court heard a defense discovery request on September 29, 1997, seeking amongst other things the identities of people who had identified an individual by the name of David Watkins as a possible suspect, and the identity of the person who had provided police with information on Robert's whereabouts both in Los Angeles and Las Vegas. (RPT 711-29; CT 1004.) Although the prosecution eventually conceded the information on the informant who had provided Robert's location, it was only provided with reluctance and after significant delay.[110] (RPT 797-837; CT 1086.) The next and most significant discovery regarding third-party culpability was not sought until January 23, 2002, and consisted of FBI documents regarding the investigation and surveillance of Gary's robbery ring, and his associates in that illicit venture. (RPT 1382-84.) This was the first motion for discovery of these FBI files made by any of Robert's defense counsel. This discovery request was followed by another on February 11, 2002, when Cormicle requested information on a series of sixteen bank robbery investigations connected to Gary, of which Cormicle had only recently learned. (RPT 1386-97.) Cormicle made the importance of this information to Robert's defense clear when he pointed out several instances of prosecution witnesses setting forth allegations of Gary's ongoing bank robbery involvement, despite the prosecution's failure to disclose any such discovery information, and he outlined the defense theory that others had motive to kill Gary because of

[109] Gary had a lengthy criminal record that included several gun related charges and at least two ATM robberies carried out at gunpoint with key prosecution witness Robert Scott. (RT 2523-73; CT 381-537.)

[110] The informant's name was Erick Boykin, and at one point the prosecution had suspected him of being the third person to supposedly have taken part in Gary's death, to the point of having him take a polygraph. (RPT 838-45.) The prosecution delayed turning this information over until January 23, 1998, after defense counsel had sought to have the court reconsider its ruling on the issue. (RPT 797-837; CT 1086.) Even then, prosecutor Ruiz was reluctant to turn over all requested information to the defense and sought permission from the court in an *in camera* hearing to limit the information conveyed to the defense. (RPT 838-45.)

these robberies.[111] (RPT 1386-97; CT 2166-76.) This very late discovery seemed to open the floodgates to potential third parties motivated to kill Gary and forced Cormicle to seek additional continuances to deal with the "significant reports that should have been turned over seven years ago but were not." (RPT 1426-44; CT 2249-53.) Despite his involvement in this delayed discovery process, Ruiz continued to argue against granting the defense more time. (RPT 1426-44, 1475-1504; CT 2253-64.) Cormicle continued to insist that he needed additional time to investigate third-party culpability up until the initial trial date; his requests, however, largely fell on deaf ears.[112] (RPT 1475-1504; CT 2265.)

Had the state disclosed this information years earlier thereby allowing thoughtful and thorough investigation, the track of the entire pretrial and indeed trial could well have been significantly altered.

The second specific detriment to Robert's case as a result of the delay was the State's ability to stabilize the testimony of Lofton. In the weeks and months following the murders, Loftons' varying accounts of events and identifications of the defendants were strewn with inconsistencies and mistakes. (*See supra* SOF, section E, pp. 23-26.) However, with the passage of time, the State was able to clean-up her testimony; when she finally testified at trial, her testimony had a certitude and conviction that belied her earlier accounts. Particularly striking was the contrast between the testimony she offered at the preliminary hearing and that given at trial. At the preliminary hearing, when testifying about her crucial identification of Robert made at the hospital following the murders, she testified that she was still under the influence of

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[111] Specifically, Cormicle theorized that past associates of Gary's who had gone to jail as a result of failed robbery attempts planned by Gary would want Gary dead for revenge or because they believed him to be an FBI informant. (RPT 1386-97.)

[112] The final blow to the defense occurred when Cormicle requested a three month continuance on May 1, 2002 and was only granted a partial continuance until July 1, 2002, despite the court being told and acknowledging that the defense needed more time to fully investigate potentially culpable third parties. (RPT 1475-1504; CT 2265.)

painkillers and muscle relaxants, whereas at trial, she claimed that she did not feel the effects of the medication. (CT 129; RT 1935-36.) At the preliminary hearing, she testified that she could not remember details about the first police interview while in the hospital "because of my state of being." (CT 129.) Yet at trial, she was able to recall specific questions, the time of day, people present during questioning, the amount of sleep she had gotten, and even the position she sat in during questioning as being "high fowlers." (RT 1935-40.)

Furthermore, details about the events on the night of the murders changed from the initial account she offered the detectives, to her preliminary testimony, and onto her trial testimony. The first irregularity in her testimony concerning the events on the night of the murders involved the number of men exiting the car across the street and entering the house. Initially, Lofton told investigators she saw only two men exit the car and enter the house. (Clerks 5th Supp. Ex. B1.) However, at the preliminary hearing and at trial she recalled seeing three. (CT 36-40; RT 2086.) On a different point, she told investigators that the three men were arguing over taking Gary's shoes, what size they were, and if they would fit anyone, but at the preliminary hearing and at trial she claimed the only person interested in the shoes was the unidentified third suspect. (RT 104-05, 2122.) One of the more peculiar inconsistencies involved the incident in the bathroom with one of the suspects. At the preliminary hearing, Lofton ambiguously recalled the suspect inserting his fingers into her and did not remember him removing his gloves, yet at trial she vividly recalled the suspect removing one glove, inserting his ungloved fingers in her, and then placing the glove back on his hand. (CT 61-62; RT 61, 2169-70.)

While it is true that defense counsel was able to impeach her on a number of points, her overall trial testimony did not reveal her earlier equivocation and uncertainty. The passage of so much time inevitably impacts a person's recall and perception, such that they can crystallize and

bring forth certitude from initial uncertainty and equivocation. Had this trial taken place in 1997 or 1998, instead of during the second half of 2002, the jurors' perception of this critical witness's credibility may have been significantly altered. This aspect of the delay was also to the significant detriment of Robert.

E. Conclusion

Due to the extraordinary eighty-three-month delay, the State's accountability for significant portions of that delay, Robert's consistent pattern of refusal to waive time, and the prejudice suffered by Robert as a result of these delays, Robert's Sixth Amendment right to a speedy trial was violated. As such, Robert's conviction must be vacated and his capital sentence dismissed.

II

THE STATE'S FAILURE TO INVESTIGATE AND PROVIDE TIMELY DISCOVERY OF THIRD PARTY CULPABILITY VIOLATED *BRADY* STANDARDS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Introduction

As already set forth, Gary Williams was a bank robber who lived a dangerous life. He had a number of enemies who had motives to harm or kill him. There were those individuals who served as Gary's minions during several failed bank robberies who were arrested and served time while Gary escaped punishment. There were gang associations with, among others, the Mexican Mafia. And there was at least one jealous boyfriend who had threatened Gary just prior to his murder.

The defense, however, was not apprised of the bulk of the third party culpability evidence until nearly seven years into pretrial, just before trial began. Yet when the defense sought to continue the trial to allow an opportunity to assess and investigate the late arriving third party discovery, that request was denied.

A full understanding and an opportunity to investigate and assess the late arriving discovery of third parties with motivation to harm Gary could well have impacted Robert's trial, and, as such, the State's failure to provide third party culpability evidence in a timely manner significantly compromised Robert's ability to mount a successful defense in violation of the due process guarantees of the Fourteenth Amendment.

B. Factual Background

As outlined in the Statement of the Case (*see supra* SOC) and further detailed in Argument I concerning the denial of Robert's right to a speedy trial (*see supra* Argument I),

Ruiz consistently delayed or refused to comply with his discovery obligations. Even though discovery issues plagued the pretrial throughout its arduous course, it was not until late in the pretrial, just months prior to trial, that the particular discovery obstructions regarding third parties with an interest in harming or killing Gary Williams surfaced.

On January 23, 2002, Cormicle sought to continue the trial so he could have the necessary time to assess the FBI's information on Gary, the string of robberies he participated in, and his associates, which had only recently come to light, and which Ruiz commented would be "appropriate" for the defense to have already had. Cormicle further commented that Robert had sought such materials related to Gary's robbery associates while Robert was representing himself, but had been told by Ruiz that they did not exist.[113] On February 11, 2002, CDP attorney Cormicle requested that prosecution materials concerning surveillance of Gary Williams be made available to the defense. After Ruiz objected, Cormicle indicated the existence of sixteen specific bank robbery investigations concerning Gary in which Ruiz had provided no discovery. Cormicle continued by citing *Kyles v. Whitley* as requiring the prosecution to obtain and turn over such documents to the defense.[114] Furthermore, Cormicle complained that there were "gaps that we haven't filled in yet with respect to photographs, with respect to viewing other types of evidence. There was one item of evidence that was missing... we opened up the envelope; it's gone[.]" He also complained that the bank robbery suspects had reason to kill

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[113] In an *ex parte* hearing on April 25, 2002, Cormicle explained his need for further time to investigate, and how these late discoveries regarding Gary's robberies and associates had been brought about by Ruiz's failure to turn over vital evidence. (RPT 1459-75.) Cormicle explained that during a meeting with Ruiz on January 9, 2002 he had come across a detailed one-page document entitled "Gary and 100 bandits," which outlined the sixteen bank robberies Gary was believed to have orchestrated with the assistance of numerous associates. (RPT 1460.) Cormicle went on to say, "Now, I had not received any discovery pertaining to that, nor had Mr. Williams when he represented himself, who had asked for the documents because this is a statement that had come up during [Ruiz's] opening statement in the Walker trial." (RPT 1460.) The discovery of this document prompted Cormicle to ask Ruiz about any other documents related to these robberies in his possession, which led to Ruiz belatedly revealing the existence of the FBI documents to the defense. (RPT 1461.)

[114] *Kyles v. Whitley* (1995) 514 U.S. 419.

Gary. Cormicle concluded his plea by requesting more time and again pointing out that Ruiz had not turned over several pieces of evidence until recently and had been uncooperative in doing that much. (RPT 1382-97.)

Two months later, on April 23, 2002, Cormicle indicated that an associate of Gary's, Robert Scott, would be testifying against Robert in exchange for a lighter sentence. Cormicle asserted this was *Brady* material and stated:

> I met back on 1/9/02 with Mr. Ruiz, expecting that I had all the discovery up to that point. And there should have been all the discovery turned over, I believe at that point, for the past 6½ years. However, yet again on Wednesday of last week I'm still receiving additional reports, significant reports that should have been turned over 7 years ago but were not... the report that I'm speaking of is a 4-page report from the FBI that was in the possession of the district attorney pertaining to Robert Scott.

(RPT 1426-44.) Cormicle also cited a need for information on a prior criminal incident committed by prosecution witness Tami Wilkerson that could be used to potentially impeach her testimony. (RPT 1429.) Ruiz admitted that he had obtained the witness information of Scott and Wilkerson "probably 2 to 3 years ago," but claimed Robert's revolving door of defense counsel as the reason he never turned it over to the defense. (RPT 1426-44.)

Scott's testimony was also the focus of an *ex parte* hearing on April 25, 2002, where Cormicle requested a continuance to craft Robert's defense in light of this new information regarding Scott. (RPT 1459-75; CT 2249-53.) In that *ex parte* hearing, Cormicle revealed that on or about April 17, 2002 he had received a four-page document regarding an interview Scott had with the U.S. Attorney and the FBI, in which Scott offered to provide information on Gary's numerous bank robberies, the names of about fifteen of Gary's robbery associates, and a robbery connected to the Mexican Mafia, in exchange for a deal. (RPT 1462-64.) Cormicle also pointed out to the court information pertaining to potential prosecution witnesses Alan Hunter and Chris

Moreno, amongst other criminal associates and members of the Palm Oaks Crip gang. Hunter and Moreno were arrested during the robberies planned by Gary, while Gary got away. It also came to light that Hunter and Moreno wanted to kill or rob Gary at the time of the murders which are the subject of this brief. (RPT 1463-64.) This recent line of investigation had also led to information on both Gary and Lofton being involved in interstate narcotics transactions, which had not been revealed by the prosecution or discovered by the defense prior to 2002, and were still under investigation by Cormicle. (RPT 1465-66.) Cormicle also claimed he was still in the process of receiving the criminal record of prosecution witness Tammy Wilkerson, which he would need for impeachment purposes, and that he was still receiving and sorting through numerous photos from Gary's photo albums, which contained evidence of Gary's connection to numerous Palm Oaks gang members and other criminals from the area who might have wanted to rob or kill Gary. (RPT 1466-67.) Cormicle added:

> I think for effective representation of Mr. Williams, this is what has to be done. I have to run down everybody that's contained in these additional reports that are being turned over from the district attorney. This is not something that we have caused the delay in getting turned over. I thought I had the stuff.... [And w]e still have, like, 700 pages to go through because we haven't even tackled that aspect of the FBI documents yet. We haven't had time to do that...

(RPT 1467-68.) When the defense's investigator attempted to further explain the necessity for investigating all of this new information the court cut him off and set the motion to continue over until May 1, 2002.[115] (RPT 1469-74.) And at that hearing, Ruiz objected to any more continuances, arguing that the new evidence concerning Gary Williams and potential third party

[115] The court seemed to regard potential evidence of third parties with motive to rob or kill Gary as unimportant for the guilt phase of Robert's trial, and was only interested in hearing evidence that the defense might use to impeach the testimony of prosecution witnesses. (RPT 1469-74.) Despite the repeated contention by Cormicle and his investigator that such information was vital to the guilt phase of Robert's trial, the court continued to cut them off. (RPT 1469-74.)

culpability was insignificant, and that Robert's attempts to continue were a threat to Lofton's safety.[116] (RPT 1475-1504.)

As outlined in the factual background on the right to a speedy trial (*see supra* Argument I, section B), as well as the factual background concerning withholding of Lofton's contact information (*see infra* Argument III, section B), the prosecution further impacted Robert's case by failing to allow his counsel access to Lofton prior to trial.

C. The State's Obligation to Provide Exculpatory Evidence

In a criminal case, the state has an obligation to expose evidence that favors the defense, especially if this evidence can exculpate the defendant. (*Brady v. Maryland* (1963) 373 U.S. 83, 90 (the prosecution withheld a statement by another suspect admitting guilt).) The "cumulative effect" of the suppressed evidence—the degree to which the defense is hindered by the government's withholding of favorable evidence—determines whether a defendant's right to due process has been deprived. (*Kyles v. Whitley* (1995) 514 U.S. 419, 421 [a number of exculpatory details, such as eyewitness accounts and a license plate video that did not include the defendant's license plate, were withheld from the defense]; U.S. Const. amend. XIV.) Even if another government agency, such as the police department, withholds the evidence, the prosecutor "remains responsible for gauging that effect." (*Id.*) This responsibility does not diminish even if the prosecutor lacked knowledge of the suppression, since knowledge by an agency acting on the state's behalf is "imputed" to the prosecution. (*In re Brown* (1998) 17 Cal.4th 873, 879 [the prosecution held to be responsible for a laboratory's suppression of blood samples despite the prosecutor testifying to his lack of knowledge of the samples].)

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[116] Furthermore, Cormicle declared he had no discovery from Ruiz about the supposed threats to witnesses that Ruiz was citing as reason for not allowing a continuance. (RPT 1494.)

The prosecution's suppression of evidence is material if the suppressed evidence could be used to impeach witness testimony, as well as refute a prosecutor's closing argument. (*In re Miranda* (2008) 43 Cal.4th 541, 576 (the prosecution withheld a confession letter by another individual that refuted its case during the penalty phase).) Even if the evidence is not wholly exculpatory for the defendant, its suppression may still be material to his ability to present a defense. (*Cone v. Bell* (2009) 129 S.Ct. 1769, 1773.) Furthermore, suppressed evidence that is not material to a defendant's guilt may still be material in determining a defendant's sentence—especially if the defendant was given the death penalty. (*Id.* at 1786 (while suppressed evidence of drug use affecting defendant's mental state was not material as to his guilt, its potential materiality in the jury's eyes with regard to his death sentence demanded a remand).) If the cumulative effect of suppressed evidence raises a reasonable probability that its disclosure would have produced a different trial result, then the defendant's conviction must be vacated and he is entitled to a new trial. (*Kyles*, 514 U.S. at 421; *Brown*, 17 Cal.4th at 891.)

D. The State's Failure to Provide Evidence of Third Party Culpability Denied Robert the Opportunity to Prepare His Defense

The prosecution's undue delay in revealing the existence of potentially exculpatory evidence related to Gary's numerous robberies and associates with motives to kill him, in addition to the existence of FBI surveillance materials related to those robberies and associates, resulted in a denial of the defense's ability to fully investigate those materials or to render a complete defense at trial. According to Cormicle's *ex parte* statements on April 25, 2002, Ruiz was aware of the "Gary and 100 bandits" document, the information connecting Gary to a multitude of robberies, the persons possessing strong, explicit motives to want him dead, and the FBI materials connected to the surveillance of Gary and his criminal associates. (RPT 1460-62.) Indeed, it was through Ruiz that the defense eventually learned of these materials. (RPT 1460-

62.) It is problematic that Ruiz failed to reveal this information until Cormicle stumbled across it in Ruiz's files and asked him directly about it. (RPT 1460-62.) Despite its potential exculpatory value, Ruiz withheld this information until just a few months before trial.[117] (RPT 1460.) While the defense was able to continue the trial date a few additional months to deal with the resulting massive influx of discovery information, both the court and Ruiz were unwilling to allow the defense the time it required to fully investigate and assess this new information and to pursue a potential third-party culpability defense at trial. (RPT 1475-1504.) As a result, the defense was not prepared to present this potentially viable defense, and did not have time to investigate and ascertain the existence of evidence to potentially impeach the statements of several prosecution witnesses, thus raising a reasonable probability that the timely disclosure of such evidence would have produced a different trial result.[118]

In addition to suppressing this material evidence, the unrelenting withholding of information by the prosecution regarding Lofton, its primary witness, contributed to the net effect of suppression. As a result, the cumulative effect of the prosecutorial suppressions warrants a new trial for Robert. While Robert's counsel ultimately discovered some of the

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[117] Cormicle made these initial discoveries about potential third parties with motive to kill Gary, as well as Gary's robbery ring during a meeting with Ruiz on January 9, 2002. (RPT 1460.) At that time, the trial was set to begin on March 4, 2002, less than two months away. (RPT 1374-76; CT 1360.) Cormicle stated that when he came onto the case, he and his investigator, Mr. Newman, "basically started from scratch; nothing had been done for the past six years essentially." (RPT 1459). On January 9, 2002, Cormicle met with Ruiz expecting that he already had all of the discovery in the case. However, while browsing through Ruiz's binder notebook, he noticed a page that he had not seen before entitled "Gary and 100 Bandits." (RPT 1460). Ruiz indicated it was an outline of about 15-17 bank robberies that Gary Williams was believed to have orchestrated and organized, and carried out by his criminal associates. At that time, Cormicle had not received any discovery pertaining to these robberies. Cormicle asked if there were other documents Ruiz had in his possession; Ruiz indicated there were other federal documents that he had seen, but did not have in his possession. (RPT 1461). Cormicle then began trying to ascertain and obtain such documents from the FBI.

[118] The cumulative nature of the effect the suppressed evidence had on Robert's ability to mount a defense can be seen in Cormicle's impeachment of Robert Scott at trial. Because Cormicle gained knowledge of the existence of prior investigations of Gary's bank robberies, as well as evidence of a sentence-reducing motive for Scott's testimony, after over six years of pretrial, Cormicle needed additional time to prepare his case in light of the favorable evidence. However, Ruiz argued against further continuances, despite his failure to reveal this evidence for "two or three years" after he had learned of its existence. The court sided with Ruiz and largely denied Cormicle's requests for continuances in the final months of pretrial, and Robert's case went to trial only several months after the discovery of the suppressed evidence.

suppressed evidence despite the prosecution's failure to disclose, the court did not provide him with ample time to assess the newly-discovered materials nor to receive any other third-party culpability discovery to mount a proper defense.

E. Conclusion

Robert's right to due process was violated by the deliberate delays of evidence favorable to him. Despite the prosecutor's knowledge of third-party culpability evidence, as well as evidence relative to several prosecution witnesses, he delayed disclosure for years and, because of this delayed disclosure, the defense was denied the opportunity to adequately investigate and assess the information and mount a viable third party defense. Such conduct compromised Robert's right to receive a fair trial in compliance with due process under the Fourteenth Amendment to which he was entitled, requiring reversal.

III

THE STATE'S FAILURE TO PROVIDE DISCOVERY OF LOFTON'S WHEREABOUTS VIOLATED *BRADY* STANDARDS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Introduction

Conya Lofton's testimony was the State's case. In the words of Prosecutor Ruiz, the prosecution's case "hing[ed] substantially, if not entirely, upon her identification" of the individuals responsible for the crime. (RT 39.) There were no other percipient witnesses. There was no forensic evidence linking anyone to the events of July 11, 1995. The only evidence with any incriminatory value, apart from Lofton's testimony, was an alleged threat made by Robert to Gary Williams a week prior to the murders, presented by a felon attempting to trade his testimony for a prison reduction. Recognizing the critical role of Lofton in the upcoming death penalty trial of Robert, the defense attempted to engage in a full and complete investigation of her. However, the State's failure to provide discovery, including most particularly Lofton's whereabouts, address, or any other contact information, precluded the potential for gathering discovery and consequently denied the defense the opportunity to effectively confront and cross-examine the State's primary witness. Thus, Robert was denied due process, in violation of the Fourteenth Amendment.

B. Factual Background

Ruiz successfully denied the defense access to Lofton, her family, her friends, her neighbors, her co-workers, and anyone else with whom she associated. The prosecution prevented any opportunity to question Lofton or those who knew her and could provide information about her. What information the defense was able to garner about Lofton developed

despite the State's obstructionism and revealed a woman with significant credibility issues. In addition to determining that she offered conflicting accounts of the events on the night of the murders,[119] Lofton also admitted to pleading guilty to welfare fraud (CT 1095; RT 3122-23), lied on employment applications (RT 3123-26), and had lied regarding the reasons behind her failure to comply with serious financial obligations. (RT 3139.) However, further investigation of Lofton's character and reputation were successfully blocked by the State.

Prosecutor Ruiz maintained that to disclose information about Lofton's whereabouts would jeopardize her life. He alleged that, on December 14, 1995, an unidentified person contacted an investigator, not Lofton directly, about some alleged death threats. (RPT 48.) This unidentified person purportedly claimed to know the whereabouts of Lofton and suggested he or she was going to attempt to harm her. (RPT 48.) On the basis of this allegation, Ruiz was able to block any defense efforts to gain access to Lofton, her family, friends, co-workers and other associates.[120] (RPT 430.)

Defense counsel Feiger, in attempting to gain access to Lofton, pointed out there was no documentation of any threat beyond Ruiz's oral allegations. Feiger also pointed out that, should information about Lofton be provided to her, she was under an obligation to not provide such information to Robert. (RPT 431.)

In response, the prosecution prepared a sealed declaration by District Attorney Investigator Pradia regarding the alleged threats to Lofton and concerns for her safety. (RPT 535.) Pradia's declaration would be the only evidence submitted that Lofton had received death threats. (CT 908.) In his declaration, Pradia contended he "believ[ed] the death threats to be very real..." (CT 909.) However, there was no mention of how these threats were delivered or who

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[119] *See supra* SOF, section E, pp. 23-26.

[120] The screening by Ruiz began with Lofton's medical and hospital records which had been requested by the defense. (RPT 430.)

delivered them. (CT 909.) The sole justification for nondisclosure of Lofton's address was Pradia's statement in his declaration that, if Lofton's address was disclosed, Pradia would not be able to assure her safety and as a consequence, Lofton would not testify.[121] (CT 908.)

Feiger argued that she was not aware of any credible evidence of threats and that even if there were threats, evidence of those threats was not privileged (RPT 539.) She also maintained that witness safety was not the paramount concern of the court and a defense team's right to have the address and phone number of witnesses can outweigh concerns for witness safety. (CT 799-805, 841-49; RPT 539.) She further argued that the alleged threats were hearsay and thus there was not competent evidence to justify withholding witness names and addresses. (RPT 617.) Feiger pointed out that there were ways to disclose Lofton's contact information to counsel only, and that such information would not be disclosed to Robert under any circumstances. (RPT 539.)

During argument on the matter, Ruiz conceded that one of the duties of the defense is to impeach the witness. (RPT 622.) Ruiz further agreed that one of the traditional ways to impeach a witness is by talking to members of the community where the witness lives to ascertain their reputation for truth and honesty. (RPT 622.) Ruiz also conceded that the defense has a right to adequately cross-examine a witness, which requires investigating the background of the witness. (RPT 623.) Ruiz spent most of his argument proffering no actual evidence of a threat to Lofton and spent much of the argument claiming that Robert had plenty of motives to harm Lofton. (RPT 623-25.) Ruiz also argued that disclosure of addresses and phone numbers of prosecution witnesses, particularly Lofton's, would hinder witness participation in the case. (RPT 627.) The court summarily rejected witness cooperation as a legitimate reason for precluding defense

[121] Pradia did not specify how disclosure of Lofton's address to only defense counsel would endanger Lofton's safety. (CT 908.) Pradia did not indicate how the threatener knew Lofton's address and offered no evidence that the threatener got the information from Robert or any member of the defense team. The court made the report part of the record but refused to unseal it and allow the defense access. (RPT 535.)

access to a witness' address, but still denied defense access to Lofton's address and phone number. (CT 914-23; RPT 567-68, 628.)

From March 13, 1997, through the balance of the proceedings, Lofton's address and phone number remained confidential, were never disclosed to the defense, and were removed from all further discovery and evidence. (RT 858-67, 1445-58, 1451, 1475-1504, 1504-1512.)

C. Evidence Related to Witness's Credibility is Discoverable When the Witness's Testimony is Paramount to the Question of Guilt or Innocence

As set forth in the previous argument, *Brady v. Maryland* (1963) 373 U.S. 83 established that "suppression of evidence by the prosecution of exculpatory evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment...." *Id.* at 87. *Brady* requires disclosure of material evidence that, if suppressed, would deprive the defendant of a fair trial. (*United States v. Bagley* (1985) 473 U.S. 667, 677; *see United States v. Agurs* (1976) 427 U.S. 97, 104 (overruled on other grounds by *Bagley*).) The United States Supreme Court, in recognizing the importance of a witness's credibility when that witness's testimony was essential to the guilt or innocence of the accused, extended *Brady* to include evidence material to witness impeachment. (*Agurs*, 427 U.S. at 104; *see, e.g.*, *Giglio v. United States* (1972) 405 U.S. 150, 154.) "[W]here... the Government's case may stand or fall on the belief or disbelief of one witness, his [or her] credibility is subject to close scrutiny." (*Gordon v. United States* (1953) 344 U.S. 414, 417.) When the credibility of a witness's testimony is essential to the guilt or innocence of the accused, the government must provide evidence material to the credibility of the witness. (*Agurs*, 427 U.S. at 104.)

A number of cases following in the wake of *Brady* involve the failure to disclose specific information—typically plea bargain arrangements with prosecution witnesses that may be material to guilt or innocence. (*Bagley*, 473 U.S. at 677; *Agurs*, 427 U.S. at 104; *U.S. v. Hickey*

(10th Cir. 1985) 767 F.2d 705, 710.) In these cases, the prosecution failed to disclose a specific piece of information and the trial court determined that the information being sought was not material. None of these cases explicitly discuss the prosecution's failure to provide access to *potentially* material information. Nonetheless, each of the aforementioned cases supports the proposition that the State may not block access to information that may prove material to the question of guilt or innocence.

In *United States vs. Bagley*, 473 U.S. 667 (1985), Bagley was charged with narcotics and firearms violations. The State's case relied primarily on the testimony of two state law enforcement officers. (*Id.* at 670.) During pretrial, Bagley had filed a motion requesting the names, addresses, criminal records, and any deals or inducements made to witnesses in exchange for testimony. (*Id.* at 669-70.) Following his conviction, Bagley discovered contracts made between the witnesses and the government stipulating that the witnesses would be paid for providing evidence and testifying against Bagley. (*Id.* at 671.) Bagley then moved the trial court to have his sentence vacated because the prosecution failed to provide evidence of these deals during pretrial discovery, violating Bagley's right to due process under *Brady*. (*Id.*) The trial court determined the evidence would not have affected the verdict. (*Id.* at 673.) The Ninth Circuit Court of Appeals reversed Bagley's conviction, finding that the contracts were material, and ordered a new trial, holding that the failure to disclose evidence of the contracts was a constitutional error preventing Bagley from effectively cross-examining the witnesses by impeachment. (*Id.* at 674.) The Supreme Court granted *certiorari* to review the standard by which impeachment evidence would be considered material and thus require a new trial. (*Id.*) The Court held that evidence is material and must be disclosed when there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*Id.* at 683.) Additionally, the Supreme Court concluded that any court reviewing a failure to disclose material evidence may consider any adverse effect the nondisclosure might have on the defense's ability to present their case and should assess the effect of the nondisclosure in light of the totality of the circumstances. (*Id.* at 684.) Thus, the Court vacated the Circuit Court's decision and remanded with instructions to apply the reasonable probability standard. (*Id.*)

On remand, in *Bagley*, the Ninth Circuit Court of Appeals vacated the conviction, finding that, because the prosecution's case rested entirely on the testimony of the officers, withholding evidence that would allow the defense to impeach the witnesses undermined the confidence in the outcome of the trial. (*Bagley v. Lumpkin* (9th Cir. 1986) 798 F.2d 1287, 1303.) Consequently, evidence of the government's contracts with the witnesses was considered material under *Brady* and withholding that information violated Bagley's right to due process.

United States v. Hickey (10th Cir. 1985) 767 F.2d 705, unlike *Bagley*, presented the issue of nondisclosure of impeachment evidence of a witness upon whom the conviction did not primarily rest. Hickey sought to have the contents of the file of a key government witness disclosed under *Brady* to determine if it contained any exculpatory or impeachment evidence material to his conviction. (*Id.* at 706.) The trial court reviewed the file and determined it contained only administrative information and that, in the interest of protecting the witness, the information would not be disclosed. (*Id.*) The Tenth Circuit Court of Appeals reviewed the trial court's ruling and determined that the contents of the file, a plea bargain, did not contain any information that would raise a reasonable doubt as to Hickey's guilt or innocence that did not otherwise exist. (*Id.* at 710.) The reviewing court held that, since there was other corroborating

evidence and other witnesses substantiating the conviction, even if the evidence of the plea bargain was discoverable under *Brady*, it did not meet the materiality standard set forth in *Agurs*. (*Id.*) Consequently, the Tenth Circuit concluded the trial court did not abuse its discretion in denying petitioner's motion to disclose the contents of the file. (*Id.*)

This Court, as recently as 2005 in *People v. Salazar* (2005) 35 Cal.4th 1031, was presented with a *Brady* issue focusing on materiality. Salazar was convicted of second-degree murder for the killing of an eleven-month-old child left in his care. (*Id.* at 1035.) Testimony from a Dr. Ribe indicated that the child had died from being shaken. (*Id.* at 1035-36.) Salazar filed an appeal, claiming that the prosecutor withheld evidence that would have allowed Salazar to impeach Ribe's testimony. (*Id.* at 1035.) The evidence requested and withheld was a follow-up report Ribe prepared in a different trial in which he relied on nonmedical facts as the foundation for his medical opinions. (*Id.*) Salazar argued access to this report would have allowed him to impeach Ribe's testimony as being biased and, therefore, unreliable. (*Id.*) The primary issue in determining if a *Brady* violation occurred was whether or not the report was material. (*Id.* at 1048-50.) This Court clearly stated that impeachment evidence is material when the witness at issue was the sole source of evidence linking the defendant to the crime. (*Id.*) This Court concluded that the impeachment evidence was not material under *Brady* because Ribe's testimony and medical analysis were or could be corroborated by other medical professionals who examined the child. (*Id.* at 1050.) Additionally, these other medical professionals could not be impeached by the withheld evidence; consequently, the confidence in the outcome of the trial would not be undermined if Ribe was effectively impeached. (*Id.*)

Even though *Salazar* was ultimately decided in the prosecution's favor, this Court enumerated the specific standard for determining materiality in violation of *Brady*, consistent with previous United States Supreme Court precedent.

D. The Denial of Access to Lofton Violated Robert Williams' Opportunity to Effectively Confront and Cross-Examine Lofton

The defense's ability to challenge Lofton's veracity and the credibility of her testimony was the primary issue at Robert's trial. If Lofton was to be believed, Robert would be convicted, whereas if Lofton was found incredible, Robert would be acquitted.

The defense, fully cognizant of the impact of Lofton's testimony, sought to investigate every aspect of her life. While some information was garnered, there was much the defense was never able to investigate. It is to that potential information that might bear on Lofton's credibility that the defense cried foul.

While it remains speculative as to what might have been discovered, the denial of the opportunity to unearth potentially material evidence that could have proved material to guilt or innocence was reversible error.

In *Hickey*, both the trial court and the reviewing court had the relevant evidence available to them and could assess the value of that evidence to the petitioner. They could determine the effects of disclosure of the contents of the file with precision. In the case at bar, the trial court could not know if disclosure of Lofton's address would be helpful or harmful to Robert's defense. So, unlike *Hickey*, where there was no abuse of discretion because there was substantial support demonstrating the evidence would not be useful, here, the court, during Robert's pretrial, made its determination without any such support and denied Robert *Brady* evidence. Consequently, under *Hickey*, the trial court did abuse its discretion and should have disclosed Lofton's address.

Unlike Dr. Ribe in *Salazar*, Lofton is the sole witness and her testimony cannot be corroborated. Without Lofton, the State has no case against Robert; so, unlike the evidence in *Salazar*, where the effect of disclosure was determined unimportant because of other available testimony or evidence, the present case presents a scenario where the effect is unknown. Although *Salazar* does not address this particular fact scenario, the reasoning in *Salazar* clearly supports the proposition that impeachment evidence may be withheld only when it is deemed immaterial. In the case at bar, the materiality of Lofton's address is unclear, and consequently, it should not have been withheld absent a finding by the court that it was immaterial.

E. Evidence Code Section 1054 Provided A Mechanism To Circumvent Any Potential Safety Concerns By Disclosure To Counsel

The purpose of Penal Code section 1054 et sec. is to "promote the ascertainment of truth in trials by requiring timely pretrial discovery." (Cal. Penal Code § 1054(a) (West 2008).) The defense's right to pre-trial discovery begins with Penal Code section 1054.1, which indicates that the defense is entitled to "[t]he names, and addresses of persons the prosecutor intends to call as witnesses at trial." (*Id.; see also In re Littlefield* (1993) 5 Cal.4th 122.) Under section 1054.2, counsel is under a duty as an officer of the court not to provide the defendant with the address or name of any victim or witness disclosed pursuant to section 1054 et. sec. (Cal. Penal Code § 1054.2 (West 2008).) Limitations on disclosure of this information to the defendant may only be made with a showing of "good cause." "Good cause" may be found where there are threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. (Cal. Penal Code § 1054.7 (West 2008).) However, section 1054.7 only requires nondisclosure to the defendant upon a showing of good cause. Allowing disclosure to defense counsel only under 1054.2 adequately

protects the interests of both a witness that might be in danger and a defendant's right to investigate prosecution witnesses, requiring disclosure of names, addresses, and phone numbers.

A showing of "good cause" was made in *Montez v. Superior Court* (1992) 5 Cal.App.4th 763. In *Montez*, Oliver Montez was charged with two counts of robbery, four counts of attempted robbery, two counts of aggravated assault, and one count of murder. (*Id.* at 764-66.) Montez sought disclosure of the addresses and phone numbers of three eyewitnesses to the murder. (*Id.* at 768-69.) Each witness had submitted a letter to the court requesting their addresses and phone numbers be kept confidential because they feared for their safety. (*Id.* at 769.) These letters were not sworn affidavits and none of the witnesses made any statement on the record. (*Id.*) None of the witnesses had any prior criminal records and all appeared to be upstanding citizens. (*Id.*) The trial court accepted the witnesses' letters and determined that, because there was no genuine reason to question the reputation of any of the witnesses for truth and honesty, investigation into their community reputations would be irrelevant; consequently, their addresses and phone numbers were not to be disclosed. (*Id.*) The Court of Appeals agreed, noting in particular that employees "who witness crimes committed by those entering their place of employment and who are otherwise unconnected with the crime, with initiating it, or with creating the circumstances in which it occurred, would seem to retain every right to keep their addresses private." (*Id.* at 770.) Good cause was found in *Montez*, thus allowing nondisclosure.

In 2002, this Court, in *Alvarado v. Superior Court* (2002) 23 Cal.4th 1121, established a balancing test to ascertain when the State may withhold access to witnesses. The test weighs the degree of danger posed to the witnesses if their identities were disclosed and the likelihood of danger posed to those witnesses against the rights of the accused. (*Id.* at 1135-36.) In *Alvarado*, there were extensive factual findings demonstrating the witnesses were in genuine danger.

Particularly, the witnesses were incarcerated in the same facility as the defendant, another witness in the same facility had already been attacked, the victim was killed in the facility in a sophisticated manner consistent with a Mexican Mafia hit, the Mexican Mafia had an extensive intelligence network within the facility, and none of the witnesses' testimony had been preserved in any way. (*Id.* at 1128-29.)

The balancing test recognizes the legitimate concerns of protecting a witness against the right of an accused to obtain the identity and address of a witness brought against them. (*Id.* at 1151.) While witness safety is a primary interest for non-disclosure, this court recognized that:

> [I]n every case in which the testimony of a witness has been found crucial to the prosecution's case the courts have determined that it is improper... to withhold information (for example, the name or address of the witness) essential to the defendant's ability to conduct an effective cross-examination.

(*Id.* at 1146; *see e.g. Eleazer v. Superior Court* (1970) 1 Cal.3d 847 (when an informant-witness is material to the conviction of the accused, the prosecution must disclose the informant's whereabouts); *Miller v. Superior Court* (1979) 159 Cal.Rptr. 456 (deprivation of a single witness's address, whose credibility was central to the defense, was a denial of the defendant's right to cross-examination).)

F. Any Potential Concerns for Lofton's Safety Could Have Been Addressed by Allowing Robert's Counsel to Investigate this Material Witness

Montez presented a far different scenario than the circumstances surrounding the denial of access to Lofton. Lofton was the sole percipient witness and, as such, to reach a guilty verdict it was essential that the jury find her to be credible. In *Montez*, however, there were several witnesses able to corroborate the identification of Montez as the suspect. Furthermore, unlike the upstanding and presumably credible witness in *Montez*, Lofton was not an upstanding citizen above any question of credibility. She has prior convictions for both theft and welfare

fraud. (*See supra* SOF, section E, p. 26.) She surrounded herself with despicable people with criminal records, such as Gary, a person she knew was a bank robber. Presumably she also had some knowledge of Gary's criminal associates. She was *the* critical witness in this trial and her character and credibility was suspect. There was a compelling need for the defense to ascertain as much information as possible about this woman.

In *Alvarado*, the degree of danger and the likelihood of danger to the witnesses made for easy application of the Court's balancing test. Given the dire circumstances, the *Alvarado* witnesses were almost certain to be killed upon disclosure. The present case presents significantly different facts and, applying this Court's reasoning in *Alvarado*, it is clear that Lofton's address and other information requested by the defense should have been disclosed.

Lofton's testimony had been preserved at a preliminary hearing, no other witnesses had been attacked or injured in any way because of their participation in the case, the alleged threats against Lofton did not come from Robert or anyone associated with Robert, and there was no evidence that the supposed unknown person making these alleged threats was a member of or was as sophisticated as a gang like the Mexican Mafia. (*See supra* p. 83.) Most importantly, the *Alvarado* Court recognized the importance of disclosing a witness' address when that witness is essential to the prosecution's case, and Lofton *is* the prosecution's case. Because this Court based its decision in *Alvarado* on extensive factual findings about legitimate safety concerns of the witnesses and, since no such factual findings have been presented in the present case, the balancing test established in *Alvarado* points to the conclusion that Lofton's address should have been disclosed to the defense.

The respondent will contend that the prosecution presented sufficient evidence demonstrating concern for Lofton's safety by producing an affidavit from Prosecution

Investigator Pradia. However, based on *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, Pradia's affidavit does not constitute sufficient evidence to justify withholding of Lofton's addresses. In *Reid*, all the potential witnesses requested their addresses not be disclosed because they would not talk to the defense under any circumstances. (*Id.* at 1329.) Despite their request the court determined that under Penal Code section 1054, the defense was entitled to their addresses unless a showing of good cause was made. In an attempt to show good cause, the prosecution prepared affidavits for each of the witnesses alleging they had received threats and were in fear for their lives. (*Id.* at 1330.) Beyond these affidavits no other evidence was presented. (*Id.*) The *Reid* court, relying on *Montez*, determined that affidavits alone were not sufficient to show good cause. (*Id.* at 1336.) Likewise in the case at bar the prosecution failed to show good cause by producing an affidavit from Inspector Pradia. As such, there is no reason under section 1054 to withhold Lofton's address from the defense.

Even if the affidavit were sufficient evidence to demonstrate good cause, it is unclear, if not irrational, to withhold Lofton's address from defense counsel despite assurances that counsel would not disclose the information. Supposing Lofton's life really was in danger, neither the prosecution nor the court demonstrated how disclosing the address solely to Robert's counsel under section 1054.2 would put Lofton at any greater risk of harm then she already was. First, section 1054.2 clearly obligates defense counsel not to disclose any information to the accused. Consequently, Robert would be in no better position to threaten or harm Lofton whether his counsel knew her address or not. Second, the alleged threats came from a third party that was not shown to be affiliated or in contact with Robert or his counsel. It is conclusory to presume that defense counsel's knowledge of Lofton's address would somehow enable an unknown, unaffiliated third party a greater opportunity to harm Lofton. Third, the existence of this

provision demonstrates awareness by the drafters that the quest for truth in criminal proceedings is paramount. Having a witness' address allows the defense to investigate the witness and furthers the discovery of the truth. Because witness safety is also a primary concern for courts, the provision allowing disclosure to counsel only under 1054.2 adequately protects those witnesses, while preserving a defendant's constitutional right to confront and cross-examine witnesses. Consequently, absent a showing of how such a disclosure under 1054.2 would place Lofton in any further danger, her address could and should have been disclosed to Robert's counsel.

G. Conclusion

Conya Lofton's testimony was the only evidence linking Robert Williams to the murders of Gary and Roscoe. The only basis on which a jury could convict Robert was their belief that Lofton's testimony was truthful and accurate. Consequently, any information leading to evidence that would call her testimony into question was essential to providing Robert the opportunity to effectively cross-examine her. Ruiz effectively denied Robert and his counsel all access to her or information about her in violation of *Brady* and Penal Code section 1054, consequently denying Robert's right to due process under the Fourteenth Amendment.

IV

IN DENYING ACCESS TO THE PRIMARY PROSECUTION WITNESS, THE STATE PRECLUDED ROBERT WILLIAMS THE OPPORTUNITY TO MEANINGFULLY CONFRONT AND CHALLENGE LOFTON'S TESTIMONY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

A. Introduction

In denying discovery of potentially material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), as set forth in the two preceding arguments, the State also violated Robert Williams' opportunity to effectively confront and cross examine Conya Lofton, the primary witness against him, in violation of the Sixth and Fourteenth Amendments.

B. Factual Background

The facts as they relate to this confrontation argument are set forth in the two preceding arguments.

C. The Accused Shall Enjoy The Right To Confront His Accusers

The Sixth Amendment guarantees that in "all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...." (U.S. Const. amend. VI.) The Confrontation Clause applies to state criminal proceedings through the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 407.) The purpose of the Confrontation Clause is not limited to securing to the accused the right to physically confront the witness. (*Davis v. Alaska* (1974) 415 U.S. 308, 315-16.) The essential right guaranteed by the Confrontation Clause is the opportunity for effective cross-examination. (*Delware v. Fensterer* (1985) 474 U.S 15, 20 (*per curiam*).) The right of cross-examination is not limited to "delv[ing] into the witness' story to test the witness' perceptions and memory"; it extends to impeachment

and other efforts to discredit the witness. (*Davis*, 415 U.S. at 316.) The United States Supreme Court has recognized:

> [W]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and *out-of-court investigation*. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

(*Smith v. Illinois* (1968) 390 U.S. 129, 131 (overruled on other grounds) (citation omitted) (emphasis added).)

There is a substantial body of cases interpreting the Confrontation Clause; however, these cases primarily focus on the denial of the opportunity for effective cross-examination and confrontation at trial and do not address the failure to disclose non-privileged information during pretrial proceedings that could impact trial confrontation. While the impact of the Confrontation Clause on pretrial discovery has not yet been fully decided, the Supreme Court has recognized "there might well be a confrontation violation if... a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 61-62 (Blackmun, J., concurring in part, dissenting in part).)

The primary issue in *Ritchie* was disclosure of a privileged document from a child services agency. (*Id.* at 43.) The document concerned the victim, who was also a witness in the case, and was sought by the defense for the purpose of evaluating its impeachment value. (*Id.* at 43-46.) The Supreme Court held that the defendant was entitled to remand for a review of the document to determine its materiality. (*Id.* at 58.) Justice Blackmun in his concurring opinion recognized that "there might well be a confrontation violation if, as here, a defendant is denied

pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness." (*Id.* at 61-62.)

This Court, in *People v. Hammon* (1997) 15 Cal.4th 1117, discussed the opinion in *Ritchie* and, in particular, Blackmun's concurring opinion. *Hammon*, like *Ritchie*, involved the potential disclosure of a privileged document. (*Id.* at 1119-20.) Concerned with the possible disclosure of privileged materials, this Court declined to extend Blackman's reasoning to the particular circumstances of *Hammon*, just as the Supreme Court stopped short in *Ritchie*, finding the disclosure "unnecessary" and, thus, immaterial. (*Id.* at 1128.)

D. Robert Was Denied His Right To Confront Lofton

The rationale in both *Ritchie* and *Hammon* support the pretrial disclosure of the information sought regarding Lofton. While disclosure was not required given the privileged materials sought in *Ritchie* and *Hammon*, there was no such complication in this case. Under California's discovery statute, as well as the requirements of *Brady*, Lofton's address is a required disclosure. Second, the trial courts in both *Ritchie* and *Hammon* had the available evidence and could evaluate its value to the defense. Here, without inquiry into Lofton's reputation in her community, there was no way for the court to independently evaluate the value of disclosing her address. The ability to evaluate the available evidence in the cited cases was evidence that the defendants would not be deprived of any opportunity for effective cross-examination because the courts could independently determine if the evidence would lead to a useful form of cross-examination. The judge in the present case had no such capacity, and consequently, if Lofton's address might have led to an effective line of cross-examination, the arbitrary denial of that address denied Robert the opportunity for meaningful cross-examination. Consequently, in a case like the one at bar, where there is only one percipient witness whose

credibility is the central issue in determining guilt or innocence, and there is no other evidence implicating the defendant, Justice Blackmun's logic is compelling and the Confrontation Clause necessarily must apply to pretrial disclosure.

E. Conclusion

Throughout the course of the pretrial, the State's successful efforts to deny Robert access to Lofton constituted a violation of Robert's right to due process under the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment.

V

IN LIMITING THE CROSS EXAMINATION OF LOFTON, THE COURT DENIED ROBERT WILLIAMS HIS OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE THE PRIMARY WITNESS AGAINST HIM

A. Introduction

As set forth in Arguments III and IV, Conya Lofton was the most significant prosecution witness in the capital trial of Robert Williams. Yet when Robert attempted to impeach Lofton's credibility and character regarding a fraud charge, as well as a lie she made to another court regarding her ability to comply with a court-ordered obligation, the judge blocked his efforts. The court's limitation of Robert Williams in his cross-examination of the primary witness against him denied Robert the opportunity of confrontation and cross-examination in violation of the Sixth and Fourteenth Amendments.

B. Factual Background

Defense efforts to scrutinize Lofton's character and question her credibility were of paramount importance in defending Robert from capital charges. Yet, the State, and eventually the court, effectively stymied defense efforts to investigate Lofton, her family, friends, co-workers, and associates. Despite this, *some* information reflecting on Lofton's credibility was eventually garnered by the defense. However, when the defense attempted to utilize this information to confront and cross-examine Lofton at trial, the court precluded use of revealing impeachment evidence.

The first restriction came when defense counsel Cormicle attempted to question Lofton regarding a June 30, 1993 warrant. Lofton was convicted on a welfare fraud charge on November 27, 1991, and placed on probation for two years. (RT 3122.) As part of her

conviction, she was ordered to pay a $350 fine by February 25, 1992, but failed to pay the fine as ordered. (RT 3138.) A warrant was subsequently issued for failing to comply with the court order to pay the fine. (RT 3138.) It took over three years for her to finally comply with the court's order to pay the fine. (RT 3138-39.)

Ruiz objected to questioning about the warrant because "hav[ing] testimony or evidence introduced that there was a warrant out for... Lofton's arrest... invit[es] speculation, and would be inappropriate impeachment evidence [under Evid. Code § 352]." (RT 3097-98.) The court agreed with Ruiz noting, "[this] type [of] impeachment would not be admissible." The trial court agreed and did not permit questions regarding the warrant. (CT 6332-33; RT 3098.)

The second limitation imposed on Williams' confrontation and cross-examination of Lofton occurred when Cormicle intended to question Lofton about the excuses she proffered to explain her failure to pay the court ordered fine. Cormicle intended to show that Lofton lied when she claimed she did not have the money to pay the fine, when in fact she had ample resources to pay and comply with the court order. (CT 6332-33; RT 3139.)

Ruiz objected on relevancy grounds because he believed his questioning during direct examination had not "opened any door into any relevant area that would allow counsel now to get into when she paid her fine, if she paid her fine and what the amounts were." (RT 3138.) The court sustained on relevance grounds, thus prohibiting questions to Lofton about her lie regarding her inability to pay her court ordered fine. (RT 3142.)

In both instances, Cormicle's efforts to expose Lofton as not credible were blocked, thus denying Robert his opportunity to demonstrate to the capital jury that Lofton's credibility was suspect and her identification of Robert should be distrusted.

C. The Sixth Amendment Guarantees the Accused the Opportunity to Confront Witnesses Against Him

The Sixth Amendment "guarantees the right of an accused in criminal prosecution 'to be confronted with the witnesses against him.'" (*Davis v. Alaska* (1974) 415 U.S. 308, 315 (*quoting Douglas v. Alabama* (1965) 380 U.S. 415, 418.) The purpose of the Confrontation Clause is not to secure the accused to merely physically confront a witness, but to "delve into the witness' story to test the witness' perceptions and memory... [and] impeach, i.e., discredit, the witness." (*Id.* at 316.)

In *Davis*, the defense sought to show the existence of possible bias and prejudice of the witness causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner. (*Id.* at 317.) The Court reversed Davis' conviction, concluding that "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof... of petitioner's act.'" (*Id.* at 315.) The prosecution's main witness, Green, was on probation for burglary. The prosecutor moved to prevent any reference to Green's juvenile record in the course of cross-examination. (*Id.* at 310-11.) Davis countered that he would not introduce Green's probation status as a general impeachment of Green's character, but to show Green's bias or prejudice causing him to make a faulty identification of the defendant. (*Id.* at 311.) While the trial court allowed Davis to question the witness about the witness's bias, it disallowed introduction of Green's probationary status. (*Id.* at 318.) The Supreme Court disagreed with the trial judge, concluding the "jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided a crucial link in the proof... of petitioner's act." (*Id.* (quotation omitted)). Although Davis could question the

witness about whether or not he was biased, disallowing Davis' to cross-examine with questions about why Green might be biased was a violation of Davis' right to confrontation because the defense needed "to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." (*Id.*)

Likewise, in *Delaware v. Van Arsdall* (1986) 475 U.S. 673, the Court vacated and remanded a murder conviction after finding that the trial court violated the defendant's right to confront and cross-examine. (*Id.* at 684.) The trial court prohibited Van Arsdall from demonstrating the primary witness' bias by questioning him about the State's dismissal of a pending public drunkenness charge against the witness. (*Id.* at 680.) While the Court acknowledged that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits" on cross-examination, it noted that these should be limited to concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Id.* at 679.) Van Arsdall received a new trial because he was denied his opportunity to confront and cross-examine the primary witness who testified against him. The *Van Arsdall* Court held a denial of the defendant's opportunity to impeach a witness was subject to a harmless error analysis. (*Id.* at 684.) Courts, when reviewing a violation of the right to confront and cross-examine, must find the error was harmless beyond a reasonable doubt. (*Id.*)

In *United States v. Larson* (9th Cir. 2007) 495 F.3d 1094, Larson was convicted of conspiracy to distribute methamphetamine. (*Id.* at 1097.) Two of the witnesses brought against him were co-conspirators. (*Id.*) The charges brought against both of those witnesses carried minimum mandatory sentences; however, they received a reduction in their sentences in exchange for their testimony against Larson. (*Id.*) Larson attempted to question both witnesses

about their deals to demonstrate that the witnesses' were biased; however, the trial court disallowed that line of questioning. (*Id.* at 1099-1100.) On review, the Ninth Circuit identified three factors to be considered when evaluating whether the lower court denied Larson his right to confront and cross-examine the witnesses: (1) whether the excluded evidence or questioning was relevant; (2) whether there was an overriding interest in excluding the evidence or denying cross-examination so significant as to outweigh the defendant's constitutional rights; and (3) whether other significant evidence existed to enable the jury to assess the credibility of the witness. (*Id.* at 1103.) Although the reviewing court ultimately upheld the conviction because there was substantial other evidence upon which the jury could base its conviction, the court did find that the limitation on Larson's right to confront and cross-examine was violated. (*Id.* at 1097.)

D. Limitation on the Cross-Examination of Lofton Denied Robert his Right to Effective Cross-Examination

Although a trial court has discretion to restrict the scope of cross-examination, these restrictions should be reserved for the prevention of questions designed to harass, annoy, or humiliate a witness. At no point did the trial judge, in limiting Robert's attempts to impeach Lofton, cite concerns regarding potential harassment, annoyance, or humiliation resultant from the intended questioning.

The three factors set forth by the Ninth Circuit in *Larson* are instructive. As to the first factor, whether the excluded evidence was relevant given the importance of Lofton's testimony, evidence bearing on her credibility was not only relevant but essential. The *only* evidence linking Robert to the murders was Lofton's testimony. Efforts to impeach Lofton by exposing her dishonesty and history of deception would have demonstrated to the jurors that her identification of Robert should be discounted. Robert's counsel attempted to expose facts—such as Lofton defrauding the welfare system, resulting in a conviction, and the subsequent arrest

warrant for failure to comply with the terms of her probation, along with her lying about her reasons for non-compliance with serious financial obligations—from which the jury could draw inferences about Lofton's credibility. (*See supra* p. 83.) These underlying facts were extremely relevant to the jury's ability to assess whether Lofton's testimony could be trusted.

Second, to restrict Robert's right to confront and cross-examine Lofton, there must have been a legitimate interest of such significance as to override Robert's Sixth Amendment rights. As the Supreme Court set forth in *Van Arsdall*, legitimate interests are limited to concerns of harassment, prejudice, confusion of the issues, witness safety, and repetitive or only marginally relevant testimony. (*Van Arsdall*, 475 U.S. at 679.) Regarding the pending warrant for failure to comply with the terms of her probation, the prosecutor, citing Evidence Code section 352, claimed its introduction would "invite speculation." (*See supra* p. 83.) Given Lofton's central role, the court's conclusion that Ruiz's generic challenge was determinative was incorrect. Ruiz's argument rested on speculation grounds, but the speculative finding of such evidence is problematic; the mere fact that there is a warrant issued is self-explanatory for impeachment purposes. Rather, limiting the cross-examination to mere disclosure that there was a warrant would invite more speculation than detailed questioning about why the warrant was issued. As for Lofton's lie as to her reason for not paying a court-ordered fine, Ruiz objected on relevance grounds. Once again, information bearing on Lofton's ability to be truthful was central to the State's case; consequently, evidence that she lied to a tribunal cannot be irrelevant. The legitimate interest—Lofton's credibility—overrides any concerns that she would be harassed or prejudiced or that the evidence would confuse any issues.

The third *Larson* factor was whether other significant evidence was available to the defense that would enable the jury to assess Lofton's credibility. As put forth in preceding

arguments, the prosecution effectively denied Robert any access to Lofton during pretrial; consequently, Robert was unable to investigate her to uncover evidence that would undermine her credibility. The only evidence uncovered that might prove useful in demonstrating Lofton as incredible was her prior fraud conviction[122] and lies about her ability to pay court-ordered fines. The court limited Robert from delving into to these issues. As a result, Robert was only able to cross-examine Lofton about inconsistencies in her story from its initial telling to her final testimony seven years later. While these inconsistencies may call Lofton's ability to recall events accurately into question, they do not provide a comprehensive basis for a juror to evaluate her credibility as an honest and truthful person.

In *Larson*, the defendant's right to confront and cross-examine witnesses was violated, but the error was harmless because the prosecution's case included other corroborating evidence and additional witnesses who could not be impeached by the excluded evidence. (*Larson*, 495 F.3d at 1097.) Unlike the court's determination in *Larson*, the main witness against Robert, Lofton, presented a far different scenario. Lofton was the sole percipient witness and there was no other evidence linking Robert to the murders. Consequently, Lofton's credibility was the sole basis on which the jury could find Robert guilty. If the jury considered Lofton credible, they would convict; if they found her incredible, they would find Robert innocent. Consequently, denial of Robert's right to confront and cross-examine Lofton on issues directly relating to her credibility cannot be harmless beyond a reasonable doubt.

E. Conclusion

Conya Lofton *was* the prosecution's case. Robert's conviction rested on the jury's belief or disbelief of her testimony because there was no other corroborating evidence implicating Robert. Due to the prosecution's effective efforts to deny access to any information regarding

[122] In 1991, Lofton pled guilty to misdemeanor welfare fraud. (RT 3117-27.)

Lofton, very little evidence useful to a determination of Lofton's credibility was discovered. When Robert sought to challenge Lofton's credibility using what little was discovered, the court limited the use of that evidence and denied Robert the opportunity to effectively confront and cross-examine her in violation of the Sixth and Fourteenth Amendments.

VI

ROBERT WILLIAMS' CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION WAS VIOLATED WHEN THE COURT REVOKED HIS RIGHT OF SELF-REPRESENTATION IN VIOLATION OF THE SIXTH AMENDMENT

A. Introduction

Frustrated by the revolving door of appointed defense counsel and, in particular, frustrated by the incessant motions for continuance necessitated by appointments of new counsel as well as those continuances caused by the prosecutor's discovery delays and obstructions, Robert Williams first broached the notion of self representation in July 2000. Four weeks later, on August 16, 2000, the trial judge acquiesced, and Robert began his self representation. Robert's ten-month period of self representation was marked by continuances due to the nearly three-month absence of the trial prosecutor, which actually delayed discovery throughout the ten months, and by continuances requested by standby counsel due to other commitments. This ten-month period was also marked by repeated admonitions from the judge urging the prosecutor to comply with discovery, but in an ironic twist, the judge revoked Robert's *Faretta* status, claiming that it was Robert's conduct rather than the conduct of the prosecutor or standby counsel that caused the trial date to be continually pushed back. The court's termination of Robert's constitutional right to represent himself without good cause violated his Sixth Amendment rights.

B. Factual Background

Robert began his self representation on August 16, 2000, and saw it terminated ten months later on June 28, 2001, when the judge decided that Robert was engaged in "dilatory tactics." (CT 1354; RPT 1335-1351.) Given the judge's rationale for termination it is necessary

to work through the events of that ten-month span to determine the propriety of the court's decision to revoke Robert's *Faretta* rights.

In invoking his right to self representation, Robert stated he was "improperly denied *Marsden* relief... that his counsel was incompetent... [and] the court's indifference to due process [left him] with no other options but to represent himself in all further matters; he had no choice but to represent himself." (CT 1160; RPT 1100.) Upon taking the waiver, the court stated, "One of the reasons for wanting to represent himself, because he wants to get it [his case] to trial.... I am convinced that Mr. Williams is not asking to represent himself simply because I denied the *Marsden* motion on Mr. Gunn." (CT 1162; RPT 1120.) Upon granting Robert's request to self represent, the court appointed Gunn [Robert's former counsel] as standby counsel. (CT 1162; RPT 1119.)

Robert objected to the appointment of Gunn as standby counsel: "I don't understand why he would still have duties in my case if he is not – if I'm representing myself." (CT 1162; RPT 1137.) The court responded,

> Because this court made the decision that I'm going to appoint him [Gunn] as a standby lawyer because I'm not going to allow this case to have to be tried twice because during the middle of that trial for some reason you convinced me that you need a lawyer. Because if I didn't have a standby lawyer, then we would have to declare a mistrial, appoint a lawyer, go through the six or eight months that it takes that lawyer to get ready, and then do the trial a second time. And I'm not going to do the trial twice.

(RPT 1137.)

On October 6, 2000, a month and a half after being appointed counsel, and with a looming trial date of February 2, 2001, Robert raised concerns regarding discovery, specifically that he had not received the discovery that Ruiz had previously stated he would yield to Robert. (CT 1167-72; RPT 1153.) At the same hearing, Gunn noted that the prosecutor failed to

surrender a list of reports.[123] (RPT 1154.) The court set a discovery hearing, which was continued on the prosecutor's motion to November 3, 2000. (CT 1173-74; RPT 1161.)

At the November 3, 2000 hearing, Ruiz was not present. (CT 1175-76; RPT 1162-65.) It was represented that Ruiz was ill; accordingly, the State sought and was granted a continuance of the discovery hearing to November 22, 2000, to await Ruiz's return. (CT 1177-78; RPT 1162-65.) Three weeks later, at the November 22, 2000 discovery hearing [two months prior to the trial date], the State had not provided the requested discovery, and a representative from the State indicated that Ruiz would be out for "another 3 to 4 weeks." (CT 1179-80; RPT 1170.) At that hearing, Robert prophetically told the trial judge that "it seemed like it's getting impossible to get investigation and discovery issues. And I just hope it don't be difficult when that time comes to go to the next phase, as far as you understand having to fight for a continuance and not look like it's my reason why I need the continuance." (CT 1179-80; RPT 1174.) Following Robert's statement, the judge, in directing the representative from the prosecutor's office to provide the requested discovery, stated, "[I]s there someone that somebody could talk to Mr. Williams and find out what it is that he has, in other words, a substitute for Ruiz so that Mr. Williams can get his discovery?" (CT 1179-80; RPT 1171.)

On January 4, 2001, six weeks after the judge's admonition, and four and a half months since Robert undertook his own defense, no discovery had been provided. Ruiz had still not appeared, and the judge urged the State to appoint another trial prosecutor to Robert's case; the judge commented on the lack of discovery and the "couple of [discovery] requests and a [discovery] motion" that were outstanding, with less than a month until the February 2, 2001 trial date. (CT 1182; RPT 1175-76.)

[123] During the August 16, 2000 hearing, in addition to the court requesting that Ruiz provide Robert and standby counsel Gunn with missing discovery, Ruiz told the court that he would "make a whole new set of discovery." (RPT 1139.)

Ruiz reappeared on January 12, 2001. (CT 1191; RPT 1178.) During the prosecutor's two and a half month absence, no discovery had been provided despite Robert's repeated requests, as well as the admonitions from the trial judge. (CT 1175-91; RPT 1162-88.) At that January 12, 2001 hearing, Ruiz indicated that he had received a discovery list from Robert. He stated, "I don't have a problem with any of the items that Mr. Williams is seeking.... " Nonetheless, Robert was still without discovery, forcing him to seek a continuance of the trial date three weeks hence, over which he expressed his ongoing frustrations: "[T]here are a lot of things that I don't have. And the only way I feel that we will be able to point to where I know everything I have is if you [Ruiz] give me the same opportunity you gave Mr. Peasley [one of co-defendant Walker's former counsel]."[124] The trial judge, noting that the case "has been kind of dead in the water for several weeks [sic; it had actually been several months]" due to the absence of Ruiz, granted Robert's motion to continue the trial and offered his third admonition to the prosecution during Robert's representation: "Don't wait until we come back to court to get them [discovery] to him. Just send them out to him, and then we'll keep a list of what you sent so that we can put it on the record." (CT 1183; RPT 1178-86.)

On January 26, 2001, fifteen weeks after Robert's October 6, 2000 discovery request, Ruiz filed a memorandum with the clerk detailing the discovery he was turning over: "I'm just providing to the court so we don't get any disputes later [how] he didn't get this or he didn't get that." (CT 1200-02; RPT 1192.) However, Ruiz refused to relinquish two taped interviews demanding that Robert first arrange for payment. In response, the court directed Ruiz to contact standby counsel Gunn and provide the tapes to him. (CT 1204; RPT 1192-93.)

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[124] Robert was asking for copies of the photos that were used in the Walker trial that were now exhibits. (RPT 1182.) The court commented that the discovery admitted in the Walker case was not going to be released; however, the court would allow Robert to view the requested material. (RPT 1182.)

Five days later, on January 31, 2001, more than five months into his self representation, Robert raised his concern over another tape recording from the Walker trial that he did not receive from the State. (RPT 1196-1212.) The court failed to intervene and reiterated its position to not get involved in discovery unless the parties could not agree:

> Once again, that is a discovery issue. I'm not going to get to playing referee on discovery issues until after the parties have attempted to work it out in a meet and confer.... So if and when it gets to a point where I have to do something, then I shall do it. Until then, I'm not going to listen to anything about it whatsoever.

(RPT 1208-10.) The court did, however, in an effort to expedite discovery from the prosecution, take an extraordinary measure and directed Robert to contact District Attorney Investigator Pradia and inform him of any discovery not yet received: "This [discovery] is something to take up with Pradia.... If you can't work it out with the District Attorney's Office, then I will get involved." (CT 1207; RPT 1209-10.) The judge's direction that Robert contact the prosecutor's investigator for the discovery materials proved futile when Robert could not complete any of his collect calls from the jailhouse to the investigator. (CT 1210; RPT 1214.)

Consequently, in the four weeks following the January 31, 2001 discovery hearing no discovery was turned over to the defense. On learning of the failure to receive discovery from the prosecutor's investigator, the trial judge told Robert to once again submit his discovery "list" to Ruiz.[125] (CT 1210; RPT 1213-14.)

In addition to the ongoing discovery problems, Robert had additional concerns, and on March 16, 2001, he brought several motions. First, he successfully moved to have Charles Evans appointed as his investigator. Second, Robert moved to disqualify Ruiz, citing three concerns. First was Ruiz's false characterization of a taped jail visit conversation as

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[125] The discovery list consisted of all the reports in the case. Specifically, Robert stated that he was missing the transcript of the Tami Wilkerson interview. He also stated that transcripts which the court ordered had still not been delivered. (RPT 1213-16.)

incriminatory.[126] Second was Ruiz's abuse of prosecutorial direction in forcing [former counsel] deputy public defender Feiger to conflict out as Robert's counsel.[127] Third was Ruiz's conduct in withholding the test results of the clothing Robert was wearing at the time of his arrest.[128] (CT 1236-40; RPT 1235.) The trial judge found the first two claims unfounded and put over the third matter concerning Ruiz's conduct regarding the testing of Robert's clothing in order that Robert could produce paperwork supporting his claim. Meanwhile, Robert's motion to continue the trial because of discovery delays as well as the recent retention of Investigator Evans was granted. The new trial date was set for June 4, 2001. (CT 1236-40; RPT 1228-52.)

Four days later, on March 20, 2001, Robert did indeed produce documentation that his clothing and the testing for his clothing had been withheld just as he had asserted. (CT 1241; RPT 1253-1263.) In response, Ruiz successfully urged the judge to put the hearing on the matter over so that he could further investigate. Also on this date, Robert requested, and the judge

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[126] Robert argued that Ruiz misled the court as to the contents of the Walker/girlfriend tapes. (*See supra* SOC, p. 5.) Robert claimed that the conversation in the tape did not state that Walker was with Robert that night. (CT 1236-40; RPT 1232.) Further, the conversation never specified which Rob [there were three or four different Robs that were referenced numerous times during the case.] (RPT 1232.) In addition, Robert argued that while Ruiz stated that "[Walker's girlfriend] got rid of the bloody clothes," the word "bloody" was never mentioned. (RPT 1232.)

[127] Specifically, Robert argued that Ruiz forced Feiger to conflict out as Robert's counsel out of retaliation: "[T]he transcript will read that they [Ruiz and Feiger] was litigating back and forth over something that we had the right to get granted for us out of retaliation because they was litigating back and forth. He brung [sic] this allegation up as far as trying to get him off the case." (CT 1236-40; RPT 1234.) However, the court denied the motion, stating to Ruiz, "A – few several months before that I had a hearing and I denied the request based upon what supervising public defender, whoever it was that came in. And I don't think – I don't – I don't think you were trying to initiate anybody. You did what you thought you had to do to preserve the record. And I'll let that one go at that." (RPT 1233.)

[128] Robert claimed that Ruiz had a court order to get Robert's clothing in 1996, and the results of the test done through the Department of Justice had disappeared. (CT 1236-40; RPT 1236.) Ruiz claimed that he had no clothing tested. (RPT 1236.) However, Robert counter-argued that he could provide the court with paperwork illustrating that Ruiz

> had the clothes took [sic] off my property and had the clothes tested, and the results of the tests, and where the reports shows that the stuff was took [sic] for further testing because it was shoe prints that was found that he wanted. They took my tennis shoes and everything to match against the shoes. So I don't know what Mr. Ruiz is sitting up here talking about. But if you put it over for two days, I can bring back all my paperwork to support everything that I'm saying here. I don't know where he's coming up with this.

(RPT 1238.) The court agreed to address this issue again on March 20, 2001. (CT 1236-40; RPT 1238-39.)

ordered, that Walker's trial transcripts be provided. (CT 1241; RPT 1253-63.) It should be noted that during this hearing, the trial judge, on several occasions, restricted Robert, who was self represented, from orally participating in the hearing. When Robert noted that the judge was cutting him off, the judge responded by cutting him off again. (CT 1241; RPT 1258.)

There were a series of hearings in early April of 2001, regarding Ruiz's conduct specifically as it related to the testing of the clothing.[129] (CT 1242-56; RPT 1271-98.) At one of those hearings, Ruiz announced the "discovery" of a bag containing the clothing Robert had been wearing at the time of his arrest. (RPT 1277.) Ruiz stated that the clothing was found in Robert's personal property, not as Ruiz had previously stated with the Las Vegas police authorities. (RPT 1277.) In addition to the clothing, there were test results which showed that there was no blood found on the clothing. (CT 1251-54; RPT 1281-84.)

On April 5, 2001, the day following the "discovery" of the clothing and test results, Robert disclosed to the judge that he had just received notice from Ruiz that three additional officers were identified by the prosecution as potential witnesses. Accordingly, Robert requested any reports that these officers may have prepared. Ruiz responded that the reports of the three officers had already been provided. The record, however, remains unclear whether the reports had been provided. (RPT 1271-98.)

At the next hearing on April 17, 2001, Robert revealed that Ruiz had told defense Investigator Evans that Evans would not be able to view the items [Robert's clothing] until the April 17, 2001 hearing. (CT 1258; RPT 1299-300.) Robert responded, "My investigator

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[129] Pradia testified that he researched the chain of custody of Robert's clothing and produced the following documents: a copy of the search warrant for Robert's property and a return to the search warrant; a document (marked A-3) indicating the prosecutor had turned said clothing over to Department of Justice; a document (A-5) from Department of Justice criminalist Stamp re clothing; documents (A-8 and A-9) from Stamp to Pradia related to the clothes. (RPT 1277-1278.) Next, the prosecutor turned to the wig allegedly worn by Robert; the wig was in the box of clothing received by DOJ from Pradia; the prosecutor represented that he previously believed the wig had been lost. (RPT 1279-1283.)

informed me that Mr. Ruiz told him that he wouldn't be able to actually view the stuff until today. So one of the reasons that I wanted to postpone it is so that we can actually see the stuff plaintiff found or wasn't actually found, and we still [haven't] been able to do that." Following the various interactions related to Robert's clothing and the testing of the clothing, Robert again moved to recuse Ruiz. The court again denied Robert's motion:

> [I]t's certainly subject to renewal if something doesn't turn out the way the People said it does. This is not a motion that you get one shot at it and if you lose you lose. If something comes up that you want to renew this motion, all you have to do is let us know, and I can take care of that.... So I deny the motion.

(CT 1258; RPT 1299-300.)

Also on April 17, 2001, eight months into Robert's self representation, the judge again voiced his ongoing discovery concerns and inquired of Ruiz: "I'm assuming at this point, Mr. Ruiz, that the defense has all the discovery that you have at this time." Ruiz responded, "Yes." However, Gunn represented that second standby counsel Cormicle[130] had within the past two weeks just turned over seven boxes of materials to Investigator Evans and upon reviewing the materials determined that "[t]here were some things missing."[131] In addition to the missing items some of the tapes had no audio, and Ruiz indicated that he would have copies made and, upon payment, provide the tapes to the defense. (CT 1258; RPT 1299-1311.) These events occurred two months before Robert's *Faretta* status would be revoked.

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[130]Gunn explained that he had brought in Cormicle as second counsel to assist him. (RPT 1302.)

[131] During an April 2 discovery hearing, Robert informed Ruiz and the court about missing tapes from the Walker trial. (RPT 1285-86.) The court ordered Ruiz to make a list "of tapes, evidence, everything." (RPT 1288.) During this April 17 hearing, Ruiz reported that "the court has brought over all of the exhibits from the Walker trial," including photos. (RPT 1303-04.) The court stated that this was an opportunity for "[Robert] and his investigator [to] see if there's anything that they don't have because the defense copy has changed hands several times since the case started." (RPT 1304.) Gunn then made the comment about the missing boxes: "[Mr. Evans] called my office to say these were some things missing, and I subsequently told him that Mr. Ruiz was subsequently making those available to Mr. Evans, and he'll pick those up this week." (RPT 1305.) The subject was then changed after the court reminded all parties the 30-day limitation on 1054. (RPT 1305.)

At the May 1, 2001 hearing, standby counsel Gunn informed the court that second standby Cormicle would not be available throughout June, and thus, Gunn requested that the trial date be continued to some date in July 2001. (CT 1336; RPT 1312.) The court asked Robert if he would be willing to reset the trial date for late July, and Robert responded, "I didn't come here to request no time. I didn't ask for a continuance. I said, if you all were going to continue it, I wouldn't oppose to it." (RPT 1315.) The court then inquired if Robert needed a continuance, to which he replied he did not. (RPT 1315.) Gunn indicated he would not be ready to litigate if he was directed to proceed as counsel. (RPT 1315-16.) The judge responded, "Obviously, I have appointed standby counsel because I think there is a better than even chance that you [Gunn] or Mr. Cormicle are going to end up trying this case." (RPT 1319.) The court then re-set the trial to July 30, 2001: "[S]o Mr. Williams can be totally ready, Mr. Gunn and Mr. Cormicle can be totally ready...." (CT 1336; RPT 1312-27.)

The following month, Ruiz claimed Robert was being dilatory and moved to have Robert's self representation terminated. The judge agreed. (CT 1354; RPT 1349.) Ruiz, without addressing the delays prompted by his own absences, without addressing the delays necessitated by his failures to provide discovery, and without acknowledging the delays due to the continuances sought by standby counsel, focused solely on Robert's conduct. (CT 1354-55; RPT 1339-50.) Ruiz's claim that Robert was using his *Faretta* status to delay the trial is ironic in that Ruiz's absence and non-compliance with discovery accounted for the bulk of delays during Robert's period of self representation, and because Robert asserted and reasserted his desire to have the trial begin as soon as possible.

Ruiz cited several instances that he claimed showed Robert was using his *Faretta* status for dilatory purposes. He first claimed that Robert's efforts to hire a medical forensic analyst

were disingenuous because Robert's five prior attorneys did not hire any expert to go over the medical forensic analysis. (RPT 1201-02.) Robert countered that the inaction of the previous lawyers was no indication of illegitimacy:

> The issue as far as the medical, it was for an orthopedic expert, due to the fact that I got a hole in my leg the size of a fist, which would not enable me to do the kind of things your witness said I done. Therefore, the need to have that witness present—you understand?—is to show that some of the events that was—is impossible for me to do with my leg. That was the reason for it. So because the—aanother lawyer did not do it, what did I—that's got nothing to do with me doing it.

(RPT 1203-04.)

Ruiz's second claim was that Robert was being dilatory in failing to retain an investigator. (RPT 1220-27.) But, as Robert explained on March 7, 2001,

> I confirmed with the court executive officer that the funding [for an investigator] was granted and they was—was told that they [an investigator] was going—accept appointment on the case. But then after they told me they talked to the public defender's office, but from there it's been a three-week process now. They—I am still waiting on them to come see me.

(RPT 1221-24.) On March 16, 2001, Robert reported that he had just retained an investigator whom he hoped could review various reports. (RPT 1228-31.) However, after giving the investigator the contact information for Gunn and confirming that the investigator left a message for Gunn to receive the information, Gunn did not respond. (RPT 1231-45.) Consequently, Robert sought and received a forty-five day continuance. (CT 1239; RPT 1246-49.)

Ruiz's third claim was an *ad hominan* attack against Robert alleging he was intentionally delaying the trial by "trying to fire every lawyer he had." In response, Robert at the hearing in which the judge revoked his *Faretta* status, pointedly did not ask for a continuance of the trial, but instead stated,

> As far as our trial date stands now, I am ready to go to trial... I know my case... I know I'm in over my head, but the only reason I want to fight my case, because I

> don't want to go to trial with somebody like Mr. Gunn that don't have knowledge of the case, and go through arguments like this.

(RPT 1338-42.) The court in acquiescing to Ruiz's motion and appointing Gunn as trial counsel said,

> Mr. Williams has had—and I do not know the number of the *Marsden* motions. I can't even count the number of lawyers that he's had. And I agree with him, [Robert], the only one he liked was Ms. Feiger. And I think it was probably for the reason, as Mr. Ruiz said, because she was—as a trial attorney, she was a hand-holder for defendants. And that's what Mr. Williams has been looking for all along, somebody that will come through here anytime he wants to be seen... [Mr. Williams is] in over his head. And... all of these have been delay tactics. And I'm going to remove him from his *pro per* status.

(CT 1354; RPT 1335-51.)

C. The Sixth Amendment Right of Self Representation May Only Be Terminated with Sufficient Cause.

In *Faretta v. California* (1975) 422 U.S. 806, the United States Supreme Court recognized that the Sixth Amendment prohibits forcing a lawyer upon an unwilling defendant; the Sixth Amendment guarantees the defendant a constitutional right to conduct his own defense, "provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." (*Id.* at 836 (quoting *McKaskle v. Wiggins* (1984) 465 U.S. 168, 173).) Even prior to *Faretta*, the Ninth Circuit recognized this right:

> A defendant in a criminal case not only has a constitutional right to the assistance of counsel, he has a correlative constitutional right to refuse the advice or interference of counsel and to present his own case. A court has no more right to force an attorney on a defendant than it has to ignore the Sixth Amendment right to counsel.

(*United States v. Dujanovic* (9th Cir. 1973) 486 F.2d 182, 184 (citing *Arnold v. United States* (9th Cir. 1969) 414 F.2d 1056, 1058).) The Ninth Circuit has stated that "the complete denial of

this right in a federal trial is, *per se,* reversible error." (*Id.* at 185 (citing *Meeks v. Craven* (9th Cir. 1973) 482 F.2d 465, 466) (internal quotations omitted).)

The right of self-representation reflects "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." (*Faretta*, 422 U.S. at 817.) In essence, it is the defendant who may stand a conviction; thus, "it is the defendant... who must be free personally to decide whether in his particular case counsel is to his advantage." (*Id.* at 834.)

It is well established that the right of self representation is not absolute. "[The] government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." (*Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 161.) "The right of self representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." (*Faretta,* 422 U.S. at 834-35.) "[The] trial judge may terminate self representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Id.*; *see also Dujanovic,* 486 F.2d at 187 ("Among these [disruptive actions or attitudes] are the actual or ready potential unruly and obstreperous accused. Such activities or potentialities can well stand as a voluntary relinquishment or forfeiture of the limited constitutional right to proceed *pro se*....").)

Ultimately, however, the right to self representation is constitutionally guaranteed, and the court is therefore limited in its ability to revoke or deny this right. The trial court must "assure both the accused and the government a fair trial conducted in a judicious, orderly fashion." (*Dujanovic*, 486 F.2d at 187.) "[A]n accused has a Sixth Amendment right to conduct his own defense, provided only that he... is able and willing to abide by rules of procedure and

courtroom protocol." (*McKaskele,* 465 U.S. at 173.) "When determining whether termination [of defendant's *in propria persona* rights] is necessary and appropriate, the trial court should consider several factors in addition to the nature of the misconduct and its impact on the trial proceedings," including whether "the defendant has been warned that particular misconduct will result in termination of *in propria persona* status." (*People v. Carson* (2005) 35 Cal.4th 1, 10.) If misconduct by a *pro se* defendant occurs in-court, "the record documenting the basis for terminating a defendant's *Faretta* rights is generally complete and explicit, without the need for further explanatory proceedings...."[132] (*Id.* at 11.) Most critically, if a court decides to terminate a defendant's *pro se* status, the "record should answer several important questions":

> A reviewing court will need to know the precise misconduct on which the trial court based the decision to terminate. The court should also explain how the misconduct threatened to impair the core integrity of the trial. Did the court also rely on antecedent misconduct and, if so, what and why? Did any of the misconduct occur while the defendant was represented by counsel? If so, what is the relation to the defendant's self representation? Additionally, was the defendant warned such misconduct might forfeit his *Faretta* rights? Were other sanctions available?

(*Id.* at 12.) "In most situations, the determination to terminate a *pro se* defendant should be based on a totality of the circumstances; no one consideration will be dispositive." (*Id.*)

In *Carson,* this Court affirmed an appellate court decision that the trial record did not indicate sufficient in-court misconduct to terminate and revoke the defendant's right of self representation. (*Carson,* 35 Cal. 4th at 13.) The "defendant's newly appointed investigator... mistakenly gave him an unredacted copy of the murder book." (*Id.*) "The prosecutor argued that defendant's improper acquisition of discovery, when considered in light of antecedent attempts to suborn perjury, fabricate an alibi, and possibly intimidate a prosecution witness, warranted

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[132] A record does not need "further explanatory proceedings because there is a contemporaneous memorialization either by the court reporter's recording events as they transpire in the courtroom or by the trial court's describing them for the record." (*Carson,* 35 Cal. 4th at 11.)

termination of his *Faretta* rights." (*Id.*) Also, the prosecutor argued that the defendant should have known the discovery process and should have known he was not entitled to obtain the murder book. (*Id.*) Carson pointed out that the murder book was given to him by the investigator and that he was unaware of the contents of the book. (*Id.*) The trial court responded:

> [The] defendant had already done things that he was not supposed to do. That he had already received information that he knew he was not to receive. That he had that information in his possession for a period of time. This was information that was not to be in his possession. He was a very, very manipulative person and no longer entitled to his *pro per* privileges.

(*Id.*) However, the Court of Appeals held, and this Court affirmed, that the record did not answer the necessary questions to determine that the defendant's "misconduct seriously threatened the core integrity of the trial." (*Id.*)

In contrast, the United States Supreme Court decision in *Illinois v. Allen* (1970) 397 U.S. 337, confronted the question of the precise nature of misconduct that would justify termination of self representation. During *voir dire*, as Allen was examining the first juror, the judge requested that he ask questions "relating to the prospective juror's qualifications." (*Id.* at 339.) "At that point, [Allen] started to argue with the judge in a most abusive and disrespectful manner." (*Id.*) In consequence, "the judge asked appointed counsel to proceed with the examination of the jurors." (*Id.* at 340.) Allen continued to use vile language directed towards the judge, to be disorderly and disruptive, and to declare his intent to prevent the trial from occurring. (*Id.* at 340-41.) Despite the repeated warnings by the judge, Allen's self representation was revoked and he was removed from his trial. Despite his later assurances of orderly behavior, Allen's *Faretta* status was not restored. (*Id.*) The Court held that the judge

acted within his discretion and did not commit legal error by removing the defendant from his own trial. (*Id.* at 347.)

Likewise, this Court in *People v. Clark* (1992) 3 Cal.4th 41, 117 (*en banc*) found the lower court to have been "justified in concluding that defendant intentionally sought to disrupt and delay his trial":

> Defendant told the court "Your prejudices are running away with you" and accused the court of "jumping to conclusions" and predetermining the case. When the court warned defendant about his behavior, defendant told it to "stop that crap," and accused the court of bias, of lying, and of having its mind made up "from day one." Defendant stated, "This railroad train of yours is going to have to come to a screeching halt." When the court once again warned defendant to behave or his in propria persona privileges would be revoked, defendant responded, "are you trying to intimidate me? Well, you goddamn can't do that.... [W]ill you just back off and do your job?"

(*Id.*) In summation, this Court stated that "although a defendant may have the right to represent himself, '[h]e should not be permitted to disparage... counsel and the court, and to disrupt the orderly presentation of the trial.' (*Id.* (citing *People v. Davis* (1987) 189 Cal.App.3d 1177, 1200) (overruled on other grounds).) Robert did not disparage the court, nor did his requests disrupt the orderly presentation of the pretrial (*infra.*).

D. Robert Williams did not Disrupt the Proceedings and was Denied His Sixth Amendment Right of Self Representation When His Self Representation Was Revoked Without Sufficient Cause.

The right of self representation is constitutionally protected and shall not be terminated absent "serious and obstructionist misconduct" that violates the "core integrity of the trial." (*Faretta* at 834-35.) Defendants who refuse to participate in trial, defendants who curse the court, defendants who threaten witnesses during trial, give up their constitutionally guaranteed right to represent themselves. Conversely, defendants who challenge the State to produce critical discovery, defendants who insist on seeking to continue their trial until they receive their court-

ordered discovery, defendants who abide by rules of procedure and courtroom protocol must not have their right of self representation wrested from them. Robert was the latter type of defendant.

It is ironic that it was Ruiz, the primary cause of delays during the ten month span of Robert's self representation, who urged the judge to terminate Robert's self representation claiming Robert was dilatory. Further it is unacceptable that the trial judge acquiesced to Ruiz's false characterization in citing three reasons for his ill-advised decision to revoke Robert's self-representation, noting first the number of lawyers who had represented Robert; second, that Robert was "in over his head"; and third, that "all of these have been delay tactics." (*See supra* pp. 116-18.)

Of these, only the claim of "delay tactics" merits serious discussion. As to the number of lawyers appointed to represent Robert throughout the pretrial period, all but one conflicted from the case, and that one was dismissed for incompetence.[133] And while Robert did state that he was "in over [his] head," the context of that statement makes clear that Robert had more confidence in his ability to represent himself than he did in Gunn's ability to represent him. Robert stated, "I know my case. I feel I know my case better than any other attorney to have my case besides Mara Feiger.... I don't want to go to trial with somebody like Mr. Gunn that don't have no knowledge of the case." (RPT 1347.) To revoke a competent defendant's *Faretta* rights because he believes he can better represent himself than some court-imposed counsel flies in the face of

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[133] CDP counsel Aquilinia was appointed on October 20, 1998 and dismissed by grant of Robert's second *Marsden* motion on August 30, 1999. (CT 1114, 1140-41; RPT 924-25, 1022-23.) During those ten months of Aquilina's representation, Aquilinia requested and was granted five continuances. (CT 1115-40.) Robert cited this pattern of continuances, as well as the lack of agreement between Aquilinia and himself on certain issues concerning representation as grounds for the first (May 17, 1999) *Marsden* motion on Aquilinia. (CT 1136; RPT 977-96.) At that hearing Aquilinia agreed with Robert that there existed communication issues between them and he also admitted, "[Robert] obviously knows his case much better than probably anybody that's been involved in the case." Robert withdrew his *Marsden* request at that time, satisfied that the communication issues were resolved. However, a little over a month later, with Aquilina's incompetence still hindering the case from proceeding, Robert again requested a *Marsden* hearing; this one was heard and granted on August 30, 1999. (CT 1139-41; RPT 1022-23.)

the principle behind the right. Whether a defendant is "in over his head" is a non-consideration in any *Faretta* analysis.

This leaves the merits of the judge's decision to turn on "delay tactics." The factual overview in this argument is testament that the delays that transpired over the ten months were primarily attributable to Ruiz. (*See supra* pp. 108-18.) Verification comes from the various admonitions to the prosecutor from the judge. Noting the complete lack of discovery during Ruiz's two and one-half month absence, the judge said, "[I]s there some way that somebody could talk to Mr. Williams and find out what it is that he has, in other words, a substitute for Ruiz, so that Mr. Williams can get his discovery?" Furthermore, six weeks later, at the January 4, 2001 discovery hearing, the judge urged the State to appoint another trial prosecutor to Robert's case citing both the lack of discovery and that "a couple of [discovery] requests and a [discovery] motion" were outstanding with less than a month until trial. (*See supra* p. 110.)

Even after Ruiz's return, the judge admonished Ruiz not to wait to turn over discovery: "Don't wait until we come back to court to get them to him. Just send them out to him, and then we'll keep a list of what you sent so that we can put it on the record." Still, Robert was missing discovery. And the judge, noting that the case "has been kind of dead in the water for several weeks" due to the absence of Ruiz, granted Robert's motion to continue the trial. Nevertheless, discovery concerns persisted. Approximately a month later, with discovery still outstanding, the court told Robert to once again submit his discovery "list" to Ruiz, and the court once again pushed back the trial readiness date. The picture that emerges from the first seven months of Robert's self representation was not of a defendant threatening the "core integrity of the trial," but rather of a prosecutor, after being absent for months, reducing discovery to trench warfare in which he would give ground only when threatened by the court. (*See supra* p. 111.)

The issue of the whereabouts of Robert's clothing and the testing of the clothing surfaced on March 20, 2001. From that point, it took another month to prove that Ruiz's representations concerning the clothing were false. And at the conclusion of that discovery dispute, a clearly frustrated judge inquired of Ruiz: "I'm assuming at this point, Mr. Ruiz, that the defense has all the discovery that you have at this time." Although Ruiz stated that all the discovery had been handed over, there were still items missing.[134] (*See supra* pp. 113-14.)

Exacerbating the delays attributable solely to Ruiz were the delays attributable to the availability of the *second* standby counsel. At the May 1, 2001 hearing, first standby counsel Gunn, instead of addressing his own availability as the court appointed standby counsel, stated that second standby counsel Cormicle would not be available for months and requested that the trial be continued to sometime in July 2001. This was not at Robert's behest: "I didn't come here to request no time. I didn't ask for a continuance. I said, if you all were going to continue it, I wouldn't oppose to it." (*See* RPT 1315.) In fact, the court then asked Robert, point blank, if he needed a continuance, to which he replied he did not. (*See* RPT 1315.) Nevertheless, the court opted to accommodate both standby counsel and re-set the trial to July 30, 2001: "[S]o Mr. Williams can be totally ready, Mr. Gunn and Mr. Cormicle can be totally ready...." (*See supra* p. 116; *see also* RPT 1319-21.)

And it was just a month later that Ruiz demanded revocation of Robert's *Faretta* status. (*See supra* pp. 116-18.)

Self representation is constitutionally protected. It shall not be terminated unless there is "serious and obstructionist misconduct." (*Faretta* at 834-35.) Can it be seriously entertained on

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[134] Missing items included: a return of search warrant listing items of Robert's personal property taken from the jail on September 26, 1996 and sent to the California Department of Justice Forensic Services for examination; a copy of the transcript for the date of April 23, 1997, which had been sealed and removed from the Court file; ID reports from Officers Creed, Fuller, and Reed; and the name of the person referred to on Ruiz's witness list as Mr. Williams' parole agent or CDC custodian of records. (RPT 1253-63.)

the record of this exhaustive pretrial and, in particular, of these ten months of self representation, that Robert's conduct was seriously disruptive or that his conduct threatened the core integrity of the trial? Or rather was the judge's decision to revoke his *Faretta* status made in a pique of frustration that this pretrial had dragged out so long that he saw this as a means to vent his frustration at Robert's expense? Whatever his reasons, the judge had no valid basis and certainly no good cause to terminate Robert's right to represent himself.

As *Faretta* and its progeny of cases has established, every criminal defendant has the right to represent himself if he so chooses, upon a waiver of his right to a court-appointed attorney, and upon a finding that the defendant is making the decision knowingly and intelligently, and agrees to follow rules of procedure and courtroom protocol. (*Faretta*, 422 U.S. 806.) As shown above, Robert knowingly chose to represent himself and was not disruptive or dilatory.

Similar to *Carson,* and distinct from *Allen*, the record of this pretrial does not exhibit misconduct threatening the "core integrity" of the trial. Instead, the record illustrates Robert's diligence in representing himself and his complete cooperation during the proceedings.

E. Conclusion

The trial judge's rationale for termination of Robert's *Faretta* rights—that Robert was using dilatory practices—is not supported by the record. Indeed, the record illustrates a defendant whose active participation in his own case revealed his desire to get to trial as quickly as possible. Consequently, the judge erred in terminating Robert's right to self representation and as a result Robert is entitled to a new trial.

VII

ROBERT WILLIAMS' CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION WAS VIOLATED WHEN THE TRIAL JUDGE FAILED TO REMOVE STANDBY COUNSEL DESPITE COUNSEL'S CONFLICT OF INTEREST WITH ROBERT WILLIAMS

A. Introduction

As set forth in the preceding argument, Robert Williams began his self representation on August 16, 2000, and at that time, the court appointed Gunn as standby counsel. Robert requested that some lawyer other than Gunn be appointed standby counsel. The court refused. A month and a half later, on October 5, 2000, Robert alerted the court to his pending civil suit against Gunn.[135] Despite Robert's efforts to have Gunn relieved because of this conflict, the court refused to remove Gunn and thus denied Robert the assistance of conflict-free counsel throughout the ten months of his self representation, in violation of the Sixth Amendment.

B. Factual Background

Robert continued his efforts to have Gunn replaced as standby counsel on May 1, 2001 and again on June 15, 2001. (CT 1336, 1340-43; RT 1328-29, 1335.) Robert continued his argument that the civil suit created a conflict of interest between Gunn and himself:

> [I]n the civil suit me and Mr. Gunn got, he filed two different demurrers. In the second demurrer he asked for a stay on the hearing on the demurrer until the continuation of the criminal case. He was basically stating that... if it was a guilty verdict in the criminal case, then the civil case basically don't have no standing. And for Mr. Gunn to be standby counsel, that you believe is going to be the—my attorney for trial....

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[135] Although Robert first mentioned the civil case on October 5, 2000 ("I do got a pending civil suit against Mr. Gunn. I don't know if that would declare a conflict or not..." (RPT 1156-57.)), the suit—for professional negligence (i.e., legal malpractice)—was not filed until October 26, 2000. On March 7, 2001, in his motion for change of venue, Robert claimed that the judge's clerk had interfered with the civil case by convincing a civil court clerk to calendar the matter "way beyond the range of where a potential positive outcome could be effective." (CT 1218.) On May 14, 2001, Gunn's demurrer to the complaint was sustained and Robert filed an amended complaint. On May 23, 2001, Gunn again filed a demurrer, asking the court to either sustain his demurrer without leave to amend or to stay the action pending resolution of the underlying criminal case. (CT 1341-43.)

> I don't feel that if he was to take my pro per status, or something was to happen to—my pro per status was taken, Mr. Gunn was to try the case, why would he actually put his best foot forward to win the case when he stands to lose the civil case, if I—if I win in the criminal case?[136]

(RPT 1336.) Gunn admitted the lawyer representing him had indeed filed two demurrers to Robert's malpractice action against him, explaining:

> The state of the law, as I understand it in California, with respect to filing claims of legal malpractice or suing lawyers, is that on a criminal case the person would have to be found or declared factually innocent to be able to proceed on the claim. So I think, you know, lawyers representing individuals on those actions now typically file—or delay the matter until after the criminal case is resolved.

(RPT 1336.) Gunn further indicated, without prompting from the court, that he too was concerned about a possible conflict:

> You know, it does create some questions. I was concerned enough that I called the State Bar on this matter and spoke to their ethics hot line. Of course they don't—they're not willing to render an opinion. I mean, an opinion comes from them actually having a litigation of the matter. But they—the only thing—they referred me to the duty of a lawyer to withdraw where lawyers sue clients. That was the closest opinion that they had....
> So I can't say that the information is overly helpful, but it has caused me some concern. Other than that I would submit.

(RPT 1337.) The court asked Gunn whether he saw any reason to have to recuse himself, to which Gunn responded in the negative. The court further asked Gunn if he believed he could "competently represent Mr. Williams, if... called to step up and be the first lawyer," to which Gunn responded, "Given other factors, yes." (RPT 1337.) The court then denied the motion, stating, "I don't see a conflict. I don't see any prejudice to you." (CT 1354-55; RPT 1338.)

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[136] This argument was also articulated in the demurrer filed by Gunn's attorney:

> [I]f he [Robert] is convicted in the criminal case, he will be collaterally estopped from asserting the essential element of factual innocence in this civil action.... any issue necessarily decided in a prior criminal proceeding resulting in a judgment of conviction of a felony is conclusively determined as to the parties if it is involved in a subsequent civil action.

(CT 1333.)

That same day, June 28, 2001, Ruiz moved to relieve Robert of his *pro per* status. The court granted the motion and appointed Gunn as trial counsel. (CT 1354-55; RPT 1349; *see also supra* Argument VII.)

On August 20, 2001, six weeks after revoking Robert's *Faretta* status and appointing Gunn as trial counsel, Gunn himself raised concerns about "continuing the representation of [Robert], partly due to the malpractice suit that... [Robert] filed against [Gunn]." (CT 1358; RPT 1365.) Gunn noted that while previously "the action of filing a lawsuit against an attorney isn't sufficient grounds necessarily for a conflict," the law had since changed:

> [T]he Supreme Court has ruled that the person filing the lawsuit, plaintiff, must be found factually innocent to sustain or to, you know, continue his lawsuit. So there is—at least there is an apparent look of a problem there, when you look at that in the context of the filing of the lawsuit against the attorney who's not the person in the trial.

(RPT 1365-66.)[137] As such, Gunn declared a conflict of interest for precisely the reasons Robert had indicated ten months earlier when Robert was self-represented. (RPT 1370.) The court acquiesced and Cormicle was appointed counsel. (RPT 1371.) Gunn further indicated that the professional opinions of "all the managers of the Criminal Defense Panel... agree that there is a problem in this case... there is a problem in terms of my continuing representation of [Robert]." (RPT 1372.) The court responded, "I don't know that I hundred percent buy into it, but I don't disagree with it either." (CT 1358; RPT 1372-73.)

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[137] Gunn was referring to *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 539, which held:

> Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss. (Citation) In sum, "the notion of paying damages to a plaintiff who actually committed the criminal offense solely because a lawyer negligently failed to secure an acquittal is of questionable public policy and is contrary to the intuitive response that damages should only be awarded to a person who is truly free from any criminal involvement."(Citation) We therefore decline to permit such an action where the plaintiff cannot establish actual innocence.

(CT 1332.)

C. Standby Counsel Must Be Conflict Free

"'[T]he assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired...." (*Holloway v. Arkansas* (1978) 435 U.S. 475, 482 (quoting *Glasser v. United States* (1942) 315 U.S. 60, 70 (superseded on other grounds).) "Effective assistance includes a duty of loyalty and a duty to avoid conflicts of interest." (*Id.*) While it is well-established that the trial court has the authority to appoint standby counsel to a *pro per* defendant, the defendant "possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege." (*Id.* at 511-12.)

In *Holloway*, the Supreme Court in overturning the convictions of the various co-defendants held, "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (*Id.* at 488.) Therefore, the Court has held such error to require automatic reversal. (*Id.*; *see also McDonald*, 143 Wash.2d at 513 ("[A] trial court commits reversible error if it knows or reasonably should know of a particular conflict and fails to inquire.... [and] reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting counsel's performance.").)

This Court has had occasion to deal with conflict cases in which an accused has brought suit against his court appointed lawyer. During the pretrial proceedings in *People v. Hardy* (1992) 2 Cal.4th 86, Hardy filed two complaints in federal court alleging negligent legal representation and seeking $5 million in compensation. (*Id.* at 132.) Hardy then moved to have

Demby, his attorney, replaced due to the resulting conflict of interest. (*Id.*) Upon the court's inquiry, Demby asserted, "I do not believe that the lawsuit will interfere with my representation of Mr. Hardy" and the judge agreed: "I think based on Mr. Demby's reputation, also his statement, I think he is going to afford you [Hardy] an adequate defense and your due process rights will not be impinged." (*Id.* at 133.) The trial court then denied Hardy's motion. Hardy's federal lawsuits were ultimately dismissed, the district court finding them "frivolous and taken in bad faith." (*Id.* at 138.)

In reviewing the trial court's denial of Hardy's motion this Court stated, "[W]hen counsel is burdened by an actual conflict of interest, prejudice is presumed; the presumption arises, however, only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" (*Id.* at 135 (quoting *Strickland v. Washington* (1983) 466 U.S. 668, 692).) It further noted that "[c]onflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person *or by his own interests.*'" (*Id.* (emphasis added).) Although this Court acknowledged that "being named as a defendant in a lawsuit by one's client can place an attorney in a situation where his or her loyalties are divided," it found only "a *possibility* of a conflict here," not an "*actual* conflict," stating, "[based on] Demby's considered decision to continue with his representation of Hardy, as well as the lack of any merit in the collateral lawsuits filed by Hardy, it is not difficult to conclude there existed no actual conflict of interest here." (*Id.* at 136-38.)

Conversely, the Eighth Circuit, in *Smith v. Lockhart* (8th Cir. 1991) 923 F.2d 1314, reversed the defendant Smith's convictions of terroristic threatening and false imprisonment,

finding that Smith had shown sufficient cause for substitution of counsel and that the trial court had violated his Sixth Amendment rights by failing to appoint different counsel. The conflict of interest involved a *pro se* lawsuit filed by Smith in federal court naming, among others, Judge Langston and the public defender Marquette, alleging a conspiracy of Crawford County officials to violate the rights of defendants, including the rights to a speedy trial and the effective assistance of counsel. (*Id.* at 1317.) The court noted that "[c]onflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case." (*Id.* at 1320.) It further noted that generally "a conflict exists when an attorney is placed in a situation conducive to divided loyalties" and that "[a] federal lawsuit pitting the defendant against his attorney certainly suggests divided loyalties." (*Id.* at 1320-21.) Finally, the court held, "When a defendant raises a seemingly substantial complaint about counsel, the judge 'has an obligation to inquire thoroughly into the factual basis of defendant's dissatisfaction.'" (*Id.* (citing *U.S. v. Hart* (1977) 557 F.2d 162, 163).)

The Eighth Circuit specifically found that the collateral lawsuit "[gave] the attorney 'a personal interest in the way he conducted [Smith's] defense—an interest independent of, and in some respects in conflict with, [Smith's] interest in obtaining a judgment of acquittal.'" (*Id.* at 1321 (citing *Douglas v. U.S.* (D.C. App. 1985) 488 A.2d 121, 136).) The court reversed on the grounds that Smith had showed sufficient cause for substitution of counsel based on the conflict of interest, and that "[o]nce good cause was shown, the trial judge violated Smith's Sixth Amendment rights by failing to appoint different counsel to assist him." (*Id.* at 1321.)

D. A Conflict Of Interest Existed Between Robert Williams And Standby Counsel, Resulting In Reversible Error.

To gain insight into the trial judge's decision to deny Robert's motion to relieve Gunn as standby counsel during Robert's period of self representation, one need only look to the judge's

comments at the time he finally relieved Gunn as counsel for the very conflict initially cited. The judge admitted, "when it first came to my attention that you [Gunn] were being sued, and what the status of the law is, I flinched a little because it doesn't look good." (RPT 1369.) Unfortunately, however, instead of making inquiry concerning the suit and the potential for actual conflict, the court opted instead to vilify Robert as "a defendant who wants to delay" and "play the Court and counsel a fine tuned fiddle." (RPT 1369.)

The contrast between *Hardy* and the case at bench is striking. Whereas the attorney in *Hardy* articulated a "considered opinion that the lawsuit would not prevent his full and active representation of Hardy," a factor the court found to be "significant... when determining whether an actual conflict exist[s]" (*Hardy*, 2 Cal.4th 86 at 137), in the present case, Gunn himself on two occasions expressed concerns about his ability to adequately represent Robert: first, when he informed the court that he had contacted the State Bar's Ethics Hotline; and second, when he brought to the court's attention that a plaintiff suing an attorney for malpractice must be "found... factually innocent to be able to proceed." Robert articulated this problem as well: "[W]hy would he actually put his best foot forward to win the case when he stands to lose the civil case... if I win in the criminal case?" And even when Gunn was asked point blank if he could represent Robert he offered an equivocal response: "Given other factors, yes." (RPT 1337.) We are left only to wonder what those "other factors" might be. This is in stark contrast to Hardy's lawyer, who, when confronted with the same question from his trial judge, unequivocally declared that "the lawsuit would not prevent his full and active representation." (*Hardy*, 2 Cal.4th at 138.)

Whereas in *Hardy*, this Court had reason to believe Hardy "was merely attempting to manufacture a possible conflict of interest to try and delay his trial" (*Id.* at 138), Robert took

pains to remind the court, "when you took my *pro per* status away from me, I told you I was ready to go to trial. And you all took that away." (RPT 1371.) On the other hand, the similarities with the *Smith* case are striking. When Smith first informed the judge of the possible conflict of interest because of the class action suit to be filed, the judge replied, "'I don't care who you've sued, Mr. Smith....'" (*Smith*, 923 F.2d at 1320.) Without further questioning or inquiry and notwithstanding the public defender's expressed concern about the conflict, the judge overruled Smith's motion for new counsel. (*Id.* at 1320-21.) Here, when Robert protested the revocation of his *Faretta* status based on the judge's perception of his use of "delay tactics," the court rebuked, "I don't really care whether you do [agree with me] or not" and appointed Gunn as lead counsel, despite its knowledge of the pending civil lawsuit between Robert and Gunn. (RPT 1371.)

Additionally, as "Smith raised his objection to [public defender] Marquette at the earliest possible time and consistently and vigorously objected to him" (*Smith*, 923 F.2d at 1320-21), so too did Robert consistently and vigorously object to Gunn. Neither Smith's suit nor Robert's suit were determined patently frivolous. And where the *Smith* court appointed new trial counsel the day after the hearing, the trial court here appointed new counsel at Gunn's request, thereby recognizing the existence of the actual conflict of interest. But as in *Smith*, by the time the court substituted defense counsel, Robert had already been denied his right to conflict-free counsel.

E. Conclusion

Gunn's assistance as standby counsel in the criminal trial was significantly impaired due to the civil suit Robert had filed against him; Gunn contemplated that, had he effectively represented Robert in the criminal trial and the court ruled in Robert's favor, this ruling would have allowed the civil suit to be sustained. On the other hand, poor representation leading to Robert's conviction would have resulted in the civil suit having no standing. The trial court was

made well aware of this conflict, yet chose to do nothing, other than use this information to further, and inaccurately, portray Robert's actions as dilatory. By the time Gunn finally convinced the court to be relieved as Robert's attorney and appoint Cormicle in his place, the prejudice resulting from his participation in Robert's defense was already realized. This error on the part of the trial court was reversible error, entitling Robert Williams to a new trial.

VIII

THE DISMISSAL OF TWO AFRICAN-AMERICAN PROSPECTIVE JURORS WITHOUT CAUSE "STACKED THE DECK" AGAINST ROBERT WILLIAMS DEPRIVING HIM OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDEMENT

A. Introduction

Prosecutor Ruiz dismissed two African-African prospective jurors based on their lack of certainty concerning the death penalty. What the judge considered standard peremptory challenges were in fact egregious errors permitting improper dismissal of potentially valuable jurors. The extremely high stakes at play in a death penalty trial require the most lucid and perceptive jurors, willing to challenge all findings with a clear application of the requisite legal principles. By denying Robert the right to be tried by these two jurors, Ruiz and the court effectively denied Robert due process.

B. Factual Background

Four African-American prospective jurors were challenged for cause by the prosecutor. One of the challenges was denied and that prospective juror was subsequently and peremptorily challenged by Prosecutor Ruiz. (*See infra*, Argument IX.) Another of the four stated he could conceive of no set of facts where he could vote for the death penalty and was appropriately dismissed. (RT 1572-73; 1626-31.) Of the remaining two prospective jurors [Wood and White], neither indicated that they could not perform the duties of a capital juror but, nonetheless, were dismissed for cause.

First, Prospective Juror Wood was successfully challenged for cause following the ensuing dialogue. The court asked, "[I]f the evidence, everything and the aggravating factors are overwhelmingly pointing toward the death penalty, would you be able to vote for death?" Wood

replied, "You know, the only thing that I can say, like, I don't know. And it's, like, an emotional thing but also a philosophical thing. *If it's a heinous crime, probably.* I don't know. But I can't just—put it in cement and say yes or no." (RT 1282-83; *emphasis added.*)

Ruiz asked, "Mr. Wood, can you give us assurance that you would do that [sentence a man to death], if you feel it is warranted under the facts and the law?" Wood replied, "I can't give you an answer, but most likely I could if it's a heinous crime." (RT 1400.)

Ruiz challenged Wood stating, "[H]e said he couldn't sit in judgment of another because of... a moral feeling." The trial judge followed up, "He also said, in answer to your direct question, Mr. Ruiz, 'Could you do it?' and he hesitated very long. And he did not ever say yes. I want to say he said no. But I can't be that bold, but I think he said no. It certainly was not a yes...." The judge then ruled, "I'm going to grant [challenge for cause] as to Mr. Wood. I think the law is very clear, that based upon a properly phrased question, if the person cannot say that they would be able to vote for death, that that would be proper grounds for challenge for cause." (RT 1405-07.)

Second, under initial questioning from the court, Prospective Juror White, who had indicated on her questionnaire that she could not sentence anyone to death, said, "I thought about it. I would be able to vote for the death penalty.... I don't want to condemn anybody to death, but if the evidence is overwhelming, as you say, and that has to be the sentence, then so be it." (RT 1288-89.) Prosecutor Ruiz, seemingly disregarding her answer, pressed White attempting to get a response indicating an inability to vote for the death sentence, but to no avail:

> Ruiz: Do I [a prospective juror] trust this legal system enough to be able to say I can make a life or death sentence either way following the laws I'm given by this system, and mean it for both sides? I want you to think about that. Ms. White?

White: Yes.

...

Ruiz: Ms. White, I want you to think about this. Do you really want to find yourself asking those questions when that man's life hangs in the balance? And you know that if you don't vote for death, there will not be a death verdict in this case. Do you really want that kind of conflict and pressure in your life?

White: No, I do not.

(RT 1395-97.)

Ruiz followed up and asked, "Ms. White, can you come in here and sentence this man to death, if you feel it's warranted?" White responded, "I believe I would have a difficult time." (RT 1400.)

Ruiz challenged Prospective Juror White for cause, citing her concerns with the death penalty, and the court dismissed her stating, "But both [White and another prospective juror] gave, and in answer to the direct question [sic], could you do it [sentence someone to death], answer to the direct question they both said no." (RT 1405.)

C. It is Error to Exclude Prospective Jurors for Cause Unless Their Views Would Prevent or Substantially Impair the Performance of Their Duties as Jurors in Accordance with Their Instructions and Their Oath

"[T]o exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." (*Adams v. Texas* (1980) 448 U.S. 38, 50.) The relevant inquiry in determining if a prospective juror may be excluded for cause based on his view of capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright*, 469 U.S. at 424.) The power of the state to exclude jurors for cause in a capital case extends only to the extent that it prevents the frustration of the state's legitimate interest in

administering constitutional capital sentencing schemes by the willful act of a juror who will not follow their oath. (*Id.* at 423.)

In *Adams v. Texas* (1980) 448 U.S. 38, the Supreme Court reversed the lower court's imposition of the death penalty, finding that the State's grounds for excluding certain jurors were insufficient under the Sixth and Fourteenth Amendments. (*Id.* at 50.) While acknowledging that "the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths," the Court found that the prosecutor in *Adams* had excluded jurors "whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." (*Id.*) An inability to state positively whether or not their deliberations would in any way be "affected" by the possibility of the death penalty is insufficient to establish that said jurors "were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme." (*Id.*) The Court held that "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (*Id.*)

Neither this Court nor the Supreme Court has ever equated a prospective juror's initial uncertainty or even initial equivocation in meting out a death sentence as substantial impairment. Such a leap prostitutes the *Witt* standard. When a juror is initially confused or even contradictory in his responses, but ultimately states that he could reach a guilty verdict and impose the death penalty, it is error to remove him for cause. (*Gray v. Mississippi* (1987) 481 U.S. 648, 653.) Such a notion is grounded in common sense. Jurors do not ordinarily bring the specialized knowledge of burdens of proof let alone the peculiar rules that govern penalty phase

determinations. That they might evidence initial confusion and perhaps even utter some initial misunderstandings is not extraordinary but rather is to be expected. Consequently, *one* of the goals of *voir dire* is to educate and inform; only after this additional education can most laypersons offer informed opinions on some of the difficult tasks ahead of them. As the Court stated in *Gray (supra)*: "Although the voir dire of member [prospective juror] Bounds was somewhat *confused*, she ultimately stated that she could consider the death penalty in an appropriate case and the judge concluded that Bounds was capable of voting to impose it." (*Id.* (emphasis added).) In reversing based on Bounds' dismissal, the Court stated: "The juror was clearly qualified to be seated as a juror under the *Adams* and *Wainwright v. Witt* standard." (*Id.* at 657.) Rehabilitation of a juror who might appear to be substantially impaired is permitted. (*Wainwright, supra*, 469 U.S. at 431.) Indeed, the purpose of questioning is to clarify the prospective juror's state of mind. (*People v. Howard* (1998) 44 Cal.3d 375, 419 (superseded on other grounds).)

The petitioner in *Lockett v. Ohio* (1978) 438 U.S. 586 also contended that prospective jurors were excluded from the venire in violation of her Sixth and Fourteenth Amendment rights. (*Id.* at 595.) In that case, the prosecutor during *voir dire* told the venire that there was a possibility that the death penalty might be imposed. (*Id.*) He then asked whether any of the prospective jurors were so opposed to capital punishment that "they could not sit, listen to the evidence, listen to the law, [and] make their determination solely upon the evidence and the law without considering the fact that capital punishment" might be imposed. (*Id.*) Four of the venire responded affirmatively. (*Id.*) The trial judge then asked each of these veniremen, "[D]o you feel that you could take an oath to well and truly try this case... and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to

capital punishment?" (*Id.* at 595-96.) Each of the four specifically stated twice that he or she would not "take the oath" and were consequently excused. (*Id.* at 596.) The Court held that the veniremen were excluded for cause, in compliance with the *Witherspoon* standard, as they had made it "unmistakably clear... that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (*Id.*) Each of the excluded veniremen made it "unmistakably clear" that they could not be trusted to "abide by existing law" and "to follow conscientiously the instructions" of the trial judge. (*Id.*)

As this Court ruled in *In re Anderson* (1968) 69 Cal.2d 613, the improper excusal of even one juror for cause based on his or her conscientious scruples against capital punishment must result in an automatic reversal:

> [I]n no case can a defendant be put to death where a venireman was excused for cause solely on the ground he was conscientiously opposed to the death penalty. According to our understanding of *Witherspoon*, reversal is automatically required if a venireman was improperly excused for cause on the basis of his opposition to the death penalty.

(*Id.* at 619.)

D. It Was Error to Dismiss Perspective Jurors Wood and White for Cause Because Their Views Would Not Have Prevented or Substantially Impaired the Performance of Their Duties as Jurors in Accordance with Their Instructions and their Oath

Bearing in mind the applicable standard, it is difficult to understand the trial judge's decision to dismiss Prospective Juror Wood for cause. When asked by the court if he could vote for death, he replied, "You know, the only thing that I can say, like, I don't know. And it's like, an emotional thing but also a philosophical thing. *If it's a heinous crime, probably.* I don't know. But I can't just—put it in cement yes or no." (*See supra*, pp. 136-37 (emphasis added).) This is an intellectually honest individual who is struggling with a difficult issue but who ultimately concluded he could vote for the death penalty "if it's a heinous crime." And when pressed by

Ruiz as to whether he could vote death if "warranted under the facts and the law," Wood again replied, "[M]ost likely I could if it's a heinous crime." (*See supra*, p. 137.) Capital cases necessarily involve heinous crimes. A limitation to only heinous crimes is no limitation whatsoever in the capital trial arena. Furthermore and of even greater consequence, Wood gave no indication that he was "irrevocably opposed to capital punishment" or that it was "unmistakably clear" that he could not be trusted to follow the law and abide by his oath. As the Court made clear in *Adams*, to exclude a juror "where his only fault was to take [his] responsibilities with special seriousness" and who might harbor an inability to state positively whether or not his deliberations would be "affected" by the possibility of the death penalty is violative of the *Witt* standard. (*Adams*, 448 U.S. at 50.)

The trial judge, in dismissing Prospective Juror Wood, appears to have been confused about the proper standard when he stated, "[I]f a person cannot say they would be able to vote for death, that that would be proper grounds for challenge for cause." (*See supra*, p. 137.) Had the judge instead applied the correct standard and recognized that it was never established that Wood demonstrated an irrevocable unwillingness to follow the law and obey his oath, Wood would not have been excused.

Much like Prospective Juror Wood, Ms. White was struggling with her views on capital punishment. On her questionnaire she stated that she could not sentence anyone to death. However, under questioning she said, "I thought about it. I would be able to vote for the death penalty.... I don't want to condemn anybody to death, but if the evidence is overwhelming, as you say, and that has to be the sentence, then so be it." (*See supra*, p. 137.) As the Court made clear in *Gray*, a prospective juror's initial uncertainty, or even opposition, does not equate to

substantial impairment. It is the ultimate resolution of that uncertainty that is essential. (*Gray*, 481 U.S. at 657-58.)

Despite White's clear and thoughtful response that she could impose the death penalty, the prosecutor set about to seek a means to have her dismissed. However, his best effort resulted in her admission that it would be *difficult* to impose a death verdict. He asked, "Ms. White, can you come here and sentence this man to death, if you feel it's warranted?" And she responded, "I believe I would have a difficult time." (*See supra*, p. 138.) Difficult is far from "irrevocably opposed." And it was never "unmistakably clear" that she could not follow the law or abide by her oath. The judge seemingly overlooked her earlier response, that she could indeed impose death. The *voir dire* of White made it clear that she was willing and able if called upon to undertake the difficult task of following the law and obeying her oath. It was error to dismiss her.

E. Conclusion

These two prospective jurors brought an honesty and candor to the courtroom as they struggled with the difficult decision that they might be called upon to make. To dismiss them with no sense that they would or could not follow the law and adhere to their oath was an egregious mistake. One juror can be a difference maker. To dismiss either Wood or White "stacked the deck" against and thus denied Robert Williams a fair trial to which he is now entitled.

IX

ROBERT WILLIAMS' CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY WAS VIOLATED WHEN THE PROSECUTOR USED PREEMPTORY CHALLENGES TO DISMISS THREE AFRICAN-AMERICAN PROSPECTIVE JURORS BASED ON GROUP DISCRIMINATION

A. Introduction

The grounds for a peremptory challenge must be related to a specific bias on the part of individual jurors, not on group identity. Three of the successful peremptory challenges made by Prosecutor Ruiz, however, were acts of group discrimination. While Ruiz struggled to establish some legitimacy for these peremptory challenges, it is clear from the *voir dire* that they were merely sham excuses contrived to conceal Ruiz's goal of excluding African Americans from Robert Williams' jury, in violation of the Sixth, Eighth, and Fourteenth Amendments.

B. Factual Background

Prospective Jurors Fleming, Hunter and McBrayer were all African American and were all peremptorily challenged by the State. Although the defense objected that the State's challenges were not race-neutral, the judge denied the defense's *Wheeler* motions.

First, the court began its examination of Prospective Juror Fleming by inquiring as to the reason he wrote in his questionnaire that he believed the death penalty was used "too often." Fleming answered:

> Well, I feel that in a lot of situations the death penalty isn't necessary. And there have been mistakes made where people have been put on death row, and they found out that that person was not guilty. And I think that if there is an option of putting someone in prison without parole, that's a better opinion.

(RT 1424.) In response to a question as to his religious views possibly conflicting with his role as a juror Fleming said, "Well, my religious belief is that I should abide by the laws of the land. If the laws of the land are for me to choose the death penalty, and there's no other options, then I

have no other options, I have to choose the death penalty." (RT 1424-25.) Pressing the issue further, the court continued, "[C]an you imagine any situation where the aggravating factors would so outweigh the mitigating factors that you would vote for death, knowing that you had the alternative to vote for life without the possibility of parole?" Fleming answered, "Yes, there's situations." (RT 1426.) The court persisted, "And by that, you're saying that it would be extremely difficult for you to vote for the death penalty?" Fleming agreed that, "It is difficult," to which the judge asked, "Would it be extremely difficult?" Fleming responded, "Depending on the situation. If I'm not convinced that a person should die, I can't do it. I cannot vote that way." (RT 1441.)

Ruiz also questioned Fleming extensively regarding his views on the death penalty. Fleming, however, insisted that he would follow the law as instructed:

> I am against the death penalty. But in a situation—if it does come out to a situation where I feel that this person is just a person that really leaving this person in prison, it's not going to make a difference, they need to be given the death penalty, I would have to go that way.

(RT 1508.)

Fleming was not challenged for cause (RT 1506.), but rather was preemptively challenged. Ruiz stated, "[H]e is strong antideath penalty. And I believe a fair reading of his questionnaire shows that that is religious based as well." (RT 1524-25.) He further alleged Fleming's "anti law enforcement [perspective], biased [sic], the anti court system bias, when it comes to treatment of African-Americans." (RT 1525.) In apparent disregard of Fleming's consistent affirmations of his ability to vote for the death penalty, the court denied the defendant's *Wheeler* motion stating, "[H]e has a strong anti-death penalty [perspective].... [There are] sufficient reasons for preemptory challenge without the issue of race involved." (RT 1525-26.)

Prospective Juror Hunter was also peremptorily challenged by the State. Initially, the court was concerned about some of Hunter's answers on his questionnaire. The court asked, "[O]n the racial prejudice issue, you checked 'No,' you never had any bad experiences, but then the next one you checked that you're mildly racial attitude or prejudices [sic]. Can you explain that, sir?" Hunter explained, "I think I marked the wrong one. I don't have any prejudice." (RT 1339.)

The court further inquired about a questionnaire response in which Hunter indicated that he had an uncle doing prison time for drug charges. (RT 1412.) The court asked, "And [juror questionnaire] number 66, 'How do you feel African-Americans are treated by the criminal justice system?' You said, 'Unfairly, unjust.' Can you explain that, sir?" Hunter replied, "Family history, that's about it... Uncles and, like, cousins were unjustly prosecuted. That's it." (RT 1359.) The court asked whether this was something which he "[knew] from personal experience," to which Hunter replied that he had "[j]ust talked to them," that he was not "aware of the circumstances," and that they had only given him "minimal details." (RT 1359-60.) The court explained to Hunter that many people who get convicted think that they were treated unfairly, and asked Hunter, "[D]o you know enough about the situation to know whether they were truly treated unfairly...?" Hunter replied, "Probably their [his relatives'] bias... since they thought they were wrongly convicted that that's why I believed it, but it might be untrue." (RT 1360-61.) To make the point perfectly clear, the court reiterated, "So in reality you don't really know?" Hunter agreed, "Yeah, I don't really know." (RT 1361.)

The court's final question addressed whether Hunter harbored any bias on account of his race and asked, "Would that [your being African-American] affect your ability to be fair to both

the People and the defendant if the defendant's African-American?" Hunter answered, "No, it would not." (RT 1361.)

Upon Ruiz's opportunity to conduct his *voir dire* of Hunter, Ruiz asked, "[C]an you trust this system enough to make a life or death decision and vote this person to death, if you feel it's warranted on the facts and the law?" Hunter answered, "Yes." (RT 1401.) Nevertheless, Ruiz preemptively challenged Hunter, focusing solely on Hunter's questionnaire responses and ignoring his later retractions under court questioning. Ruiz claimed, "I am very nervous about having an individual on my jury who has an uncle doing prison time for drug charges.... [H]is answer to whether or not African-Americans are treated fairly... was 'rarely.'" (RT 1412-13.) Cormicle responded:

> [H]is explanation as to why he would say [his cousins and uncles were] unfairly and unjustly prosecuted, once he realized his error of his own analysis, which was just relying on the word of his relatives as opposed to really thinking about [it]... I think he did come to the realization that his initial position was erroneous, that he should not have made such a blanket statement without actually having analyzed the circumstances of these statements that were made about his relatives.

(RT 1415.) The court agreed with Cormicle that "Mr. Hunter did, in fact, change his answers in light of my questioning of him, that especially about the uncles and the cousins," but then denied the *Wheeler* motion anyway:

> I think these reasons [Ruiz's argument] are good enough to defend against a *Wheeler* motion. And I would deny the *Wheeler* motion, with the caveat that I'm kind of operating in the blind here. But I would expect Mr. Ruiz to use the same standards on evaluating a Caucasian speculative juror as he does Mr. Hunter.

(RT 1416.)

The third challenged juror, McBrayer, indicated on his questionnaire that he had experienced racial prejudice. Under questioning by the court he said, "Well, in America race prejudice exists, and as a black person or minority person growing up, you usually experience it,

and I have experienced it. And it's no secret. It's a fact of American life." The court asked whether this had affected him such that he was distrustful of non African-Americans, to which he replied, "It's very—no, it hasn't because you have to depend on white lawyers, white restaurant people. I mean, the larger society you depend on them every day." The court further inquired, "But your feelings don't run so deeply that you would be prejudiced against Mr. Ruiz or Mr. Cormicle or their side simply because of their race?" McBrayer answered, "No." (RT 1364-75.)

Ruiz asked McBrayer, "[C]an you trust this system of prosecutors that want to convict people regardless of the evidence?[138] Can you trust this system enough to vote for the death of Mr. Williams?" McBrayer responded, "Yes." (RT 1401.) Ruiz first challenged McBrayer for cause, stating that he "talks about... prosecutors trying to convict regardless of evidence.... I submit that that man is so hostile to the judicial system and prosecutors and law enforcement that he cannot give the people a fair trial." (RT 1408.)

The court denied Ruiz's challenge for cause stating, "I questioned him probably as much or as long as anybody... I've listened carefully to his answers. And I don't think I can... grant a challenge for cause.... His answers were sufficient that I can't, in good conscious under the law, grant a challenge for cause." (RT 1408-09). Ruiz then challenged McBrayer preemptively, on his alleged bias against law enforcement. (RT 1419.) Cormicle brought a *Wheeler* motion which the court denied, finding that there were race neutral reasons for the prosecutor's challenge stating, "[T]here are more race neutral reasons to challenge Mr. McBrayer that we went over on the

[138] Ruiz's question was referring to an answer in McBrayer's questionnaire, in which he had stated the three most important problems in the criminal justice system are "prosecutors who try to convict regardless of guilt, overcrowding of prisons and plea bargaining." McBrayer explained that his opinion stemmed from "media reports that in some cases it's a tactic for prosecutors to withhold evidence that could even bring about nonconviction of a particular person that they're prosecuting" because some prosecutors "receive their reputation and their career status based on whether or not they win cases." (RT 1370.)

challenge for cause than there is on Mr. Hunter. So I would deny the motion for him also." (RT 1418-19.)

C. Use Of Preemptory Challenges To Remove Prospective Jurors Based On Race Discrimination Is Unconstitutional And Constitutes Reversible Error.

In *Batson v. Kentucky* (1986) 476 U.S. 79 (overruled in part), a black defendant was convicted by an all white jury. (*Id.* at 83.) The trial judge permitted the prosecutor to use his peremptory challenges to strike all four African Americans on the venire. (*Id.*) Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated the defendant's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. (*Id.*) In denying Batson's motion, the trial judge improperly claimed the parties were entitled to use their peremptory challenges to "strike anybody they want to." (*Id.*)

The Court in *Batson* noted that "although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome'" of the case to be tried, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (*Id.* at 89 (quoting *United States v. Robinson* (Conn. 1976) 421 F. Supp. 467, 473).)

The *Batson* Court noted that, while the burden is on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination, "total or seriously disproportionate exclusion of Negroes from jury venires... is itself such an unequal application of the law... as to show intentional discrimination." (*Id.* (quoting *Washington v. Davis* (1976) 426 U.S. 229, 242).) Under *Batson*, "once the opponent of a peremptory challenge

has made a prima facie case of racial discrimination [step one], the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation [step two]. If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination [step three]." (*Purkett v. Elem* (1995) 514 U.S. 765, 767; *see also Hernandez v. New York* (1991) 500 U.S. 352, 358-59 (plurality opinion; *id.* at 375 (O'Conner, J., concurring).)

The court's decision in *Powers v. Ohio* (1991) 499 U.S. 400, partially overruled *Batson* by eliminating the *prima facie* requirement of the first prong of the *Batson* test, which improperly considered whether the race of the excluded juror(s) was the same as that of the defendant. (*Id.* at 409-10.) Courts should also consider the persuasiveness of the justification tendered by the prosecution during step two of the *Batson* analysis; the prosecutor's explanation need only be clear, reasonably specific, and related to the case at hand. (*Purkett*, 514 U.S. at 768.) Instead, persuasiveness of a race-neutral explanation is only relevant upon reaching step three of the analysis. (*Id.*; *Batson*, 476 U.S. at 98.) Terminating the inquiry at step two of the analysis, no matter how implausible or fantastic the prosecutor's explanation, is an improper application of the *Batson* standard. (*Purkett*, 514 U.S. at 768.) Such a modification would "violate[] the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Id.*; *see also St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 511.)

D. Prosecutor Ruiz Preemptively Challenged Three African-American Prospective Jurors Based on Group Discrimination.

Prosecutor Ruiz's alleged rationale for his preemptory challenge of prospective juror Fleming was that he harbored a strong anti-death penalty perspective. Ruiz explained his "strategy":

> If there is any juror that indicates on that check list [referring to Ruiz's own methodology] that they're either moderately antideath penalty or strong antideath penalty, [and] I've got a preemptory challenge left, I'm going to make it as to that juror.
>
> . . . .
>
> And there are other reasons that I think are valid as to Mr. Fleming, the anti law enforcement, biased [sic], the anti court system bias, when it comes to treatment of African Americans.
>
> . . . .
>
> But I think it is enough that he's said in the questionnaire, and that's affirmed in questioning, that he is strong anti death penalty. And... that is religious based as well.

(RT 1524-25.)

While Fleming did admit that he was against the death penalty, he also asserted throughout the *voir dire* that he could remain impartial, and vowed to "abide by the laws of the land," even if that law would demand the death penalty. He further agreed that he could "imagine [situations] where the aggravating factors would so outweigh the mitigating factors that [he] would vote for death, knowing that [he] had the alternative to vote for life without the possibility of parole." He ultimately asserted that if he felt the defendant "is just a person that really leaving this person in prison, it's not going to make a difference, they need to be given the death penalty," he would vote for such a verdict in that instance. (*See supra* pp. 144-45.)

Prospective Juror Fleming's consistent answers illustrated a person who, while struggling with capital punishment, was nonetheless willing to follow the law and abide by his oath. For the prosecutor to assert that Fleming's views regarding the death penalty was a legitimate race-neutral reason for exclusion is to stretch the record of his *voir dire* responses beyond recognition. The prosecutor's rationale was a sham to exclude this African American from Robert's jury.

Ruiz justified his preemptory challenge of prospective juror Hunter by explaining his use of a "three strikes system": "If the individual hits what I think are three negative answers, regardless of race, the three strikes and you're out, basically are the wisdom of my approach."

Among the "strikes" against Hunter, Ruiz cited that (1) Hunter had an uncle doing prison time for drug charges; (2) Hunter answered in his questionnaire that African Americans are "rarely" treated fairly in our courts; (3) Hunter had an uncle who was murdered [Ruiz claimed this was not one of his "strikes" but that it remained a question]; (4) Hunter had "an agenda when it [came] to black males facing the system;[139] and (5) Hunter claimed in court that he had cousins and uncles unjustly prosecuted. (*See supra* pp. 146-47.)

However, as Cormicle argued, under further questioning Hunter did come to the realization that his initial position that African Americans were treated unfairly was erroneous and that he should not have made such a generalization without actually having analyzed the circumstances of his relatives' circumstances. Hunter assured the court that his "ability to be fair to both the People and the defendant if the defendant's African-American" was unimpaired by previous experiences with the criminal justice system. The court, in denying Cormicle's *Wheeler* motion, admitted it was "kind of operating in the blind." This is undoubtedly so, as Hunter not only stated, "I don't have any prejudice," but also answered in the affirmative to the question of whether he could "trust this system enough to make a life or death decision and vote this person to death," if he felt it was warranted on the facts and the law. (*See supra* pp. 146-47.)

Once again, Ruiz alleged that his rationale for challenging this African American had no relation to race, but rather to Hunter's concerns that African Americans were treated unfairly by the criminal justice system. Yet Hunter's responses on further reflection demonstrated an acknowledgement that his views on racial "fairness" were unfounded and even erroneous. Given

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[139] Ruiz claimed this was an inference he made based on Hunter's answers of "not applicable" to questions on the questionnaire about his general feelings regarding the death penalty and life in prison without the possibility of parole, and whether the death penalty is used too often, too seldom or about right. (RT 1413.) Cormicle countered that the lack of answers on the series of questions the first time around was of little importance, as Hunter had filled out the questionnaire the second time around, with answers that seemed fairly neutral. (RT 1414.)

his candid and thoughtful responses and his assurances that he could be fair to both sides, there was no legitimate race-neutral justification to challenge this juror.

Ruiz claimed that prospective juror McBrayer was "so hostile to the judicial system and prosecutors and law enforcement that he cannot give the people a fair trial." The prosecutor was engaged in hyperbole. Under questioning, McBrayer acknowledged a sad reality that "in America race prejudice exists...." He then said he was not distrustful of non African Americans and that his "feelings don't run so deeply that [he] would be prejudiced" toward either side. This was an honest man recognizing an obvious reality and offering thoughtful assurances that he could follow the law and his oath. Ruiz's overstatement of McBrayer's views should not have carried the day with the trial judge. There was no legitimate race-neutral basis to challenge and excuse this man. (*See supra* pp. 147-49.)

E. Conclusion

The State's misuse of preemptory challenges to purge African Americans from the trial of this African American defendant violated that fundamental right to a trial by jurors drawn from a representative cross section of the community. This Court should recognize the prosecutor's efforts for what they were: pretextual covers for a more sinister purpose. Robert Williams demonstrated that three of the prosecution's successful preemptory challenges were exercised against African American jurors on the ground of group bias alone. This infringement of a fair and impartial jury violated a constitutional right, constituting reversible error. Accordingly, the trial court's reversible error entitles Robert Williams to a new trial.

X

DEATH THREAT AND GANG ASSOCIATION TESTIMONY UNDULY PREJUDICED ROBERT WILLIAMS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Introduction

Evidence of death threats and gang affiliation were put before Robert Williams' capital jurors for no reason other than to taint him as a violent and dangerous man in the minds of his jurors. Despite the prosecutor's protestations that such evidence had some purpose other than to predispose the jurors to fear and loath Robert, this Court should recognize the prosecutor's efforts and the trial court's acquiescence to this inflammatory and damning evidence for its true intent and impact and find it violative of Robert Williams' ability to receive a fair trial in violation of the due process clause of the 14th Amendment.

B. Factual Background

1. The Death Threats

During the prosecutor's direct exam of Lofton, the following testimony was elicited presumably to explain that Lofton's fear of testifying was partly due to having received death threats:

> Q: Now, is there another reason why you're nervous about testifying in this case?
> A: There's been death threats.
> Q: Okay. Over the last seven years have you received threats on your life?
> A: Yes, I have.
> Q: And have these threats gotten to you through third persons or independent mediaries?
> A: Yes, they have.
> Q: And are you in fear for your life as you testify in this case?
> A: Yes, I am.
> Q: Does that fear also make it hard to remember exactly what happened and what happened next?
> A: Yes.

(RT 2287.)

On cross-examination, Lofton testified that none of the alleged threats were received directly; rather, they were relayed to her by third parties:

> Q: I believe you testified on direct that you had received death threats in this case; is that correct?
> A: That's correct.
> Q: Was this a threat that you had received... as through a third party; correct?
> A: Correct.
> Q: You did not receive anything directly; correct?
> A: That's correct.
> Q: And which individuals relayed this information to you?
> A: One was relayed to me by Mr. Thompson, [Detective] Gary Thompson.
> Q: Was there any other threat?
> A: Yes
> Q: And who was that relayed to or relayed by?
> A: My sister.
> Q: And was that Tanya?
> A: Yes.
> Q: Was there any other threat?
> A: Yes
> Q: And who was—who relayed that to you?
> A: The person begged me not to reveal their name.

(RT 2489-91.)

Cormicle, concerned about the inflammatory nature of the death threat evidence, requested that the judge instruct the jurors, "You have received evidence of threats to a witness. If you believe that evidence to be true you must limit that evidence solely to considering the effect on the demeanor of that witness." (RT 3050.) The request was denied and ultimately the following stipulation was entered, "There is no evidence that Robert Williams made a threat to any witness in this case." (RT 3063.)

To be clear, Lofton testified to threats relayed to her by others from some unidentified person or persons some seven years prior to her testimony.

Ruiz maintained that this "death threat" testimony was essential to explain Lofton's demeanor on the stand and more importantly insulate her from any cross examination that points

out the many discrepancies in her account of the events of July 15, 1995. Ruiz further reasoned, "She's got a lot going on in her head... she's worried about her life too. She feels like a hunted animal. So I would not be attributing these threats to Mr. Williams." (RT 2016.) It must be emphasized that Ruiz had previously blocked the defense access to any meaningful discovery of Lofton (*see supra* Argument III.) and had successfully barred the defense from impeaching her with her prior criminal conduct. (*See supra* Argument V.)

Cormicle, however, only countered that "death threat" testimony would "prejudice Mr. Williams to such an extent because the jury can only be led to believe that he had something to do with it, if not entirely to do with it, even though there's two other possible options [there were allegedly three individuals involved in the home invasion and a host of individuals motivated to harm Gary] and maybe more." (RT 2014.) Cormicle further argued that,

> unless she actually attributes it [the death threats] to somebody else, like to Mr. Walker's contingent or connection—unless we attribute it to somebody specifically other than Mr. Williams, the jurors are going to be left with the impression, or at least the option that, well, it is Mr. Williams on trial... The court would not let this witness testify to something unless it was relevant to this proceeding.

(RT 2017.)

The court overruled Cormicle's objection and allowed in the testimony of the death threats, finding that its probative value outweighed the prejudicial effect. The court reasoned that "a threat on somebody's life, no matter who makes it... that threat does affect one's ability to recall. It effects one's ability to think about it. I think a death threat has tremendous impact on a witness's demeanor, ability, especially with the facts that we know." (RT 2018.)

2. Gang Association

Ruiz called witness Robert Scott, a long-time friend of Gary Williams, who testified that he knew Gary like a brother; they grew up together and robbed banks and credit unions together.

(*See supra* SOF, section B.) Scott testified about an incident which occurred on July 4, 1995, eleven days prior to the murders, in which Robert allegedly held a handgun to Gary's neck and said, "I know you niggers are out there hitting these licks. And I want my share of the money. And if I don't get my share of the money, I'm going to kill you, him [Scott], and anybody else—anybody else I got to kill...." (RT 2542.) Scott testified that he felt Gary's life and his own life were threatened during this incident (RT 2596.) Scott, however, did not contact the police about the threat until days after the murders and only then to receive sentencing consideration for his involvement in a July 11, 1995 credit union robbery. (RT 2603.)

In order to establish that Gary and Scott took the alleged "threat" seriously, Ruiz proffered that Scott could testify to Robert's alleged gang affiliation. However, concerned about the prejudicial impact of such testimony, Ruiz told the court that he had instructed Scott prior to his testimony that "he was not to refer to the defendant being a gang member or being a gangster." (RT 2748.) Ruiz suggested that the term "jacker" should be substituted for gangster, reasoning that "jacker" was less prejudicial. Ruiz argued that the "jacker" characterization was essential in explaining Scott's and Gary's fear of Robert. (RT 2750.)

Cormicle countered that the change from "gangster" to "jacker" would not lessen the prejudicial impact. (RT 2749.) Cormicle maintained that "the impression's going to be left that this is something that the witness knows... that my client had done all of these things—that he is ruthless, he will take out anybody...." (RT 2751-52.) Cormicle also noted that Scott "does not have any personal knowledge of any event with respect to Robert Williams" and that any testimony from Scott regarding Robert's alleged criminal conduct was "not based on anything that he had seen. It would have to have been based upon some sort of, one, speculation or, two, hearsay." (RT 2749-50.)

Pursuant to Evidence Code § 352, the court held that the probative value of referring to Robert as a "jacker" outweighed the prejudicial effect with "the admonition that it's not being offered for the truth of the matter, but only as to the state of mind of this witness...." (RT 2752.) Scott accordingly testified that Robert Williams "was a jacker. He—he was crazy, you know." (RT 2758.) Ruiz attempted, during his direct of Scott, to clarify what that term meant:

> Q: When you use the term "jacker," do I understand correctly... that he was somebody who would just rip off anybody?
> A: He would jack anybody—
> Q: Okay.
> A: --for anything.

(RT 2758.)

On recross-examination by Cormicle, it was apparent that "jacker" meant much more than merely stealing:

> Q: Mr. Scott, I guess by that definition you were a jacker too, then; correct?
> A: Well, no. No.
> Q: Going into federal credit unions and committing robberies that you were convicted of, does not qualify you as a jacker?
> A: Well, no, they don't.

(RT 2759.)

This testimony coupled with Scott's earlier testimony, that he and Gary were "little old bank robbers. We wasn't into, you know, going out and shooting people, and, you know, killing people" (RT 2747.), makes it clear that Scott was using the term "jacker" as a substitute for gangster, indicating to the jury that, while he was a bank robber, he was not a "jacker" because he did not kill people, but that Robert did kill people.

C. Allegations of Anonymous Death Threats, and Hearsay Testimony of Gang Affiliation May Unduly Prejudice An Accused

1. Death threats

Two issues surface in connection with testimony regarding a death threat that was never shown to have been authorized by the accused. The first is the weighing of whether the probative value substantially outweighs the prejudice. The second is the attribution concern which could lead to base conjecture that the accused made the threat without any means available to the defendant to satisfactorily rebut the conjecture.

Historically this Court has given ample guidance as to both concerns. As to the probative/prejudicial balancing, this Court in *People v. Green* (1980) 27 Cal.3d 1, 26 (reversed in part on other grounds), held that the trial court had erred in admitting testimony of an alleged death threat made against the murder victim without making an explicit determination that the risk of undue prejudice to Green did not substantially outweigh the probative value of the evidence. The witness testified that the murder victim had told her she had a conversation with Green in which he threatened he would kill her. (*Id.* at 23.) Green invoked the discretion vested in the court by Evidence Code § 352 to exclude this testimony. (*Id.* at 24.) Without discussion, the trial court denied defendant's motion and permitted the testimony with the admonishment to the jurors that they could not consider the statement as proof of its truth, but could consider it only for the limited purpose of showing the victim's state of mind. (*Id.*)

This Court noted that § 352 requires that the record "affirmatively show that the trial judge did in fact weigh prejudice against probative value" in order "to furnish the appellate courts with the record necessary for meaningful review" and "to ensure that the ruling on the motion 'be the product of a mature and careful reflection on the part of the judge.'" (*Id.* at 25 (quoting *Mercer v. Perez* (1968) 68 Cal.2d 104, 113).) This Court further conceded that the

record did not show that the trial court discharged its statutory duty by weighing the statement's potential for prejudice against its probative value. (*Id.* at 24.) Recognizing that "[t]estimony that a defendant threatened his victim prior to committing the crime charged is a particularly sensitive form of evidence of the victim's state of mind," this Court held that its admission was error. (*Id.* at 25.)

Given the mean and prejudicial nature of death threat testimony, the attribution concerns merit close attention. In *People v. Weiss* (1958) 50 Cal.2d 535, 553 (superseded on other grounds), this Court found the trial judge to have erred in allowing hearsay testimony of an alleged threat received by the witness via telephone from an unidentified caller. The trial court made a weak attempt to dispel the prejudicial inference by informing the jury that there was no reason to believe that the call was authorized by the defendant. But as this Court later noted in *People v. Mason*, referring to the *Weiss* case, "the inference persisted, however, that the defendant, himself, had been responsible for the threat." (*People v. Mason* (1991) 52 Cal.3d 909, 946-47 (discussing *Weiss*).) In *Weiss*, this Court found the testimony as to the telephone call inadmissible:

> The record is barren of any showing that the call was connected with or authorized by any defendant. The People assert that the evidence was admissible to show that the witness Rogers had been 'implicitly intimidated'... [but] the trial court had no more basis for assuming that the call came from an agent of defendants than from an agent of the prosecution.

(*Weiss*, 50 Cal.2d at 553.) The Court further stated:

> If the attempt [to suppress witness testimony through threat] is made by a third person, not in the presence of the defendant or shown to have been authorized by him, it should at once be suspect as a mere purporting attempt to suppress evidence and in truth an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender.

(*Id.* at 554.)

In *People v. Terry* (1962) 57 Cal.2d 538, the trial court allowed into evidence a telegram, which the prosecutor argued "can certainly be construed as a threat or an admonition to [witness] (Wilson) to keep his mouth shut." The prosecutor argued that the sending of the telegram corroborated the witness's story of a threat he received from the defendant, drawing the conclusion that he "is a cunning, cruel individual, regardless of how many tears he sheds." The prosecution produced a telegraph-office employee who identified the telegram as being sent by the wife of the brother of defendant's wife. This Court held the admission of the telegram to be error, as merely sending the telegram proved nothing as to its authorization, and that its admission into evidence could "do no more than create a conjecture, surmise of suspicion that the act may have, because it could have, been done. The life of even the most hardened criminal should not be staked on such a flimsy foundation." (*Id.* at 566-67.)

Conversely, in the aforecited *Mason*, this Court found no prejudice to the accused as there was specific and emphatic disavowal of the defendant's connection with any threat. This Court found that "[the threatened witness] expressly testified that [the] defendant was not connected with the threats in any way." (*Mason*, 52 Cal.3d at 947.) Furthermore, the prosecutor in *Mason* "made diligent efforts to ensure that no prejudicial inference arose.... [The threatened witness] testified five times, unambiguously, that defendant was not connected with the threats in any way, directly or indirectly." (*Id.*) No such protections were afforded Robert by the prosecutor or the trial court against the jury's likely supposition that Robert was somehow responsible for the threats against Lofton.

2. Gang Association

Evidence of a defendant's criminal disposition is inadmissible to prove he committed a specific criminal act. (Cal. Evid. Code § 1101; *see also People v. Ruiz* (1998) 62 Cal.App.4th

234, 240 ("[E]vidence of gang membership should be excluded if the evidence is only relevant to prove a defendant's criminal disposition.").) This Court has recognized that "admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) Due to the volatile impact of any gang involvement, courts must be particularly vigilant in analyzing whether the probative value of such inflammatory evidence substantially outweighs its prejudicial effect. (Cal. Evid. Code § 352.).

In *People v. Cardenas* (1982) 31 Cal.3d 897, this Court reversed the defendant's conviction of attempted murder, attempted robbery, and assault with a deadly weapon, holding that the trial court had abused its discretion by allowing the prosecution to introduce evidence that the defendant and his witnesses were affiliated with the El Monte Flores gang. (*Id.* at 906.) This Court found that the testimony "made it a near certainty that the jury viewed [the defendant] as more likely to have committed the violent offenses charged against him because of his membership in the Flores gang." (*Id.* at 904.) "When a[n] [Evidence Code] section 352 objection is raised, the trial court 'must weigh the admission of [the challenged] evidence carefully in terms of whether the probative value of the evidence is greater than the potentially prejudicial effect its admission would have on the defense.'" (*Id.* (citing *People v. Perez* (1981) 114 Cal. App. 3d 470, 478).) If the prejudicial effect outweighs the probative value, the trial court should exclude the evidence. (*Id.*)

In *Cardenas*, the prosecutor maintained that the "gang evidence" was offered to establish possible bias of defense witnesses. However, the prosecution had already established through other testimony that the defendant and defense witnesses had lived in the same neighborhood and had the same circle of friends. (*Id.*) Furthermore, the fact that the defendant and his witnesses

were members of the Flores gang was cumulative, creating the likelihood that the jury would improperly infer that the defendant had a criminal disposition. In reversing Cardenas's conviction this Court stated, "[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant." (*Id.* at 905 (citing *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242).)

Similarly, in *Dawson v. Delaware* (1992) 503 U.S. 159, the Supreme Court vacated Dawson's murder conviction and remanded the case after finding Dawson's First Amendment rights to have been violated by the admission of evidence associating him with the Aryan Brotherhood, as "the evidence proved nothing more than [defendant]'s abstract beliefs." (*Id.* at 166.) The Court emphasized that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" and concluded that the Aryan Brotherhood evidence was likely employed "simply because the jury would find these beliefs morally reprehensible." (*Id.* (citing *Texas v. Johnson* (1987) 491 U.S. 397, 414).)

The Court acknowledged that evidence concerning a defendant's associations might be relevant in proving certain aggravating circumstances where "the evidence showed that the defendant's membership in the Black Libertarian Army, and his consequent desire to start a 'racial war,' were related to the murder of a white hitchhiker," but distinguished *Dawson*, where both the murder victim and the defendant were white, and "elements of racial hatred were therefore not involved in the killing." (*Id.* at 166 (citing *Barclay v. Florida* (1983) 463 U.S. 939, 942-44).)

It is well-established that evidence of gang association "is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) However, it is also well-established that

"[g]ang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Memory* (2010) 182 Cal.App.4th 835, 859 (citing *In re Wing Y.* (1977) 67 Cal. App. 3d 69, 79).)

The Ninth Circuit in *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, traced the case holdings which have firmly established that evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error:

> Evidence of gang membership may not be introduced... to prove intent or culpability. In this regard, we have stated that testimony regarding gang membership "creates a risk that the jury will [probably] equate gang membership with the charged crimes." We further stated that where... "gang" evidence is proffered to prove a substantive element of the crime (and not for impeachment purposes), it would likely be "unduly prejudicial."

(*Id.* at 1055-56 (citing *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342-43 (overruled on other grounds) (reversing the conviction and holding that evidence of membership in a gang cannot serve as proof of intent, because, while someone may be an "evil person," that is not enough to make him guilty under California law); *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1244-46 (reversing the conviction and stating that it would be contrary to the fundamental principles of our justice system to find a defendant guilty on the basis of his association with gang members); *United States v. Hankey* (9th Cir. 2000) 203 F.3d 1160, 1170).)

The *Lockyer* Court followed the precedence and found that the use of gang membership evidence implied "guilt by association," and therefore held it to be impermissible and prejudicial. (*Id.*)

D. The Cumulative Impact of the Threats, and the Reference to Gang Affiliation Embodied in the Term "Jacker" was Unduly Prejudicial in That They Depicted the Accused as Predisposed to Violent Behavior.

The death threats or the gangster/jacker references standing alone may well have been sufficient to unduly predispose the jurors to believe Robert was a violent man to be feared and loathed thus denying him the most basic of rights: to be tried on facts rather than the fears and emotions of the jurors. However, when the two are set one after the other by the orchestrated efforts of the prosecutor, they compel a finding that but for their inclusion, the verdict would have been more favorable to Robert.

The two concerns that generally arise when death threat testimony is being evaluated, attribution and inflammatory impact, are not central to the discussion in this case. It was clear during trial that such testimony if admitted would constitute error, and hence any claim of legitimacy must rely on the stipulation that "there is no evidence that Robert Williams made a threat to any witness in this case." (RT 3063.) This stipulation, however, failed to insulate the prosecutor's gamble when he introduced this testimony. The inflammatory impact of this woman claiming death threats, especially in such a mean and grisly case, was substantial. And any reasoned analysis, despite the benign stipulation, is certain to attribute these anonymous third party threats to Robert. One need look no further than Ruiz's explanation for admissibility to comprehend the pretext for admission. Ruiz somehow convinced the trial judge that this volatile testimony was not presented to inflame the jurors against Robert, but rather to offer some explanation for Lofton's nervousness while testifying. The disingenuous nature of his rationale aside, by the time of her testimony, some seven years post event and better than six years from the time of the alleged threats, Lofton had testified twice previously—at the preliminary hearing and at Walker's trial; her testimony on those occasions, while contradictory, was not incoherent

and offered no evidence of nervousness. This Court should recognize that, with this implied connection between Robert, gangs, and the death threats, the jurors would view Robert as a dangerous and violent man. Contrary to the trial court's finding, the prejudicial effect of these alleged third party threats cannot be outweighed by the scant probative value of its explanation for Lofton's demeanor on the witness stand. (*See supra* pp. 155-57.)

Turning to the gang association evidence, it is instructive to reference Ruiz's concern that Scott not testify about "any crimes he may have heard that [Robert] committed because... that would be more prejudicial than probative." (RT 2748.) Ruiz, recognizing that he was treading on tenuous ground, was of the belief that if the word gang was somehow purged from Scott's characterization of Robert all would be well. He believed that substituting "jacker" would somehow convey a less sinister, less ominous portrayal of Robert. And yet when Scott was asked to explain what "jacker" meant—the explanation made "jacker" even *more* threatening than gangster. When viewed in the context of Scott's testimony, the inference was that "jackers" were "crazy," that unlike bank robbers who would not "shoot people" and "kill people," "jackers" would shoot and kill people. In attempting to avoid at least some of the substantial prejudice of gang affiliation, the prosecutor's efforts backfired and actually elevated the prejudicial impact. (*See supra* pp. 157-59.)

Beyond the miscalculation of "jacker" there is a question of Scott's competence to even venture a characterization of Robert. Cormicle argued that Scott did not have any personal knowledge of Robert related to any alleged gang affiliation or criminal conduct and that his testimony was speculative and at best based on hearsay. And while Cormicle, Ruiz, and the judge were in agreement that this testimony was prejudicial, the judge nevertheless allowed it. Rather than weigh the prejudicial effect against the probative value as Evidence Code § 352

demands, the judge perfunctorily asserted its "probative value as to the state of mind of [Scott] and Mr. Gary Williams, at least at the time of the [alleged] threat." (RT 2752.) A proper balancing, however, makes clear that the prejudice to Robert from implicating him in gang activities is much more substantial than the value of attributing Scott's fear during an alleged threat to hearsay. (*See supra* pp. 157-59.)

E. Conclusion

The cumulative impact of the death threat testimony and the jacker/gangster characterization so tainted Robert in the minds of the jurors that he could not receive a fair trial. Beyond the blatantly prejudicial impact of the alleged death threats was the tenuous nature of the source of the alleged threats. They were anonymous and delivered to third parties. Their probative value was accordingly low. Furthermore, the court's rationale for accepting the threats was weak in that they helped explain a witness's inconsistent account of events. Accordingly, Robert's conviction should be vacated and remanded, and the death threat and the gang association testimony should be suppressed upon remand.

XI

THE COURT ERRED IN FAILING TO LIMIT THE JUROR'S USE OF THE DEATH THREAT TESTIMONY

A. Introduction

Compounding the imprudence of the trial judge's decision to admit Conya Lofton's "death threat" testimony (*see supra* Argument X), the judge refused to instruct the jury on the limited purpose for which this testimony was allowed. Both counsel stipulated specifically that the "threat" testimony be limited to its effect on Lofton rather than to permit any inference that Robert was involved in the purported threat. The trial court, in denying defense counsel's request for a limiting instruction, failed to prevent the impermissible use of evidence during the jury's deliberations and, as a result, denied Robert a fair trial in violation of the Fourteenth Amendment.

B. Factual Background

Toward the close of the guilt phase, Cormicle requested Special Jury Instruction #1: "You have received evidence of threats to a witness. If you believe that evidence to be true you must limit that evidence solely to considering the effect on the demeanor of that witness." (RT 3047.) While the court admitted, "[t]hat's a true statement" and further acknowledged that "[t]here is no evidence that the defendant Robert Williams was responsible for those threats," the judge expressed his concern over this instruction wondering, "[I]s that a jury instruction or is that commenting on the evidence?" (RT 3047.) Cormicle responded, "I thought it was an appropriate limiting instruction, which we do with other types of evidence." (RT 3047-48.) The court admitted, "I don't think it's improper," but again articulated its concern about "the last sentence that sounds like I'm making a comment on the evidence, rather than giving them how

they can consider what they heard." (RT 3048.) Ruiz stated, "[W]hile I don't like instructing the jury that [Robert] didn't have anything to do with it, maybe it is just more a caution to do it the way Mr. Cormicle is suggesting. I would waive—I won't object, that way I'll just argue." (RT 3048.) Still, the court insisted that such an instruction would amount to "commenting on the evidence," and instead suggested "entering into a stipulation that there is no evidence that the defendant Robert Williams made a threat to any witness in this case." (RT 3049.) In the face of the judge's position, Cormicle withdrew Special Instruction #1 in favor of the stipulation favored by the court: "There is no evidence that Robert Williams made a threat to any witness in this case." (RPT 3049, 3063.)

C. A Trial Court Is Required Upon Request Of Counsel To Restrict Evidence To Its Proper Scope and Instruct The Jury Accordingly

Upon counsel's request of proposed jury instructions, the court "must decide whether to give, refuse, or modify the proposed instructions." (Cal. Penal Code § 1093.5.) Under the doctrine of limited admissibility, "[w]hen evidence is admissible... for one purpose and is inadmissible... for another purpose, the court *upon request shall restrict the evidence* to its proper scope and *instruct the jury accordingly*." (Cal. Evid. Code § 355 (emphases added).) While the timing of the instruction is within the judge's discretion, the court is required "to give appropriate limiting instructions if properly requested." (*People v. Dennis* (1998) 17 Cal.4th 468, 533.) Failure to give a properly requested limiting instruction constitutes error by the court. (*People v. Sweeney* (1960) 55 Cal.2d 27, 42.) If it is reasonably probable that, in the absence of the limitation on the evidence provided by such an instruction, "a result more favorable to the defendant would have resulted," then the error is reversible. (*People v. Miranda* (1987) 44 Cal.3d 57, 83; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Not only may the trial judge "give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance," (Cal. Penal Code § 1093) the court may also "*make any comment on the evidence* and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (Cal. Const. art. VI, § 10 (emphasis added).) In *People v. Rodriguez* (1986) 42 Cal.3d 730, this Court overruled the prohibition of judicial comment laid down previously in *People v. Cook* (1983) 33 Cal.3d 400, thereby reestablishing the trial judge's privilege to summarize the evidence and to analyze it critically. (*Rodriguez*, 42 Cal.3d at 765-66.) This Court cited the 1934 amendment to the California Constitution which restored the power of comment in broad terms: "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (*Id.* at 766 (quoting Cal. Const. art. VI, § 10).) The amendment "sought to place 'more power' in the judge's hands 'and [to] make him a real factor in the administration of justice... [not] a mere referee or automaton as to the ascertainment of the facts....'" (*Id.* at 766 (citing *People v. Ottey* (1936) 5 Cal.2d 714, 723).)

Appellate courts have taken notice that this language "imposes no limitations on the content or timing of judicial commentary, deferring entirely to the trial judge's sound discretion." (*Id.*) The only requirement is that:

> [J]udicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.

(*Id.*) Appellate courts therefore have the duty to "evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury." (*Id.* at 770.)

In *People v. Proctor* (1992) 4 Cal.4th 499, this Court again upheld a trial judge's comments on the evidence to a jury, noting the permission granted by the Constitution of California to comment on the evidence. The trial judge had explained to the jury before continuing their deliberations that it would provide some comments "for the purpose of assisting [them] in deciding [the] case." (*Id.* at 540.) The trial court first emphasized, "you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses." (*Id.* at 540.) The court then stated, "[T]here have been several statements attributed to the defendant out of court concerning his whereabouts and activities.... These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court...." (*Id.* at 540.) The judge expressed his "difficulty in believing the testimony of the defendant," but cautioned, "You should disregard any or all of the comments that I've made if they do not agree with your views of the evidence and the credibility of the witnesses." (*Id.* at 541.) The jury then commenced its deliberations and reached a verdict.

Proctor contended that his due process was violated by the court's failure to provide advance notice of its intended comments and because the content of the court's comments fell outside the range permitted. (*Id.*) As to the former, the trial court acknowledged that it was required by statute to afford advance notice of intended jury instructions, but denied any similar statutory or judicial requirement pertaining to judicial comment.[140] (*Id.*) As to the latter, the Court cited Article VI, section 10, of the California Constitution, permitting the court "to comment on the evidence and the testimony and credibility of any witness as in its opinion is

[140] The Court stated, "In fact, because the statutory provision authorizing judicial comment is contained in the same section as that governing jury instructions (§ 1127; see § 1093, subd. (f)), and the Legislature, while expressly providing that courts are to afford notice of jury instructions (§ 1093.5), has declined to impose such a requirement in the case of judicial comment, we may presume no such requirement was intended by the Legislature as to the latter subject." (*People v. Proctor* (1992) 4 Cal.4th 499, 541.)

necessary for the proper determination of the cause," stating that the purpose of this provision was to allow the court "to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict." (*Id.* at 541-42.)

The *Proctor* court cited *Rodriguez*'s upholding of judicial commentary as constitutional, so long as it is "accurate, temperate, nonargumentative, and scrupulously fair." (*Id.* at 542 (citing *People v. Rodriguez*, 42 Cal.3d at 766).) On the ground that a trial court has this "broad latitude in fair commentary, so long as it does not effectively control the verdict," this Court found the trial court's choice "to single out for particular emphasis the evidence concerning the presence of defendant's fingerprints at the crime scene, and defendant's inconsistent testimony" did not render its comments improper. (*Id.* at 542.) The judge's remarks "fell within the scope of the constitutional privilege," as they did not inaccurately state or distort any testimony, nor comment on defendant's guilt or innocence. (*Id.* at 543.)

The Ninth Circuit has also recognized that the California Constitution expressly provides that a judge may comment on trial evidence. (*Smith v. Curry* (9th Cir. 2009) 580 F.3d 1071, 1079.) The *Smith v. Curry* decision affirmed a California court decision to uphold a trial judge's commentary and instruction to the jury that "it should consider certain 'consistencies and inconsistencies' in the evidence...." (*Id.*)

D. The Trial Court Denied Robert's Right To An Impartial Jury In Violation Of The Sixth Amendment By Failing To Instruct On The Limited Purpose Of Crucial Testimony

The State's case rested almost entirely on Conya Lofton's testimony; as such, the jury's deliberations necessarily centered primarily on her story. Therefore, it was crucial for the court to properly instruct the jury as to the ways they could analyze her testimony. Cormicle requested an instruction to limit the scope of the testimony's purpose "solely to considering the effect on the

demeanor of that witness." Although Ruiz had no objection to this instruction, and the court acknowledged that it was "not improper," and was an accurate statement of the limited purpose for which the testimony was admitted, the court nevertheless refused to give it, stating as its sole rationale the concern that it sounded like commenting on the evidence. (*See supra* pp. 176-77.)

Even if the requested jury instruction constituted a comment on the evidence as the judge feared, the constitutional provision and the case law applying it have consistently supported the trial judge's discretion in commenting on the evidence "where necessary for a proper determination of the cause." (*Rodriguez*, 42 Cal.3d at 766.) The instruction as written and requested clearly met each element of the *Rodriguez* requirement for privileged judicial comment: it was "accurate, temperate, nonargumentative, and scrupulously fair." (*Id.*) Furthermore, there is no indication or imputation that giving this instruction would have "withdr[a]w[n] material evidence from the jury's consideration, distort[ed] the record, expressly or impliedly direct[ed] a verdict, or otherwise usurp[ed] the jury's ultimate factfinding power." (*Id.*) In fact, the instruction sought would have served to clarify the material evidence and preserve the accuracy of the record.

As stated in Argument X, *supra*, the inflammatory impact of the death threat claim was substantial, as the jurors were likely to attribute these anonymous third party threats to Robert. It was therefore necessary for the court, in instructing the jury, to inform them of the absence of evidence linking Robert to the threats in order to prevent such a faulty and prejudicial inference. Despite the judge's conclusion to the contrary, counsels' stipulation regarding absence of evidence given at the time of said testimony was insufficient. Robert's fate rested in the hands of those twelve jurors; he was entitled to have their determination based upon an analysis of the evidence limited to the purposes for which the testimony was admitted. By failing to include the

requested jury instruction regarding the limited purpose of the death threat testimony, the trial court denied Robert his right to a trial by an impartial jury in violation of the Sixth Amendment.

E. Conclusion

The judge's failure to instruct the jury on the limited purpose for which the death threat testimony was admitted cannot be justified by his concern that it may be commenting on the evidence. Due to the probability that jurors would make false inferences from this testimony, and because of its acknowledged prejudicial effect, the requested instruction was undoubtedly necessary for a proper determination of the cause. Had the jury been instructed to limit the scope of the death threat testimony solely to consider the effect on Lofton's demeanor as requested, it is reasonably probable the jury would have returned a verdict more favorable to Robert. Instead, Robert's fate was determined by a misinformed jury, violating his Sixth Amendment right to an impartial jury.

XII

JUROR MISCONDUCT DENIED ROBERT WILLIAMS HIS RIGHT TO HAVE HIS CASE HEARD BY A COMPETENT JURY IN VIOLATION OF THE SIXTH AMENDMENT.

A. Introduction

When a defendant is denied his constitutional right to a jury that is both impartial and competent, he is denied his right to a fair trial. Allegations of juror misconduct, therefore, must be investigated by the trial judge to determine whether the misconduct compromised a juror's ability to fairly and competently consider the case. The court's failure to investigate whether a juror slept through crucial portions of the trial proceedings denied Robert Williams his right to have his trial heard and decided by an impartial and competent jury in violation of the Sixth Amendment.

B. Factual Background

During the morning session on August 29, 2002, while defense counsel was cross-examining Robert Scott, the prosecution witness who focused the investigation on Robert (*see supra* SOF, section F), it was brought to the attention of the court during a recess that one of the jurors had been sleeping during the morning's proceedings. A spectator, Irma Foster, reported that she had observed Juror No. 6 sleeping:

> Irma Foster: Well, I observed that in its entirety he has nodded off. He's been—a couple of times when he was nodding off, he was actually asleep. At first I wasn't really sure because a lot of times people listen with their eyes closed. I thought that might be the case. But trust me, that is not the case.

(RPT 2753.) The court asked Ms. Foster whether she had observed this before:

> Irma Foster: I noticed it already today... [H]e was already nodding off, you know. And the testimony to me—every day the testimony to me was not dry, just drawn out, where you might nod off, you know. It's every day. And I'm not the only one who has noticed.

(RPT 2754.) Another unidentified courtroom spectator expressed her concern: "I just really don't feel that it is fair to the defense or the prosecutor's case. I really don't think that is fair." (RPT 2754.) The court dryly commented, "Maybe that is a clue to the lawyers that maybe they ought to be more interesting." (RPT 2754.) The court then inquired of Cormicle what he would like to do about the matter:

> Mr. Cormicle: I think a general admonition, to make sure that everybody pays attention, is alert throughout the proceedings.
> The Court: [D]o you feel that your client's rights have been sacrificed by keeping that juror?
> Mr. Cormicle: No. But I can also say that I have not been watching the jury so I cannot say—I cannot weigh this one way or the other....
> The Court: Waive any defect? I know I'm asking you a tough question, but I have to, I think.
> Mr. Cormicle: Yes. My suggestion is to keep quiet.
> The Court: I think so. Any issue of whether he was asleep or not, you're willing to waive that at this point?
> Mr. Cormicle: Yes....
> The Court: Mr. Williams, waive—counsel waive any defect or prejudice, if, in fact, he was dosing off? Waive any defect or prejudice?
> Robert: No comment.

(RPT 2755- 56.) Back in the presence of the jury, the court gave the jury a general admonishment:

> The Court: I'm going to ask you to keep your eyes open. The reason I say that is because it's important that all jurors stay awake. And I can't tell if somebody is dosing off if they have their eyes closed, or when they're really just listening with their eyes closed. I just caution you that sometimes trials get a little bit boring. Maybe you might have noticed. And I'm being very generous now. I just ask you to please keep your eyes open and stay awake. Okay?

(RPT 2757.) Upon Ruiz's and Cormicle's affirmations that the admonishment was satisfactory, the proceedings resumed.

C. Establishing a Due Process Violation and Impartial Jury Violation on Account of a Sleeping Juror

The United States Supreme Court recognized that "a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing.'" (*Tanner v. United States* (1987) 483 U.S. 107, 126 (citing *Jordan v. Massachusetts* (1912) 225 U.S. 167, 176).) Upon allegations of jury misconduct, the trial judge has "considerable discretion in determining whether to hold an investigative hearing... and in defining its nature and extent." (*United States v. Barrett* (9th Cir. 1983) 703 F.2d 1076, 1083.)

In *Tanner*, a juror brought to the trial court's attention that "several of the jurors consumed alcohol during the lunch breaks at various times throughout the trial, causing them to sleep through the afternoons." (*Tanner*, 483 U.S. at 113 (superseded on other grounds).) The trial court held an evidentiary hearing in response to the defendants' new trial motion, at which the judge invited the defendants to introduce any admissible evidence in support of their allegations. Tanner's counsel testified that he had observed one of the jurors "in a sort of giggly mood" during the trial but did not bring this to anyone's attention at the time. (*Id.* at 113.) The judge advised counsel to immediately inform the court if they observed jurors being inattentive in the future, and suggested it would take a recess in such a situation. (*Id.* at 113-14.) The judge then denied the motion for a new trial. While the appeal of this case was pending, the defendant filed a second motion for new trial, supported by an affidavit from another juror in which it was admitted that "some jurors were 'falling asleep all the time during the trial,' and that his own reasoning ability was affected on one day of the trial." (*Id.* at 126.) However, because Tanner had already had an evidentiary hearing, and finding that the "supplemental allegations... differ quantitatively but not qualitatively" from those of the first motion, the court refused to hold an additional evidentiary hearing. The Supreme Court agreed that an additional post-verdict

evidentiary hearing was unnecessary, stating "the District Court held an evidentiary hearing giving petitioners ample opportunity to produce nonjuror evidence supporting their allegations." (*Id.* at 127.)

In *Barrett*, after the court had instructed the jury but before the jury began its deliberations, a juror asked to be removed from the panel because he had been sleeping during the trial. (*Barrett*, 703 F.2d at 1082.) The judge advised both counsel of the juror's request, stating, "I don't have the authority to [order the substitution]. If you wish to do it by stipulation, I shall, or will leave it alone, depending on the view of counsel." (*Id.*) Barrett requested the substitution, but because the Government refused to so stipulate, the judge refused to order the substitution. (*Id.*) After the jury returned a verdict of guilty, Barrett filed a motion to permit the defense to interview the juror. The trial judge denied the motion, stating, "there was no juror asleep during this trial. I watch the jurors constantly. Of course, I can't tell whether somebody might have felt drowsy, nor could I tell if somebody has a personal problem of some kind which might divert their mind from the case." (*Id.* at 1082-83.)

The Ninth Circuit, however, held that "in failing to conduct a hearing or make any investigation into the 'sleeping' juror question, the trial judge abused his considerable discretion in this area." (*Id.* at 1083.) The case was remanded with instructions for the trial judge to conduct a hearing to determine whether the juror was in fact sleeping during trial and, if so, whether the resulting prejudice amounted to a deprivation of the Fifth Amendment due process or Sixth Amendment impartial-jury guarantees. (*Id.*) Consequently, in the case of a sleeping juror, the court must determine whether the sleeping juror missed essential portions of the trial, and hence, whether he was able to fairly consider the case. (*Id.*) If it is found that the juror's inattention sufficiently limited his ability to fairly consider the case, the trial judge has the independent

authority, under Rule 24(c) of the Federal Rules of Criminal Procedure, to order a substitute or an alternate juror for the sleeping juror. (*United States v. Smith* (5th Cir. 1977) 550 F.2d 277, 285-86; Fed. R. Civ. Proc. 24(c).)

In *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, this Court held that certain jurors had committed misconduct during the trial by failing to fulfill their duty of attentiveness. (*Id.* at 415.) The Court's holding was based on juror declarations stating that one juror was observed reading a novel "while witnesses and evidence were being presented" and that certain jurors had worked crossword puzzles "while evidence and testimony were being presented." (*Id.* at 410.) The court agreed with Ford that:

> [T]he basic premise that a jury's failure to pay attention to the evidence presented at trial is a form of misconduct which will justify the granting of a new trial if shown to be prejudicial to the losing party. The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations. Each juror should attempt to follow the trial proceedings and to evaluate the strengths and weaknesses of the evidence and arguments adduced by each side so that the jury's ultimate determinations of the factual issues presented to it may be based on the strongest foundation possible. Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled.

(*Id.* at 411. (citing Cal. Code Civ.Proc., § 657, subd. 2.; U.S. Const., amends. VI, VII; Cal. Const., art. I, § 16).) This Court found Ford had made a *prima facie* showing of improper conduct by certain jurors, as there was no evidence contradicting the declarations that some jurors engaged in distracting activities during the presentation of evidence at trial. (*Id.* at 412.)

The Court then noted, however, that "a new trial is required only if it can be established that Ford was somehow prejudiced by the jurors' inattentiveness. Prejudice exists if, in the absence of proven misconduct, it is reasonably probable that a result more favorable to the complaining party would have been achieved." (*Id.* at 415.) Ford urged that prejudice should be presumed from the fact of inattentiveness alone, and this Court agreed that "a presumption of

prejudice arises from any juror misconduct.... However, the presumption may be rebutted by proof that no prejudice actually resulted." (*Id.* at 416 (quoting *People v. Honeycutt* (1977) 20 Cal. 3d 150, 156 (finding a jury foreman's misconduct sufficient to reverse the judgment; case remanded)).) This "presumption of prejudice" afforded in criminal cases functions as an:

> evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred.

(*Ford*, 32 Cal. 3d 388 at 416.) Despite the presumption of prejudice, the Court found overwhelming proof of Ford's liability and that no substantial likelihood of actual prejudice resulted from the jurors' activities:

> It was not clear what type of evidence was being presented while the misconduct occurred or even which side's case was being presented.... The instances of misconduct demonstrated here do not rise to the level of evidence 'of such a character as is likely to have influenced the verdict improperly.'

(*Id.* at 417-18.)

D. The Court Erred In Not Conducting An Investigation

While in *Ford* it was unclear whose side was presenting or what type of evidence was being presented when the jury misconduct occurred, in the case at hand the juror misconduct occurred during the defense cross-examination of a key witness. On the morning that Juror No. 6 was alleged to have been sleeping, defense counsel was cross-examining Robert Scott. Scott's testimony regarding an alleged "threat" made by the defendant prior to the deaths was crucial for the prosecution in establishing Robert's motive for the murders. Cormicle's subsequent cross-examination worked to undermine the credibility of this important prosecution witness by introducing evidence that Scott was seeking a reduction of his eleven-year prison sentence on a robbery charge in exchange for his testimony in the current case. Additionally, Cormicle elicited

from Scott that in his original statement to the police he never mentioned that Williams wielded a gun during the alleged July 4, 1995 "threat," further undermining the veracity of the alleged threat. (*See supra* p. 176 and SOF, section F.)

This cross-examination seriously undermined Scott's testimony concerning any alleged motivation for Robert to have been involved in the murders. Without testimony of Robert's potential motivation to harm Gary, the State's case was reduced to the testimony of Lofton, a witness whose credibility was suspect and whose testimony was ripe with contradictions and inconsistencies. (*See supra* Arguments IV-V.)

As this crucial testimony was being elicited, Juror No. 6 was reportedly sleeping. An impartial observer, a court spectator, concerned about unfairness to both the State and Robert, reported to the court that a juror had fallen asleep during testimony. Her observations were confirmed by another independent courtroom observer. Although the trial court was obliged to hold an evidentiary hearing providing "ample opportunity to produce nonjuror evidence supporting [the] allegations [of juror misconduct]" as the trial court in *Tanner* had done (*Tanner*, 483 U.S. at 127), in this capital trial the trial judge's first inclination was to dismiss the concern with a quip that the lawyers must be more interesting. Instead of taking the matter as a potentially serious concern and making even a modest inquiry of Juror No. 6, the judge inquired of defense counsel as to what should be done. As the Ninth Circuit established in *Barrett*, failing to conduct a hearing or make any investigation into the "sleeping juror" question is an abuse of the trial judge's considerable discretion. (*See Barrett*, 703 F.2d at 1083; *see also supra* pp. 176-77.)

Counsel's suggestion of a general admonition failed to ascertain how much of the defense's cross-examination of Scott completely eluded Juror No. 6. Consequently, no inquiry

was ever made of this capital juror and the record is barren as to how much testimony was missed during Robert's death penalty trial.

E. There Was No Waiver

A reviewing court will not consider a claim of error not raised at the trial court. (*People v. Vera* (1997) 15 Cal.4th 269, 275.) This "waiver" principle is based on the premise that the trial court, once alerted to any claim of error, will have the opportunity to correct or mitigate that error at the trial level. (*Id.*)

This "waiver" principle is dependent on court and counsel having sufficient information related to any claim of error to take appropriate measures or make appropriate objections. (*Id.*) It follows that there can be no waiver absent counsel being aware of the true extent for concern. Since, in this instance, the trial court failed in its duty to engage in even the most rudimentary inquiry, the full basis for concern was not clear. Had the judge made even the most perfunctory inquiry of the "sleeping juror," the extent of the misconduct would have been revealed. So armed, Cormicle would then have been in a position to assess the concern and recommend to the judge appropriate remedial measures. As is evident from the foregoing section (*see supra* pp. 175-76), once alerted to the potential of juror incompetence, the trial judge had an absolute obligation to investigate the concern. That investigation may or may not have triggered a genuine concern that this juror, this capital juror, had missed crucial testimony. However, without any proper investigation, the concern never crystallized. Had the judge done what he was obligated to do, the full extent of any alleged error would be before court and counsel and the appropriate objections and measures would have been undertaken to ensure the sanctity of this capital trial.

F. Conclusion

Robert's motive—or lack thereof—was one of the primary issues in his trial. The only witness who offered any testimony supporting Robert's motive to harm Gary was Scott. If Juror No. 6 was truly asleep during any part of the direct or cross-examination of Scott, he could not have competently and fairly evaluated and considered this crucial witness's testimony. Juror No. 6 sleeping through the cross-examination of Scott, in which his character and veracity were successfully attacked, was a significant development that rendered the juror incompetent; the trial court's failure to hold a hearing to determine the truth and extent of the allegations does not permit effective appellate review. Thus, Robert was denied the right to have his trial heard and decided by an impartial and competent jury, in violation of the Sixth Amendment.

XIII

THE PROSECUTOR'S PATTERN OF CONDUCT INFECTED THE PRETRIAL AND TRIAL WITH SUCH UNFAIRNESS AS TO RENDER ROBERT WILLIAMS' CONVICTION AND DEATH SENTENCE A DENIAL OF DUE PROCESS

A. Introduction

In his zealousness to convict and garner a death verdict for Robert Williams, Prosecutor Ruiz lost sight of the ethical responsibilities every prosecutor owes to the accused. Ruiz, as an officer of the State, had an ethical duty to guard Robert's constitutional rights. There were at least six instances in which Ruiz failed in his prosecutorial capacity to ensure Robert a fair trial. First, as maintained throughout this brief, there were systematic obstructions in discovery. Second, Ruiz interfered with the appointment of defense counsel. Third, Ruiz delayed in relaying information regarding an informant that created a conflict and caused the Public Defender to withdraw, thus significantly delaying the onset of trial and forcing one of several changes in representation for Robert. Fourth, he offered a disingenuous argument which resulted in the termination of Robert's self representation. Fifth, he misrepresented that Robert's clothing was missing and then misrepresented the testing of the clothing. Finally, Ruiz insisted that the trial go forth knowing that there was still third party culpability evidence that had not been disclosed. The cumulative impact of these instances of misconduct so permeated the pretrial as to deny Robert Williams a fair trial and due process under the Fourteenth Amendment.

B. Factual Background

1. Ruiz's discovery delays and obstructions

As set forth throughout this brief, Ruiz viewed discovery as trench warfare and throughout the seven-year ordeal, he delayed, hid, and refused discovery. (*See supra* Arguments I-IV.)

2. Ruiz interfered with the appointment of defense counsel

On December 19, 1997, the trial court heard arguments as to Ruiz's phone call to a judge other than the trial judge concerning appointment of counsel for co-defendant Walker. While discussing Ruiz's *ex parte* call, Peasley [Walker's recently appointed counsel] noted that in "a death penalty case... everything should be on the record. And [there's] somethings that weren't on the record." (RPT 769.) Peasley specifically questioned Ruiz's actions to the court: "I think an appellate lawyer, looking down the road 5 years from now, whatever that could be, looks at that and wonders why—Why is the District Attorney interjecting himself into this, you know, who the counsel for the defendant is? I think that's a concern." (RPT 770.) Ruiz responded in an attempt to justify his *ex parte* communication:

> I was attempting to see if the Court had available to it attorney's [sic] where the Court could do a proceeding and find out if it had any attorneys that could announce ready in less than a year... I did not attempt to have any communication that interfered with that attorney/client privilege or relationship at all. The extent of my involvement was when the Court said, 'Hey, you know, I don't know any attorneys that can announce ready for a year.' Hearing that, and hearing the People's case could be delayed another year, I inquired of the presiding criminal judge... 'Do you have any other attorneys that could announce ready in less than a year, because the Court needs to know about it?'

(RPT 722-73.) According to Ruiz, he was unaware how Driggs [the potential defense counsel] was contacted: "[W]hen I asked [Judge Theirback]—'Are there other attorneys that may be available?' he said that he would have the Executive Office contact Mr. Driggs. So I don't know

how Mr. Driggs got contacted." (RPT 774.) Ruiz went on to relate that when Driggs contacted him concerning the case, Ruiz gave Driggs a "thumb-nail sketch of it." (RPT 775.)

Even though Ruiz's conduct involved the appointment of counsel for co-defendant Walker and not Robert, it is indicative and symptomatic of his overreaching and manipulative conduct throughout pretrial and trial.

3. Ruiz delayed information concerning a conflict of interest which caused the Public Defender to withdraw and thus significantly delayed the trial

In April of 1998, three years into the Public Defender's representation of Robert, Ruiz disclosed that the Public Defender had already communicated with a confidential prosecution informant against Robert, thus creating a conflict of interest. Accordingly, at an April 3, 1998 hearing, Zagorsky [a Public Defender supervisor] indicated to the court[141] that a conflict had arisen due to this late release of information by Ruiz:

> I do believe the Court should be aware that this conflict comes as a result, at least, of information that we received recently from the prosecution. Information we felt should have been provided much earlier in this case. And had that been provided, we would not be at the junction we are now, a conflict at this late stage in the case.

(RPT 879.) Zagorsky further described the effect of the conflict: "We have had a long term relationship with our client, Mr. Williams. And [it is] with a great deal of reluctance that we declare this conflict. We have explored all the possibilities of trying to remain on this case. We do not feel that we can." (RPT 879.) Later, on March 16, 2001, Robert commented on Ruiz's withholding of the information:

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[141] In an *in camera* hearing held on March 25, 1998, Zagorsky stated:

> And so the Court is aware, I think I will only say at this point that we're investigating a possible conflict in the case. And that's as much as I am at this point, I think, able to say to the Court. But we would ask to try to resolve this particular issue as soon as possible.

(RPT 871.)

> I was saying he did it out of retaliation. If you go back to the date in question, the whole date, the transcript will read that they was [sic] litigating back and forth over something that we had the right to get granted for us out of retaliation because they was, I guess, fighting back and forth. He brung [sic] this up as far as trying to get him took [sic] off the case.

(RPT 1234.) The court also acknowledged the clashing relationship between Ruiz and Feiger: "I think it's a safe analogy—or it's a safe statement to say that Mr. Ruiz and Ms. Feiger [Robert's deputy public defender much earlier in the pretrial] were not kissing cousins... and, they both knew how to push each other's buttons, and weren't reluctant to do so." (RPT 1234.)

4. Ruiz's disingenuous claim of Robert's dilatory tactics resulted in termination of Robert's self-representation

As set forth in Argument VI, Ruiz urged the court to terminate Robert's self representation, claiming that Robert was using his *Faretta* status to delay the trial. However, as the facts reveal, all delays during Robert's ten-month period of self representation squarely lie on Ruiz. Ruiz, fully aware his argument was disingenuous, nonetheless persuaded the trial judge to terminate Robert's self representation.

5. Ruiz misrepresented critical evidence to the court

During a March 16, 2001 hearing, an issue surfaced regarding Robert's connection with Walker on the night of the murder. Ruiz maintained at the hearing that Robert was with Walker on the night of the murder based on the Walker-Perales jail visit tapes; the tapes disclose Walker stating: "I was with Rob that night." (RPT 1232.) However, as Robert commented to the court, the tapes never stated "Robert Williams" was with Walker: "[I]n that tape, we clearly hear Mr. Walker saying that I was with Rob that night.... [The tapes] never said which Rob. And the transcript, whereas he knows through the case there was [sic] three or four different Robs that came up during [sic] numerous times with this case." (RPT 1232.)

Moreover, during that same hearing, Ruiz asserted that Robert's clothing was "bloody" based on the Walker-Perales tape, whereas the tape only disclosed that "Theresa got rid of the clothing from that night." (RPT 1231.) However, as noted by Robert, "the word 'bloody' was never mentioned one time during [the tapes]." (RPT 1232.)

Ruiz further misrepresented to the court and to Robert that Robert's clothes had not been tested. During that same March 16, 2001 hearing, the court asked Ruiz if he "[had] any of Mr. Williams' clothes test [sic]." (RPT 1236.) Ruiz responded, "No..." (RPT 1236.) However, two weeks later during the April 5, 2001 hearing, Ruiz stated that Robert's clothing had, in fact, been tested. Ruiz attempted to explain that "while there were initial conversations" about Robert's personal clothing, the parties would "get part of the way and then the issue would be left as we would move onto other things.... " (RPT 1282.) Ruiz then told the court how he discovered the existence of the wig and, in effect, of the test results of Robert's clothing:

> As the report makes clear, we had been told that the DA's office—that the wig had not been placed in evidence at the Las Vegas Police authorities in their jurisdiction and was placed in his property. And when I asked for the wig, found out that it had been placed in the defendant's property, my first thought was, well, that's probably gone by now. And I had not seen the handwritten notes of Maryanne Stamp,[142] where as we can see in those notes, there is a reflection of a separate wig. There is a reflection as to a wig there of some type. Well, what we can tell from looking at the chain of custody here is that when Maryanne Stamp at DOJ received TP-1—that's—I'm sorry—2, that is the clothing of Mr. Williams, she received it in the same condition that Mr. Pradia got it from the defendant's property.[143] It's only—and so Mr. Pradia wouldn't have opened that up. He took it over in the condition, as we just heard, that he received it in. It was only when Ms. Stamp opens up that bag that she finds that, in addition to clothing there's some Jheri-curl wig. So here I had thought that Jheri-curl wig had just been allowed to stay in his property and was probably gone by now. So that that's why later, when we would talk about it in court, I was of the impression that the Jheri-curl wig didn't exist anymore because Mr. Pradia never saw it, because he wouldn't have gotten into that bag so he didn't assert himself necessarily in the further chain—in the chain of custody.... If Mr. Williams wants to introduce the

[142] Maryanne Stamp was a criminalist for the California Department of Justice.
[143] Pradia received the items after executing the search warrant on Robert's property.

> results of that testing[144] by Maryanne Stamp on the clothing saying that there was no blood found on that clothing, I won't even make Mr. Williams establish the chain of custody. I'll even stipulate that that, in fact, was the case.

(RPT 1284.)

Ruiz's convoluted explanations offered no cover for his misrepresentations.

6. Ruiz insisted the trial proceed following his late disclosure third party culpability evidence

As set forth in Argument II, *supra*, Ruiz delayed disclosing third party culpability evidence that many of Gary Williams' former associates had motive to harm Gary and then compounded the error by successfully urging the trial court to deny any continuance to allow the defense to assess and investigate the late arriving materials.

C. A Prosecutor's Duty to Uphold a Defendant's Constitutional Rights

"[T]he prosecutor is not only the defendant's adversary, but is also... guardian of the defendant's constitutional rights." (*People v. Sherrick* (1993) 19 Cal.App.4th 657, 660.) A prosecutor may not "act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." (*Maine v. Moulton* (1985) 474 U.S. 159, 171.) "Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) While a prosecutor has an obligation to prosecute vigorously and "strike hard blows," a prosecutor "is not at liberty to strike foul ones. It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 99.) "[T]he defendant need not show that the prosecutor acted in bad faith or with appreciation for the wrongfulness of the conduct, nor is a

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[144] The results of the testing are reflected in the Physical Evidence Examination Report of 1-9-97 prepared by the DOJ Bureau of Forensic Services. (CT 1251-1254.)

claim of prosecutorial misconduct defeated by a showing of the prosecutor's subjective good faith." (*People v. Price* (1991) 1 Cal.4th 324, 447 (superseded on other grounds).)

The applicable federal and state standards regarding prosecutorial misconduct are well-established. "A prosecutor's... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214 (citing *People v. Espinoza* (1992) 3 Cal. 4th 806, 820).) However, under California law, even if the prosecutor's conduct does not result in an unfair criminal trial, "a prosecutor [still] commits misconduct when he or she uses deceptive or reprehensible methods to attempt or persuade either the court or the jury." (*Espinoza*, 3 Cal.4th at 820; *People v. Hill* (1998) 17 Cal.4th 800, 819.) Truly, "the ultimate question to be decided is, had the prosecutor refrained from the misconduct, is it reasonably probable that a result more favorable to the defendant would have occurred." (*People v. Strickland* (1974) 11 Cal.3d 946, 955.)

Under California statutory law, the trial court has the authority to disqualify a prosecuting attorney. (Cal. Code Civ. Proc. § 128.) Initially, this Court's standard of recusal was "any conflict of interest that might 'affect or appear to affect' the prosecutor's impartiality.'" (*People v. Vasquez* (2006) 39 Cal.4th 47, 59.) Statutory law was then modified such that recusal is required "only if it [bears] an *actual likelihood* of leading to unfair treatment." (*Id.*) During pretrial proceedings, judges can thus "avoid conflicts that *might* lead ultimately to due process violations and hence to reversals or mistrials." (*Id.*) Notably, "[i]ndividual instances of unfairness, although they may not separately achieve constitutional dimension, might well cumulate and render the entire proceeding constitutionally invalid." (*People v. Sup. Ct. of Contra Costa County* (1977) 19 Cal.3d 255, 264-65 (superseded on other grounds).)

D. Ruiz Failed to Protect Robert's Rights

Ruiz failed to protect Robert's constitutional rights and in fact was an agent to violate those rights. First, Ruiz's various discovery obstructions denied Robert the opportunity to obtain potentially exculpatory evidence. Over the course of the nearly seven-year pretrial, Ruiz repeatedly delayed production of discovery requested by Robert and his counsel. In particular, Ruiz ceaselessly refused to provide any information regarding key witness Lofton's whereabouts or contact information, effectively denying Robert's defense counsel the opportunity to interview and confront the most important prosecution witness. (*See supra* Arguments I-IV, detailing the continual pattern of Ruiz's discovery obstructions.)

Second, Ruiz improperly interjected his opinion into the appointment of defense counsel. When co-defendant Walker needed new counsel, Ruiz undertook an *ex parte* communication with the appointing court suggesting particular defense counsel selections and advising the court how to proceed in its appointment. This overreaching, while not involving Robert's representation directly, was demonstrative of Ruiz's overzealous influence over Robert's trial. (*See supra* pp. 186-87.)

Third, Ruiz withheld information that directly resulted in the Public Defender conflicting from Robert's case, resulting in a significant delay of the trial. Despite Ruiz's awareness that a prosecution informant may have had prior ties to the Public Defender's Office, Ruiz withheld the identity of the informant until nearly four years of pretrial had elapsed. Once the Public Defender conflicted, a revolving door of appointed counsel led to delay upon delay in getting Robert's case to trial. (*See supra* pp. 187-88.)

Fourth, Ruiz again obstructed discovery during Robert's period of self representation, only to assert a disingenuous argument to revoke that self representation. Robert's stint as a *pro*

se litigant began with his request to Ruiz for all discovery previously provided to defense counsel, as well as additional discovery not yet turned over. The court instructed Ruiz to comply with Robert's request, and Ruiz indicated he would do so. What followed was a prolonged period of illness for Ruiz in which he failed to appear at hearings for over three months. During this period, no discovery was provided by the prosecution as ordered. When Ruiz finally returned, he again delayed and was admonished by the court for failing to promptly provide discovery. Consequently, Robert was forced to request multiple continuances, since he did not have the requisite discovery to proceed with his defense. Within the next five months, these continuances were somehow rebranded as dilatory tactics on Robert's part. Ruiz accused Robert of "foot-dragging," even though it was the prosecutor's absence and failure to provide discovery that actually necessitated the delays. The court acquiesced to Ruiz's accusations without even considering Ruiz's prolonged absence, revoking Robert's *Faretta* status less than a year after granting it. (*See supra* Argument VI.)

Fifth, Ruiz misrepresented facts with regard to several pieces of physical evidence. As indicated in the aforementioned facts, Ruiz blatantly glorified descriptions of physical evidence on the record to create more violent imagery. In addition, he falsely represented the nonexistence and unavailability of forensic evidence which favored Robert—evidence that did in fact exist and had been made available to him. (*See supra* pp. 188-90.)

Sixth, Ruiz once again obstructed the disclosure of potentially exculpatory evidence regarding a theory of third party liability, then coerced the court and defense counsel into rushing the trial start date, preventing Robert's counsel from developing a viable third party defense. As perhaps Ruiz's most glaring instance of misconduct, Ruiz was forced to admit the existence of files that he failed to turn over to defense counsel for a period of at least five years, and most

likely the entire pretrial period. Cormicle, Robert's eventual trial attorney, was in Ruiz's office one day when he happened to observe a box containing a massive collection of files that he had not seen previously. The undisclosed documents were from a federal investigation of Gary Williams and a startling number of accomplices in Gary's bank robbery schemes. For all his credit union and bank robberies, Gary had largely evaded authorities, while many of his minions had been arrested and incarcerated. What emerged was a potentially viable theory of third party liability, since so many suspects, all with criminal histories, had motives to kill Gary. (*See supra* Argument II.)

Despite the late and only partial disclosure of such volatile materials, the court initially granted Cormicle a relatively short continuance to study the evidence now available to him and focus on the newly discovered viable theory. However, within a few months, Ruiz grew impatient and soon began pressuring the court to press forward. Ironically, this push came after nearly seven years of pretrial delays largely caused by Ruiz's dilatory tactics. Nonetheless, much as it had throughout the pretrial, the court acquiesced to Ruiz and denied Cormicle further pretrial preparation. With insufficient time before the trial began, Cormicle inevitably abandoned the third party liability theory, only presenting it in passing throughout the trial and failing to craft a compelling theory to the jury. (*See supra* Argument II.)

Determining whether prosecutorial misconduct was harmless to a trial's outcome is a difficult task, relying on hypothetical considerations and retrospective predictions. In reality, it is often impossible for a court to ascertain exactly what would have happened at trial had the misconduct not occurred. Nevertheless, when the State's misconduct is so consistent and egregious, realizing a qualitative and quantitative impact on the trial is more realistic and certain. Prosecutor Ruiz took advantage of his powerful position to systematically deny Robert a fair trial

through a series of unethical and biased actions. Despite a prosecutor's duty to seek justice and uphold the truth, Ruiz had the sole agenda of seeking a death sentence for Robert by whatever means necessary. The cumulative effect of Ruiz's conduct rendered the entire trial constitutionally invalid.

E. Conclusion

Ruiz's multiple failures to ensure Robert's constitutional rights amounted to an egregious violation of his prosecutorial duties. As such, Robert was not afforded the fair trial to which he was entitled and as a result Robert's conviction should be vacated and remanded.

XIV

CUMULATIVE ERROR AT THE GUILT PHASE REQUIRES REVERSAL OF ROBERT WILLIAMS' CONVICTION

A. Introduction

Assuming, arguendo, that there is any doubt that each of the errors set forth above independently require reversal of Robert Williams' conviction, this Court should find that the cumulative effect of the guilt phase errors mandates such reversal. These individual errors compound the prejudicial effect of one another.

B. Prejudicial Errors Require Reversal of Conviction

Violations of a criminal defendant's constitutional rights at trial do not necessarily entitle the defendant to a new trial. (*Chapman v. California* (1967) 386 U.S. 18, 22 (overruled on other grounds).) Instead, certain constitutional errors are tolerable if harmless in their effect on his trial. (*Id.* at 22.) The constitutional harmless error doctrine is ambiguous as to what types of constitutional errors may be harmless, and how this harmlessness is to be determined. (*Commonwealth v. Perez* (Mass. 1991) 581 N.E.2d 1010, 1017 ("The United States Supreme Court has used different formulations of the [harmless error test].").) Nonetheless, the current standard for reversible error is when adjudication of a case results "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." (28 U.S.C. § 2254(d)(1).)[145]

In *People v. Holt* (1984) 37 Cal.3d 436, the defendant was convicted on one count of first degree murder with the use of a deadly weapon and one count of robbery with the use of a deadly weapon. (*Id.* at 448.) He was sentenced to death. (*Id.*) He appealed, claiming that numerous evidentiary errors occurred during the guilt phase of his trial, resulting in a cumulative

[145] *See supra* note 150 and accompanying text.

prejudicial effect. (*Id.*) In sum, he claimed that the trial court improperly: (1) permitted Holt to be portrayed as a drug abuser, (2) allowed evidence of prior burglaries he had committed with his co-defendant, (3) permitted impeachment of Holt without weighing the prejudicial effect against the probative value, (4) allowed impeachment with felonies not shown to involve lack of veracity, (5) permitted evidence of an escape which had no probative value whatsoever, (6) permitted the prosecution to introduce evidence that Holt's associates were members of prison gangs, (7) permitted a defense witness to be improperly impeached, and finally, (8) permitted the prosecutor to argue the effect of a certain finding on Holt's punishment. (*Id.* at 458.)

This Court held the errors committed in the guilt phase were prejudicial and reversed the judgment of conviction. (*Id.* at 458-59.) This Court applied the test enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836, and reasoned that it was reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error. (*Holt*, 37 Cal.3d at 458). The "erroneously admitted evidence portrayed Holt as a drug abuser, an often-convicted felon with a history of unpunished crimes, and a person with a propensity for crime and an associate of criminals." (*Id.* at 459.) The improper evidence effectively destroyed whatever credibility Holt had. Holt, like all parties, was entitled to the rules of evidence which keep prejudice in bounds. (*Id.*)

C. Without the Litany of Errors, the Jury Would Have Reached a Verdict Favorable to Robert

The litany of errors by the trial judge, prosecutor, and the assortment of defense counsel wreaked havoc on the eighty-three month pretrial as well as the trial itself. Ruiz's trench warfare approach to discovery successfully frustrated defense efforts by insulating the State's primary witness from investigation and effective cross-examination and by withholding crucial information of third parties motivated to kill Gary Williams. Both efforts severely compromised

Robert's ability to defend himself. By effectively removing Lofton from defense investigation, Robert had no means to learn anything of her that might well have led to information that might call her character and credibility into question. As it was, this primary witness was left to offer her testimony free from meaningful confrontation. The same charge is levied against the prosecutor in his refusal to provide information about a number of other individuals who had a real interest in Gary Williams' demise. While ultimately some of this third party evidence was disclosed it was not all disclosed and what was disclosed came so late in the pretrial process as to be virtually unusable at trial. (*See supra* Arguments I-VI.)

The fundamental fairness of Robert's conviction and death sentence must also be questioned in this trial of an African-American in which two prospective African-American jurors were dismissed for cause, even though neither expressed views regarding capital punishment which would have prevented or substantially impaired the performance their duties. The removal of either of these jurors "stacked the deck" against Robert. These *voir dire* errors were compounded by the successful preemptory challenges of three other African-American prospective jurors by the prosecutor in his act of group discrimination. Ruiz offered sham excuses to conceal his goal of excluding African-Americans, a disingenuous tactic that the court should have recognized. Defense counsel's *Wheeler* motions were denied. The improper dismissal of even one juror may have fundamentally altered the course of the trial. (*See supra* Arguments IX-X.)

In addition to allowing the prosecutor to "stack the jury" against Robert, the trial judge failed to investigate and take necessary remedial means when he learned that a juror had slept through critical testimony. The judge's apathetic, joking dismissal of this independently-

verified report of jury incompetence further undermines confidence in the jury's verdict. (*See supra* Argument XII.)

Adding to the errors that inextricably built toward a cumulatively prejudicial effect was the court's decision to improperly allow testimony of death threats and gang affiliation which must have had the impact the prosecutor intended, specifically that it would lead the jurors to fear, loath convict and ultimately condemn Robert to execution. (*See supra* Argument XI.) The combination of an unwarranted revocation of Robert's *Faretta* status, a failure to disqualify Ruiz despite unacceptable misconduct, and the wholly ineffective assistance of Robert's revolving door of defense counsel further add to this cumulative effect. (*See supra* Arguments VI, VIII, XIII, and XIV.)

In sum, the overarching error apparent from a holistic view of the pretrial and trial amounts to reversible error.

D. Conclusion

The overall prejudice of the guilt phase errors intensified the harm resulting from each separate error. The cumulative effect denied Robert Williams a fair trial in violation of the due process guarantees of both State and Federal Constitutions. (Cal. Const., art I, § 15; U.S. Const., amends. VI, XIV.)

PENALTY PHASE

XV

JUROR #1 WAS IMPROPERLY EXCUSED, DEPRIVING ROBERT OF HIS RIGHT TO A COMPETENT, IMPARTIAL JURY AND DUE PROCESS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

A. Introduction

In capital cases, courts strongly favor having the same jury for both the guilt and penalty phases. It is also well-established that to excuse a juror due to illness, the trial court must indicate on the record its reasons for doing so, based on evidence elicited during a hearing on the matter. The court erred in excusing Juror #1 and substituting an alternate juror following the guilt phase and prior to the penalty phase of the trial without having established that Juror #1's illness rendered him unable to perform his duties as a juror, thereby denying Robert Williams his right to have his trial heard and decided by an impartial and competent jury in violation of the Sixth Amendment, and depriving him of due process of the law in violation of the Fourteenth Amendment.

B. Factual Background

On October 15, 2002, following Robert's conviction and prior to commencement of the penalty phase, the clerk informed the court that Juror #1 had called the previous night and left a message stating that he wanted to be excused because of a "very bad swollen foot," a result of stepping on a nail a couple of days prior, rendering him unable to walk. (RT 3485.) Ruiz urged the court to dismiss Juror #1 and replace him: "It would be the People's request, given his—sounds like a medical unavailability, certainly for today, to excuse that juror and replace him with our first alternate." (RT 3486.) Cormicle indicated that the defense favored keeping Juror #1

on the panel, at least until the court knew more about his condition. (RT 3485-88.) During the noon recess that same day, Juror #1 again called the clerk and reported that his doctor said he "probably has an infection that's gone into the bone—his bones which he believes is osteomyoloitis," which may require hospitalization, depending upon the results of a bone scan scheduled for the following day. (RT 3496.) He also asserted that he would fax a letter from his doctor the following day. (RT 3496.) Cormicle requested that the juror be retained "until we have some idea when he can return." (RT 3496.)

Ruiz argued that it had been his experience that "when the infection sets in the bone, that is something that you can't put a time limit on," the infection being "very difficult to treat because of the nature of its location." (RT 3497.) Cormicle countered that the court was not "in a position to speculate... as to what length of time that he would be gone" without receipt of the doctor's report. (RT 3497.) Conceding that "we don't know how bad it is. And we don't have the doctor's report," the court nonetheless decided to relieve the juror and replace him with Alternate #1 stating, "[Juror #1]'s not here today... he won't be here tomorrow. And we anticipated—told the jury we were going to get done tomorrow." (RT 3496-98.) The jurors were called back in, and the court seated Alternate #1 in place of Juror #1. (RT 3507-08.)

C. A Juror May Be Discharged And Replaced With An Alternate If Illness Renders Him Unable To Perform His Duty As A Juror

The California Penal Code section 1089 provides, in pertinent part:

> If at any time... a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box.

(Cal. Penal Code § 1089.)

In *People* v. *Sanders* (1995) 11 Cal.4th 475, the defendant was convicted by a jury of four murders. (*Id.* at 539.) Shortly after the jury rendered the guilty verdicts a juror, Bateman, collapsed for the second time and required emergency medical treatment from paramedics. (*Id.*) The paramedics determined that she did not require hospitalization at that time, but informed the court that her condition was due to the high blood pressure and the pressure that is inherent in a long and arduous trial. (*Id.*) The trial court discharged her from the jury and replaced her with an alternate juror. (*Id.* at 539-40.) The jury, sitting with the alternate juror, returned verdicts of death. (*Id.* at 540.) Sanders argued that the decision to discharge Bateman lacked any factual support in the record. (*Id.*) This Court emphasized that California cases construing statutes giving the trial court the authority to discharge a juror "found to be unable to perform his duty" have established that, "once a juror's competence is called into question, a hearing to determine the facts is clearly contemplated.... Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review..." (*Id.*) This Court found that the responses from the paramedics provided substantial evidence to discharge the juror and thus found no abuse of discretion. (*Id.*)

People v. *Farnam* (2002) 28 Cal.4th 107, is also instructive as to the trial court's duty when a juror's competence is called into question. In *Farnam*, this Court held that the trial court did not err in refusing to discharge four women jurors, one of whom, in the presence of the others, was attacked while returning to court from lunch and had her purse snatched:

> Section 1089 authorizes a trial court to discharge a juror if, among other reasons, good cause is shown that the juror is unable to perform [her] duty. When a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error.

(*Id.* at 140-41 (internal quotations and citation omitted).) The *Farnam* Court stated that dismissal of a seated juror is error unless "the juror's inability to perform a juror's functions" is a "demonstrable reality" supported by "substantial evidence" on the record. (*Id.* at 141.) Prior to making a decision, the *Farnam* trial judge held two separate hearings in which the judge questioned the jurors and allowed counsel to question the juror who was attacked; the assaulted juror affirmed the event would not affect her ability to be impartial in a case involving an allegation of robbery, and the other three jurors affirmed that witnessing the incident would not create a problem for them in deciding the case. (*Id.* at 140.) Consequently, following the hearing and upon a finding of demonstrably reality supported by substantial evidence this Court found no error. (*Id.*)

More recently in *People v. Barnwell* (2007) 41 Cal.4th 1038, no error was found where the trial court had excused a juror for not following the court's instructions during deliberation due to his expressed "disbelief of police officers' testimony." (*Id.* at 1051-54.) In its decision, this Court emphasized that "[r]emoving a juror is, of course, a serious matter, implicating the constitutional protections defendant invokes," and for which "a hearing is required." (*Id.* at 1051-52.) "While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care." (*Id.* at 1052.) This Court first recognized the "two different formulations of the applicable standard on review" utilized in prior cases:

> On the one hand, we have stated that a court's decision to remove a juror is to be upheld if supported by 'substantial evidence.' 'Substantial evidence' has been characterized as a 'deferential' standard. On the other hand, we have stated, often in the same opinion, that a juror's disqualification must appear on the record as a 'demonstrable reality.' This standard 'indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror.'

(*Id.* at 1052 (citing *People* v. *Cleveland* (2001) 25 Cal.4th 466, 488).) This Court then identified the appropriate standard to be applied:

> To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.

(*Id.* at 1052.) The demonstrable reality test "entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact relied on evidence that, in light of the entire record, supports its conclusion" that the juror should be dismissed. (*Id.*) The trial court has a "duty to provide a record that supports its decision [to remove a juror] by a demonstrable reality." (*Id.*) This Court found the record to have established the juror's bias to a "demonstrable reality," based on the credible testimony of nine jurors who stated that the dismissed juror had expressed a bias against police officers. (*Id.*)

D. The Court Erred In Replacing Juror #1 Without A Determination That He Was "Unable To Perform His Duty As A Juror"

Robert's trial judge did nothing to confirm or dispel the condition of Juror #1's "swollen foot". He did not speak directly with the juror or the juror's doctor, nor did he wait for the doctor's letter to be faxed over to the court. Instead, the court relied solely on the court clerk's recitation of her brief telephone conversation with the juror and Ruiz's apparently persuasive medical opinion that in his experience "when infection sets in the bone, that is something you cannot put a time limit on." This lack of inquiry and dearth of facts falls well short of the level of inquiry this Court has consistently demanded to establish an illness sufficient to excuse a juror. (*See supra* pp. 225-26.)

Cases such as *Farnam* and *Barnwell* establish the trial court's "duty to provide a record" that shows "the juror's inability to perform a juror's functions" by a "demonstrable reality." The

records of the trial proceedings in both *Farnam* and *Barnwell* demonstrate that the trial judges in both cases held hearings, took competent testimony, and found demonstrable facts prior to making the decision regarding juror dismissal. (*See supra* pp. 227-29.)

It cannot be said that the record here demonstrates that an illness prevented Juror #1 from performing his duties, especially not by a "demonstrable reality." Had the court observed the juror's condition in court, or heard testimony from the other jurors confirming his condition, or received a doctor's report, or spoken to the doctor or to the juror personally, or inquired if he could get around on crutches or a wheelchair, Juror #1's excusal may not have been error. But the record is devoid of any such inquiry or evidence. Rather, the record here reflects the court's uncertainty—"we don't know how bad it is. And we don't have the doctor's report"—and impatience—"he's not here today... he won't be here tomorrow. And we anticipated—told the jury we were going to get done tomorrow." (RT 3496-98.)

Also of significance in the present case is that Juror #1 was excused after the guilt phase, but prior to the penalty phase. Cal. Penal Code § 190.4 states in pertinent part:

> If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider... the penalty to be applied, unless for good cause shown the court discharges that jury.... The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(Cal. Penal Code § 190.4.) This statute, which "expresses a clear legislative intent that both the guilt and penalty phases of a capital trial be tried by the same jury," further demonstrates the trial court's indifference to Robert's fundamental rights to due process and to a fair trial by an unbiased jury. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 572.)

E. Conclusion

Since this was a capital trial, it was extremely important that the same jury which found Robert guilty be the jury to deliberate his penalty. "[T]he use of a single jury may help insure that the ultimate decision-maker in capital cases acts with full recognition of the gravity of its responsibility throughout both phases of the trial and will also guarantee that the penalty phase jury is aware of lingering doubts that may have survived the guilt phase deliberations." *Nicolaus*, 54 Cal.3d at 572 (1991) (citing *People v. Fields*, 35 Cal.3d 329, 352 (1983).) In seeming disregard for this legislative preference, the trial court substituted an alternate juror for a juror who called the court complaining of a swollen foot at the commencement of the penalty phase. The requirement of a hearing to investigate the illness at issue was disregarded by the court, as was the need to establish for the record the evidence illustrating a demonstrable reality that the juror was unable to continue. This Court should recognize that the record here establishes nothing more than the court's desire to finish the trial as soon as possible, even at the expense of Robert Williams' constitutional rights, a denial of which entitles Robert to a new trial.

XVI

THE COURT FAILED TO PROPERLY INSTRUCT ON THE STANDARD OF PROOF PRIOR TO IMPOSING THE DEATH PENALTY

A. Introduction

The court's refusal to instruct the jurors that they must be convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors prior to imposing the death penalty violated the cruel and unusual punishment clause of the Eighth Amendment and the due process clause of the Fourteenth Amendment, in that the jurors were not provided that "guided discretion" essential in making the capital determination. (*Gregg* v. *Georgia* (1976) 428 U.S. 153, 189.)

B. Factual Background

During the penalty phase, defense counsel Cormicle proposed Defense Special Instruction No. 7, which stated in part, "After considering all of the evidence it is entirely up to you to determine whether you are convinced that the death penalty is the appropriate punishment."

In response, Prosecutor Ruiz said, "I would ask to strike the words, 'you are convinced that' because I don't think the law ever says anything about what standard that is, and certainly doesn't approach convincing." (RT 3499.) Ruiz suggested modifying the requested instruction: "We could do it either by striking the words, 'you are convinced that,' or... insert[ing] the word 'persuaded' instead of 'convinced.'... I think either is the more correct statement of the law." (RT 3499.)

Cormicle maintained, "I don't see any harm that is caused by leaving in 'convinced.'" (RT 3500.) The judge, however, looked to the language of instruction 8.88 that stated in part,

"To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" and concluded:

> [I]t makes perfect sense if we were to put in, "It is entirely up to you to determine... whether the death penalty is the appropriate punishment."... I would also say that the consistent [sic]—it should be changed to at least "you are persuaded." But I think 8.88 has that language "you are persuaded" right in the instruction itself.... However, I don't like the word "persuaded."

(RT 3501.)

Cormicle, in acknowledging the limitations imposed by the judge, stated, "given those two options... I would ask that the Court remove 'you are convinced that' and just leave it, 'It is entirely up to you to determine whether the death penalty is the appropriate punishment under all of the circumstances in the case.'" (RT 3501.) Ruiz agreed, and, consequently, the instruction read:

> The law of California does not require that you ever vote to impose the penalty of death. After considering all of the evidence in the case and the instructions given to you by the court, it is entirely up to you to determine whether the death penalty is the appropriate punishment under all of the circumstances of the case.

(CT 6448.)

C. Penalty Phase Instructions Which Do Not Articulate The Standard Of Proof To Be Applied Violate The Eighth And Fourteenth Amendments.

The penalty of death, being "qualitatively different from a sentence of imprisonment, however long," requires a "corresponding difference in the need for reliability in the determination" to impose such a sentence. (*Woodson v. N. Carolina* (1976) 428 U.S. 280, 305.) The cruel and unusual punishment clause of the Eighth Amendment and the due process clause of the Fourteenth require capital jurors be given instructions that provide "guided discretion" in making this determination. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.)

Supreme Court decisions have confirmed that "a death penalty law avoids the Eighth Amendment's proscription of 'arbitrary' sentencing procedures if it suitably narrows the class of death-eligible persons, then provides for an individualized penalty determination at the sentencing and appeal stages." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 778.) Although the death penalty law followed by California courts meets this standard, constitutional violations can nonetheless occur on the basis of erroneous jury instructions which "create the risk that the death penalty would be imposed despite evidence which may call for a life sentence." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

The Eighth Amendment prohibiting cruel and unusual punishment proscribes jury instructions rendering arbitrary and capricious imposition of the death penalty. Similarly, the Due Process Clause of the Fourteenth Amendment requires jury instructions that aid the jury in making a reasoned and informed choice between a sentence of life and death. "It is well established that because the punishment of death is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether a death sentence is appropriate in a particular case." (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1159-60 (citing *Fetterly* v. *Paskett* (9th Cir. 1993) 997 F.2d 1295, 1301).) For this reason, the Eighth and Fourteenth Amendments have been interpreted to dictate that:

> [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

(*Hamilton*, 17 F.3d at 1159-60 (citing *Gregg* v. *Georgia* (1976) 428 U.S. 153, 189).)

Challenged instructions must therefore be examined in light of these exacting standards for fair and informed jury deliberation in death penalty cases. Under such an examination, this Court should recognize that an instruction requiring anything less than the jury being

unanimously convinced that death is the appropriate punishment violates these Constitutional requirements and jeopardizes the consistent and rational functioning of such a sentencing system. "Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." (*Gregg v. Georgia* (1976) 428 U.S. 153, 192.[146]) Although this problem is inherent, to a degree, in jury sentencing, the problem can be alleviated by providing the jury with guidance regarding the requisite level of conviction to unanimously sentence a person to death.

In *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, the Ninth Circuit reversed the district court's denial of habeas relief and remanded the matter with instructions to order new penalty phase proceedings stating, "on the basis of the confusing ["Briggs"] instruction given, the jury could not have made a reasoned and informed choice between a death sentence and a life sentence without possibility of parole."[147] (*Id.* at 1152.) *Hamilton* should be of interest to this Court, however, not for this "Briggs" instruction that was deemed inappropriate, but for the following uncontested instruction:

> In order to impose a death sentence, you must be *convinced beyond a reasonable doubt* that the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances. If you are *not convinced beyond a reasonable doubt* that the aggravating circumstances outweigh the mitigating circumstances, *you must return a verdict of life imprisonment without possibility of parole.*

(*Hamilton*, 17 F.3d at 1173 (Appendix) (emphases added).)

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[146] *Citing* American Bar Association Project on Standards for Criminal Justice, Relating to Sentencing Alternatives and Procedures, s 1.1(b), Commentary, pp. 46-47 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967).

[147] The since-repealed "Briggs" instruction, which described the effect of a life sentence without the possibility of parole and provided that the Governor had the authority to commute a life sentence instruction, was found to have "misled the jury as to the likelihood of parole eligibility, encouraged, rather than discouraged the jury from speculating about parole, and distracted the jury from considering relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments." (*Hamilton*, 17 F.3d at 1161.)

D. The Denial of Requested Jury Instruction Violated Robert's Eighth and Fourteenth Amendment Rights.

The Supreme Court has recognized that:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

(*Woodson v. N. Carolina* (1976) 428 U.S. 280, 305.) A penalty phase instruction requiring the jury to be convinced that aggravating circumstances sufficiently outweigh mitigating circumstances before imposing the death penalty would ensure the reliability that is the touchstone of constitutional jury verdicts. Unfortunately, Cormicle was unable to open the court's eyes to this fact. Not satisfied with the jury instruction at issue here, Cormicle nevertheless had to settle for a modified instruction after the court refused his special instruction. The instruction, as modified, made no reference to the standard of proof required for a determination of death as the appropriate penalty.

Regarding disputed instructions assailed as ambiguous and subject to an erroneous interpretation, the Supreme Court has held that the proper inquiry is whether there is a reasonable, objective likelihood that the jury was misled. (*Boyde v. California* (1990) 494 U.S. 370, 380.) How could a jury not be misled when the instructions they are to follow give no guidance as to the standard of determination? Were they to determine that death might be appropriate? Probably appropriate? Definitely or unquestionably appropriate? The lack of clear instruction on this point creates a distinct likelihood for the imposition of an arbitrary and unreliable capital judgment.

Admittedly, this Court has argued that, "[u]nlike the guilt determination, the sentencing function is inherently moral and normative, not factual, and, hence, not susceptible to a burden-

of-proof quantification." (*People* v. *Hawthorne* (1992) 4 Cal.4th 43, 79 (internal quotations omitted).) However, Cormicle's requested instruction was almost identical to the uncontested one given in *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, and quite simply and clearly establishes just such a quantification: "convinced beyond a reasonable doubt." As argued in *People v. Coddington* (2000) 23 Cal.4th 529 (overruled by *Price v. Superior Court* (2001) 25 Cal.4th 1046), "we should join other states that have concluded a capital jury may not return a death verdict unless the jury finds beyond a reasonable doubt that aggravating factors outweigh mitigating factors and/or that death is the appropriate penalty. An instruction must be given to articulate the standard of proof to be applied in the penalty phase." (*Id.* at 643.)

This Court should recognize that the requested instruction correctly states the law and better protects the constitutional rights of capital defendants. Applying the death penalty imposes on the People the burden of proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate punishment—such a clarification ensures that the jury makes its determination in a fair and reasoned fashion. "When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg*, 428 U.S. at 193.)

E. Conclusion

The jury here, being given no such standard of proof to guide their deliberations, could not have made a reasoned and informed choice between a sentence of life imprisonment without possibility of parole and a sentence of death, as mandated by the United States Constitution. Because these capital jurors were not adequately guided, their imposition of the death sentence

violated Robert's Eighth Amendment and Due Process rights under the Fourteenth Amendment, entitling him to new penalty phase proceedings.

XVII

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

Even if this Court finds that the evidence is sufficient to support the jury's finding that appellant was guilty of the murders of Gary and Roscoe Williams, it cannot reasonably say that appellant committed this crime beyond all doubt. Experience over the past 15 years tells us that there is a significant possibility that the investigators' confirmatory bias led them to a hasty conclusion that, even if based on long experience, was simply wrong. In light of our evolving recognition of this reality, the Eighth Amendment to the United States Constitution now prohibits affirmation of a death sentence unless guilt is proven beyond all doubt.

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

Reliability of criminal convictions is a bedrock constitutional requirement, and the goal of the numerous procedural protections guaranteed by the state and federal constitution. The need is greatest in death penalty cases: "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opn. of Stewart, Powell, and Stevens, JJ.).) The need for reliability is no less great in the determination of guilt. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.)

Although the possibility of wrongful convictions has been a part of the debate on the death penalty for centuries,[148] the possibility has remained abstract, and the proportions long

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[148] *See generally* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987) 40 Stan. L.Rev. 21, 22. "In the mid-1770s, the British scholar Jeremy Bentham argued that capital

assumed to be minute. Over 20 years ago, a painstaking effort to identify wrongful convictions asserted that from 1900 through 1985, at least 139 innocent persons were sentenced to death and at least 23 innocent persons were executed.[149] This study sparked considerable controversy in the years following its appearance;[150] but we now know that wrongful convictions occur at a frequency far greater than even the boldest examiners dared suggest 15 years ago.[151]

A 1996 Department of Justice Report noted that every year since 1989, *in about* 25 *percent of the sexual assault cases referred to the FBI where results could be obtained (primarily by State and local law enforcement), the primary suspect has been excluded by forensic DNA testing.* Specifically, FBI officials report that out of roughly 10,000 sexual assault cases since 1989, about 2,000 tests have excluded the primary suspect, and about 6,000 have "matched" or included the primary suspect.[152] The National Institute of Justice's informal survey of private laboratories reveals a strikingly similar 26 percent rate. As noted by Peter Neufeld and Barry Scheck, "the consistency of these numbers strongly suggests that postarrest and postconviction DNA exonerations are tied to some strong, underlying systematic problems that generate erroneous accusations and convictions."[153]

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punishment differs from all other punishments because '[f]or death, there is no remedy.' Jeremy Bentham, The Rationale of Punishment 186 (Robert Heward ed., 1830) (circa 1775). Bentham recognized that there could be no "system of penal procedure which could insure the Judge from being misled by false evidence or the fallibility of his own judgment," *id.* at 187, and he argued that execution prevents "the oppressed [from meeting] with some fortunate event by which his innocence may be proved. [citation omitted]." *(United States v. Quinones* (2d Cir. 2002) 313 F.3d 49, 63.)

[149] Bedau & Radelet, *supra.*

[150] *See, e.g.,* Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study* (1988) 41 Stan. L.Rev. 121.

[151] Huff, Rattner, and Sagarin, authors of the 1995 book *Convicted but Innocent*, spent more than a decade studying the persistence of wrongful convictions, gathering evidence and assessments from police administrators, sheriffs, prosecutors, public defenders, and judges. The three scholars concluded that about 0.5 percent of persons convicted of felonies are innocent.

[152] See Research Report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence AfterTrial,* National Institute of Justice, U.S. Dept. of Justice (June 1996), at 0-3.

[153] Research Report, n. 5, pp. xxviii-xxix. In Actual Innocence (2000), Scheck, Neufeld and Jim Dwyer suggest that the true rate of wrongful convictions may be closer to ten percent than to one-half of one percent.

The rate of mistakes in rape cases is stunning—and there is every reason to believe that the rate is even higher in robbery cases. Both rape and robbery are crimes of violence in which the perpetrator is often a stranger to the victim. They are both susceptible to the well-documented[154] dangers of eyewitness misidentification, the leading cause of wrongful convictions—a phenomenon restricted to crimes committed by strangers. Such is the case in about three-quarters of robberies, but only a third of rapes. (*See* Bureau of Justice Statistics, *Criminal Victimization in the United States 2002,* Table 29, cited in Samuel Gross et al., *Exonerations in the United States, 1989 through 2003* (2005) 95 J.Crim.L. and Criminology, No.2, p. 530.) The nature of the crime of rape means that the victim must spend time with the perpetrator, while robberies are usually quick, and generally involve less immediate physical contact.

As of April, 2004, Gross reported 120 exonerations in rape cases; 88 percent of them involved mistaken eyewitness identification. (Gross et al., *supra,* at pp. 529-530.) There were only three robbery exonerations, all of which include eyewitness misidentifications. Before DNA, the results were dramatically different. A study of all known cases of eyewitness identification in the United States from 1900 through 1983 found that misidentifications in robberies accounted for more than half of all misidentifications, and outnumbered rape cases by more than 2 to 1. (Samuel Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt* (1987) 16 Journal of Legal Studies 395, 413.) The difference in the number of recent exonerations is solely due to the availability of DNA testing in rape cases. (Gross et al., *Exonerations in the United States, supra,* at pp. 529-531.) If we had a technique for detecting

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[154] *See generally,* Brian Cutler, ed., *Expert Testimony on the Psychology of Eyewitness Identification,* Oxford University Press (2009); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony* (2003) 54 Ann. Rev. Psychol. 277, 278 (reviewing the literature over the last 30 years). Studies continue to be published regarding this issue. *See, e.g.*, Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy* (2002) 87 J. Appl. Psychol. 112.

false convictions in robberies comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations.

DNA testing has thus revealed that error of the gravest kind is institutionalized in criminal prosecutions. And capital cases are more, not less, vulnerable to mistake than rapes or robberies. Murder cases generate the most intense community pressure, which often leads to "confirmatory bias," or tunnel vision, by law enforcement officials who feel the heat. The victims of murder cases are by definition unavailable.[155]

Since 1973 and the reimposition of the death penalty after *Gregg v. Georgia* (1976) 428 U.S. 153, 139 people have been freed from death row after being cleared of their charges. These prisoners cumulatively spent over 1,000 years awaiting their freedom.[156] As the U.S. Supreme Court noted in June of 2002, "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." (*Atkins v. Virginia* (2002) 536 U.S. 304, 321, n. 25; *see also Ring v. Arizona* (2002)122 S.Ct. 2428, 2447 (conc. opn. of Breyer, J.), noting the release of the 100th exonerated death row inmate since executions resumed in 1977.)

Prior to the revelations of DNA testing the consensus was best expressed by Justice Learned Hand: "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." (*United States v. Garsson* (S.D.N.Y. 1923) 291 F. 646, 649.) Justice Hand's formulation was reversed by Illinois Governor George Ryan, who was confronted with 13 cases of innocent men condemned to death, so many that he finally said, "Our capital

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[155] *See* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital cases* (Autumn 1998) 61 Law and Contemporary Problems 123, 129-133; James Liebman, *The Overproduction of Death* (2000) 100 Colum.L.Rev. 2030.

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

system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die."[157]

The profound shift in our understanding of the error level in serious criminal convictions led to a sweeping rejection of the Federal Death Penalty Act (FDPA) in *United States v. Quinones* (S.D.N.Y. 2002) 205 F.Supp.2d 256. The court held the FDPA unconstitutional because "it not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process." *(Quinones,* 205 F.Supp.2d at p. 257.) The court so held because: (1) In recent years, an extraordinary number of death row inmates have been exonerated, in some cases, after they came within days of execution—these exonerations, especially those based on DNA evidence, have opened a window on the workings of our system of determining guilt in capital cases, and have shown that the risk of wrongful executions is far higher than anyone used to believe; (2) nothing about the procedural structure of federal capital litigation affords any special protection against that risk. (*Id.* at 266-68.)

On appeal, the district court's decision was reversed. (*United States v. Quinones* (2d Cir. 2002) 313 F.3d 49.) The Second Circuit found that the likelihood of an innocent person being executed had long been a part of the debate over the death penalty's propriety in both Europe and the United States:

> [T]he argument that innocent people may be executed—in small or large numbers—is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment, and binding precedents of the Supreme Court prevent us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be

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

innocent.

(*Quinones*, 313 F.3d at 62; *see generally,* 313 F.3d at 63-66.) The court of appeals further found that no lower court could hold that the death penalty was unconstitutional, in light of three specific references to the death penalty in the U.S. Constitution, and the U.S. Supreme Court's decisions in *Gregg v. Georgia, supra,* 428 U.S. 153, and *Herrera v. Collins* (1993) 506 U.S. 390; the court interpreted *Gregg* as foreclosing a challenge to the death penalty as unconstitutional *per se*, and *Herrera* as foreclosing any challenge to a death penalty scheme on grounds that it led to the execution of innocent people. (*Quinones, supra,* 313 F.3d at 61-62, 67-70.)

The court's assertion that fear of executing an innocent person is no different now than at any time in our country's history is wrong. It simply picked statements from philosophers and death penalty opponents over the past 230 years warning of the irrevocable nature of death as a penalty and the danger of convicting innocent people, and did not acknowledge, let alone refute or minimize, what moved the district court to hold the FDPA unconstitutional: the abstract possibility of error has been made concrete in the last 15 years. Error has occurred, and is occurring, at a massively greater rate than anyone believed possible.

The Second Circuit's reading of the *Herrera* decision is likewise wrong. In her concurring opinion in *Herrera,* Justice O'Connor, joined by Justice Kennedy, wrote: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed... *the execution of a legally and factually innocent person would be a constitutionally intolerable event.*" (*Herrera,* 506 U.S. at 419, emphasis added.) Given the tenor of the dissent, 506 U.S. at 430 (dis. opn. by Blackmun, J., in which Stevens and Souter, JJ., join), on this issue Justice O'Connor spoke for a majority of the Court.

Herrera had claimed that he was factually innocent, and could prove it with evidence that had only become available after trial. He had argued that the execution of an individual who is known to be innocent violates the Constitution. On his *factual* claim, the Court's reaction is best summarized in Justice O'Connor's pivotal concurring opinion: "Petitioner is not innocent, in any sense of the word." (*Herrera, supra,* 506 U.S. at 419.)

In *Herrera,* the Court was not asked to pass on the constitutionality of a system that repeatedly executes innocent people, and it had no record of such a systemic problem before it. As a result, the *Herrera* opinions deal solely with the rights of an individual defendant who had claimed [unpersuasively] to be able to prove that he was innocent after he had exhausted all ordinary remedies for direct and collateral review. The Court's discussion of the issues points in the opposite direction from the Second Circuit's description. The high court says that the execution of innocent defendants *is* a matter of critical constitutional importance.

In *Gregg* and its companion cases, the U.S. Supreme Court held (1) that the death penalty is not intrinsically unconstitutional (428 U.S. at 187), and (2) that three of the five death penalty statutes before the Court contained adequate procedural safeguards to avoid the arbitrary imposition of death sentences that had been condemned in *Furman v. Georgia* (1972) 408 U.S. 238. (*Gregg,* 428 U.S. at 207; *Proffitt v. Florida* (1976) 428 U.S. 242, 259-60; *Jurek v. Texas* (1976) 428 U.S. 262, 276.) Neither of those issues is raised here. But there is another holding in *Gregg* (and in *Furman*) that is pertinent: (3) that the constitutionality of the death penalty must be examined and re-examined in light of "the evolving standards of decency that mark the progress of a maturing society." (*Gregg,* 428 U.S. at 173, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101.)

The Supreme Court repeatedly has relied on that third holding to declare unconstitutional specific applications of the death penalty and procedures used to administer it.[158] In many of these cases following *Gregg,* the Court has applied new information and new arguments to old procedures, and has found them wanting. In *Roper v. Simmons* (2005) 543 U.S. 551, the high court reversed its decision in *Stanford v. Kentucky (1989)* 492 U.S. 361, and held that the execution for an offense committed by a defendant under the age of 18 is unconstitutional. (*See also Atkins v. Virginia, supra,* reversing *Penry v. Lynaugh* (1989) 492 U.S. 302, by holding that mentally retarded persons are categorically exempt from the death penalty.)

The precise issue here—the constitutionality of the beyond-a-reasonable-doubt standard in the face of mounting new evidence that under current procedures it leads to the executions of a substantial number of innocent defendants—has never been addressed by the U.S. Supreme Court. The issue in this case was not decided in *Herrera,* and it has not been addressed in *Gregg* or in any other post-*Gregg* case. The issue did not ripen until recently. It remains undecided to this day. This Court's authority to consider it, within the framework created by *Gregg* and subsequent cases, is beyond dispute.

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

The high number of wrongful convictions has made it possible for causal factors to be identified. They are: (1) mistaken eyewitness identifications; (2) false "incentivized" testimony from accomplices and jailhouse informants; (3) false confessions; (4) wrong science; and (5)

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[158] (*See, e.g., Woodson v. North Carolina, supra,* 428 U.S. 280; *Coker v. Georgia* (1977) 433 U.S. 584; *Gardner v. Florida* (1977) 430 U.S. 349; *Lockett v. Ohio* (1978) 438 U.S. 586; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Simmons v. South Carolina* (1994) 512 U.S. 154; *Thompson v. Oklahoma* (1988) 487 U.S. 815.)

official misconduct.[159] One of the most thorough reviews of the sources of wrongful convictions was done in Illinois. Governor Ryan appointed a Governor's Commission to study how and why so many innocent men in his state could have been sentenced to death, and to "submit to the Governor a written report detailing its findings and providing comprehensive advice and recommendations to the Governor that will further ensure the administration of capital punishment in the State of Illinois will be fair and accurate." The commission included judges, prosecutors and defense lawyers from across the political spectrum, all of whom were familiar with Illinois' death penalty system.[160] On April 15, 2002, after two years of study, the Illinois Governor's Commission issued its Report [hereinafter Illinois Commission Report]. (Report of the Governor's Commission on Capital Punishment (Apr. 15, 2002) <http://www.idoc.state.il.us/

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[159] National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward (2009); Gould, The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System (2009); Samuel Gross, *Convicting the Innocent* (2008) 4 Ann. Rev. of L. and Social Science 173; *Errors of Justice: Nature, Sources and Remedies* (Cambridge Studies in Criminology) by Brian Forst, Alfred Blumstein (Series Editor), David Farrington (Series Editor) Cambridge University Press (2003); *Innocence Lost... and Found: Faces of Wrongful Conviction Symposium* (2006) 37 Golden Gate L.Rev. 1; Kreimer & Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA* (Dec. 2002) 151 U. Penn. L.Rev. 547 [describing several examples of wrongful convictions in Pennsylvania, some based on testimony of jailhouse informants]; Liebman, *The Overproduction of Death* (2000) 100 Colum.L.Rev. 2030 [noting several cases in which jailhouse snitches were used to secure faulty convictions]; Garvey (Ed.), Beyond Repair? America's Death Penalty (2003); Blume, *Twenty-five Years of Death: a Report of the Cornell Death Penalty Project on the 'Modern' Era of Capital Punishment in South Carolina* (2002) 54 S.C. L. Rev. 285; American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: a Guide for Examining the Administration of the Death Penalty in the United States* (2002) Ohio St. L.J., Symposium: Addressing Capital Punishment through Statutory Reform; Scheck et al., *Actual Innocence* (2000) [out of 62 cases in which DNA has exonerated an innocent defendant, 13 cases, or 21 percent, relied to some extent on the testimony of informers]; Keith Findley, *Learning from Our Mistakes: a Criminal Justice Commission to Study Wrongful Convictions* (2002) 38 Cal. Western L.Rev. 333; Stanley Cohen, The Wrong Men: America's Epidemic of Wrongful Death Row Convictions (2003); Warden, *The Snitch System: How Incentivized Witnesses Put 38 Innocent Americans on Death Row* (2002) Research Report, Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern Univ. School of Law.

[160] Former federal prosecutor and First Assistant Illinois Attorney General, Judge Frank McGarr served as the Commission's Chairman. (Illinois Commission Report, note 5, at 1.) Judge McGarr spent 18 years on the federal bench and served as Chief Judge of the Federal District Court for the Northern District of Illinois between 1981 and 1986. (*Id.*) A former member of the Illinois General Assembly and the United States Congress, Senator Paul Simon served as Co-Chair. (*Id.*) Since he retired from the United States Senate in 1997, Senator Simon has been a professor at Southern Illinois University and Director of its Public Policy Institute. (*Id.*) Thomas P. Sullivan also served as Co-Chair. Formerly a United States Attorney for the Northern District of Illinois from 1977 to 1981, Mr. Sullivan is now in private practice at Jenner & Block. (*Id.*) The Commission included six former prosecutors, four current or former defense lawyers, and two current or former judges: Judge McGarr and Judge William H. Webster. (*Id.*) Refer to the "Commission Members" section of the Illinois Commission Report for more information. (Commission Members, Illinois Commission on Capital Punishment <http://www.idoc.state.il.us/ccp/ccp/member_info.html>.)

ccp/ccp/reports/commission_report/index.html> [as of Dec. 12, 2010].)

The Commission found that the primary problem, from which many others flow, is the intense community pressure on law enforcement authorities to resolve horrific cases. This pressure leads to tunnel vision,[161] or "confirmatory bias," the premature closing off of investigative leads, directive interviews of suspect and witnesses, provision of irresistible favors to informants and accomplices, and misuse of science. Community pressure can make officials desperate enough for resolution to commit misconduct; which is present in a high percentage of known wrongful convictions.

The Illinois Commission Report's recommendations were designed to combat the influence of confirmatory bias by training and by particular procedures to eliminate the effect of various forms of witness direction. The first 19 recommendations are concerned with police and pre-trial procedures, and with accuracy in catching the real perpetrator. An additional six recommendations relate to informant and accomplice testimony. The recommendations also require police to receive training on issues that have caused wrongful convictions.[162] None of these recommendations is in effect now in California.[163]

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[161] The Illinois Commission Report suggests that tunnel vision occurs "where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty." (Illinois Commission Report at p. 20.) Officers become so convinced that they have arrested the correct person that they often ignore information pointing in another direction. (*Id.* at 20-21; *see also* Stanley Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England* (2000) 68 Fordham L.Rev. 1379.)

[162] *See, e.g.,* Recommendation #16: All police who work on homicide cases should receive periodic training in the following areas, and experts on these subjects should be retained to conduct training and prepare manuals on these topics: (1) The risks of false testimony by in-custody informants ("jailhouse snitches"). (2) The risks of false testimony by accomplice witnesses. (3) The dangers of tunnel vision or confirmatory bias. (4) The risks of wrongful convictions in homicide cases. (5) Police investigative and interrogation methods. (6) Police investigating and reporting of exculpatory evidence. (7) Forensic evidence. (8) The risks of false confessions. (Illinois Commission Report, p. 40.)

[163] A meticulous comparison of the Commission's recommendations with current California practice was made by Robert Sanger in *Comparison of the Illinois Commission Report on Capital Punishment with The Capital Punishment System in California* (2003) 44 Santa Clara L.Rev. 101.

The risk of wrongful executions, wrongful convictions and wrongful death sentences was recognized in the Final Report of the California Commission on the Fair Administration of Justice.[164] The Report noted a significant number of exonerations of people convicted of murder, and made a comprehensive series of recommendations to improve California's system of death penalty trials, appeals, and postconviction challenges to death sentences. (See Final Report, pp. 20-30.)

For over 40 years, the Model Penal Code barred death where "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." (*See* Margery Malkin Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt* (2001) 21 N. Ill. U. L.Rev. 41, 50-51, quoting Model Penal Code § 210.6(1)(f).) The commentary notes that "[t]his provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains, the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal." (*Ibid.*)

Although this aspect of the American Law Institute's Model Penal Code was never adopted, the institute created the modern framework for the death penalty, one adopted by Georgia and relied on by the high court when capital punishment was reinstated in 1976. (*See Gregg v. Georgia, supra,* 428 U.S. at 189-91.)

However, citing "the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment," the American Law Institute retracted its guidelines for administration of the death penalty in the United States in April of

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

2009.[165] A study commissioned by the institute said that decades of experience had proved that the system could not reconcile the twin goals of individualized decisions about who should be executed and systemic fairness. It added that capital punishment was plagued by racial disparities, was enormously expensive, and carried a significant risk of executing innocent people.

C. Conclusion

In *Unites States v. Quinones,* the district court wrote, "[t]he best evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed, and that, on the other hand, convincing proof of their innocence often does not emerge until long after their conviction." *(Quinones,* 205 F.Supp.2d 256, 257.) As of November 2010, California's system has about 695 people on its death row. Most have never had their cases thoroughly reviewed by the courts, and many do not even have lawyers to initiate a review. It is highly likely that many of those now on California's death row are innocent of the crimes for which they were convicted, or of the aggravating circumstances that led to their punishment.

All aspects of criminal investigation and prosecution that have been identified as productive of wrongful convictions in capital cases are inherent parts of California's criminal justice system. There is no reason to believe they are not having the same effect in California.

This Court's standard of review of the sufficiency of evidence upholding any criminal conviction, including those making a defendant eligible for death, has been in effect around the country for several decades, and was the controlling standard for *hundreds* of felony convictions

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

now known to have been erroneous. However adequate it may be for criminal cases in which life or death is not at stake, it should not guide juries or reviewing courts in capital cases.

This Court has thus far rejected claims that death penalty cases require a standard of proof higher than beyond a reasonable doubt. (*People v. Riel* (2000) 22 Cal.4th 1153, 1182; *People* v. *Kaurish* (1990) 52 Ca1.3d 648, 706.) Both these cases simply cited the plurality opinion in *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-75, without further analysis. Neither this Court nor the U.S. Supreme Court has yet confronted the new reality of criminal trials exposed by DNA testing and other post-conviction investigations in criminal trials—a significant percentage of capital cases are so flawed that innocent people are convicted and sentenced to death for crimes they did not commit. Even if the odds are 90 percent in favor of the accuracy of a guilt finding, there are now many innocent people sitting on California's Death Row.

Aside from the complex revamping of criminal procedure along the lines of the Illinois Commission Report, which can only be done by the legislature, this number could be severely limited by simply requiring that proof of guilt in such cases be beyond all doubt. Since we now know beyond all doubt that innocent people are routinely sentenced to death, the Eighth Amendment requires that we translate that knowledge into the appropriate burden of proof in cases where death is a potential outcome.

XVIII

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT ROBERT WILLIAMS' TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, Robert Williams presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date, the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6.)[166] *See also Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a

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[166] In *Marsh,* the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at 178.)

meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime—even circumstances squarely opposed to each other [e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home]—to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute—but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

XIX

APPELLANT'S DEATH PENALTY IS INVALID BECAUSE IT PROVIDES NO MEANINGFUL BASIS FOR CHOOSING THOSE WHO ARE ELIGIBLE FOR DEATH

"To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citations omitted.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

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[167] 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 definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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

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[167] 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.

under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 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 469,500-01,512-15.) 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.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

XX

ROBERT WILLIAMS' DEATH PENALTY IS INVALID BECAUSE IT ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[168] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[169] or having had a "hatred of religion,"[170] or threatened witnesses after his arrest,[171] or disposed of the victim's body in a manner that precluded its recovery.[172] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (*See, e.g., People v. Robinson* (2005) 37 Cal.4th 592, 644-52, 656-57.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm

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[168] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270.)
[169] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, cert. den. (1990) 494 U.S. 1038.
[170] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-82, cert. den. (1992) 112 S.Ct. 3040.
[171] *People v. Hardy* (1992) 2 Cal.4th 86, 204, cert. den. 113 S.Ct. 498.
[172] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, cert. den. (1990) 496 U.S. 931.

they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-83).

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra,* 512 U.S. at 986-90, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts—or facts that are inevitable variations of every homicide—into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying

that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

XXI

CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3, factor (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make—whether or not to condemn a fellow human to death.

A. Robert Williams' Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors...." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi]; Ring v. Arizona* (2002) 536 U.S. 584 [*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

In *Apprendi,* the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence [other than a prior conviction] are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra,* at 478.)

In *Ring,* the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring, supra,* 536 U.S. at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is

attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra, 542* U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (542 U.S. at 304; emphasis in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact [other than a prior conviction] which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v.*

Booker, supra, 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi,* and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra,* 549 U.S. at 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (*Id.* at 282.)

B. In the Wake of *Apprendi, Ring, Blakely,* and *Cunningham,* Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance—and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; *see also People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and... not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor [or factors] substantially outweigh any and all mitigating factors.[173] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is *any fact, condition or event*

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[173] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also—and most important—to render an individualized, normative determination about the penalty appropriate for the particular defendant...." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself."

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[174] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[175]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People* v. *Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi*, *Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has

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[174] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact –no matter how the State labels it—must be found by a jury beyond a reasonable doubt.'" (*Johnson, supra,* 59 P.3d at 460.)

[175] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-77; *People v. Brown* (*Brown I*) (1985) 40 Cal.3d 512, 541.)

been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[176] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (549 U.S. at 276-79.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra,* 549 U.S. at 290-91.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (549 U.S. at 293.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. *See Blakely,* 542 U.S. at 307-08, 124 S.Ct. 2531. *But see Black,* 35 Cal.4th at 1260, 29 Cal.Rptr.3d 740, 113 P.3d at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* 549 U.S. at 291.)

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[176] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely,* and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black,* 35 Cal.4th at 1253; *Cunningham, supra,* 549 U.S. at 289.)

In the wake of *Cunningham,* it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi,* this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (*see* § 190.2, subd. (a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring,* this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra,* 30 Cal.4th at 263.)

This holding is simply wrong. As section 190, subdivision (a)[177] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense." (*Cunningham, supra,* 549 U.S. at 279.)

Arizona advanced precisely the same argument in *Ring.* It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California,

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[177] Section 190, subdivision (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S. at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; *see* 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring,* 536 U.S. at 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra,* 536 U.S. at 604.) Section 190, subdivision (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (§ 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances (§ 190.3). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (*Ring,* 536 U.S. at 604.) In *Blakely,* the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely, supra,* 542 U.S. at 328; emphasis in original.)

The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham,* is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

C. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors—a prerequisite to imposition of the death sentence—is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; *accord, State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State, supra,* 59 P.3d 450.)[178]

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[179] As the high court stated in *Ring*:

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[178] *See also* Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala. L.Rev. 1091, 1126-27 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[179] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring, supra,* 536 U.S. at 609.)

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

D. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

1. Factual determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-21.)

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applied to capital sentencing proceedings: *"[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra,* 524 U.S. at 732 (emphasis added), quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, and *Addington v. Texas* (1979) 441 U.S. 418, 423-24.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentence" (*Gardner v. Florida, supra,* 430 U.S. at 358; *see also Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition of life or death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra,* 397 U.S. at 363-64; *see also Addington v. Texas, supra,* 441 U.S. at 423; *Santosky v. Kramer, supra,* 455 U.S. at 755.) It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (*See Winship, supra* [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (*1977*) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra,* the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky,* involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra,* 455 U.S. at 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship, supra,* 397 U.S. at 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding,* as in a criminal trial, 'the interests of the defendant [are] of such magnitude that... they have been protected by standards of proof designed to exclude as nearly as

possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra,* 524 U.S. at 732 (emphasis added), quoting *Bullington v. Missouri, supra,* 451 U.S. at 441, and *Addington v. Texas, supra,* 441 U.S. at 423-24.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

E. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 539, 543; *Gregg v. Georgia, supra,* 428 U.S. at 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra),* there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (*See Townsend v. Sain* (1963) 372 U.S. 293, 313-16.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers, supra,* 39 Cal.4th at 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the

circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at 267.)[180] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (§ 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see generally Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417,421; *Ring v. Arizona, supra;* Section D, *post),* the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (*See Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias, supra,* 39 Cal.4th at 41-42) and "moral" (*People v. Hawthorne, supra,* 4 Cal.4th at 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the

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[180] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Cal. Code Regs., tit. 15, § 2280 et seq.)

protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (*See Kansas v. Marsh, supra,* 548 U.S. at 177-78 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

F. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Intercase Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review—a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra,* 465 U.S. at 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*"

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris,* in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris,* 465 U.S. at 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that *cannot be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (*See* Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (*see* Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (*see* Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (*see Kansas v. Marsh, supra,* 548 U.S. at 177-78), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (*See People v. Fierro* (1991) 1 Cal.4th 173, 253.)

The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants

is strictly the creation of this Court. (*See, e.g., People v. Marshall* (1990) 50 Cal.3d 907, 946-47.) This Court's categorical refusal to engage in intercase proportionality review now violates the Eighth Amendment.

G. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If it Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (*See, e.g., Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The U.S. Supreme Court's recent decisions in *United States v. Booker, supra, Blakely v. Washington, supra, Ring v. Arizona, supra,* and *Apprendi v. New Jersey, supra,* confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury.

Appellant's jury was not instructed on the need for such a unanimous finding on these facts, nor is such an instruction generally provided for under California's sentencing scheme. This failure violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

XXII

THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NONCAPITAL DEFENDANTS

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (*See, e.g., Monge v. California, supra,* 524 U.S. at 731-32.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-85.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[181] as in *Snow*,[182] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (*See also People v. Demetrulias, supra,* 39 Cal.4th at 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (*See, e.g.,* sections 1158, 1158a.) When a California judge makes a sentencing choice in a non-capital case, the court's "reasons... must be stated orally on the record." (Cal. Rules of Court, rule 4.42(e).)

In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante.)* And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for noncapital Crimes, in California, no reasons for a death sentence need be provided. (See Section C.3, *ante.*) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[183] (*Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 530].)

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[181] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra,* 30 Cal.4th at 275; emphasis added.)

[182] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra,* 30 Cal.4th at 126, fn. 3; emphasis added.)

[183] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum Punishment.... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra,* 536 U.S. at 609.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (*See, e.g., Mills v. Maryland, supra,* 486 U.S. at 374; *Myers v. Ylst, supra,* 897 F.2d at 421; *Ring v. Arizona, supra.*)

XXIII

THE VIOLATIONS OF ROBERT WILLIAMS' RIGHTS ARTICULATED ABOVE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT ROBERT'S CONVICTIONS AND PENALTY BE SETASIDE

Robert Williams was deprived of a fair trial and a reliable penalty in violation of customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above-mentioned instruments as well as the International Convention Against All Forms of Racial Discrimination.

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise accepted the applicability of these standards to their own citizens. This Court has not only the right, but the obligation, to enforce these standards.

International law "confers fundamental rights upon all people vis-à-vis their own governments." (*Filartiga v. Pena-Irala* (2nd Cir. 1980) 630 F.2d 876, 885.) International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252; *Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64.)

The first modern international human rights provisions appear in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[184] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights (Universal Declaration)[185] and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[186] The Universal Declaration is part of the International Bill of Human Rights,[187] which also includes the International Covenant on Civil and Political Rights (International Covenant),[188] the Optional Protocol to the International Covenant,[189] the International Covenant on Economic, Social and Cultural Rights,[190] and the human rights provisions of the UN Charter.

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[184] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere—without regard to race, language or religion—we cannot have permanent peace and security in the world.

Robertson, Human Rights in Europe (1985) p. 22, n. 22 (quoting President Truman).

[185] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization.

[186] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951. Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. *See generally*, Burgenthal, *International Human Rights in a Nutshell,* Vol. 14 (1988) p. 48.

[187] *See generally*, Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[188] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976.

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

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

The United States and our Bill of Rights was the inspiration of international human rights law. Our government has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As a key participant in drafting the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[191] In the late 1960s and throughout the 1970s, the United States became a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[192]

In the 1990s, the United States ratified three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination (Race Convention),[193] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[194] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[195]

The United States, by signing and ratifying the International Covenant, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of

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[191] Sohn and Burgenthal, *International Protection of Human Rights* (1973) pp. 506-09.
[192] Burgenthal, *International Human Rights.*
[193] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. 60 U.N.T.S. 195 (1994). More than 100 countries are parties to the Race Convention.
[194] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. 1465 U.N.T.S. 85 (1994).
[195] Burgenthal, *International Human Rights.*

customary international human rights law. Many of the substantive clauses of these treaties articulate customary international law and thus bind our government.[196]

Safeguards adopted by international organizations are also indicative of customary international law. The Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty adopted by the United Nations Economic and Social Council provides, "[c]apital punishment may only be carried out pursuant to *a final judgment by a competent court after legal process which gives all possible safeguards to ensure a fair trial...* including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." (Emphasis added).

This Court has repeatedly rejected claims that international law has any application to California capital proceedings, on grounds that it does not prohibit a sentence in accord with state and federal constitutional requirements. (*People v. Hamilton* (2009) 45 Cal.4th 863, 896; *People v. Hillhouse, supra,* 27 Cal.4th at 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) To the extent that this Court has concluded that international law need not be considered as long as standards of domestic law are met, then the opinion in *Jenkins* and ensuing cases (*see, e.g., People v. Curl* (2009) 46 Cal.4th 339, 362-63), effectively relegates international legal principles to the trash can, holding that international law is no broader than the law of a sovereign state. If this were the case, then every nation on earth could claim that international law is only binding to the extent it reiterates domestic law.

As the United States Constitution and Supreme Court jurisprudence recognize, international law is part of the law of this land. International treaties have supremacy in this country. (U.S. Const., art. VI, § 2.) Customary international law, or the "law of nations," is

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[196] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory LJ. 731, 737.

equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; *see Eye v. Robertson* (1884) 112 U.S. 580; U.S. Const. art. I, § 8 (Congress has authority to "define and punish... offenses against the law of nations").) This Court therefore has an obligation to fully consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, it should enforce violations of international law where that law provides more protections for individuals than does domestic law.

XXIV

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The non-use of the death penalty, or its limitation to "exceptional crimes such as treason"—as opposed to its use as regular punishment—is particularly uniform in the nations of Western Europe. (*See, e.g., Stanford v. Kentucky, supra,* 492 U.S. at 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have *not* abolished the death penalty in law or fact are in Asia and Africa—with the exception of the United States. (*Death Sentences and Executions 2009: Annex I—Abolitionist and Retentionist Countries as of 31 December 2009* (Mar. 1, 2010) Amnesty Intl. <http://www.amnesty.org/en/library/info/ACT50/001/2010/en> [as of Dec. 12, 2010].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v.*

Guyot (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra,* 536 U.S. at 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina,* O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes—as opposed to extraordinary punishment for extraordinary crimes—is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (*See Atkins v. Virginia, supra,* 536 U.S. at 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. at 227; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious

crimes."[197] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (*Cf. Ford v. Wainwright, supra,* 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Robert's death sentence should be set aside.

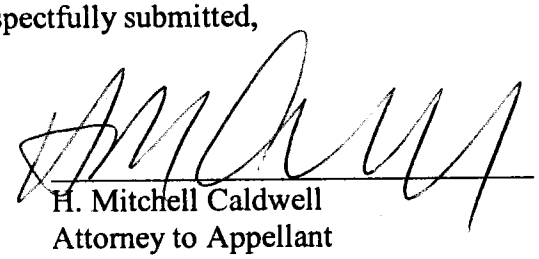
[197] *See* Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev. 1, 30.

CONCLUSION

For the reasons stated in this brief, the judgments of guilt and death must be reserved.

Dated: March 3, 2011

Respectfully submitted,



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I certify under penalty of perjury that the foregoing is true and correct.

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