SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ROBERT LEE WILLIAMS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S118629

Riverside County Superior Court Case No. CR64075
Hon. Dennis A. McConaghy, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On January 18, 1996, the Riverside County District Attorney filed an Information, charging Appellant Robert W. Williams (Williams), in count 1, with the murder of Gary Williams in violation of Penal Code section 187, subdivision (a). In count 2, Williams was charged with the murder of Roscoe Williams. (§ 187, subd. (a).) In count 3, Williams was charged with the attempted murder of Conya L. In count 4 Williams was charged with sexual penetration of Conya L. with a foreign object. (§ 289, subd. (a).) (1 CT 148-151.)

As to counts 1 and 2, it was alleged that Williams committed multiple murder within the meaning of Penal Code section 190.2, subdivision (a)(3) and that the murders were committed during the commission of a robbery (§ 190.2, subd. (a)(17)), burglary (§ 190.2, subd. (a)(17)), and torture (§ 190.2, subd. (a)(18)). As to counts 1, 2 and 3, it was alleged that Williams used a semi-automatic handgun. (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8).) (1 CT 148-151.) Further, as to count 3, it was also alleged that Williams personally inflicted great bodily injury upon Conya L. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8).) (1 CT 151.) Jury selection began on July 1, 2002. (5 RT 1001.) The jury was sworn on July 31, 2002. (10 RT 1674.) On September 17, 2002 the jury found Williams guilty on all counts as charged and found all the special circumstances allegations and enhancement allegations were true. (27 RT 3425-3432.)

On October 15, 2002, the penalty phase began. (28 RT 3507.) The jury began their penalty phase deliberations on October 16, 2002. (28 CT 3653.) On October 18, 2002, the jury returned a verdict of death. (28 RT 3659-3661.)

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On August 29, 2003, the trial court denied Williams's motion for modification of the verdict (30 RT 3793) and Williams was then sentenced to death. (30 RT 3811.)

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

STATEMENT OF FACTS

Williams was sentenced to death for the murders of Gary and Roscoe Williams, and attempted murder of Conya L., during the home invasion robbery of Gary Williams' Moreno Valley home. During the robbery, Williams and two cohorts bound and tortured the victims before severing their throats with knives. Despite suffering serious bodily injury and sexually assault, Conya L. escaped and survived, ultimately testifying against appellant.

Robert Scott (Scott) testified that on July 4, 1995, he and his friend since childhood, Gary Williams (Gary)[1] drove to Long Beach in Gary's truck in order to see Scott's cousin. (18 RT 2529-2530.) As the two sat in Gary's car, Appellant Robert E. Williams (Williams)[2] pulled up alongside in his car. (18 RT 2534-2536.) After exiting his car, Williams grabbed Gary by the neck, pressed a black nine-millimeter semi-automatic handgun against Gary's neck and said, "I know you niggers out there getting licks and I want my share of the money." (18 RT 2537-2542.) Scott testified that the term "lick" describes the proceeds gained from a successfully

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[1] As both victims, Gary and Roscoe Williams possessed the same last name as appellant, respondent references the victims by their first names.

[2] No evidence was presented that Appellant Williams was related to either Gary or Roscoe Williams.

completed credit-union robbery.[3] (18 RT 2542-2543.) Williams continued that should Gary fail to meet his demand, Williams would kill Gary and his family. (18 RT 2542.) Before departing, Williams cautioned, "I'm not playing, mother fuckers." (18 RT 2561.)

Following Williams' July 4, 1995 threat, Gary and Scott discussed the fact that Williams presented a problem for them. (18 RT 2555.) Gary feared Williams. (19 RT 2758.) Accordingly, Gary and Scott decided to commit a credit-union robbery so they could pay Williams off and also make money for themselves. (18 RT 2555-2556.) Gary told Scott that he had something lined up. (18 RT 2555.)

Six days after Williams' threat, on July 10, 1995, the men robbed an Orange County credit-union. (18 RT 2562.) Gary acted as the lookout while Scott and another man, Curtis Jackson (Jackson), entered the credit union in order to obtain the money. (18 RT 2562.) Gary provided guns to both Scott and Jackson to use during the crime. (18 RT 2601.) Although Scott and Jackson were able to successfully flee the credit union with fifty-six thousand dollars in stolen proceeds, following a high-speed police chase, they were captured. (18 RT 2564-2565.) However, Gary, fled in a different car than Scott and Jackson, and got away. (18 RT 2602.)

A. The July 15, 1995 Home Invasion Murders of Gary and Roscoe Williams

In July of 1995, Conya L. and Gary had been romantically involved for about a year and had discussed marriage. (15 RT 2047; 17 RT 2408-

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[3] In the early 1990s, Gary and Scott worked together to commit over twenty armed credit-union robberies. (18 RT 2523-2524, 2574, 2586.) Williams' brother-in-law, Alan Hunter had also participated in some of the credit union robberies. (20 RT 2879-2880.) During that timeframe, Scott had introduced Gary to Williams. (18 RT 2544.)

2409.) She was aware that Gary made his living robbing credit unions. (17 RT 2410.)

On the evening of July 15, 1995, at approximately eight o'clock, Conya L. and Gary met at Gary's Moreno Valley home and discussed dinner plans. (15 RT 2059-2060.) The couple determined that they would dine at the Golden Corral Buffet, located approximately seven minutes away from Gary's home. (15 RT 2061.) As they drove home from dinner approximately 40 minutes Later, Gary informed Conya L. that he needed to hurry back to the house because he had a meeting. (15 RT 2061-2062.) Conya understood that Gary was meeting a man named "Boochie," also known as "Black" or Ronald Walker[4] (Walker), in order to buy a gun because Gary's guns had been confiscated in the failed credit union robbery five days earlier. (15 RT 2079, 2090; 17 RT 2403; 21 RT 2926, 2929-2931.) As they turned onto Gary's street, Gary and Conya L. drove past a car. (15 RT 2063.) Conya L. testified that Gary asked, and seemed very curious, about the car. (15 RT 2063.)

Upon arriving at Gary's house, Conya L. observed that Gary's father, Roscoe Williams (Roscoe), was impatiently waiting. (15 RT 2063-2065.) A woman named Charlotte was also waiting outside. (15 RT 2064-2065.) After Gary invited everyone inside, the four entered the house by walking through the attached garage and through an interior entry door. (15 RT 2066.) Once inside the house, Charlotte briefly explained to Gary that she needed some spending money to give to her incarcerated husband. (15 RT

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[4] A separate jury convicted Ronald Walker of the first degree murders of Gary and Roscoe Williams. In an unpublished Court of Appeal decision, case number E028953, the conviction was affirmed on March 28, 2002. This Court denied Walker's Petition for Review, in case number S106516, on June 19, 2002.

2067-2068.) After receiving money, Charlotte began to leave, however, before departing she noted that moments before Gary and Conya L. had arrived, someone had been waiting but had left. (15 RT 2068-2069.) The phone rang. (15 RT 2072.) Gary answered it and indicated to Conya L. that it was his incarcerated credit union robbery cohort Alan Hunter. (15 RT 2072.) Conya L. went upstairs. (15 RT 2074.)

As Conya L. was upstairs in the master bedroom she overheard through the open window Gary and Roscoe talking down below—first inside the open garage and then on the driveway. (15 RT 2074, 2080-2081.) Roscoe stated that he was going to the store and asked Gary for money. (15 RT 2081.) Gary teased Roscoe but then yelled up to Conya L., asking the whereabouts of her purse so he could give Roscoe some money. (15 RT 2081.) Conya L. admonished Gary to stop teasing Roscoe. (15 RT 2082.) Gary joked that he was going to come up and get Conya L. next as he handed some money to Roscoe who left for the store. (15 RT 2082.)

Conya L. testified she heard Gary, apparently talking to himself, comment that he observed the car that he "saw earlier." (15 RT 2083.) Conya L. then observed three men exit a large four door sedan and quickly walk across the street towards the house. (15 RT 2085-2088.) The men included Williams, Walker and an unidentified third robber. (15 RT 2090, 2103-2104.) Gary commented to the men that he and Conya L. had passed them earlier and asked if they had seen them. (15 RT 2089.) Walker responded, "nah, nigger[,] I was rolling a joint." (15 RT 2090.) One of the men was carrying a black case. (15 RT 2090.) When, at trial, Conya L. was shown a dark colored gun case found at the scene by homicide detectives, she testified that it looked like the case that one of the men, whom Conya L. characterized as the "heavy set guy," had been carrying. (11 RT 1843-1844; 15 RT 2090, 2092.) Conya L. testified that Williams was the heaviest of the three men. (15 RT 2120.) When the three men and

Gary went inside the garage, Conya L. could hear them talking. (15 RT 2093.) Conya L. remained upstairs and thought about taking a bath. (15 RT 2094-2095.)

As Conya L. was inside the upstairs bathroom, she heard a component of the home's security system beep, indicating that the interior person door, separating the garage from the house, had been opened. (15 RT 2095-2096.) She heard the floor creak. (15 RT 2097.) Anticipating Gary, Conya L. heard a voice. (15 RT 2097.) Upon turning, Conya L. was confronted with Walker, pointing a machine gun at her face. (15 RT 2099-2100.) Conya L. provided an in-court identification of the gun, which had been recovered from Williams' Las Vegas motel room during his arrest (detailed below) on July 26, 1995. (15 RT 2099; 18 RT 2637-2638; 20 RT 2891.) When Conya L. asked Walker for an explanation, Walker ordered her out of the bathroom. (15 RT 2101-2102.) Conya L. observed that Walker was wearing a pair of yellow dishwashing gloves. (15 RT 2097.) Conya L. testified that neither Walker, Williams or the third robber had been wearing gloves when they had arrived. (15 RT 2098.)

Conya L. complied and exited the bathroom into one of the adjacent bedrooms. (15 RT 2101-2102, 2104.) Williams abruptly entered the bedroom, looked Conya L. "up and down" and ordered her to remove all of her jewelry and give it to him. (15 RT 2102-2106.) Conya L. obeyed and Williams stuffed her property into his pocket. (15 RT 2105, 2107.) Williams was wearing yellow rubber dishwashing gloves that matched those worn by Walker.[5] (15 RT 2106.) Given the gloves, coupled with the lack of masks, Conya L. believed the invaders intended to kill them. (16

[5] Gary Williams did not keep dishwashing gloves in the house. (15 RT 2105.)

RT 2246.) Williams inquired of Conya L., "bitch where's the money?" (15 RT 2108.) When Conya L. claimed that she did not know, Williams directed Walker to tie her up. (15 RT 2108.) Walker led Conya L. to the bedroom, ordered her to the bed face down and bound her hands behind her back with duct tape. (15 RT 2109-2111.) Walker had a difficult time with this task because the duct tape kept sticking to his rubber gloves. (15 RT 2111-2112.) Walker encountered further difficulty as he ran out of duct tape before he could bind Conya L.'s legs. (15 RT 2112-2114.) Williams therefore assisted Walker by ripping a cord from a lamp which he used to tie Conya L.'s ankles together. (15 RT 2113-2114.) With Conya L. bound, Williams threatened that if Conya L. failed to disclose the location of the money, he would kill her. (15 RT 2114.) Conya L., terrified, asked for Gary. (15 RT 2115.) Williams responded that if he did not get the money expeditiously, he intended to sodomize Conya L. and then "break a broom stick off" in her anus. (15 RT 2115.) Conya L. offered that if he took her to the master bedroom, she would find the money. (15 RT 2115.)

Williams dragged Conya L. to the master bedroom. (15 RT 2116.) As Williams sat Conya L. on the side of the bed, she observed the third robber enter the room. (15 RT 2119.) The third robber, also wearing yellow dishwashing gloves, had blood on his shirt and gloves. (15 RT 2119-2121.) Upon entering the master bedroom, the third robber became quite excited about stealing Gary's clothes and a jar of loose change. (15 RT 2122, 2128.) However, he appeared upset that Gary's shoes did not fit him. (15 RT 2122.) Conya L. testified that the third robber appeared to have difficulty controlling his excitement over the property available to steal and the opportunity to kill their prisoners. (15 RT 2127-2128.) Williams, the apparent leader, assured the third robber that there would be plenty of time for stealing the victims' personal items and instructed him to go back downstairs and keep an eye on Gary. (15 RT 2127-2128.)

Williams began to ransack the master bedroom. (15 RT 2133.) Upon finding Gary's gold chains and jewelry, Williams shoved the items into his pockets. (15 RT 2134-2135.) Williams again demanded that Conya L. disclose the whereabouts of the money. (15 RT 2136.) He further ordered Walker to gag Conya L. with a sock as she was apparently "talking too much," but disclosing too little. (15 RT 2136.) Williams evidenced his dissatisfaction with Conya L.'s talking by delivering a firm opened handed strike to her face as he instructed her to "shut the fuck up." (16 RT 2256.) Walker found a sock and gagged Conya L. with it. (15 RT 2136.) However, the gag proved ineffective as once Williams left Walker and Conya L. alone in the master bedroom, Conya L. was able to ask Walker why he was involved in the endeavor when he and Gary were friends. (15 RT 2137-2138.) Walker explained that Williams had threatened to kill his baby if he failed to assist Williams. (15 RT 2138.) Walker continued that Williams had been "looking to get" Gary for the past several weeks. (15 RT 2141.) When Conya L. asked if Walker was going to kill her, Walker responded in the negative. (15 RT 2140.) However, Walker added that while he would not be performing any killings, he was unable to speak for his cohorts. (15 RT 2142.) Walker gave Conya L. a "little pat" and kissed her on the cheek. (15 RT 2141.)

Williams returned to the master bedroom and was in the process of repeating his threat to sodomize Conya L. and insert a broomstick into her anus when there was a knock on the door. (15 RT 2143.) Conya L. testified that Roscoe had returned from the store and was standing outside calling for Gary to let him in. (15 RT 2144.) Williams ordered everyone to be quiet, stated that Gary's father was at the door, and instructed the third robber to "snatch his ass in the house." (15 RT 2144.) Conya L. heard the front door open and the third robber command, "get the fuck in here, old

man. Don't you say a mother-fucking word." (15 RT 2144.) The door slammed closed. (15 RT 2145.)

Conya L. offered to Walker that she believed Gary kept money in a vacuum bag in an adjacent bedroom. (15 RT 2146, 2151.) Walker passed the information to Williams. (15 RT 2151.) Upon locating the vacuum, the third robber tore open the bag which was determined to contain no money. (15 RT 2152.) Williams became angry and exclaimed, "this bitch thinks I'm playing, I want the fucking money." (15 RT 2152.) When Conya L. offered that perhaps Gary had no money, Williams responded that the time had arrived for him to rape Conya L. (15 RT 2152.) Williams ordered his cohorts to bring Gary and Roscoe upstairs. (15 RT 2152.)

Upon Gary being dragged up the stairs, Conya L. observed that his hand and feet were bound and his eye was bloody and swollen shut. (15 RT 2152-2153.) Pursuant to Williams' instruction, Gary was laid down in the hallway and the cohorts returned back downstairs to retrieve Roscoe. (15 RT 2154.) Roscoe, with his hands bound behind his back, was pulled up the stairs and laid on the hallway floor next to Gary. (15 RT 2159-2160.) Conya L. testified that at this juncture, Williams' anger was increasing with his inability to find the money. (15 RT 2160-2161.) Conya L. pleaded with Gary to give the invaders the money. (15 RT 2161.) Finally, Gary disclosed that the money was hidden in a cologne bag in the master bathroom. (15 RT 2162.) Upon locating the money, the third robber fanned it out. (15 RT 2163.) Dissatisfied, Williams stated that he was aware that Gary had recently committed two bank robberies and that the money in the cologne bag did not constitute all of the proceeds. (15 RT 2163.) Williams grabbed Conya L. and stated that he intended to make good on his threat to rape her as he forced her into a bathroom located five feet from Gary. (15 RT 2163, 2166.)

After forcing Conya L. into the bathroom, Williams shut the door and informed Conya L. that his actions were a direct consequence of the fact that Gary had "fucked" him. (15 RT 2165.) Williams stated that he intended to kill Gary. (16 RT 2253.) After Conya L. complied with Williams' demand to remove her shorts, Williams pushed down her underwear. (15 RT 2168.) When Conya L. begged Williams not to rape her, pleading she was menstruating, Williams responded, "bitch, I don't give a fuck. Is your ass bleeding?" (15 RT 2170.) Williams removed one of the yellow rubber gloves and, using up to three fingers, digitally penetrated Conya L.'s vagina several times. (15 RT 2170-2171.) Williams further assured, "I got some condoms so I don't leave any DNA behind." (15 RT 2171.) Williams paused when Gary called asking to speak with him. (15 RT 2173.) During the encounter, Gary referred to Williams as "Rob." (16 RT 2253.)

Williams placed his rubber glove back on his hand. (15 RT 2173.) Before exiting the bathroom, Williams instructed Conya L. to leave her clothes off so that his two cohorts could see her naked in order to determine if they too wished to rape her. (15 RT 2173-2174; 16 RT 2255.) After Williams exited the bathroom, Gary looked up at him and pleaded that he could have the money in a few days. (15 RT 2176-2177.) Williams responded by asking if Gary wished to be shot in the head. (15 RT 2177-2178.) Williams stated, "this nigger thinks I'm playing. Do his old man in front of him," as he ordered the third robber to "go downstairs and get them (sic) bags." (15 RT 2164, 2177.) Gary cried, "that's my dad[,]" as the third robber ran downstairs. (15 RT 2183.)

The third robber quickly returned with brown plastic trash bags in his hands, similar to bags Gary kept in the house. (15 RT 2183, 2188-2189.) Conya L. testified that as Gary continued to plead, "that's my dad," Roscoe "brought his face up from the carpet and said, 'That's okay, son . . . I've

lived my life.'" (15 RT 2191.) These were Roscoe's final words as the third robber knelt behind Roscoe and drew one of the plastic bags tightly over his head. (15 RT 2190-2192.) Conya L. testified that at that juncture, Roscoe did not appear to have been gagged with duct tape. (16 RT 2272.) As Gary was crying, Williams stated, "shut the fuck up," and ordered Walker to "kill this fool." (16 RT 2274.) As Roscoe "squirmed," Walker moved in over Gary, placed him in a choke hold and began choking him. (15 RT 2191-2192; 16 RT 2272-2273.) With Gary and Roscoe being simultaneously choked, Gary's back arched and Roscoe gasped for air. (15 RT 2193.) Conya L. cried "no, no" as she backed away. (15 RT 2193.) Conya L. testified that as the killing had begun, she believed she was going to die. (15 RT 2194.)

Standing over Gary, who was being choked by Walker, Williams looked up at Conya L. as she was backing away and stated, "bitch thinks I'm playing" and advanced towards her. (15 RT 2195-2196.) Williams grabbed Conya L. and placed her into a choke hold rending her unconscious. (15 RT 2196-2197.) Conya L. testified that she felt like she was in a dream state as she lay face up on the ground, with Williams over her "cutting" her throat with a knife. (15 RT 2197.) She felt "something warm running down [her] neck." (15 RT 2197.) Conya L. began to fight back. Williams, while cutting her throat, cautioned her against fighting him. (15 RT 2201.) During the struggle, one of Williams' cohorts commented to Williams that Conya L. had experienced a bowel movement. (15 RT 2201.)

As Williams' effort at killing Conya L. was proving ineffective, the third robber directed Williams' attention to specific area of Conya L.'s throat, and opined that an incision at the subject location would produce death. (15 RT 2203, 2210.) Williams, not receptive to the advice, retorted, "nigger, I know how to kill someone." (15 RT 2203, 2210.) Williams

lamented that the straight edge knife that he was using was dull and ordered the third robber to go downstairs and retrieve a serrated knife. (15 RT 2204-2205, 2207.) Meanwhile, Walker began assisting Williams by holding the struggling Conya L. down. (15 RT 2207-2208.) The third robber returned and handed Williams a serrated knife which Williams immediately began using to saw Conya L.'s throat. (15 RT 2209-2210; 16 RT 2281.) At some point, the third robber informed Williams that one of the two male victims was still alive. (16 RT 2280.) Then the phone rang. (16 RT 2282.)

Walker stated to his cohorts that the phone had been ringing and that the group should get out of there. (16 RT 2282.) Conya L. testified that the beams from a car's headlights suggested that a car was in the driveway. (16 RT 2282.) All three men got up and went downstairs, leaving Conya L. alone. (16 RT 2282.) Conya L. heard the home's "watchfeature" chime indicating that the door located between the house and garage had been opened. (16 RT 2291.) Capitalizing on her ongoing effort to loosen her restraints, Conya L. freed her arms and legs. (15 RT 2149-2150, 2202.) Conya L. rolled over to Roscoe and pulled the plastic bag from his head. (16 RT 2296.) Roscoe, whose mouth was not covered with duct tape, was gurgling as if drowning. (16 RT 2296, 2298.) Unaware as to whether or not Gary was breathing, Conya L. pushed him on his side. (16 RT 2298-2299.) Gary's mouth was not covered with duct tape. (16 RT 2300.) Conya L. fled into the master bedroom and dialed 911. (16 RT 2300.) She heard the house "watchfeature" alarm again indicating that the interior garage door had opened and someone had entered the home. (16 RT 2300.)

With the sound of footsteps quickly advancing up the stairs, Conya L. dropped the phone and opened a window. (16 RT 2300.) Upon pushing the screen out and climbing out onto a portion of the roof that overhung the garage, Conya L. told herself that the situation was "do or die," as she

jumped to the ground below. (16 RT 2301.) Naked, except for a blouse and bra, Conya L. hit the lawn below and took off running. (16 RT 2301, 2303.) Without stopping, she ran past two men, yelling to them, "help, they're trying to kill us." (16 RT 2303.) Crying, Conya L. ran through numerous yards, banged on windows, jumped at least four gates and pleaded with a second group of men to call 911. (16 RT 2304-2305.) One of the men stated that the police were in route and gave Conya L. a towel. (16 RT 2305.) Exhausted, Conya L. laid down in the street. (16 RT 2305.) Riverside County Sheriff Deputy David Kirkendall was rapidly approaching the scene. (10 RT 1736; 16 RT 2306.)

Deputy Kirkendall testified that responding to the 911 call, he arrived at Gary's house just before 11:00 p.m. (10 RT 1723-1727.) Upon arriving, Kirkendall knocked on the front door. (10 RT 1730.) With no response, he proceeded to the open garage. (15 RT 1731.) Illuminating into the garage with his flashlight, Kirkendall observed a pool of blood. (10 RT 1731.) Upon contacting police dispatch to report his finding, Kirkendall was advised that numerous 911 calls regarding a woman in distress had been received from a cul-de-sac, located directly behind the subject house. (10 RT 1734.) Kirkendall ran to his patrol car and hurried around the block. (10 RT 1735.) As he approached the location, Kirkendall saw Conya L., naked and "just covered in blood from her face all the way to her toes." (10 RT 1735, 1742.) When Conya L. pulled her hand away from her throat, blood began pouring out. (10 RT 1736.) Kirkendall held her hand as he reassured Conya L. and told her to keep pressure on her neck and to focus on breathing. (10 RT 1736, 1740-1742.) As Conya L. lay in the street, Kirkendall asked her what happened. (10 RT 1736, 1742.)

Conya L. reported to Deputy Kirkendall that three men invaded their home and robbed her and her boyfriend. (10 RT 1743.) One of the men, named Rob, had attempted to rape her. (10 RT 1743.) Conya L. continued

that she had managed to escape through an upstairs window. (10 RT 1744.) Her boyfriend and his father were still in the house. (10 RT 1744.) Accordingly, a second responding deputy sheriff, Deputy Petti, immediately traveled back to Gary's house. (10 RT 1744.) As Kirkendall waited with Conya L., a transmission came over his police radio, transmitted by Petti, indicating that he had located two dead bodies in the home. (10 RT 1745.) This information appeared to increase Conya L.'s level of fear and terror. (10 RT 1745-1746.) Paramedics arrived and rushed Conya L. to the Riverside Community Hospital. (10 RT 1746.)

Deputy Kirkendall followed close behind the ambulance. (10 RT 1747.) Upon arriving at the hospital, Kirkendall located Conya L. in the emergency room and held her hand. (10 RT 1747-1748.) After being examined at trial as to his knowledge and experience in the field of human anatomy, Kirkendall was permitted to testify as to his observations of Conya L.'s neck injury. (10 RT 1750-1754.) He characterized Conya L.'s neck as "open." (10 RT 1748.) Kirkendall testified that at the treating physician's direction, he observed a "vascular tube" inside Conya L.'s neck region that appeared completely severed. (10 RT 1754.) Kirkendall could see another in-tact vessel that pulsated with Conya L.'s heart beat. (10 RT 1754.) The jury was provided a photograph depicting Conya L.'s injury. (10 RT 1758.)

Back at Gary's home, before Deputy Petti's arrival, at approximately 10:00 p.m., Gary's across-the-street neighbor Michelle Contreras testified that she observed four[6] cars rapidly accelerate away from the house, in the same direction of travel. (16 RT 2315, 2319-2320.) Two of the cars left from Gary's driveway and two from where they had been parked, across the

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[6] This is the only testimony suggesting the involvement of a fourth person.

street from Gary's house. (16 RT 2320.) The two cars that departed from the driveway were Gary's Chevy Cavalier and an El Camino that Gary had been storing for a friend, both of which had been parked inside the garage. (15 RT 2049-2052; 16 RT 2322-2323.) The Cavalier and El Camino were recovered by police in the following two days. (21 RT 2963-2964, 2970-2971.) Yellow dish washing gloves were found inside the El Camino. (21 RT 2967.)

Inside Gary's home, law enforcement personal located the bound bodies of Gary and Roscoe. (11 RT 1877, 1880; 19 RT 2772, 2812.) Although Conya L. testified that neither victims' mouth had been duct taped when she escaped, both mouths were duct taped when discovered by the police. (11 RT 1886-1887; 16 RT 2298, 2300.) Further, although Conya L. had pulled the plastic bag off of Roscoe's head before her escape, when he was discovered by authorities, there was a bag over his head. (11 RT 1877; 16 RT 2296.) Two knives, one serrated and one dull straight edge were recovered near the bodies. (11 RT 1917-1918; 19 RT 2805-2806.) An empty black gun case was found in the street in front of the house. (11 RT 1841-1844; 16 RT 2326-2328.) By stipulation, the parties agreed that neither Williams' or Walker's finger or palm prints were found in the house or on the gun case. (21 RT 2997-2998.) Nor did any of the shoeprints located in the house match any of those shoes subsequently confiscated from Williams or Walker. (21 RT 2998.) Finally, neither Williams' nor Walker's finger prints were found on the yellow rubber gloves that were located inside the stolen El Camino. (21 RT 2997.)

Riverside County Forensic Pathologist Joseph H. Choi, M.D., conducted the autopsies of Gary and Roscoe. (19 RT 2767-2769.) Choi testified that neither victim's body exhibited defensive wounds. (19 RT 2780, 2813.) As to the post-mortem condition of Gary's body, Dr. Choi observed a blunt force trauma injury to the left eye. (19 RT 2771-2772,

2785.) Dr. Choi opined that the injury was consistent with an impact to the face, followed by a fall to the floor. (19 RT 2787.) Gary's neck exhibited five non-fatal superficial cuts. (19 RT 2791, 2795.) However, the right side of the neck exhibited a single stab wound that penetrated nearly two inches into Gary's neck. (19 RT 2772, 2808.) Dr. Choi established the cause of death as blood loss due to a partially severed jugular vein which caused cardiovascular failure. (19 RT 2800-2801.) Further, Dr. Choi testified that petechial hemorrhages evidence that Gary had been choked before he was stabbed to death. (19 RT 2802-2803.) As to the post-mortem condition of Roscoe's body, Dr. Choi observed that Roscoe's neck exhibited a deep slash type wound that had fully severed his jugular vein and larynx. (19 RT 2814-2815.) Choi established the cause of death as blood loss causing cardiovascular failure. (19 RT 2818.) Finally, as to both victims, Dr. Choi opined that the duct tape applied to each victim's mouth was applied before the victim was fatally slashed or stabbed. (19 RT 2823-2824.)

Riverside County Sheriff's Department Homicide Investigator Phil Ricciardi traveled to the Riverside Community Hospital the day after the murders, July 16, 1995, at approximately 1:00 p.m., in order to interview Conya L. (21 RT 2339-2940.) Ricciardi first presented Conya L. with a picture of Walker. As Conya L. had previously identified one of the attackers to police by way of the attacker's moniker, the investigation of Gang Detective Keith Yoshimura had revealed that Walker possessed an identical moniker. (10 RT 1777; 21 RT 2925-2931.) As such, when shown Walker's picture, Conya L. began crying and said that "he was the one that did this to her." (21 RT 2944.)

Next, Ricciardi read Conya L. a standard Riverside County Sheriff's Department photographic lineup admonition and presented Conya L. a lineup containing a picture of Williams. (21 RT 2945-2947.) Conya L.

"immediately" began crying and pointed to Williams' picture as she declared that "he was the one that was cutting on her throat." (21 RT 2948.) Conya L. further stated that during the attack, Williams had told her that he intended to sodomize and kill her. (21 RT 2950.) At trial, Conya L. provided an in-court identification of Williams. (16 RT 2364.) She was asked numerous times if she was certain as to her identification. (16 RT 2364.) Conya L. responded, "I'm a hundred percent positive. . . . [t]here is no doubt in my mind. . . . [i]t was Rob. We were in the bathroom with the light on." (16 RT 2364.)

Conya L. further testified that following the murders of Gary and Roscoe, she had received numerous death threats though "third persons."[7] (16 RT 2287.) In August of 1995, Conya L. had moved to Mississippi to stay with relatives. (17 RT 2365.) While there, she received a prearranged visit from Riverside County Sheriff's Department Detective Gary Thomas. (17 RT 2365-2366; 21 RT 2960.) Thomas presented Conya L. with a photographic lineup for purposes of attempting to identify the third unidentified attacker. (17 RT 2366-2371.) Upon being presented the lineup, Conya L. made a selection. (17 RT 2369-2371, 2509.) However, during the identification, Conya L. stated to Thomas that she did not recall the third robber having a tattoo that was depicted on her selected person in the photographic lineup. (17 RT 2508-2509 [an audiotape of Conya L.'s comment was played for the jury].) Conya L. subsequently learned that her selection of the person she believed to be the third robber was incorrect. The person she selected had been incarcerated on July 15, 1995. (17 RT 2370-2371; 23 RT 3064.)

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[7] By stipulation, the jury was informed that there was "no evidence that [Williams] made a threat to any witness in the case." (23 RT 3063.)

On July 26, 1995, the Las Vegas Police Department (LVPD) had become aware that Williams was wanted in California for murder. (18 RT 2612-2613; 20 RT 2891.) Las Vegas Homicide Detective Martin Wildeman testified that based on a California warrant for Williams' arrest, the police department began conducting surveillance at a motel where Williams was suspected to be staying. (18 RT 2612-2613.) Despite a local temperature exceeding one hundred degrees, Williams was observed leaving his motel room clad in a wig and hat. (18 RT 2618, 2622-2623; 20 RT 2899, 2905.) Beyond the suspicious disguise, as Williams hurried across Las Vegas Boulevard, he was observed turning and scanning behind him as if attempting to see if anyone was following him. (20 RT 2900-2901.) After Williams returned to his room, a dozen law enforcement officers, including DEA agents, armed with a search warrant surrounded the motel. (18 RT 2614-2615.) LVPD Sergeant Donald Sutton, who was posted up in an alley behind the motel, testified that Williams stuck his head out a rear window, made eye contact with Sutton and then went back into the room. (20 RT 2891-2893.)

Shortly thereafter, Williams was taken into custody. (20 RT 2903.) Upon being arrested, Williams spontaneously declared, "I guess I'm fucked because I'm going to jail behind two murders." (18 RT 2674.) While refusing to provide his name, Williams stated to another officer, "I'm hiding out because they're looking to pin a homicide on me." (18 RT 2655, 2666, 2671.) A child staying in Williams' motel room directed officers to a loaded gun concealed in a nightstand. (18 RT 2629-2634.) A second loaded semi-automatic handgun was also located in the room, hidden behind the toilet. (18 RT 2645-2647.) During her testimony, Conya L. was shown the gun that was found in the nightstand. (15 RT 2099-2100; 18 RT 2637-2638 [plaintiff's Exh. No. 66].) She testified that she was "positive" that the subject gun was the same gun that Walker pointed at her face

during the home invasion. (15 RT 2100.) As stated above, by stipulation, the jury was informed that no comparable finger prints were recovered from the guns. (21 RT 2998.)

B. Defense Case

Sonya Jimmons (Jimmons) testified that she was working as a social worker at the Riverside Community Hospital when Conya L. was admitted in July 1995. (23 RT 3066.) Jimmons' responsibilities included providing patients with counseling and supportive services, as well as assessing patients' ability to pay. (23 RT 3068-3068.) Jimmons testified that Conya L. reported to her that she had been sodomized during her attacks, and that her co-victims had each been shot in the head by their attackers. (23 RT 3074-3075.) Jimmons stated that Conya L. had a visitor when Jimmons was present, and that Conya L. was laughing and joking. (23 RT 3073.) Finally, although Jimmons had observed Conya L.'s medical file, including pictures, during her time spent assessing Conya L., such that Jimmons was aware that Conya L.'s "neck had been completely opened up so that you could see her trachea[,]" Jimmons characterized the neck injury as a "superficial" wound. (23 RT 30833084, 3086.) However, she testified that her opinion was only based on what she had heard from doctors. (23 RT 3087-3088.)

Next, the defense called Riverside County Sheriff's Deputy Don Plata. (23 RT 3102.) Plata testified that he participated in the investigation of the murder scene on July 15 and 16, 1995. (23 RT 3102.) He spoke with neighbor Michelle Contreras who informed him that she had seen cars leaving Gary's house. (23 RT 3104.)

Finally, the defense recalled Conya L. and established that in 1989, Conya L. had been convicted of misdemeanor welfare fraud. (23 RT 3122-3123.) Conya L. subsequently lied about that conviction on two applications submitted in 1992 and 1996. (23 RT 3123-3125.) Moreover,

Conya L. signed the 1992 application under penalty of perjury. (23 RT 3123-3125.) Finally, in 1994, Conya L. fraudulently used a Medi-Cal card. (23 RT 3126.)

C. Penalty Phase

1. Evidence in Aggravation

The parties entered a stipulation regarding Williams' criminal history. (28 RT 3522.) The stipulation provided:

> It is stipulated between the parties that the defendant Robert Lee Williams, Jr., was convicted of the felony, possession of cocaine, on November 25th 1986, in violation of Health and Safety Code Section 11350. ¶ It is further stipulated that the defendant was convicted of being an ex-felon in possession of a firearm on [] April 27th, 1992, in violation of Penal Code Section 12021. ¶ It is further stipulated between the People and the defense that the defendant has also been convicted of a third felony offense, in that on or about November 16, 1992, he was found again to be in possession of a firearm, having previously been convicted of a felony, in violation of Section 1202.21 of the Penal Code.

(28 RT 3522-3533.)

Roscoe's brother, George Frank, testified that Roscoe was 55 years old when he was murdered. (28 RT 3524-3525.) Frank characterized Roscoe as caring and funny and opined that he was well liked. (28 RT 3526-3527.) Frank stated that the family missed Roscoe terribly and that Frank's grandchildren were aware that Roscoe had been tortured and murdered. (28 RT 3528-3529.) Frank further characterized Roscoe as morally decent. (28 RT 3526.) On cross-examination, Frank conceded that Roscoe had suffered many criminal convictions for narcotics and theft, and agreed that Roscoe had always struggled with drug addiction. (28 RT 3532.) Roscoe's sister, Erma Foster, similarly testified that Roscoe had

been a great brother and friend who "was never mean to anybody[.]" (28 RT 3538-3539.)

2. Defense Mitigation Case

Abel Zaragoza testified that in 1998 he worked as a correctional group supervising counselor with the Riverside County Sherriff's office. (28 RT 3549.) Zaragoza offered that Williams had voluntarily joined and participated in a jail anger management program. (28 RT 3549-3550.) Next, Daniel Johnson testified that while in jail, Williams earned his GED and a certificate for anger management class completion. (28 RT 3551-3552.)

Williams' daughter, 17 year old Fantasia Williams, testified that she wished for her father's life to be spared. (28 RT 3554-3556.) Victoria Windom, a close friend of Williams', testified that Williams had been like a son to her and had acted like a "big brother" to Windom's children. (28 RT 3557-3558.) She stated that Williams was always respectful to her and influenced her children to stay in school. (28 RT 35558.) Next, Donna Josey testified that she had known Williams since he was 13. (28 RT 3560.) Williams was like a son to her. (28 RT 3560.) Williams made friends with everyone. (28 RT 3563.) However, Williams was unable to establish a bond with his father because his father used marijuana and crack. (28 RT 3563.) As a youngster, Williams worked at Burger King and was a good worker. (28 RT 3564.) Finally, Pearl Lee testified that she knew Williams when he was young from the "projects." (28 RT 3567.) Williams was like a big brother to Lee's daughters, encouraging them to stay in school. (28 RT 3567.)

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ARGUMENT

I. WILLIAMS' SPEEDY TRIAL RIGHTS WERE NOT VIOLATED BECAUSE HE WAS RESPONSIBLE FOR THE DELAY, AND EVEN IF HIS RIGHTS HAD BEEN VIOLATED, HE IS NOT ENTITLED TO RELIEF BECAUSE HE WAS NOT PREJUDICED

Williams argues that the failures of the prosecution, the trial court and his many defense lawyers cumulatively caused his right to a speedy trial to be violated. However, Williams caused the delay. Moreover, even if his rights had been violated, given the ironclad nature of the prosecution's evidence, Williams is unable to make his threshold showing that the delay resulted in any prejudice.

The Sixth Amendment affords the accused in all criminal proceedings the right to a speedy trial. Whether that right to a speedy trial has been violated in a particular case depends on four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Barker v. Wingo* (1972) 407 U.S. 514, 530 [92 S.Ct. 2182, 33 L.Ed.2d 101], fn. omitted (*Barker*).) Article I, section 15 of the California Constitution provides "[t]he defendant in a criminal cause has the right to a speedy public trial . . . ." The Legislature has implemented that constitutional speedy trial guarantee in Penal Code section 1382, which "is '"supplementary to and a construction of"'" the constitutional provision. (*People v. Anderson* (2001) 25 Cal.4th 543, 604.) Hence, "[t]he constitutional guarantee may apply even where the statute does not . . . ." (*Id.* at p. 605.) "[W]hen a claim of violation of the state constitutional speedy trial right goes beyond [section 1382], California law requires an affirmative showing of prejudice. [Citation.]" (*People v. Anderson, supra*, 25 Cal.4th at p. 605.) Accordingly, courts deciding speedy trial claims under the state Constitution use a balancing test similar to the one applied to Sixth Amendment claims under *Barker*. Any prejudice to the defendant

resulting from the delay must be weighed against justification for the delay. (*People v. Martinez* (2000) 22 Cal.4th 750, 767; see also *People v. Harrison* (2005) 35 Cal.4th 208, 227 [rejecting federal and state constitutional claims "on the same basis"].)

A. Williams Consented to 17 of the 19 Continuances of His Trial, and Repeatedly Sought and Caused the Delay he Now Claims Violated his Speedy Trial Rights

Gary Williams and Roscoe Williams were murdered on July 15, 1995. Williams was arrested on July 26, 1995. On August 11, 1995, represented by Riverside County Public Defender Forest Wright, Williams entered a plea of not guilty. (1 PTRT[8] 1; 1 CT 3.) Walker, with whom appellant was jointly charged, was represented by Attorney Bernie Schwartz. (1 PTRT 17.) On September 7, 1995, the trial court accepted time waivers from both Williams and Walker, and set the preliminary examination for September 21, 1995. (1 PTRT 17-19; 1 CT 5.) On September 21, 1995, the trial court once again accepted time waivers from both Williams and Walker, and the matter was continued until October 13, 1995. (1 PTRT 20-27; 1 CT 6.) On October 13, 1995, both defendants again waived time and the matter was continued until November 15, 1995. (1 PTRT 28-29; 1 CT 8.) On November 9, 1995, Walker's attorney sought a 20-day continuance because he was in another trial. (1 PTRT 32; 1 CT 15.) The prosecution and Williams opposed the continuance request. (1 PTRT 32-33.) Finding good cause, the trial court continued the matter until December 1, 1995. (1 PTRT 33-34; 1 CT 15.) On November 29, 1995, Walker's attorney requested another continuance based on his scheduling conflict. (1 PTRT 37.) Despite his earlier opposition to a continuance, this time Williams again waived time. (1 PTRT 45; 1 CT 16.) The prosecutor objected,

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[8] Pre-Trial Reporter's Transcript

stating that he was ready to proceed immediately. (1 PTRT 38-39.) The trial court overruled the prosecution's objection, accepted the time waivers of both defendants, and continued the preliminary examination until December 22, 1995. (1 PTRT 45.) On December 14, 1995, Walker's attorney, citing issues with his investigator, requested that the matter be continued into January 1996. (1 PTRT 46-47.) The prosecutor objected to any further continuances, representing to the court that the victim, Conya L., the prosecution's primary witness, had been the subject of death threats. (1 PTRT 47-48.) The trial court denied the continuance request and pushed the preliminary examination date up one day to December 21, 1995. (1 PTRT 50.) On December 21, 1995, Walker's attorney requested a continuance as based on his recent receipt of a taped interview of the victim, Conya L. (1 PTRT 52.) Despite the trial court's explanation that the prosecution was ready with its preliminary hearing witnesses present, such that Williams was free to proceed with the hearing immediately, Williams again waived time and the matter was continued until January 4, 1996. (1 PTRT 59-62.) The preliminary hearing was conducted on January 4, 1996. (1 CT 23-144; 1 CT 23.) Following which, Williams was held to answer and the arraignment was set for January 17, 1996. (1 CT 23.)

On January 17, 1996, Williams' first *Marsden*[9] hearing was heard and denied. (1 CT 146; 1 CT 146.) The trial court ordered the arraignment to occur the next day. (1 PTRT 80-82.) That day, January 18, 1996, counsel for both Williams and Walker requested a continuance. (1 PTRT 83-84.) Despite his counsel's request, Williams refused to waive time. (1 PTRT 84;

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[9] *People v. Marsden* (1970) 2 Cal.3d 118, 123-126 [when a criminal defendant seeks a new attorney based upon a claim that his appointed counsel has not provided competent representation, the trial court must inquire into the reasons for the defendant's dissatisfaction with counsel]

1 CT 147.) The trial court denied the continuance requests and not guilty pleas were entered by both defendants. (1 PTRT 84, 87-88; 1 CT 147.) Trial was set for March 11, 1996. (1 PTRT 88; 1 CT 147.)

On February 2, 1996, Walker filed a motion requesting that his case be severed from Williams'. (1 PTRT 89.) The same day, Williams informally complained to the trial court that he was dissatisfied with Attorney Wright. (1 PTRT 91.) On February 23, 1996, Williams joined Walker's February 2, 1996 severance motion. (1 PTRT 104.) Walker's attorney argued that the cases should be severed because he needed more time to prepare for trial, and Walker was willing to waive time but Williams was not amenable to waiving time. (1 PTRT 106-107.) The motion was denied. (1 PTRT 110; 1 CT 184.) The trial court heard and denied Williams' second *Marsden* motion on that same date. (1 PTRT 115-116; 1 CT 185.) On March 1, 1996, over Williams' objection, his attorney's continuance request was granted based on his need to further prepare. (1 PTRT 134-138; 1 CT 202.) The March 11, 1996 trial date was therefore vacated and the matter continued until May 6, 1996. (1 PTRT 137-139; 1 CT 202.)

On May 3, 1996, Williams' trial counsel requested another continuance based on his need to further prepare for trial. (1 PTRT 146-147; 1 CT 256.) Counsel asserted that he was "diligently preparing" for trial but simply needed more time. (1 PTRT 171.) The prosecutor announced that the prosecution was ready for trial and did not wish to have the matter continued. (1 PTRT 170.) The trial court, noting the importance of balancing Williams' right to a speedy trial with his right to competent counsel, continued the trial date to October 7, 1996 based on counsel's representations. (1 PTRT 169, 147-148, 170-172; 1 CT 257.) The trial court heard and Williams' third *Marsden* motion. (1 PTRT 153; 1 CT 257.) Attorney Wright continued to represent Williams. (1 CT 291.)

On August 30, 1996, Williams' fourth *Marsden* hearing was considered and denied. (1 PTRT 205; 2 CT 308-309.) On September 4, 1996, the prosecution announced ready for trial. (1 PTRT 217.) Williams' counsel represented to the trial court that he did not anticipate being ready. (1 PTRT 217.) His request for second (*Keenan*)[10] counsel, under Penal Code section 987, subdivision (d), was denied. (1 PTRT 217, 341.) On September 11, 1996, Williams' counsel again indicated that he did not anticipate being prepared for the pending trial date and would require a continuance. (1 PTRT 258, 268; 2 CT 310.) This time, both Williams and Walker waived time. (1 PTRT 274-275; 2 CT 310.) Williams' request for *Keenan* counsel was denied. (1 CT 320-336; 2 CT 310; 2 CT 312-313.)

On September 23, 1996, Williams filed a petition for writ of habeas corpus, asserting ineffective assistance of counsel by Attorney Wright, in the Riverside County Superior Court. (2 CT 314-319.) The petition was denied. (2 CT 345.) On September 27, 1996, counsel for both Williams and Walker again moved to continue trial and the motions were granted. (2 PTRT 346-348; 2 CT 337.) Williams' trial counsel stated that he believed that a second attorney should be assigned to the case and that he would be "in much better shape" if his office could make that accommodation. (2 PTRT 347.) Williams waived time and the trial court continued trial until January 27, 1997. (2 PTRT 358, 361; 2 CT 337.)

On November 15, 1997, during a discussion regarding discovery, the trial court instructed Williams' counsel to provide the prosecution with a "list" of any items that the defense desired to receive from the prosecution. (2 PTRT 369-370.) The court indicated that such a list, requiring a

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[10] *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430 [trial court has discretion under statutes governing appointment of counsel to appoint a second defense attorney to assist in defense of a capital case].

response from the prosecution, would assist the court with "stay[ing] on top of" the discovery process. (2 PTRT 369-370.) Williams provided a list to the prosecutor on December 13, 1996. (2 PTRT 376.) The prosecutor responded on the record that, as some of the requested items would be disputed, the parties would require a judicial determination. (2 PTRT 376.) The trial court therefore indicated that it would hear discovery motions the following month. (2 PTRT 376.)

On January 15, 1997, Williams was represented by Wright's associate, Deputy Public Defender Mara Fieger, acting as co-counsel. (2 PTRT 381; 2 CT 373.) Fieger, as well as Walker's attorney, requested a continuance of the January 27, 1997 trial date. (2 PTRT 381; 2 CT 374.) Fieger represented that the defense required more time to prepare. (2 CT 370.) The trial court granted the request and trial was continued to April 28, 1997. (2 PTRT 389.) Attorney Fieger represented that she expected the new trial date to be firm. (2 PTRT 386.) Asked to waive time, Williams stated that he did not believe it would assist him to refuse to waive time because he believed the matter would be continued over his objection. (2 PTRT 388-389.) The trial court accepted Williams' comments as a valid waiver and continued the trial until April 28, 1997. (2 PTRT 388-389; 2 CT 375.)

On February 28, 1997, the parties discussed discovery. Williams' counsel, Fieger, stated that she had subpoenaed Conya L.'s medical file from Riverside General Hospital and Fieger agreed that the prosecutor should be permitted to redact Conya L.'s current address. (2 PTRT 397.) Fieger further commented that she did not believe the April 28, 1997 trial date to be realistic. (2 PTRT 407.) The prosecutor objected, stating that he was opposed to continuing the trial date. (2 PTRT 408.)

On March 7, 1997, the parties revisited the issue of Conya L.'s medical records. Despite her previous statements, Williams' counsel,

Fieger, objected stating that she should be permitted to review the documents before the prosecutor redacted Conya L.'s address. (2 PTRT 430-431.) The prosecutor responded that Conya L.'s address should not be disclosed because Conya L. had "been threatened for testifying." (2 PTRT 430.) The trial court stated that it was intent on protecting the witnesses and ordered the parties to brief the issue. (2 PTRT 432-433; 3 CT 794.)

On March 21, 1997, the prosecution announced ready for trial. (2 PTRT 449.) Williams' counsel, Fieiger, once again represented that she anticipated requesting a continuance because she desired to bring a motion to compel numerous discovery items. (2 PTRT 449-451; 3 CT 798.) The prosecutor objected to any further continuances, stating it anticipated that the defense was interested in some Department of Justice reports, the existence of which the prosecution could not even confirm. (2 PTRT 450-451.) Attorney Fieger stated to the court, "unless and until I get all the discovery in this case, I can not make representations to this Court when I will be prepared for trial, or what the justification is for my not being prepared." (2 PTRT 451.) The prosecutor represented to the court that he was wholly unaware of the discovery materials Fieger was complaining about and objected that her position was untenable given the parties previous representations that they would be prepared to announce ready for trial the next month. (2 PTRT 451-452.)

On March 24, 1997, the trial court heard Williams' fifth *Marsden* motion. (2 PTRT 457.) On March 31, 1997, Williams' counsel filed a motion to compel the prosecution to produce Conya L.'s address and requested a continuance. (2 PTRT 472-475; 3 CT 838.) Williams waived time. (2 PTRT 490; 3 CT 837.) As the prosecutor represented that he intended to immediately produce tapes of several jail house conversations involving Walker and a woman regarding the disposal of some bloody clothing, conversations which had previously been the subject of an

ongoing criminal investigation and therefore not produced, the trial court continued the trial until July 28, 1997. (2 PTRT 479, 489, 491; 3 CT 837.)

On April 29, 1997, the prosecution represented to the trial court that it had turned over to the defense the tape recorded jail house conversation between Walker and a woman named Theresa Perales. (2 PTRT 515.) Also on that date, the parties discussed numerous discovery issues including the defense's desire to have Conya L.'s address despite the ongoing threats to her safety. (2 PTRT 517-519.) On June 6, 1997, the trial court ruled that the prosecution was entitled to redact Conya L.'s personal identifying information from her hospital records before turning the material over to the defense. (2 PTRT 576.) Williams waived time and a new trial date was ordered for October 20, 1997. (2 PTRT 596-599; 3 PTRT 695; 4 CT 917.)

On August 7, 1997, the parties continued litigating discovery issues, including the defense's right to the address of another percipient witness. (3 PTRT 637, 644.) The trial court ordered the prosecution to produce the address. (3 PTRT 637, 647; 4 CT 936.) On September 5, 1997, Walker's attorney, Schwartz, declared a conflict. (3 PTRT 658; 4 CT 974.) Schwartz asserted that Walker was interfering with his investigation of the case. (3 PTRT 660-662.) The motion was granted and Attorney Schwartz relieved. (3 PTRT 679.) On October 7, 1997, Attorney Peasley appeared for Walker. (3 PTRT 730.) Also on that day, Williams' counsel, Fieger, represented that she would "probably" not be prepared to go to trial for at least a year because she believed that the prosecution had failed to adhere to its discovery obligations.[11] (3 PTRT 730-731.) Walker's counsel similarly

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[11] The prosecution disputed this assertion and complained that the defense's discovery complaint was being made in order to delay the trial. (See 3 PTRT 736-741.)

represented that he would not be prepared for trial for at least six months. (3 PTRT 733.) Following Williams' time waiver, and over the prosecutor's continued objection, the trial court continued trial until August 3, 1998. (3 PTRT 738-740, 746-474; 4 CT 1005.)

On January 23, 1998, the trial court continued the hearing on the discovery motions.[12] (3 PTRT 803-834; 4 CT 1086.) On March 13, 1998, Public Defender Cox substituted in for Public Defender Wright for Williams. (3 PTRT 858; 4 CT 1096.) On April 3, 1998, the Public Defender's office declared a conflict with Williams. (3 PTRT 879; 4 CT 1098.) A representative of the Public Defender's office, Attorney Zagorsky, stated that he was not at liberty to discuss the nature of the conflict. (3 PTRT 879-880.) Notwithstanding this limitation, Zagorsky assured the court that the conflict was the fault of the prosecution. (3 PTRT 879.) The trial court relieved Attorney Wright and Attorney Fieger. (3 PTRT 895; 4 CT 1098.) On June 2, 1998, Attorney Porter was appointed to represent Williams. (3 PTRT 903; 4 CT 1100.) Reasoning that it would expect a minimum of eight months for Porter to prepare for trial, the trial court continued the trial date until February 23, 1999. (3 PTRT 903-904; 4 CT 1100.) Williams waived time. (3 PTRT 907; 4 CT 1100.)

On September 18, 1998, Attorney Porter, citing health concerns, asked to withdraw and the court granted the motion. (3 PTRT 913-914; 4 CT 1111.) A week later, Attorney Myers was appointed. (3 PTRT 916-917; 4 CT 1112.) On October 1, 1998, Myers represented to the trial court that Attorney John Aguilina would be acting as co-counsel. (3 PTRT 918.)

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[12] As to discovery, the trial court commented, "I'm like [prosecutor] Ruiz. We've had so many motions filed and responses ***about the same thing,*** that every time I put these in order, the next time they come back, they're out of order. (3 PTRT 803, emphasis added.)

On October 20, 1998, Attorney Myers was relieved[13] and Attorney Aguilina stated that he needed an additional two weeks to evaluate the file in order to opine on when he could be ready for trial. (3 PTRT 924; 4 CT 1114.) On November 3, 1998, Attorney Aguilina, stating that he had recently received "eight boxes of materials" requested that the trial date be pushed back seven months to June 1999. (3 PTRT 926.) The trial date was therefore continued to June 14, 1999. (3 PTRT 928; 4 PTRT 932, 939; 4 CT 1115.)

On April 23, 1999, Attorney Aguilina requested that the July 14, 1999 trial date be further continued in order for him to conduct additional investigations and due to an issue regarding his investigator that he could only discuss in camera. (4 PTRT 942-944; 4 CT 1121-1129.) The prosecutor opposed the request, citing his concern that the current investigator had been involved with the case "for years" and although the prosecutor was not privy to the reasons supporting the investigator's departure, he lamented that another lengthy continuance was inappropriate given the age of the case and the concerns with prosecution witness Conya L. (4 PTRT 946-944.) On May 13, 1999, Attorney Aguilina again requested that the trial date be continued. (4 PTRT 967; 4 CT 1135.) The prosecutor again opposed the request. (4 PTRT 969.) Walker also opposed the continuance request. (4 PTRT 974.) However, Williams waived time and the trial court continued the trial until January 10, 2000. (4 PTRT 973-975; 4 CT 1135.)

The trial court heard and denied Williams' sixth *Marsden* hearing on May 17, 1999. (4 PTRT 976; 4 CT 1136.) On June 25, 1999, Attorney Filipone joined Attorney Aguilina as co-counsel for Williams. (4 PTRT

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[13] The record does not reflect the reason that Myers was relieved. (See 3 PTRT 924; 4 CT 1114.)

997-998; 4 CT 1137.) On August 30, 1999, the trial court heard Williams' seventh *Marsden* motion. (4 PTRT 1004, 1022-1025; 4 CT 1140.) The trial court granted the motion. (4 CT 1144; 4 CT 1140.) On September 2, 1999, Attorney David Gunn was appointed to represent Williams. (4 PTRT 1142; 4 CT 1142.) On October 1, 1999, Attorney Gunn represented that he needed two weeks to determine when he could be ready for trial and stated that he was making efforts to secure co-counsel. (4 PTRT 1030; 4 CT 1143.) On October 22, 1999, Gunn represented that the upcoming trial date, set for January 10, 2000, was unrealistic and that he was still in the process of securing co-counsel. (4 PTRT 1032.) On November 22, 1999, Gunn explained to the trial court that he was still attempting to secure co-counsel and would not be prepared for trial. (4 PTRT 1034.) Noting Walker's objection to any further continuances, the prosecutor commented that the cases should be severed. (4 PTRT 1035-1036.) On December 17, with the parties' stipulation, agreeing to severance, the trial court severed the cases. (4 PTRT 1045; 4 CT 1146.) On December 21, 1999, the trial court heard and denied Williams' eighth *Marsden* motion. (4 PTRT 1051; 4 CT 1147.) Attorney Gunn stated that the earliest he could be ready for trial was the following October, 2000. (4 PTRT 1060.) Gunn represented that Attorney Bruce Cormicle[14] had become involved in the case as co-counsel. (4 PTRT 1061, 1073.) The trial date was continued to October 2, 2000. (4 PTRT 1064-1065; 4 CT 1147.)

On January 14, 2000, Attorney Cormicle officially appeared as counsel for Williams, along with Attorney Gunn. (4 PTRT 1065.) During an April 7, 2000 status conference, the trial court inquired if the parties would be prepared to go forward with the October 2, 2000 trial date. (4 PTRT 107.) Attorney Gunn responded that the defense was "on track," and

[14] Cormicle was lead counsel when the case went to trial.

although the defense had lost its investigator, a new investigator was in the process of being retained. (4 PTRT 1070.) On May 12, 2000, Attorney Gunn indicated to the court that his effort to retain an investigator had been unsuccessful and the issue would likely affect his ability to be prepared for the upcoming trial date. (4 PTRT 1073.)

On June 9, 2000, the trial court held the eighth *Marsden* hearing regarding representation of Williams but the hearing was concluded when Williams informed the court he had changed his mind. (4 PTRT 1077; 4 CT 1153.) Attorney Gunn represented to the trial court that his investigator problems were ongoing as his current investigator was having personal problems. (4 PTRT 1077.) The trial court heard and denied Williams' ninth *Marsden* motion on July 14, 2000. (4 PTRT 1094; 4 CT 1154.) Williams subsequently made a motion for self-representation and the trial court directed him to review a "*Faretta* form."[15] (4 PTRT 1094; 4 CT 1154.) On August 16, 2000 the trial court ordered Williams' *Faretta* motion filed. (4 PTRT 1117; 4 CT 1155.) The trial court stated in open court that *in camera* Williams had represented that if granted pro per status, he would be ready for trial in six months, i.e. February of 2001. (4 PTRT 1118, 1141.) The trial court granted Williams' *Faretta* motion, but directed Attorney Gunn to remain as "stand-by counsel." (4 PTRT 1118-1121, 1143; 4 CT 1162.) The court reasoned that in the event Williams pushed the matter to trial but then refused to participate, Gunn should be prepared to step in and try the case. (4 PTRT 1118-1119.) At Williams' request, the

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[15] *Faretta v. California* (1975) 422 U.S. 806, 819 [95 S.Ct. 2525,45 L.Ed.2d 562] [an accused has a Sixth Amendment 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]

trial court continued the trial date to February 5, 2001. (4 PTRT 1141, 1144.)

On October 6, 2000, despite the trial court's assurance to Williams that Attorney Gunn had absolutely no control over Williams' management or control of the defense case, Williams nevertheless continued to complain about Gunn's role as stand-by counsel. (4 PTRT 1152, 1156.) Williams further noted to the trial court that he had initiated civil litigation against Gunn, and offered that he did not "know if that would declare (sic) a conflict or not." (4 PTRT 1156.) Williams also complained about his court-appointed investigator, stating that the investigator would not take his calls and failed to visit him in jail. (4 PTRT 1152-1153.) On January 12, 2001, opining that the prosecutor had failed to provide him with discovery[16] and complaining that he had no money to pay his investigator, Williams requested another continuance. (4 PTRT 1179-1181.) The trial court ordered the parties back on January 26, 2001 in order to discuss a new trial date. (4 PTRT 1183.) Also on January 12, 2001, the trial court denied Williams' request that the court "appoint a second counsel."[17] (4 PTRT 1188; 4 CT 1191.)

On January 26, 2001, Williams filed a motion pursuant to Code of Civil Procedure section 170.1, to disqualify the trial judge. (4 PTRT 1189; 5 CT 1203.) On January 30, 2001, the presiding judge denied Williams' section 170.1 motion. (5 CT 1205.) On January 31, 2001, Williams stated that he needed another six month continuance, claiming that as he was

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[16] The prosecutor responded that some of the complained of discovery items had been turned over to the defense long before. (4 PTRT 1179.)

[17] Williams challenged the trial court's denial in Petition for Writ of Mandate, filed on April 18, 2001. (5 CT 1259-1265.)

"starting from scratch[,]"and the time was needed to prepare. (4 PTRT 1205-1206.) The trial court, reasoning that appellant "had work[ed] with all of the lawyers along the way[,]" and stated that Williams would not get a six month continuance. (4 PTRT 1205.) The prosecutor objecting to further delay, represented the prosecution was ready to proceed to trial immediately, and complained that Williams was utilizing his pro per status to cause delay. (4 PTRT 1201, 1207.) Specifically, the prosecutor noted that at one point Williams attempted to support his continuance request with a representation that he needed an expert to testify that his physical disabilities would not have allowed him to have committed the charged crimes (See 4 PTRT 1203), but in his oral justification for the continuance request, Williams asserted an entirely different rational. (4 PTRT 1207.) Accepting Williams' time waiver, over the prosecution's objection, the trial court granted Williams another two month continuance, continuing the trial date to April 2, 2001.

On February 23, 2001, discussing Williams' discovery complaints, the prosecutor represented to the trial court that at the last proceeding, he had provided his investigator's phone number to Williams so that Williams could call the investigator with any questions or concerns regarding any of the prosecution's reports that Williams was concerned with or believed he had not received, and Williams never called. (4 PTRT 1213.) Williams responded that the phone system in the jail was faulty and the prosecutor's investigator never answered the phone. (4 PTRT 1214.)

Also on February 23, 2001, Williams filed another Code of Civil Procedure section 170.1 motion to disqualify the trial judge. (5 CT 1208.) That motion was denied on February 23, 2001. (5 CT 1210.) On March 7, 2001, Williams filed a Penal Code section 1424 motion to disqualify the district attorney, another Code of Civil Procedure section 170.1 motion to disqualify the trial judge and a Penal Code section 1033 motion for change

of venue. (4 PTRT 1230, 1239; 5 CT 1211, 1216, 1217.) The motions were all denied. (5 PTRT 1250-1251; 5 CT 1220, 1237, 1240, 1248-1249, 1258.) On March 16, 2001, Williams waived time and his motion for continuance was granted over the prosecutor's objection. (5 PTRT 1243-1244, 1248-1249.) At Williams' request, the jury trial was continued to June 4, 2001. (5 PTRT 1248-1249; 5 CT 1239.)

On April 5, 2001, Williams complained that although the trial court granted him pro per status, his previous attorney (and current stand-by counsel), David Gunn, had failed to turn any of the defense files over to him as ordered by the court. (5 PTRT 1289-1290.) Williams further complained that his trial preparation was being hindered by the fact that he had not been appointed a "legal runner" to courier items between him and his investigator. (5 PTRT 1294.) The trial court granted Williams' request that his wife, Sharon Williams be appointed as his unpaid legal runner. (5 PTRT 1294-1295; 5 CT 1243.) On April 17, 2001, the prosecutor represented to the court that Williams had been provided additional copies of discovery that he did not believe to be in his files and complained that Williams had refused to reimburse the district attorney's office for the cost of photocopying the requested documents. (5 PTRT 1304, 1309.) The prosecutor also complained that appellant would represent that he had discovery materials in his possession but then subsequently deny that he had been provided the materials. (5 PTRT 1286.) On May 1, 2001, stand-by-counsel Gunn represented to the court that his stand-by co-counsel Cormicle would be unavailable in June and therefore requested that the trial date be pushed back into July 2001. (5 PTRT 1312.) Williams stated that he too wished to continue trial and waived time. (5 PTRT 1314, 1321.) Over the prosecutor's objection, the trial court continued the trial until July 30, 2001. (5 PTRT 1314, 1321; 5 CT 1336.)

On May 18, 2001, the trial court denied Williams' motion to remove Gunn as stand-by counsel. (5 PTRT 1318, 1328-1329; 5 CT 1338.) Before issuing its ruling, the court commented that it had serious reservations regarding Williams' motivation in electing to represent himself. The court stated that the reason it "appointed standby counsel [was] because [it believed] there [was] a better than even chance [standby counsel would] end up trying the case." (5 PTRT 1319.) During a June 15, 2001 trial readiness conference, the trial court noted that it had received a letter from Williams' court appointed investigator notifying that court that the investigator was "no longer" on the case and asking for his appointment to be terminated. (5 PTRT 1332; 5 CT 1340.) In the letter, the investigator, Evans, asserted, "I find it impossible to work with" Williams and provided information detailing Williams' efforts at delaying matters. (5 PTRT 1339.) The court granted Evan's request and relieved him from the case. (5 PTRT 1333; 5 CT 1340.)

On June 28, 2001, the trial court heard Williams' repeated motion to remove stand-by counsel Gunn. (5 PTRT 1336; 5 CT 1340, 1354.) Citing the civil litigation he had filed against Gunn, Williams argued that Gunn would not do his "best" because a guilty verdict would provide Gunn with a defense to Williams' pending civil suit. (5 PTRT 1336.) The court denied the motion. (5 PTRT 1338; 5 CT 1354.) The prosecutor requested that Williams' pro per status be revoked based on Williams' hostility, failure to cooperate and ongoing effort at delaying the proceedings. (5 PTRT 1338-1339; 5 CT 1354.) The prosecutor argued that with the trial date just over a month away, Williams had yet to subpoena a single witness, turn over a witness list or any discovery. (5 PTRT 1341-1342.) When asked by the trial court if Williams had even retained a new investigator at that juncture, Williams offered, "No. I do plan on, yes." (5 PTRT 1348.) Stating that it was unable to "even count the number of lawyers" Williams had gone

through, and reasoning Williams had engaged in "delay tactics," the trial court revoked[18] Williams' pro per status and reappointed Attorney Gunn, as well as Attorney Cormicle. (5 PTRT 1349; 5 CT 1354.)

On July 30, 2001, the date set for trial, Gunn represented to the trial court that the defense required an additional 30-day continuance because he needed more time to prepare for trial. (5 PTRT 1354-1355.) This time, Williams opposed the continuance request. (5 PTRT 1354.) Finding that there was a "15-court day waiver beyond today's date," the trial court continued the matter to August 10, 2001. (5 PTRT 1355; 5 CT 1356.) On August 10, 2001, after declaring a conflict, following a sealed hearing, Attorney Gunn was relieved as counsel. (5 PTRT 1365-1369; 5 CT 1358.) The court appointed Attorney Cormicle as lead counsel. (5 PTRT 1371; 5 CT 1358.) Finding good cause, and without a time waiver from Williams, the trial court granted Attorney Cormicle's request to continue the trial date. (5 PTRT 1363-1364; 5 CT 1357.) The court set a trial readiness conference for September 20, 2001. (5 PTRT 1363; 5 CT 1358.) On that date, Attorney Cormicle requested a continuance, citing problems that he had securing investigative funds on behalf of the defense. (5 PTRT 1374.) Williams refused to waive time. (5 PTRT 1375.) Notwithstanding, finding that good cause existed for the continuance, the trial court continued the trial to March 4, 2002. (5 PTRT 1374-1377; 5 CT 1360.)

During a January 23, 2002 trial readiness conference, Cormicle represented to the trial court that he required a trial continuance because he had yet to receive some federal documents that he had subpoenaed regarding bank robberies committed by one of his victims. (5 PTRT 1382.)

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[18] The trial court's revocation of Williams' pro-se status is the subject of Argument VI, below.

Williams waived time. (5 PTRT 1383-1384; 7 CT 2162.) Trial was continued until April 8, 2002. (5 PTRT 1383-1384; 7 CT 2162.)

On March 29, 2002, the trial court heard and denied Williams' tenth *Marsden* motion. (5 PTRT 1417; 7 CT 2186.) Attorney Cormicle requested another continuance of the trial date. (5 PTRT 1421, 1429; 7 CT 2180.) Cormicle asserted that the FBI had granted him access to its files four days earlier regarding 15 separate bank robberies involving the victim, Gary Williams. Cormicle represented to the court that he needed more time to review these materials. (7 CT 2181.) Williams waived time and the trial court continued the matter until June 3, 2002. (5 PTRT 1421, 1429; 7 CT 2185-2186.)

On May 1, 2002, Attorney Cormicle requested that trial be continued until August 2002 in order for him to develop evidence to rebut the prosecution's anticipated victim impact evidence and to investigate impeachment evidence pertaining to Conya L. (5 PTRT 1482; 7 CT 2250.) The prosecutor objected to any further continuances and represented that he did not intend on introducing any victim impact evidence as to Gary Williams. (5 PTRT 1482-1483; 7 CT 2253.) Cormicle responded that his continuance request was also based on the amount of time his investigator had stated he needed to conclude his investigation. (5 PTRT 1494.) Over the prosecutions objection, the court continued the trial date to July 1, 2002. (5 PTRT 1485, 1502-1503; 7 CT 2265.)

The trial court heard and denied Williams' eleventh *Marsden* motion on June 7, 2002. (5 PTRT 1510-1512; 7 CT 2278.) Jury selection began on July 1, 2002. (5 RT 1001.)

B. Williams Is Not Entitled to Relief Based on His Constitutional and Statutory Speedy Trial Rights as the Record Demonstrates that He Waived His Rights and Caused the Delay

Williams asserts that his federal constitutional and state constitutional and statutory speedy trial rights were denied because his trial did not commence until July 2002, nearly seven years after the prosecution filed charges in August of 1995. (AOB 29-73.) He is incorrect as the record shows that he repeatedly waived his speedy trial rights and engaged in a course of conduct designed to cause delay.

As noted above, in deciding speedy trial claims under the state Constitution, this Court uses a balancing test similar to the one applied to Sixth Amendment claims under *Barker* as any prejudice to the defendant resulting from the delay must be weighed against justification for the delay. (*People v. Martinez, supra*, 22 Cal.4th at p. 767.) In considering the four factors articulated in *Barker* (length of delay, reason for the delay, the defendant's assertion of his right, and prejudice to the defendant) the Supreme Court explained that no one factor is essential to show a violation of a defendant's Sixth Amendment right to a speedy trial, nor is any factor alone sufficient for a violation. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." (*Id.* at p. 533.) Applying *Barker's* analysis shows that Williams' speedy trial claim fails.

The Supreme Court applying the four-part balancing test enunciated in *Barker* concluded that a delay of well over five years between arrest and trial did not violate the defendant's speedy trial right. The court acknowledged that the length of the delay was "extraordinary" and that only seven months could be attributed to a strong excuse, the illness of the officer in charge of the investigation. (*Barker, supra*, 407 U.S. at pp. 533-534.) However, "prejudice was minimal" because, just as here, there was

"no claim that any of *Barker's* witnesses died or otherwise became unavailable owing to the delay." (*Barker, supra*, 407 U.S. at p. 534.) More important, the record, just as here, showed the defendant "did not want a speedy trial," but merely "hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges . . . ." (*Id.* at pp. 534-535.)

As defendant notes, 20 years after *Barker*, the Supreme Court observed that "lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." (*Doggett v. United States* (1992) 505 U.S. 647, 652 [112 S.Ct. 2686, 120 L.Ed.2d. 520], fn. 1.) It is important to note, however, what "presumptively prejudicial" means for purposes of the Sixth Amendment. As *Barker* explained: "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." (*Barker, supra*, 407 U.S. at p. 530.)

Thus, a finding of "presumptively prejudicial" delay does not mean that the prejudice prong of the *Barker* analysis necessarily weighs in favor of the defendant. Rather, it merely means that the other factors, including prejudice, must be considered. Further, in *Barker* the Supreme Court said that the significance of the length of delay "is necessarily dependent upon the peculiar circumstances of the case. For example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." (*Barker, supra*, 407 U.S. at pp. 530-531, fn. omitted.) The instant case involved a double-homicide committed by three perpetrators, one of whom was never captured such that the case involved an ongoing investigation.

In determining the length of the delay, the reviewing court excludes any periods regarding which the defendant requested continuances of the

proceedings or formally consented to a delay of his trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 634 [in seeking continuances and personally waiving statutory time, defendant relinquished his federal right to a speedy trial "for the period covered by each continuance"].) Here, Williams complains that the trial date was continued 19 times. (AOB 29-48.) However, he consented to the delay, formerly waiving his speedy trial rights, or expressly requesting continuances 17 times. (1 PTRT 26, 45, 273-274; 2 PTRT 358, 388-389, 490, 599; 3 PTRT 746, 907; 4 PTRT 975, 1141, 1179-1181, 1206; 5 PTRT 1243, 1249, 1321, 1384, 1421.) Williams' 17 time waivers and continuance requests contradict his claim that "he consistently and adamantly insisted that his case be heard expeditiously." (AOB 66.) Indeed, while acting in pro per, the trial court declined Williams' request for a full six month continuance, reasoning that Williams, as the accused, should be well aware of the identity of witnesses who could testify that he did not commit the murders. (4 PTRT 1205-1206.) Coupled with the seriousness and complexity of the case, Williams' continued willingness to postpone matters contradicts his claim that the length of delay supports a finding that his constitutional right to a speedy trial was violation.

As the Supreme Court observed in *Barker*:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

(*Barker, supra*, 407 U.S. at p. 531, fn. omitted.) With respect to this second *Barker* factor, this Court looks to "whether the government or the criminal defendant is more to blame for the delay . . . ." (*Doggett v. United States, supra*, 505 U.S. at p. 651.) "[D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence . . . should be weighted less heavily but nevertheless should be considered . . . ." (*Barker v. Wingo, supra*, 407 U.S. at p. 531.) Here, the record shows the state was not responsible for the delay. (AOB 51-52.)

First, as detailed above, Williams consented to the delay, formerly waiving his speedy trial rights, or specifically requesting a continuance, 17 times. (1 PTRT 26, 45, 273-274; 2 PTRT 358, 388-389, 490, 599; 3 PTRT 746, 907; 4 PTRT 975, 1141, 1179-1181, 1206; 5 PTRT 1243, 1249, 1321, 1384, 1421.) As stated, while acting in pro per, Williams requested a six month continuance. (4 PTRT 1206.) Second, his statement that he suffered from a "revolving door of defense lawyers," which contributed to the delay (AOB 29), ignores the fact that, with the exception of Attorney Fieger (who conflicted out), Williams sought to replace each of the nine attorneys appointed to represent him. (See 2 PTRT 464; 3 PTRT 879; 5 PTRT 1349.) Williams brought a total of 11 *Marsden* motions. (1 CT 146, 185, 257; 2 CT 308-309; 3 CT 798; 4 CT 1136, 1140, 1147, 1154; 7 CT 2186, 2278.) His first request to replace counsel was against his first appointed attorney and occurred less than six months after his arrest, and his last effort to replace his attorney occurred less than one month before his trial. (5 RT 1001; 20 RT 2903; 1 CT 146; 7 CT 2278.)

Beyond his complaints with appointed counsel, Williams' role in delaying the proceedings is evident from his efforts to replace each of his attorneys, his investigator, the trial judge, the district attorney, his

appointed "standby counsel" and to change venue. As to his court appointed investigator, Williams complained that the investigator neglected to come visit him and failed to return his phone calls. (4 PTRT 1152.) On June 15, 2001, the trial court received a letter from the investigator requesting to be relieved. (5 PTRT 1330.) The prosecutor subsequently quoted a portion of the investigator's letter for the record: "I find it impossible to work with Mr. Williams," and further commented how the letter specifically provided "how Mr. Williams ha[d] done everything to delay the proceedings" by way of his "hostile attitude" and "refus[al] to cooperate" with the investigator. (5 PTRT 1339.) Williams informed the court that he wanted the investigator fired. (5 PTRT 1332-1333.)

As to the trial court, Williams unsuccessfully sought to disqualify the same judge twice pursuant to Code of Civil Procedure section 170.1. (5 CT 1205, 1208, 1210.) As to the district attorney, Williams unsuccessfully brought a motion to recuse the prosecutor pursuant to Penal Code section 1424 based on his assertion that the prosecutor "testified falsely". (5 PTRT 1300.) Williams further unsuccessfully sought a change of venue pursuant to Penal Code section 1033. (5 PTRT 1239, 1250-1251.)

While acting in pro per, despite the fact that his court appointed stand-by counsel, Attorney Gunn, had no control over the case, Williams continued to complain to the court that he disliked Gunn and asked to have him removed. He claimed that if he did lose his pro per status, Gunn would not "put his best foot forward," because Williams had sued Gunn civilly and he reasoned that a guilty verdict would offer Gunn a civil defense. (5 PTRT 1335-1336.) The continuing complaints regarding discovery while Williams was acting in pro per also illustrates the lack of delay attributable to the prosecution. In a January 31, 2001 status conference the trial court inquired as the status of discovery. (4 PTRT 1196.) The prosecutor stated that he had provided a list of reports to Williams. (4

PTRT 1196-1197.) The court instructed Williams to review the list and contact the prosecutor if he observed any items on the list that he needed. (4 PTRT 1197.) The prosecutor provided Williams with his investigator's phone number and instructed Williams that if he needed anything, he should call collect. (4 PTRT 1197-1198.) In a subsequent hearing, conducted nearly a month later, Williams again complained that he did not have all of the reports. (4 PTRT 1214.) The prosecutor explained that despite being provided a list of the reports and a phone number which he could call collect, Williams had done nothing. (4 PTRT 1213.) When asked by the trial court to explain, Williams imparted contradictory excuses: That the phone at the jail did not work properly and that the investigator never answered his phone. (4 PTRT 1214.)

Similarly, nearly a month and a half after firing his investigator, the trial court inquired of Williams, "have you hired a new investigator?" (5 PTRT 1333, 1348.) Williams responded, "No. I do plan on, yes." (5 PTRT 1348.) Williams offered that it was the court's fault because the court "denied [his] motion to make phone calls." (5 PTRT 1348.) The trial court corrected Williams as it had issued no such order. (5 PTRT 1348.) Near the conclusion of his pro per status, with the trial date 30 days away, the prosecutor complained that Williams had failed to hire an investigator, had failed to provide the prosecution with any discovery, had failed to subpoena a single witness and had failed to provide a witness list. (5 PTRT 1341-1342.) Citing Williams' chronic "delay tactics," the trial court then terminated Williams' pro per status. (5 PTRT 1349.)

Further, the record shows Williams would impermissibly pit his speedy trial rights against his right to counsel. (See *People v. Lomax* (2010) 49 Cal.4th 530, 556 ["He may not demand a speedy trial and demand adequate representation, and, by the simple expedient of refusing to cooperate with his attorney, force a trial court to choose between the two

demands, in the hope that a reviewing court will find that the trial court has made the wrong choice"].) On January 18, 1996, his *Marsden* motion having been rejected the previous day, Williams refused to waive time when his attorney represented to the trial court that he needed time to prepare. (1 PTRT 84; 1 CT 146.) Similarly, when his pro per status was revoked and Attorney Gunn assigned, notwithstanding his unsuccessful six month continuance request a month earlier, Williams refused to waive time upon Gunn's representation to the trial court that he needed additional time to prepare. (5 PTRT 1349-1350, 1354-1355.) Such a "situation presented a classic confrontation between defendant's statutory and constitutional rights to a speedy trial and his Sixth Amendment right to competent and adequately prepared counsel." (*People v. Lomax, supra*, 49 Cal.4th at p. 556, citing *Townsend v. Superior Court* (1975)15 Cal.3d 774, 782.) Williams' sporadic use of his speedy trial rights cannot serve "as a means to provoke confrontation with his attorney and to express displeasure when his wishes were not granted." (See *People v. Lomax, supra*, 49 Cal.4th at p. 558.)

Finally, the record contradicts the suggestion that the prosecution engaged in a "deliberate attempt to delay the trial[.]" (*Barker v. Wingo, supra*, 407 U.S. at p. 531.) Indeed, the record reflects that the prosecutor habitually objected to the defense's chronic continuance requests through the pre-trial proceedings. (See, e.g., 1 PTRT 32-33, 47-48; 2 PTRT 450; 4 PTRT 969; 5 PTRT 1243-1245, 1314, 1482-1483.)

Williams assertion that he "consistently and adamantly insisted that his case be heard expeditiously" (AOB 66) is contradicted by his 17 time waivers and continuance requests. (1 PTRT 26, 45, 273-274; 2 PTRT 358, 388-389, 490, 599; 3 PTRT 746, 907; 4 PTRT 975, 1141, 1179-1181, 1206; 5 PTRT 1243, 1249, 1321, 1384, 1421.) Moreover, significantly, the record does not reflect, nor does Williams appear to assert, that he ever

filed a motion below to dismiss as based on violation of speedy trial rights. (AOB 66-68.)

Beyond the above, Williams' cannot demonstrate prejudice from the delay between being discharged and being tried. Prejudice for purposes of the *Barker* speedy trial analysis is assessed "in the light of the interests of defendants which the speedy trial right was designed to protect." (*Barker v. Wingo, supra*, 407 U.S. at p. 532.) These are: (1) preventing oppressive incarceration of the defendant while awaiting trial; (2) minimizing the defendant's anxiety and concern due to the continuing pendency of unresolved criminal charges; and (3) limiting the possibility that the defense will be impaired. (*Ibid.*) "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past." (*Ibid.*)

The Supreme Court in *Barker* recognized that delay "may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. It the witnesses support the prosecution, its case will be weakened, sometimes seriously so." (*Barker v. Wingo, supra*, 407 U.S. at p. 521.) Accordingly, "deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself." (*Ibid.*; accord, *United States v. Loud Hawk* (1986) 474 U.S. 302, 315 [106 S.Ct. 648, 88 L.Ed.2d. 640] ["delay is a two-edged sword"].)

Here, Williams is unable to demonstrate prejudice. In his effort to do so, he cites "two specific and concrete losses" that he believes he suffered based on the delay. (AOB 69.) Neither are availing. First, he asserts that the delay prevented him from engaging a "meaningful investigation into the

third parties motivated to kill" the victim. (AOB 69.) Second, he claims that the delay allowed the prosecution to "clean-up" the testimony of Conya L., which had previously been "strewn with inconsistencies and mistakes." (AOB 71.) Williams, however, offers no foundation to support either claim. As a threshold matter, a defendant cannot meet his initial burden to show actual prejudice merely by conclusory allegations. Vague, unsupported, and conclusory declarations are insufficient to establish actual prejudice. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 ["A defendant must prove prejudice that is a 'demonstrable reality,' not simply speculation"]; *In re Clark* (1993) 5 Cal.4th 750, 766.) "'[P]rejudice may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.'" (*People v. Catlin* (2001) 26 Cal.4th 81, 107, quoting *People v. Morris* (1988) 46 Cal.3d 1, 37.) Moreover, any resulting prejudice must be such that it cannot be overcome by reliance upon other available evidence. (*People v. Hannon* (1977) 19 Cal.3d 588, 609.) Williams establishes none of these.

As to his first claim, Williams' conclusion that the time delay compromised his opportunity to "contact, question, and investigate," all of the unknown people who may have been interested in killing the victim, Gary Williams, is vague, unsupported and conclusory. (AOB 69.) Williams simply speculates that because Gary had a "violent criminal past," and had engaged in bank robberies, there must have been many unknown individuals who wished to kill him. (AOB 69-70.) Williams neglects to explain how the time delay compromised his ability to find these unknown killers. Indeed, it may more reasonably be argued that the delay benefited Williams by allowing him time to identify and seek out the many purportedly unknown individuals who allegedly wished Gary harm.

Similarly, Williams' second claim regarding Conya L. is equally unpersuasive. Conya L. testified to the jury that she was positive that Williams ordered his cohorts to kill Gary and Roscoe before slashing her throat. (15 RT 2164, 2177, 2196-2197; 16 RT 2364 ["I'm a hundred percent positive. . . . [t]here is no doubt in my mind. . . . [i]t was Rob. We were in the bathroom with the light on."], 2274.) There is nothing in the record, nor does Williams direct this Court's attention to any portion of the record which suggests that the prosecution abandoned its ethical obligations in order to somehow "clean-up" Conya L.'s testimony. Moreover, even if Conya L.'s purported "varying accounts" were "strewn with inconsistencies and mistakes," as Williams claims, there is nothing in the record which suggests Williams' attorney was prohibited from highlighting these alleged inconsistencies to the jury, and how more time to prepare for trial would adversely affect his ability to do so. Indeed, given the threats to Conya L., and one of three cohorts being at large, delaying the case served to advance Williams' chances the prosecution might be adversely impacted by the passage of time.

Williams is unable to show that the delay had any effect on his ability to prepare or present his defense. He did not call any witnesses at trial, nor was there any claim that any exonerating evidence, such as the testimony of an alibi witness, became unavailable due to the delay. The case therefore is comparable to *Barker*, in which there was no prejudice notwithstanding the fact that the defendant had spent 10 months in jail before trial. (*Barker v Wingo, supra*, 407 U.S. at p. 534.)

In his effort to satisfy his burden, Williams claims that the delay prevented him from finding the real killer and allowed the prosecution to favorably manipulate the testimony of Conya L. (AOB 71.) Both claims rely on speculation and neither are supported by evidence or the record. Accordingly, Williams' speedy trial claim under the Sixth Amendment and

California Constitution should be denied because he is unable to affirmatively demonstrate prejudice. (*People v. Anderson, supra*, 25 Cal.4th at p. 605.)

Williams is also not entitled to relief based on violation of his statutory speedy trial rights. His reliance on his statutory speedy trial rights is unavailing. Penal Code Section 1382 provides in relevant part: "The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: [¶] . . . [¶] (2) In a felony case, when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment or information . . . ." (Pen. Code, § 1382, subd. (a).) However, the action shall not be dismissed if the case "is set for trial beyond the 60-day period by request or consent, expressed or implied," of the defendant. (Pen. Code, § 1382, subd. (a)(2)(B).)

Here, it cannot be disputed that Williams was not brought to trial within 60 days of his arraignment on the information. However, Williams waived any claim based on violating his statutory speedy trial rights by failing to move to dismiss below. Even ignoring the waiver of his rights, Williams' claim would still be rejected because there was good cause for not trying him within the statutory period. This Court has held that the right to a speedy trial is not a "favored right" but "a privilege personal to the defendant which will be deemed to be waived if not asserted by him in timely fashion." (*People v. Wilson* (1963) 60 Cal.2d 139, 148.) Accordingly, "[t]he right to a speedy trial . . . will be deemed waived unless the defendant both objects to the date set and thereafter files a timely motion to dismiss." (*Id.* at p. 146; accord, *People v. Wright* (1990) 52 Cal.3d 367, 389, ["a defendant's failure to timely object to the delay and thereafter move for dismissal of the charges is normally deemed a waiver of his right to a speedy trial"].) A motion to dismiss is required in addition to an objection because even after such an objection there is no duty

incumbent on the court to order dismissal under section 1382 unless the defendant demands it. (*People v. Wilson, supra*, 60 Cal.2d at p. 147.) Rather, "'a right to move for a dismissal is the sole right protected by section 1382.' It is not enough that the defendant has objected at the time the cause was set for trial beyond the statutory period: 'an appellant in such a case cannot make a successful claim of error by the trial court merely because the court has not heeded an objection to the setting of the case. . . .' [Citation.]" (*People v. Wilson, supra*, 60 Cal.2d at p. 147.)

While Williams objected several times to the delay in this case, at no time did he bring a motion to dismiss. Moreover, although Williams would at times object to the delay, just as frequently, he would freely waive time or demand a continuance. (1 PTRT 26, 45, 273-274; 2 PTRT 358, 388-389, 490, 599; 3 PTRT 746, 907; 4 PTRT 975, 1141, 1179-1181, 1206; 5 PTRT 1243, 1249, 1321, 1384, 1421.)

"Once a defendant has been tried and convicted, the state Constitution in article VI, section 13, forbids reversal for nonprejudicial error,' and so on appeal from a judgment of conviction a defendant asserting a statutory speedy trial claim must show that the delay caused prejudice, even though the defendant would not be required to show prejudice on pretrial appellate review." (*People v. Martinez, supra*, 22 Cal.4th at p. 769.)

For the reasons explained above, Williams cannot meet his burden of establishing prejudice. Accordingly, Williams is not entitled to relief based on his state and federal speedy trial rights.

II. WILLIAMS WAS NOT DENIED DUE PROCESS BASED ON ANY FAILURE OF THE PROSECUTION TO FULFILL ITS DISCOVERY OBLIGATIONS

Williams claims he was denied due process because the prosecution did not investigate Gary's life to determine if he had enemies interested in killing him even though he was a bank robber who "lived a dangerous

life[,]" purportedly associated with gang member and had business contracts within the Mexican Mafia. (AOB 74.) Moreover, because the FBI had purportedly conducted its own investigations into numerous bank robberies believed to have been committed by Gary, Williams claims that the prosecution also had a duty to obtain these FBI reports on behalf of the defense. (AOB 75, 79-80.) To the contrary, the prosecution was under no obligation to obtain and provide reports of the FBI pertaining to cases unrelated to the charged offenses. Nor was the prosecution (who had an eyewitness who had identified Williams as the killer) required to go on a fishing expedition for purposes of attempting to ascertain if Gary had enemies who may have wished to kill him.

The prosecution has an independent obligation to disclose to the defense material evidence that is "favorable to an accused." (*Brady v. Maryland* (1963) 373 U.S. 83, 86–87 [83 S.Ct. 1194, 10 L.Ed.2d 215] (*Brady*).). This obligation, one of constitutional dimensions, obligates the prosecution to learn of "favorable evidence known to the others acting on the government's behalf in [a] case, including the police." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437–438 [115 S.Ct. 1555, 131 L.Ed.2d 490].)

In *Strickler v. Greene* (1999) 527 U.S. 263 [119 S.Ct. 1936, 144 L.Ed.2d 286] (*Strickler*), the United States Supreme Court observed that the *Brady* court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. (*Strickler v. Greene, supra*, 527 U.S. at p. 280.) *Strickler* also observed, "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or

inadvertently; and prejudice must have ensued." (*Strickler v. Greene*, *supra*, 527 U.S. at pp. 281-282.)

However, *Brady* does not require disclosure of information when that information is not itself admissible and only might lead to admissible evidence. In such circumstances, the information is not itself "evidence" for purposes of *Brady*, and the mere fact that such information might lead to the discovery of admissible evidence does not make such information "material" for purposes of *Brady*. (*Wood v. Bartholomew* (1995) 516 U.S. 1, 5-8 [116 S.Ct. 7, 133 L.Ed.2d 1] (*Wood*).)

In *In re Brown* (1998) 17 Cal.4th 873 (*Brown*), this court stated, the scope of the prosecution's "disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf.'" (*Id.* at p. 879, quoting *Kyles v. Whitley, supra*, 514 U.S. at p. 437.) Courts have thus consistently declined to draw a distinction between different agencies under the same government, focusing instead upon the prosecution team which includes both investigative and prosecutorial personnel. (*In re Brown, supra*, 17 Cal.4th at p. 879.) This Court also concluded that the individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation of the accused. (*Ibid.* citing *U.S. v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1208.)

However, "information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 903, emphasis added, citing *People v. Superior Court* (2000) 80 Cal.App.4th 1305, 1315, *In re Steele* (2004) 32 Cal.4th 682, 696–697.) Thus, information possessed by an agency that has

no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material. (*Barnett v. Superior Court, supra*, 50 Cal.4th at p. 903.)

In pre-trial proceedings, the defense indicated to the trial court that it was in the process of subpoenaing FBI investigative reports regarding numerous robberies believed to have been committed by Gary. (5 PTRT 1382.) The prosecutor represented that it had not "requested those materials." (5 PTRT 1383.) The prosecutor further assured the trial court that the prosecution had "turned over copies of all reports generated in this case relative to the investigations of [Williams'] and [cohort] Walker's murder of the victims in this case." (5 PTRT 1387.) As to Gary, the prosecutor stated that it was "clear" that Gary was a bank robber who had worked in conjunction with other bank robbers, and the prosecution stated that it would stipulate to that fact at trial. (5 PTRT 1387-1388.) Moreover, since the prosecution, during the course of its investigation into the murders of Gary and Roscoe, had received some reports from other law enforcement agencies regarding Gary's criminal endeavors, the prosecution had turned "all that [it] had," over to the defense. (5 PTRT 1387.) The prosecutor informed the court that he did not believe he was obligated to seek out the investigative reports of other law enforcement agencies regarding crimes committed by Gary that were "unrelated" to the subject murders on behalf of the defense. (5 PTRT 1387-1388.)

The defense attorney disagreed, opining that the prosecutor was "obligated" to obtain, "on [his] own," all reports of all other law enforcement agencies regarding any investigations into bank robberies, unrelated to the subject murders, believed to have been committed by or involving the murder victim, Gary Williams. (5 PTRT 1389.) The defense attorney reasoned that because Gary was being investigated for bank

robberies that may have involved cohorts, the cohorts might have been motivated to kill Gary. (5 PTRT 1391.) And, if someone else killed Gary, then Williams must be innocent such that the evidence must be considered exculpatory. (5 PTRT 1389-1391.) The prosecutor observed that the defense approach found no support in the law. (5 PTRT 1395.)

On April 23, 2002, defense Attorney Cormicle stated he had been reviewing the prosecution's files during the previous week when he discovered a four-page FBI report pertaining to Robert Scott[19] that had not previously been turned over. (5 PTRT 1427-1428.) The prosecutor responded that the report had been incidentally obtained as part of law enforcement's unsuccessful effort to ascertain the identity of the third robber. (5 PTRT 1431.) Further, if the report had not in fact been turned over to the defense by the prosecution, failure to do so was not intentional. Rather, the prosecutor argued that it was the result of inconsistent discovery proceedings based on the fact that each time Williams was appointed an attorney, discovery would begin but soon become interrupted as the assigned attorney would inevitably turn his or her attention away from discovery in order to attempt to maintain a working relationship with Williams. (5 PTRT 1432[20].) The prosecutor further argued that the FBI reports regarding Scott had been independently available to the defense and, moreover, the defense had reason to know about the reports because Scott's criminal endeavors and incarceration had been addressed during

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[19] As detailed above in the statement of facts, Scott and Gary committed credit union robberies together.

[20] The trial court noted that with each new attorney came a new round of discovery motions. (5 PTRT 1435.)

cohort Walker's separate trial. All of the transcripts of Walker's trial had already been provided to Williams' defense team. (5 PTRT 1432, 1434.)

In a pre-trial proceeding, Williams' trial counsel complained that the defense had not received evidence of a "prior criminal incident" committed by an individual named Tami Wilkinson, whom the defense expected the prosecution to call. (5 PTRT 1429.) Williams argues on appeal that the prosecutor violated his discovery obligations by failing to turn over this information. (AOB 76.) However, no such witness was ever called to testify at trial.[21]

Here, the "third-party culpability evidence" that Williams' complains the prosecution failed to disclose involved FBI reports investigating Williams' victim's involvement in a number of bank robberies. (AOB 74-81.) Williams does not suggest that the FBI reports involved the instant criminal charges against Williams for the murders of Gary and Roscoe and the attempted murder of Conya L. Rather, Williams speculatively reasons that because Gary was a bank robber, he must have had enemies, and if he had enemies, then those enemies must necessarily have wanted to kill him. Finally, Williams deduces that if an unknown party had reason to kill Gary then that someone could have been the "real killer" and finding the "real killer" would necessarily exonerate Williams. Williams' reasons such evidence was therefore exculpatory. Williams' argument ignores the fact that "*Brady* does not require the disclosure of information that is of mere speculative value." (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472; accord *People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1214 ["The problem here, however, is that defendants cannot point to anything in the undisclosed reports they could have used" to assist their case].)

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[21] Despite not being called to testify at trial, Wilkinson was listed as a civilian witness in the jury questionnaire. (8 CT 2322.)

"[T]he prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (See *People v. Hoyos* (2007) 41 Cal.4th 872, 922 [speculative evidence is not material under *Brady*]; *In re Littlefield* (1993) 5 Cal.4th 122, 135, italics omitted; *Kyles v. Whitley, supra*, 514 U.S. at pp. 436–437; *People v. Jordan* (2003) 108 Cal.App.4th 349, 361.) "[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. [Citation.]" (*Kyles v. Whitley, supra*, 514 U.S. at pp. 436-437.) Accordingly, Williams is unable to show that the prosecution denied him "favorable" evidence. (*Strickler v. Green, supra*, 527 U.S. at pp. 263, 281.) Indeed, Williams fails to point to anything in any of the alleged FBI reports that may be deemed exculpatory. To the contrary, Williams simply concludes that "third party culpability evidence" must have existed and must have been exculpatory. (AOB 74.) This argument lacks merit and should be rejected.

Williams' claim also fails because he is unable to show any prejudice. To demonstrate prejudice, he is required to show that the "nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." (*Strickler v. Green, supra*, 527 U.S. at pp. 263, 281.) Here, as discussed, while the complained of FBI reports may have chronicled Gary's suspected bank robbing endeavors, Williams does not assert that these reports identified the true killers, or otherwise disproved Williams as the killer. As discussed, all the reports offered was information tending to show that Gary was a bank robber, a fact that was presented as undisputed to the jury. (See 18 RT 2523-2524, 2574, 2586.) Accordingly, Williams is unable to show that the FBI reports were material or that he was prejudiced by being denied this immaterial information.

Further, regarding the "establish[ing of] . . . prejudice necessary to satisfy the 'materiality' inquiry," (*Strickler v. Greene, supra*, 527 U.S. at p. 282) the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. (*Id.* at pp. 289-290.) The "touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*In re Brown, supra*, 17 Cal.4th at p. 887, citing *Kyles v. Whitley, supra*, 514 U.S. p. 434.)

Williams is unable to make such a showing because, as discussed, he is unable to direct attention to the portion of the undisclosed FBI investigative reports which show, or even suggest, that someone else killed Gary and Roscoe and attempted to kill Conya L. such that Conya L. was incorrect when she testified that she was "a hundred percent positive" that Williams was the killer. (16 RT 2364; see also 15 RT 2164, 2177, 2196-2197; 16 RT 2274.)

Williams' further claim that the prosecutor committed a *Brady* violation by failing to disclose the criminal history of a person named Tami Wilkerson "that could be used to potentially impeach her testimony," also lacks merit. (AOB 76.) Williams does not assert, nor does the record reflect, that the prosecution called this alleged person to testify. As such, Williams could not have been harmed by way of being prevented from impeaching a prosecution witness who was not called to testify. Finally, Williams' claim that the prosecutor failed to turn over evidence proving that prosecution witness Robert Scott had agreed to testify for the prosecution "in exchange for a lighter sentence," ignores the record. (AOB

76.) Scott testified, and was extensively cross-examined on the point that he had received nothing in exchange for his testimony. (19 RT 2739.) While Williams suggests that evidence of such a "deal" existed, he does not identify any such evidence. (AOB 76.) Accordingly, his claim should be rejected.

III. THE TRIAL COURT PROPERLY EXCLUDED CONYA L.'S ADDRESS FROM THE DEFENSE BECAUSE SHE HAD BEEN THREATENED WITH DEATH

Using two knives, Williams lacerated Conya L.'s throat with such severity that a blood vessel was severed and others exposed. However, Conya L. escaped and subsequently provided the police with a full accounting of Williams' acts against her, Gary and Roscoe. Shortly after her release from the hospital, Conya L., fearing for her safety, fled the state. During pre-trial, the prosecution informed the trial court that Conya L. had been threatened with death. The court therefore excluded Conya L.'s physical address from the defense discovery. Williams now argues that the trial court's ruling violated his due process and fair trial rights because being deprived of Conya L.'s whereabouts denied him "the opportunity to effectively confront and cross-examine" Conya L. (AOB 82.) To the contrary, when the trial court was presented with credible evidence that Conya L., who had fled the state out of concern for her safety, and had become the subject of death threats, it was entitled to protect Conya L. by concealing her whereabouts. Indeed, as Williams concedes, the successful exclusion of Conya L. from the trial, would have greatly enhanced Williams' chances at acquittal. (AOB 89.)

The reciprocal discovery statutes provide that in criminal cases the prosecutor must disclose the names and addresses of the individuals whom he intends to call at trial. (Pen. Code, § 1054.1, subd. (a).) Parties must make an informal request for discovery prior to seeking court enforcement

of an opposing party's discovery obligations. (Pen. Code, § 1054.5, subd. (b).) But if disclosure is not made within 15 days of an informal request, the party may seek a court order requiring disclosure, and "a court may make any order necessary to enforce the provisions" of the discovery statutes, including ordering immediate disclosure of the desired material and information. (*Ibid.*; see also *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1132.)

The statutes also provide that discovery "shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (Pen. Code, § 1054.7.) "'Good cause' is limited to 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." (*Ibid.*) Section 1054.7 also provides:

> Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

(See also *Alvarado v. Superior Court, supra*, 23 Cal.4th at pp. 1132-1133.) Generally, a trial court's ruling on discovery matters is reviewed under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

"The Sixth Amendment guarantees the right of an accused in a criminal prosecution '"to be confronted with the witnesses against him."' [Citation.]" (*Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1137.) "[T]he main and essential purpose of confrontation is to secure for the

opponent the opportunity of cross-examination." (*Ibid.*, internal quotation marks and italics omitted.) "'[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.'" (*Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1137.) A "'permissible'" purpose of cross-examination includes, among other things, "'that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood.'" (*Id.* at p. 1139, quoting *Alford v. United States* (1931) 282 U.S. 687, 691-693 [51 S.Ct. 218, 75 L.Ed.2d 624]; see also *Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1140.) "The right of confrontation is not absolute, however [citations], 'and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" (*Id.* at p. 1139; see also *Id.* at pp. 1142-1143 & fn. 10 [discussing California and federal appellate court cases that upheld the nondisclosure of witnesses' addresses].)

In *Alvarado*, the trial court issued an order permitting the prosecutor to refuse to disclose, both prior to and at trial, the identities of "crucial witnesses" the prosecution intended to call at trial. (*Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1125.) This order permitted the prosecutor to withhold from the defense the true names of the witnesses. (*Id.* at p. 1130.) *Alvarado* provided that a defendant's federal constitutional rights to confrontation and due process are not violated when a trial court denies disclosure of a witness's identity for good cause prior to trial pursuant to section 1054.7. (*Id.* at pp. 1134-1136; see also *Id.* at p. 1148.) But *Alvarado* held that, at trial, "the confrontation clause imposes greater demands upon the prosecution in that defendants must be afforded an

adequate opportunity to confront and cross-examine effectively the witnesses who testify against them." (*Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1148.) Consequently, "should the witnesses provide such crucial testimony at trial, the confrontation clause would prohibit the prosecution from relying upon this testimony while refusing to disclose the identities of the witnesses under circumstances in which such nondisclosure would significantly impair the defendant's ability to investigate or effectively cross-examine them." (*Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1147; see also *Id.* at p. 1151.)

Over four years after *Alvarado* was decided, this Court in *People v. Panah* (2005) 35 Cal.4th 395, rejected the defendant's appellate challenge to the trial court's order withholding the address of a prosecution witness. (*Id.* at pp. 457-458.) *Panah* found that the trial court's order did not violate the defendant's statutory discovery rights or any constitutional rights "where there appears to have been a credible allegation of potential injury to the witness." (*Id.* at p. 458.) In *Panah*, the witness was the defendant's ex-girlfriend and had been "relocated to protect her based on information that defendant had been involved in a plan to jeopardize her life." (*Ibid.*)

The record here demonstrates that the trial court did not abuse its discretion or violate Williams' constitutional rights by ordering the nondisclosure of Conya L.'s address. On December 14, 1995, Williams' co-defendant Walker requested a continuance of the preliminary examination. (1 PTRT 46-47.) The prosecutor opposed the request citing that Conya L. had received a "death threat," and that the threatening party had represented to Conya L. that he was aware of her whereabouts and intended on carrying out a "hit" on her in the immediate future. (1 PTRT 48.) During the preliminary examination, Conya L. testified that she had received death threats. (1 CT 84.)

On February 28, 1997, the issue of Conya L.'s physical address first arose. As the defense had subpoenaed Conya L.'s medical records, which had been received by and were in the possession of the trial court, the parties initially agreed that Conya L.'s address could be redacted from the documents before being turned over to the defense. (1 PTRT 397.) However, on March 7, 1997, Williams' counsel demanded access to un-redacted copies of Conya L.'s medical records including her current physical address. (1 PTRT 429-431.) On March 31, 1997, beyond seeking her unredacted medical records, Williams' counsel informed the court that she wished for the prosecution to immediately provide Conya L.'s current physical address. (1 PTRT 475.)

On May 16, 1997, the trial court indicated that the issue had been fully briefed by the parties and invited argument. (1 PTRT 532-534.) The court further provided that it had reviewed the sealed[22] declaration of district attorney investigator Tony Pradia. (1 PTRT 535.) In his sworn statement, Pradia provided that three men had unsuccessfully attempted to kill Conya L. by slitting her throat. (4 CT 908-909.) One of the men remained at large and his whereabouts was unknown. (4 CT 909.) Pradia declared that Williams and co-defendant Walker were each known Crips gang members with "strong ties" to the gang. (4 CT 909.) On December 19, 1995, "Conya L. received two separate death threats in which she was told that she would be killed if she attempted to testify at the preliminary hearing in this matter." (4 CT 909.) Pradia declared that information had further been received from a confidential informant "that Conya L. and her then six-year-old son would be murdered prior to the preliminary examination." (4 CT 909.) As such, Conya L. was relocated before the

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[22] During the hearing, the sealed declaration was ordered unsealed and provided to the defense. (1 PTRT 547.)

preliminary hearing. Conya L. had to be relocated again following the preliminary hearing due to the threats received. (4 CT 909.) Finally, Pradia declared that should Conya L.'s current whereabouts become disclosed to the defense, Pradia could no longer assure Conya L.'s safety. (4 CT 909.) Moreover, Pradia stated that he did not believe Conya L. would continue to cooperate as a witness if her whereabouts became disclosed. (4 CT 909.)

In addition to Pradia's declaration, the prosecutor directed the trial court's attention to Conya L.'s sworn preliminary examination testimony wherein she had testified that she had in fact been the subject of death threats. (2 PTRT 544.) After taking the matter under submission, and acknowledging its judicial "obligation to protect witnesses," on June 6, 1997, the trial court ruled that Conya L.'s address would not be provided to the defense. (2 PTRT 536, 576.)

Finally, before trial, Conya L. was permitted to address the trial court on May 1, 2002. (5 PTRT 1477.) Conya L. stated that every time she had been confronted with a death threat, she immediately relocated. (5 PTRT 1477.) She indicated that "all the time" Williams sent her stressful messages and that she was routinely warned that Williams was eager to ascertain her current address. (5 PTRT 1478.) Conya L.'s trial testimony also included details about the death threats. (17 RT 2489-2491.)

Unlike the situation in *Alvarado*, Williams was not deprived of the true identity of a crucial witness against him. Beyond Conya L.'s identity, as required, Williams was provided detailed information regarding Conya L.'s criminal history, which included the willful commission of welfare fraud, perjury, lying on an employment application and fraudulent use of a Medical card. (23 RT 3122-3126.) Further, unlike *Alvarado* and *Panah*, here, Williams had attempted, nearly successfully, to kill Conya L. Moreover, Williams had killed two other human beings in Conya L.'s

presence, had digitally penetrated her while threatening to sodomize her and Conya L. only narrowly avoided being killed herself because she managed to escape. (15 RT 2170-2171, 2190-2192; 16 RT 2272-2273; 21 RT 2948-2950.)

This case is further distinguishable from *Alvarado* because here, Williams was not denied the ability to investigate Conya L. Instead, he was only denied her current address following her relocation after the crime. Conya L. testified that immediately after being threatened, she fled the county and soon thereafter, the state. (15 RT 2489-2490.) Just as in *Panah*, Conya L.'s address in her current community was of minimal relevance because as she had only lived there for a short time, it was unlikely that the defense could have gathered much "reputation in the community" evidence even if provided that address. (See *People v. Panah*, *supra*, 35 Cal.4th at p. 458.) Notably, Williams did not call any witnesses to testify as to Conya L.'s reputation in the Southern California community where she had lived. Rather, as discussed, Williams relied on the objective proof provided by Conya L.'s criminal history, which included several acts of moral turpitude.

Williams contends that his purported denial of his right to investigate Conya L. was especially damaging because Conya L.'s testimony, which Williams believes to be weak, could not be "corroborated." (AOB 90.) To the contrary, Conya L.'s trial testimony was corroborated by the physical evidence. When discovered by police officers shortly after the attack, Conya L. was naked, covered in blood, hysterical and clutching her throat, which exhibited a gaping knife wound. (10 RT 1735, 1742, 1748.) Her injuries were so severe that a vascular vessel in her throat had been completely severed and another was pulsating with Conya L.'s heart rhythm. (10 RT 1754.) When Conya L. relieved pressure from her neck, blood began pouring out. (10 RT 1736.) The jury was provided a

photograph depicting Conya L.'s injury. (10 RT 1758.) Conya L.'s testimony was corroborated by her physical injuries. Moreover, Conya L's testimony was corroborated by the fact that she specifically identified Williams, while recovering from her wounds in the hospital, as the person who cut her throat. (21 RT 2948.) Williams' claim should be denied.

IV. WILLIAMS WAS NOT DENIED HIS RIGHT TO CROSS-EXAMINE CONYA L.

Similar to his argument above, Williams claims that because he was not provided Conya L.'s current address, following her post-death threat relocation, he was denied his right to confront and cross-examine her because knowledge of her address may have impacted his ability confront her at trial. (AOB 96.) He is wrong. As discussed herein in Argument III., Penal Code section 1054.7 specifically authorizes trial courts to do that which Williams argues is prohibited, and, as this Court has concluded, section 1054.7 is constitutional.

"'[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 538.) The constitutional right of confrontation includes the right to cross-examine adverse witnesses "on matters reflecting on their credibility[.]" (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) "As this court has explained, cross-examination is required in order 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 513.) Williams relies on *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 [107 S.Ct. 989, 94 L.Ed.2d 40] (*Ritchie*) and *People v. Hammon* (1997) 15 Cal.4th

1117 (*Hammon*) in support of his assertion that this right to confront entitled him, during pre-trial, to know the whereabouts of Conya L., who as discussed above, had been the subject of death threats. Williams reliance is misplaced.

Ritchie does not support Williams' contention. There, the defendant was charged with committing sexual acts against his daughter. (*Id.* at pp. 56-57.) The child's allegations had been investigated by the state's child protective services agency. (*Ibid.*) Before trial, the defendant served the agency with a subpoena requesting the records of its investigation. (*Ibid.*) The trial court rejected the request, and the state court reversed the defendant's conviction in part, finding the trial court order violated the defendant's confrontation rights under the Sixth Amendment. (*Ibid.*) The United States Supreme Court remanded the matter for an in camera review of the records to determine whether, under the Fourteenth Amendment's due process clause and *Brady v. Maryland, supra,* 373 U.S. at p. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215], they contained evidence material to the issues of guilt or punishment that was favorable to the defendant. (*Pennsylvania v. Ritchie, supra*, 480 U.S. at pp. 56-57, 59, 61.)

In so ruling the high court considered but declined to decide whether the Sixth Amendment's confrontation or compulsory process clauses authorized pretrial disclosure of the child protective service's records. (*Pennsylvania v. Ritchie, supra*, 480 U.S. at p. 56.) However, the lead opinion, expressing the views of four members of the court, declared "[t]he opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. [Citations.]" (*Id.* at p. 52.) No meaningful limitations were placed on Williams' ability to cross-examine Conya L. or to tenaciously attack her credibility using her criminal history.

Nor does *Hammon* support Williams. There, this Court declined to "extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information." (*People v. Hammon, supra*, 15 Cal.4th at p. 1128.) However, the court also recognized that "[w]hen a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon . . . to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. [Citation.]" (*People v. Hammon, supra*, 15 Cal.4th at p. 1127.)

Williams argues that the above cases support the conclusion that criminal defendants must always (notwithstanding Pen. Code, § 1054.7) be provided the current addresses of all prosecution witnesses, including those threatened with death, because exclusion of such information "could impact [his right to] trial confrontation." (AOB 97.) This argument ignores this Court's decision in *Alavarado v. Superior Court, supra*, 23 Cal.4th at p. 1121. There, the Court, upholding Penal Code section 1054.7, noted that it was "unaware of any case that suggests that the denial of pretrial disclosure in such circumstances is constitutionally impermissible." (*Id.* at pp. 1134-1135.) As Williams provide no reason for this Court to revisit its holding in *Alvarado*, his argument should be rejected.

V. WILLIAMS WAS NOT PREVENTED FROM EXAMINING CONYA L. REGARDING HER ACTS OF MORAL TURPITUDE

During trial, Williams elicited testimony from Conya L. that she had willfully committed welfare fraud, perjury, lied on an employment application and fraudulently used a Medi-Cal card. He complains now that the trial court errantly precluded him, in violation of his constitutional right to confront and cross-examine Conya L., from inquiring into Conya L.'s alleged failure to fulfill one of her probation conditions stemming from her welfare fraud conviction, which required her to pay a small fine. (AOB

100.) Moreover, Williams complains that in addition to being prevented from asking about Conya L.'s failure to pay this fine, he was denied his right to inquire into Conya L.'s "excuses" explaining her failure to pay the fine. (AOB 101.) Williams' claim lacks merit because the trial court's evidentiary ruling constituted a proper exercise of its discretion under Evidence Code section 352.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. The right of confrontation means more than being allowed to confront the witness physically. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 1435, 89 L.Ed.2d 674] citing *Davis v. Alaska* (1974) 415 U.S. 308, 315 [94 S.Ct. 1105, 1110, 39 L.Ed.2d 347].) Indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. (*Davis v. Alaska, supra*, 415 U.S. at pp. 315-316.) Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. (*Id.* at p. 316.) Williams was not denied his right to confront and cross-examine Conya L.

As part of the defense case, Williams called Conya L. (23 RT 3117.) However, before doing so, Williams indicated to the trial court that he wished to introduce evidence that Conya L. "had a warrant out for her arrest at the time" that the crimes were committed against her, Gary and Roscoe. (23 RT 3097.) The prosecutor objected that the evidence of the warrant, which involved Conya L.'s 1994 conviction for fraudulent use of a Medi-Cal card, should be excluded under Evidence Code section 352 because it would invite the jury to speculate as to the reason for the warrant. (23 RT 3097-3098.)

The trial court overruled the prosecution's objection, stating that although "the fact that the warrant was issued" was inadmissible, the

"underlying facts" would be permitted. (23 RT 3098.) Williams responded, "[a]ctually, it wasn't just for impeachment of her credibility as a witness, but also to explain her absence from the state." (23 RT 3098.) At that point, the trial court cautioned that the evidence might "open some doors" regarding the reason Conya L. fled the state, which would allow the prosecution to revisit the "threat issue." (23 RT 3098.) The court cautioned that opening that door was something the defense "probably [would not] want to" do. (23 RT 3098.) Williams' trial counsel acknowledged the court's caution. (23 RT 3098-3099.)

Next, counsel indicated that he wished to examine Conya L. as to a separate warrant, related to an earlier conviction.[23] (23 RT 3138-3139.) Counsel argued that the warrant was in relation to Conya L.'s failure to pay a court ordered fine and that although the fine had been paid in full as of 1996, evidence of the warrant was relevant to prove that "she had access to money during the time that she was with Gary Williams" and that "she stuffed [$6,000 from a car sale] into the vacuum cleaner bag[.]" (23 RT 3139.) The prosecutor objected that the evidence should be excluded as "irrelevant and time-consuming." (23 RT 3138.) The court excluded the evidence on the grounds cited by the prosecutor. (23 RT 3139.)

Williams called Conya L. to testify. During examination, Conya L. admitted being convicted of misdemeanor welfare fraud in 1991. (23 RT 3122-3123.) She further admitted that in 1992, she had lied in an employment application, signed under penalty of perjury, where she falsely declared that she had never been convicted of a misdemeanor. (23 RT 3124.) Similarly, but not under penalty of perjury, Conya L. admitted lying about her conviction on a 1996 employment application. (23 RT 3125.)

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[23] Presumably Conya L.'s 1991 misdemeanor conviction for welfare fraud. (23 RT 3122-3123.)

Conya L. further admitted being convicted of misdemeanor fraudulent use of a Medi-Cal card in 1994. (23 RT 3126.) During his examination, Williams' trial counsel did not inquire as to the warrant regarding Conya L.'s 1994 conviction for fraudulent use of a Medi-Cal card.

Accordingly, despite permission to do so, Williams' trial counsel elected not to introduce evidence of the subject warrant. Williams does not assert deficient performance by his counsel in this regard. Indeed, he ignores altogether the import of his attorney declining to do what the trial court authorized him to do. As this omission by Williams tacitly concedes, there is no reason to second guess his trial counsel's litigation decision, a decision which warrants deference. (Cf. *People v. Fairbank* (1998) 16 Cal.4th 1223, 1243 [discussing an ineffective assistance of counsel claim as based on challenges to litigation strategy].)

Williams asserts that his trial attorney "intended to show that Conya L. lied when she claimed she did not have the money to pay the fine." (AOB 101.) He thereafter asserts, without citation to the record, that "Conya L.'s lie[d]" regarding her inability to pay. (AOB 101, 105.) Nothing in the record shows that Conya L. lied about, or was even examined regarding, her ability to pay a probation fine.

Only relevant evidence is admissible. (Evid. Code, § 350.) Williams argues that the additional evidence regarding Conya L. was relevant to prove to the jury that "Conya L.'s credibility was suspect" such that her testimony should be rejected as unreliable. (AOB 101.) Williams is wrong regarding the admissibility of evidence regarding the warrant and Conya L.'s ability to pay the fine at the time of Williams' capital crimes.

Evidence Code section 352, allows for the exclusion of evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of

misleading the jury." (Evid. Code, § 352.) As to the second warrant, the trial court's exclusion of the warrant was proper. As discussed, Williams' trial counsel wished to introduce the warrant for purposes of showing that Conya L. had access to money during the time of the murders and to prove she stuffed $6000 from a car sale into the vacuum cleaner bag. (23 RT 3139.) Under Evidence Code section 352, the trial court was reasonably entitled to grant the prosecutor's objection to the evidence as irrelevant and time-consuming. (23 RT 3138.)

Williams was permitted to impeach Conya L. with a plethora of clear, direct and objective impeachment evidence. Indeed, the jury was presented with the fact that Conya L. was the type of person willing to lie repeatedly and to commit fraud and perjury, and she had been prosecuted for those actions. (23 RT 3122-3126.)

As it does not appear to have been in dispute as to whether or not Conya L. had access to money when the murders of Gary and Roscoe were committed, the trial court reasonably excluded evidence of the warrant under section 352. The court's ruling should be upheld here. A trial court's decision to admit or exclude evidence pursuant to Evidence Code section 352 "'will not be disturbed unless it constitutes a manifest abuse of discretion that results in a miscarriage of justice.'" (*People v. Thomas* (2011) 51 Cal.4th 449, 485, quoting *People v. Cain* (1995) 10 Cal.4th 1, 33.) Williams has not shown such a "manifest" abuse here. Accordingly, his argument should be rejected.

VI. WILLIAMS' PRO SE STATUS WAS PROPERLY REVOKED BY THE TRIAL COURT

Williams contends the trial court violated his Sixth Amendment right to represent himself under *Faretta v. California, supra*, 422 U.S. at p. 806, when it revoked his pro se status before trial. (AOB 108-126.) Williams has forfeited his right to challenge the revocation because the record shows

that he acquiesced to the revocation by way of his statements that he was ill-prepared to represent himself and, in any event, was ambivalent as to the issue so long as the trial court refrained from reappointing Attorney Gunn, whom Williams disliked. Even if Williams had not forfeited his right of self-representation, the revocation was nevertheless proper in light of Williams' chronic dilatory conduct which obstructed the trial.

On August 16, 2000, the trial court granted Williams' request to represent himself. (4 PTRT 1117, 1143.) The court's order followed, as detailed above, nine *Marsden* hearings, eight of which were denied, and the failed appointment of nine[24] trial attorneys. Upon the *Faretta* grant, Williams assured the court that he would be prepared for trial on February 5, 2001, which was in less than six months. (4 PTRT 1118, 1141.) His self-representation lasted ten months. As is detailed below, during that time, the records reflects that Williams utilized this time to repeatedly seek to remove the trial judge, recuse the district attorney, challenge venue, complain about the court's appointment of stand-by counsel, his investigator, discovery and his prior attorneys.

Upon granting Williams pro per status on August 16, 2000, the trial court commented that despite its concern regarding "further delay," given Williams' representations to the court, the court believed that Williams would be prepared for trial on February 5, 2001, i.e. in six months. (4 PTRT 1118, 1141.) The court ordered that Attorney Gunn should remain, strictly within the role of "stand-by counsel," for the purpose of remaining prepared to try the case in the event that Williams decided that he no longer wished to continue (4 PTRT 1118.) The trial court made it clear to Williams that Gunn had no authority to control the defense whatsoever. (4

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[24] Wright, Fieger, Cox, Porter, Myers, Aguilina, Filipone, Gunn, Cormicle.

PTRT 1118, 1137-1139.) Despite Gunn's complete lack of control, Williams complained that he did not like Gunn and did not want him involved in any capacity. (4 PTRT 1138.) The court responded that the decision was the court's to make and not Williams'. (4 PTRT 1138.)

At the next pretrial hearing, on October 6, 2000, Williams complained that his investigator did not return his calls. (4 PTRT 1152.) He also reasserted his complaint with Gunn, advising the trial court that he had initiated civil litigation against Gunn, such that Gunn might have to "declare a conflict." (4 PTRT 1156-1157.) Over the course of the next 10 months, despite the fact that Gunn possessed no ability to control the case, Williams chronically complained about the trial court's decision to appoint Gunn as standby counsel and continually submitted motions seeking Gunn's removal. (See 4 PTRT 1152, 1156; 5 PTRT 1286-1287, 1318, 1328-1329, 1336; 5 CT 1323-1325, 1341-1343.)

Regarding Williams' complaints about discovery, eight months into his self-representation, Williams informed the court that Gunn, after being relieved as appointed counsel (at Gunn's request), had purportedly failed to turn over any of the case files to him. (5 PTRT 1289-1290.) This contention was contradicted by Gunn's previous representation to the trial court, made in August of 2000, that Gunn understood that Williams had been provided all discovery. (4 PTRT 1139.) Williams' representation was further contradicted by Gunn's October 2000 statement to the court where Gunn asserted that Williams' investigator had also been provided all of the material possessed by Gunn's former co-counsel, Attorney Cormicle. (4 PTRT 1155.)

Williams also complained that, separate and apart from Attorney Gunn's alleged failure to turn over his case files, the prosecutor had

purportedly failed to turn over discovery.[25] (5 PTRT 1174.) On January 12, 2001, the prosecutor represented to the trial court that Williams wanted "all of the items that ha[d] been generated in this case" and offered to provide Williams with a list of the discovery materials. (4 PTRT 1181.) On February 23, 2001, the prosecutor represented to the trial court that he had provided Williams with his investigator's phone number in order that Williams could call the investigator with any questions or concerns regarding discovery. (4 PTRT 1213.) The prosecutor complained that, notwithstanding his discovery complaints, Williams never actually called. (4 PTRT 1213.) Asked by the court to explain, Williams offered that he tried to call, but the prosecutor's investigator never answered the phone. (4 PTRT 1214.) On April 17, 2001, the prosecutor represented to the trial court that Williams had been provided "all of the discovery" possessed by the prosecution.[26] (5 PTRT 1304.) Moreover, the prosecutor informed the court that Williams had been provided "all of the exhibits" from his cohort Walker's separate trial. (5 PTRT 1303.)

Beyond his discovery complaints, Williams unsuccessfully filed three motions to disqualify the trial judge. (5 CT 1203, 1208, 1211; 5 CT 1316-1319.) Williams also unsuccessfully filed a motion to recuse the district

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[25] Williams states that with regard to his discovery complaints, the trial court directed the prosecution's office to comply with Williams' demands. (AOB 110.) The record reflects that the court commented, "I don't know what Mr. Williams' requests are," and the court requested that the prosecution confer with Williams for purposes of determining "what it is that [he] want[ed]." (4 PTRT 1172-1173.)

[26] Williams asserts that his tenure as his own attorney was marked with repeated discovery violations by the prosecution. (AOB 108.) While Williams may have complained, repeatedly, that the prosecution was not fulfilling its discovery obligations, the record does not, however, support Williams' claim that any discovery violations actually occurred.

attorney' office. (5 PTRT 1230.) He further unsuccessfully challenged the venue. (5 PTRT 1239, 1250-1251.)

As to his trial preparation, Williams' unsuccessfully demanded that the trial court appoint "second counsel" to work for him. (4 PTRT 1188.) He further complained that his efforts were being hindered because he did not have a "legal runner" to courier items between him and his court appointed investigator. (5 PTRT 1294.) As to his investigator, Williams complained that the investigator had engaged in fraudulent billing practices. (5 PTRT 1343-1344.) Notably, the investigator opined to the trial court that appellant had engaged in delay tactics. During a June 15, 2001, trial readiness conference, the trial court stated that it had received a letter from Williams' court appointed investigator which provided that the investigator was no longer working on the case and requesting that the trial court terminate the appointment. (5 PTRT 1332.) It was noted that in the letter the investigator specifically protested, "I find it impossible to work with" Williams and provided information detailing Williams' efforts to delay matters. (5 PTRT 1333; 5 CT 1340.) Williams explained his problems with his investigator as based on his belief that his investigator had been covertly working as an agent of the prosecution. (5 PTRT 1346.) Based on Williams' request that the investigator be relieved, the court terminated the appointment. (5 PTRT 1333.) On June 28, 2001, 32 days before trial, the trial court inquired if Williams had retained a new investigator. (5 PTRT 1348; 5 CT 1336.) Williams responded, "No. I do plan on, yes." (5 PTRT 1348.)

Finally, lamenting, "we're at 30 days to trial," and citing that Williams had failed to subpoena a single witness, generate a witness list or provide any discovery, the prosecutor requested that the court revoke Williams' pro per status. (5 PTRT 1338-1342.) Invited to respond, Williams offered that he had attempted to address every issue that he

believed to be "wrong." (5 PTRT 1346.) He did not however address the prosecutor's specific complaints regarding his failure to subpoena witnesses, provide discovery or a witness list. (See 5 PTRT 1342-1348.) Williams explained to the trial court that he was "in over his head," and stated that it was "fine" with him if the trial court terminated his pro se status, so long as the court did not re-appoint Attorney Gunn. (5 PTRT 1347, 1348 ["So if you want to take my pro per status, fine. This is your courtroom. Do what you want to. I don't care. But don't give it to [Attorney Gunn]"].) Finally, reasoning that Williams had engaged in "delay tactics," the trial court terminated his right to self-representation and appointed counsel.[27] (5 PTRT 1349.)

A defendant who knowingly and intelligently makes an unequivocal and timely *Faretta* request after having been apprised of the dangers of self-representation must be allowed to proceed in pro per. (*People v. Valdez* (2004) 32 Cal.4th 73, 97-98; *People v. Welch* (1999) 20 Cal.4th 701, 729.) The Sixth Amendment implies a right of self-representation. (*People v. Butler* (2009) 47 Cal.4th 814, 824, citing *Faretta v. California, supra*, 422 U.S. at p. 821.) Although *Faretta* error requires automatic reversal, improper grounds for the denial of self-representation do not compel a finding of error "if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds." (*People v. Dent* (2003) 30 Cal.4th 213, 217-218; see *People v. Welch, supra*, 20 Cal.4th at pp. 729, 734.)

A challenge to the revocation of a defendant's pro se status is waived or forfeited on appeal if the defendant fails to timely object to the

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[27] Although the trial court reappointed Attorney Gunn, Attorney Cormicle took the case shortly thereafter as Gunn declared a conflict and was relieved of his appointment.

revocation, or acquiesces to it. (*People v. Butler* (2009) 47 Cal.4th 814, 825; see *People v. Valdez, supra*, 32 Cal.4th at p. 99 [*Faretta* right may be forfeited].) Williams argues that the trial court violated his *Faretta* rights by revoking his pro se status on June 28, 2001. (AOB 108-126.) However, he did not object and acquiesced to the revocation. Specifically, upon being confronted with the fact that the court was considering revoking his right to self-representation, Williams conceded that he was "in over [his] head," representing to the trial court that he would rather go to trial alone than with Attorney Gunn. (5 PTRT 1347.) He further stated, "[s]o if you want to take my pro per status, fine. This is your courtroom. Do what you want to do. I don't care. But don't give it to [Attorney Gunn.]" (5 PTRT 1348.) Accordingly, the record reasonably supports the finding that Williams did not object to the revocation at trial. (See *People v. Rudd* (1998) 63 Cal.App.4th 620, 628-630.) Rather, he agreed to it, while conditioning it on any attorney but Gunn, being appointed. Accordingly, the issue should be deemed forfeited.

Forfeiture aside, the June 2001 revocation did not violate Williams' *Faretta* rights because "[t]he trial court possesses much discretion when it comes to terminating a defendant's right to self-representation and the exercise of that discretion 'will not be disturbed in the absence of a strong showing of clear abuse.' [Citations.]" (*People v. Welch, supra*, 20 Cal.4th at p. 735 [trial court's "'judgment calls'" and "decision to revoke self-representation status entitled to deference"]; see also *People v. Clark* (1992) 3 Cal.4th 41, 116 [decision to revoke self-representation status entitled to deference]; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, fn. 8 [104 S.Ct. 944, 79 L.Ed.2d 122] [calling for "the usual deference" to the trial judge when making these "judgment calls"].) The decision to terminate self-representation is reviewed for an abuse of discretion. (*People v. Carson* (2005) 35 Cal.4th 1, 12.)

There are limits on the right to act as one's own attorney. "'*Faretta* itself and later cases have made clear that the right of self-representation is not absolute.'" (*People v. Butler, supra*, 47 Cal.4th at p. 825, quoting *Indiana v. Edwards* (2008) 554 U.S. 164, 171 [128 S.Ct. 2379, 171 L.Ed.2d 345].) The court may deny a request for self-representation that is, inter alia, "intended to delay or disrupt the proceedings." (*People v. Butler, supra*, 47 Cal.4th at p. 825.) Indeed, as stated by the high court in *Falsetta*, "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." (*Id.* at p. 834, fn. 46; *People v. Welch, supra*, 20 Cal.4th at p. 734 ["*Faretta* itself warned that a trial court may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"].) "Thus, a trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation." (*People v. Welch, supra*, 20 Cal.4th at p. 735.)

In such circumstances, where the defendant's *Faretta* rights are subject to revocation, each case must be evaluated in its own context, on its own facts. (*People v. Carson* (2005) 35 Cal.4th 1, 10.) When determining whether termination 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. (*Ibid.*) Such factors include the availability and suitability of alternative sanctions, whether the defendant has been warned that particular misconduct will result in termination of in propria persona status, and whether the defendant has intentionally sought to disrupt and delay his trial. (*Ibid.*) As to a defendant's effort to disrupt and delay, "the relevance inheres in the effect of the misconduct on the trial proceedings, not the defendant's purpose. (*Id.* at p. 11.) A clearly

"'[e]rroneous denial of a *Faretta* motion is reversible per se.'" (*People v. Butler, supra*, 47 Cal.4th at p. 824, citing *McKaskle v. Wiggins, supra*, 465 U.S. at p. 177, fn. 8.)

Here, as discussed, Williams made clear that he was ill-prepared to try the case. (5 PTRT 1347 ["I know I'm in over my head"].) Moreover, Williams implicitly agreed with the revocation asserting that "the only reason" he wished to self-represent was to avoid having to rely on Attorney Gunn. (5 PTRT 1347.) These comments support the conclusion that Williams' goal was to avoid Gunn, and not to represent himself. Further, ultimately, Williams asserted to the court, "[d]o what you want to do. I don't care." (5 PTRT 1348.) Williams' actual request was that the court simply not turn the matter over to Gunn. (5 PTRT 1348.) The trial court accepted Williams' assertion that was not prepared to handle the trial. (5 PTRT 1349 ["I find that I agree with Mr. Williams, he's in over his head."].) Given Williams' comments, coupled with the manner in which Williams litigated the case during his ten month tenure, support the finding that the trial court was reasonably entitled to exercise its discretion and revoke Williams' pro se status. (Compare *People v. Lawrence* (2009) 46 Cal.4th 186, 195 ["Buyer's remorse may not be an illegitimate reason for wanting to revoke a *Faretta* waiver, but neither is it a compelling one"].)

As to the record, a review of the pretrial proceedings reveals numerous instances supporting the conclusion that Williams' objective was to delay matters indefinitely. Indeed, very early in the proceedings, even before assuming his representation, the record reflects that Williams was intent on delay. Even prior to their cases being severed, while Williams remained paired with co-defendant Walker, Walker's attorney complained that a situation had emerged where "you have one which does not wish to waive time and one of which does wish to waive time," thereby creating an inherent conflict between the codefendants. (1 PTRT 107.) More

significantly, as discussed at length above, before waiving his right to counsel Williams contested all[28] of his numerous court-appointed attorneys, asserting nine *Marsden* challenges. Indeed, each time a new attorney came on board, a lengthy continuance was necessitated in order for that attorney to get up to speed. (See, e.g., 3 PTRT 888-889, 903-905; 4 PTRT 932-933, 1024, 1030, 1061.) Williams was certainly aware of the delay attendant with each substitution of counsel.

Once Williams successfully gained control of the litigation upon his successful *Faretta* request, he capitalized on his control in an attempt to manipulate every aspect of the proceeding, asserting numerous challenges against the trial judge based on his belief that the judge, inter alia, had "act[ed] with extreme bias and prejudice toward [him as] based on his choice to [waive his right to counsel]." (5 CT 1294, 1316, 1319.) As a basis for his challenge to disqualify the district attorney, Williams asserted his belief that the prosecutor lied to his former co-defendant Walker's jury regarding Williams' involvement in the murders. (5 PTRT 1230.) Williams further challenged venue. (5 PTRT 1250-1251.)

In addition to the delays attendant with Williams' ancillary activities, he also neglected to prepare his case for trial. In March 2001, based on Williams' failure to prepare for trial, the prosecutor urged the trial court to advise him that his failure to adhere to the discovery rules could cause defense evidence to be excluded from trial. (5 PTRT 1247.) The record further reflects that Williams disregarded the prosecutor's invitation for him to personally contact the prosecution's investigator in order to assure that he was in possession of all of the prosecution's discovery items. (See 4 PTRT

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[28] The record reflects that following Fieger's departure, Williams subsequently represented that he had not had a problem with Fieger. (5 PTRT 1339.) Notwithstanding his subsequent assessment, Williams did bring a *Marsden* motion directed at Fieger. (2 PTRT 454.)

1213-1214.) And, with trial just over a month away, Williams had yet to subpoena a witness, turn over a witness list or otherwise participate in the discovery process. (5 PTRT 1341-1342.)

Williams working relationship with his court appointed investigator was also of significance as it provided insight into Williams' handling of the matter. As discussed above, Williams' investigator wrote a letter to the trial court asking to be relieved of Williams. (5 PTRT 1338-1339.) During a June 15, 2001 hearing, the prosecutor referenced the letter, which provided that the investigator found it "impossible" to "work with" Williams based on Williams' "refus[al] to cooperate with" the investigator. (5 PTRT 1339; 5 CT 1340.) The letter further presented that "Mr. Williams ha[d] done everything to delay the proceedings in his dealings with the investigator." (5 PTRT 1339.)

At Williams' request, the investigator was finally relieved on June 15, 2001. (5 PTRT 1330, 1333.) Nearly two weeks later, on June 28, 2001, the trial court inquired if William's had secured a new investigator. (5 PTRT 1335, 1348.) Despite the fact that the trial date was just over 30 days away, Williams confirmed that he had not, adding that he "plan[ned]" on hiring an investigator. (5 PTRT 1341, 1348.) The prosecutor questioned how, given the looming trial date, Williams could possibly be ready when he lacked an investigator to serve subpoenas. (5 PTRT 1341.) Aside from its acceptance of Williams' concession that he was not competent to try the case, the court found that he had engaged in "delay tactics" and revoked his self-representation. (5 PTRT 1349.) For the reasons stated, the trial court's action was reasonable under the circumstances and should be upheld. (See *People v. Welch, supra*, 20 Cal.4th at p. 735.)

VII. CONTRARY TO WILLIAMS' BELIEF, THE SIXTH AMENDMENT DOES NOT INCLUDE A RIGHT TO "STANDBY COUNSEL"

Williams claims that the Sixth Amendment right to counsel includes the right to "conflict free" standby counsel when the accused has waived his right to counsel and is proceeding in properia persona. (AOB 127-135.) It is well settled that the appointment of standby counsel lies within the discretion of the trial court and is not mandated by law. Accordingly, Williams had no right to standby counsel – conditional or otherwise. And, even if he did, the "conflict" that he complains of could not have caused him harm because the allegedly conflicted attorney never took meaningful control of the case once Williams' pro se rights were terminated.

Williams' eighth court appointed attorney, David Gunn, began representing Williams on September 2, 1999. (4 PTRT 1024-1025.) Williams' multiple *Marsden* challenges of Gunn were litigated on December 21, 1999, July 14, 2000 and August 11, 2000. (4 PTRT 1051, 1094; 4 CT 1147, 1154.) Following the August 11, 2000 *Marsden* motion, Williams asserted his *Faretta* motion. (4 PTRT 1100; 4 CT 1155.) His motion was granted on August 16, 2000 and Gunn was relieved. (4 PTRT 1120-1121; 4 CT 1162.) However, the court ordered Gunn to remain as "standby counsel." (4 PTRT 1118-1119; 4 CT 1162.) It further expressly stated that Gunn's appointment was not as "advisory counsel." (4 PTRT 1119; 4 CT 1162.) Gunn was to remain solely for purposes of standing in should Williams take the case to trial and then refuse to "cooperate and proceed[.]" (4 PTRT 1118-1119.)

At the next hearing, conducted on October 6, 2000, Williams advised the trial court that he had initiated civil litigation against Gunn and offered his concern that Gun might therefore have a conflict based on that litigation. (4 PTRT 1156-1157.) On May 1, 2001, Williams filed a "[r]equest to remove" Gunn, stating that his civil suit created a conflict with

Gunn. (1 CT 1323-1325.) On May 13, 2000, the trial court denied the motion. (5 PTRT 1329.) On June 15, 2001, Williams again brought a motion to remove Gunn as standby counsel, asserting that his civil suit created a conflict with Gunn. (5 CT 1341-1343.) Williams argued that if his pro per status ended, he did not believe that Gunn would "put his best foot forward." (4 PTRT 1336.) The court denied the motion. (5 PTRT 1336.) However, before it denied the motion, it inquired of Gunn. Gunn represented to the court that he felt he could competently represent Williams and that he was unaware of any reason why he should recuse himself. (5 PTRT 1337.) In denying the motion the court reasoned that Williams had failed to show that a conflict existed and that even if one did exist, he could not show prejudice. (5 PTRT 1338.)

The trial court terminated Williams' pro per status on June 28, 2001. (5 PTRT 1349.) Gunn was reappointed as counsel. (5 PTRT 1349-1350.) On August 20, 2001, citing Williams' civil professional malpractice suit against him and Williams' refusal to cooperate with him, Gunn declared a conflict. (5 PTRT 1365-1366.) The court commented that it found Williams' act of suing Gunn to be part of his ongoing effort to delay matters and stated that it was disturbed that a "defendant who wants to delay can play the court and counsel [like] a fine tuned fiddle." (5 PTRT 1367, 1369.) Notwithstanding, the court dismissed Gunn and, with Williams' express agreement, appointed Attorney Cormicle. (5 PTRT 1371.)

In *Faretta, supra*, 422 U.S. at pp. 820-821, the Supreme Court held that a defendant has the right to present his or her own case, and that a court may not compel a defendant to accept court-appointed counsel. *Faretta* does not entitle the defendant to the appointment of co-counsel, advisory counsel, or counsel to assist in the preparation of a defense. *McKaskle v. Wiggins* (1984) 465 U.S. 168, 183 [104 S.Ct. 944, 953, 79 L.Ed.2d 122

["*Faretta* does not require a trial judge to permit 'hybrid' representation."].) A defendant has no right to "hybrid representation"[29] as the Sixth Amendment right to counsel and the right to represent oneself are mutually exclusive rights. (*People v. Moore* (2011) 51 Cal.4th 1104, 1119-1120; *People v. D'Arcy* (2010) 48 Cal.4th 257, 282; *People v. Lawley* (2002) 27 Cal.4th 102, 145; *People v. Clark* (1992) 3 Cal.4th 41, 111; *People v. Barnett* (1998) 17 Cal.4th 1044, 1106 [defendant has no right to be represented by counsel and to also participate in the presentation of his own case.) However, a court may, even over objection by the accused, appoint standby counsel[30] to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. (*Faretta v. California, supra*, 422 U.S. at pp. 834-835 n. 46.) Such an appointment is within the discretion of the trial court and is not mandated by law. (See *People v. Moore, supra*, 51 Cal.4th at pp. 1119-1120.)

Here, the record reflects that the trial court's determination to appoint standby counsel was to serve the orderly administration of justice. Specifically, the court ordered that standby counsel should be prepared to proceed in the event that Williams, at any given moment, should elect to disrupt the proceedings in order to cause delay. (4 PTRT 1118-1119.) Appellant had no right to standby counsel, including stand by counsel that he believed to be free from conflict. Indeed, there is no simultaneous right

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[29] Hybrid representation includes arrangements involving the presence of both a self-represented defendant and a defense attorney, i.e. as standby counsel, advisory counsel, or co-counsel. (*People v. Moore* (2011) 51 Cal.4th 1104, 1119-1120.)

[30] "Standby counsel" is an arrangement "in which the attorney takes no active role in the defense, but attends the proceedings so as to be familiar with the case in the event that the defendant gives up or loses his or her right of self-representation." (*People v. Moore, supra*, 51 Cal.4th at pp. 1119-1120, fn. 7.)

to self-representation and a Sixth Amendment right to counsel. (*People v. Moore, supra*, 51 Cal.4th at pp. 1119-1120; *People v. D'Arcy, supra*, 48 Cal.4th at p. 282.)

However, even if appellant had a right to standby counsel, and could prove that Attorney Gunn did indeed possess a conflict, the fact remains that Gunn did not represent Williams during his 10 month period of self-representation, and after Gunn was appointed to represent Williams following the revocation of his right to self-representation, Gunn withdrew. Thereafter, with Williams' agreement, Attorney Cormicle represented Williams and proceeded to take the case to trial. (5 PTRT 1367-1371.) Williams' argument lacks merit and should be denied.

VIII. THE TRIAL COURT PROPERLY EXCLUDED PROSPECTIVE JURORS WOOD AND WHITE FOR CAUSE

Williams contends that the trial court's exclusion of Prospective Jurors Wood and White for cause violated his constitutional right to due process and to trial by an impartial jury. (AOB 136-143.) The trial court's excusal of the prospective jurors constituted a proper use of the court's discretion.

The relevant legal principles governing the dismissal of a prospective juror for cause in a capital case are well settled:

> In *Wainright v. Witt* [(1985)] 469 U.S. 412, the United States Supreme Court set forth the proper procedures for choosing jurors in capital cases. That case 'requires a trial court to determine "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. [Citation.] "Under *Witt*, therefore, our duty is to 'examine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties. . ." was fairly supported by the record.'" [Citations.] [¶] In many cases a

> prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts. [Citations.]

(*People v. Bunyard* (2009) 45 Cal.4th 836, 845.)

Here, Williams contends that nothing elicited in the questioning of Prospective Jurors Wood or White supported a finding that either's view would have "prevented or substantially impaired the performance of their dut[y] as [a] juror[] in accordance with their instruction and oath." (AOB 141.) This contention ignores the record.

On his juror questionnaire in answer to question 26, Prospective Juror Wood affirmed that he had "philosophical, religious or moral feelings that would make it difficult or impossible for [him] to sit in judgment of another person[.] (14 CT 3999.) He explained his answer as being based on his "moral feelings." (14 CT 3999.) During voir dire, the trial court asked the prospective juror to expand on his answer. Mr. Wood responded, "[a]fter your explanation of the death penalty, then I feel more comfortable being here." (6 RT 1280.) Invited to elaborate further, Mr. Wood offered, "[b]ut I want to explain that I am really against the state taking the life of another person." (6 RT 1281.) During subsequent examination, Mr. Wood affirmed this belief repeatedly, stating that he could not give the court his assurance that he could impose death under any circumstances. (6 RT 1280-1283.)

During his voir dire examination, the prosecutor asked all of the prospective jurors to "nod" if they could offer him the assurance that during the guilt phase of the trial they would follow the rule that they are not

permitted to consider punishment or sympathy. (6 RT 1394.) The prosecutor stated that should any prospective juror fail to nod, then the prosecutor "would know you don't want to go through that." (6 RT 1394.) As to Mr. Wood, the prosecutor noted, "Mr. Wood, I didn't see you nod your head. Okay. No." (6 RT 1394.)

Question 78 of her juror questionnaire asked Ms. White to describe her "general feelings regarding the death penalty." (14 CT 3941.) Ms. White responded, "I don't want to sentence anyone to death. If convicted of a serious crime, I think they should be sentenced for the rest of their life without parole." (14 CT 3941-3942.) In question 79, Ms. White provided that the religious group that she participates in "does not advocate death." (14 CT 3942-3943.) Mr. White further offered that she was not interested in "condemn[ing] anybody to death." (14 CT 3942-3943.) In question 80, Ms. White stated, "I don't want to be in conflict with my spiritual beliefs. I don't want to have to agonize over whether I did something against God and his teaching." (14 CT 3943.) Finally, Ms. White offered in the questionnaire that her views were premised on her "religious conviction[s]" and she would "always vote for life without possibility of parole" over death. (14 CT 3946-3947.)

Asked by the court to elaborate on her questionnaire responses, Ms. White stated that after giving the matter further consideration, she "would be able to vote for the death penalty." (6 RT 1288.) She agreed that imposing death would create a "conflict" with her God and spiritual beliefs, but felt that she could "go ahead and vote for [death]" if required. (6 RT 1289.) She would deal with the conflict by "ask[ing] God to forgive" her. (6 RT 1291.)

During his voir dire examination, the prosecutor inquired into the conflict that Ms. White stated existed between her spiritual beliefs and her ability to impose a death sentence:

> 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"

(6 RT 1397.) Ms. White responded, "No, I do not." (6 RT 1397.) The prosecutor further asked, "Ms. White, can you come in here and sentence this man to death, if you feel it's warranted?" (6 RT 1400.) Ms. White replied, "I believe I would have a difficult time." (6 RT 1400.)

The prosecutor therefore challenged both Prospective Jurors Wood and White for cause. (6 RT 1405-1406.) As to Mr. Wood, the prosecutor cited Mr. Wood's uncertainty at being able to follow the law if it conflicted with his morals. (6 RT 1406; 14 CT 3999.) The prosecutor further argued that he was troubled by Mr. Wood's questionnaire responses to questions asking him to describe his feelings as to how "African-Americans are treated by the criminal justice system[,]" as well as to offer his opinion as to "the three most important problems with the criminal justice system." (6 RT 1406.) As to both questions, Mr. Wood wrote, "not applicable." (6 RT 1406.)

The trial court granted the prosecution's challenge at to Mr. Wood. (6 RT 1407.) It reasoned, "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 a challenge for cause." (6 RT 1407.)

As to his challenge to Ms. White, the prosecutor stated simply that Ms. White should be excused for cause because with regard to imposing death, she stated she "didn't think that [she] could do it." (6 RT 1405.)

The trial court agreed with the prosecutor's reasoning and excused Ms. White for cause. (6 RT 1405.)

Both prospective jurors' responses on their respective juror questionnaire, coupled with their responses to the questions of the trial court and prosecutor, unequivocally satisfied the *Witt* standard. As to the questionnaires, Mr. Wood stated that his "moral feelings" precluded him to sitting in judgment of another person. (14 CT 3999.) Similarly, Ms. White specifically provided that she did not "want to sentence anyone to death" as doing so would put her in direct conflict with her God and religious beliefs. (14 CT 3941, 3943.)

Despite these answers, Williams claims the court was not entitled to excuse the jurors for cause because, as to Mr. Wood, he told the court that he might be able to impose death if the crime was heinous. (AOB 142; 6 RT 1283.) However, Williams ignores the fact that Mr. Wood specifically stated, twice, "I don't know," when asked if he could impose death. (6 RT 1283.) Moreover, Mr. Wood would not give the prosecutor his assurance that he would "follow the rule [of law]" that he not consider "punishment" or "sympathy" during the guilt phase of the trial. (6 RT 1394.) Mr. Wood's uncertainty supported his removal. (See *People v. Thomas* (2011) 52 Cal.4th 336, 358 [when there is ambiguity in the prospective juror's statements the trial court is entitled to resolve it in favor of the State].)

As to Ms. White, Williams argues that although she stated on her questionnaire that she did not want to sentence anybody to death, she subsequently represented to the trial court that if the evidence was so overwhelming that death "has to be the sentence, then so be it." (AOB 142; 6 RT 1289.) However, Williams ignores the fact that when pressed by the court, Ms. White immediately acknowledged that such a position, deciding life or death, created an inherent conflict with her spiritual beliefs and that imposing death on another person would require her to subsequently "have

to ask God to forgive" her for her decision. (6 RT 1289, 1291.) Ms. White admitted to the prosecutor that she would have a "difficult time" imposing death, and had no desire to engage the conflict that existed between imposing death and her religious values. (6 RT 1397, 1400.) Accordingly, the record supports the trial court's ruling. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 80 [on review of a trial court's ruling, if the prospective juror's statements are equivocal or conflicting, that court's determination of the person's state of mind is binding].)

"'[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a questions of fact, except in a clear case'" (*Wainright v. Witt*, *supra*, 469 U.S. at p. 428, fn. 9, quoting *Reynolds v. United States* (1879) 98 U.S. 145, 156-157.) "In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record." (*People v. Stewart* (2004) 33 Cal.4th 425, 451.) "In the final analysis, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record, and ambiguities are to be resolved in favor of the trial court's assessment." (*People v. Howard* (1998) 44 Cal.3d 375, 418.) Given the deference that the trial court's ruling is entitled to, it cannot be said that the court's exclusion of Mr. Wood or Ms. White for cause was unsupported by the record. Accordingly, the trial court's ruling should be affirmed.

IX. THE TRIAL COURT PROPERLY DENIED WILLIAMS' *WHEELER*[31] MOTIONS

Williams claims he was denied his state and federal constitutional rights when the trial court denied his *Wheeler* motions[32] claiming the prosecutor improperly exercised peremptory challenges against three African-American Prospective Jurors, McBrayer, Hunter and Fleming. (AOB 144-153.) The trial court properly denied the motions as to Prospective Jurors Hunter and Fleming. Williams' complaint on appeal regarding Prospective Juror McBrayer is specious since, contrary to Williams' assertion (AOB 144), the record reflects that the prosecutor never even exercised a peremptory challenge against Prospective Juror McBrayer. Accordingly, Williams' claim of error based on denial of his *Wheeler* challenges as to three prospective jurors should be rejected.

The use of peremptory challenges to strike prospective jurors on the basis of bias against an identifiable group of people, distinguished on racial, religious, ethnic or similar grounds, violates the right of a criminal defendant to be tried by a jury drawn from a representative cross-section of the community under Article I, section 16 of the California Constitution, and the right to equal protection under the United States Constitution. (*People v. Hamilton* (2009) 45 Cal.4th 863, 898, citing *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 88 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*), overruled in part, *Powers v. Ohio*

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[31] *People v. Wheeler* (1978) 22 Cal.3d 258

[32] While Williams' motions below referenced only Wheeler, that is considered sufficient to preserve a *Batson* claim for the first time on appeal. (*People v. Howard* (2008) 42 Cal.4th 1000, 1017, fn. 9; *People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, & fn. 22.)

(1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *People v. Davis* (2009) 46 Cal.4th 539.)

There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, citations omitted.) The United States Supreme Court, in *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-94 [106 S.Ct. 1712, 90 L.Ed.2d 69], established three steps to guide a trial court's constitutional review of peremptory strikes:

> First, the defendant must make out a prima facie case by 'showing that the totality of the relevant facts give rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, 'if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]

(*People v. Blacksher* (2011) 52 Cal.4th 769, 801, quoting *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 2416, 162 L.Ed.2d 129, 138].) Excluding even a single juror for impermissible reasons under *Batson* and *Wheeler* requires reversal. (*People v. Huggins* (2006) 38 Cal.4th 175, 227, citing *People v. Silva* (2001) 25 Cal.4th 345, 386.)

A. The Proceedings Below Have Rendered Moot the Question of Whether Williams Satisfied the First Stage of *Batson/Wheeler* by Making a Prima Facie Case of Discriminatory Exercise of Peremptory Challenges.

As the record shows, the trial court did not require Williams to meet his burden of stating a prima facie case before the prosecutor anticipatorily stated his reasons for exercising a peremptory challenge as to three African-American jurors. Moreover, the trial court passed upon those reasons

before requiring Williams to meet his burden under either the first or second stage of a *Batson/Wheeler* analysis. Accordingly, as explained below, the question of whether Williams made a prima facie case of discrimination has been rendered moot.

Voir dire began on July 22, 2002. (21 CT 6099.) After reviewing four panels of prospective jurors, and issuing hardship dismissals, 103 prospective jurors remained. (5 RT 1173.) By stipulation, the trial court dismissed a number of jurors for cause and approximately 70 prospective jurors remained. (6 RT 1229, 1235-1236, 1257.) Accordingly, in groups of 24, the trial court began examining the individual prospective jurors. (6 RT 1239, 1259, 1265.) After the court's examination, both parties engaged in voir dire. (7 RT 1375, 1383.) To this initial group, the defense posited three challenges for cause. (7 RT 1402-1404 [Lynch, Greneved, Garland].) The court granted the challenges and dismissed the three prospective jurors. (7 RT 1403-1404.) The prosecution posited four challenges for cause. (7 RT 1405-1407 [White, Ayala, Wood, McBrayer].) With the exception of Prospective Juror McBrayer, the court granted the prosecution's challenges. (7 RT 1405-1407.)

It was then agreed between the court and the parties that because Williams is African-American, that any challenges to African-American jurors would be litigated outside the presence of the jury before the issuance of any peremptory challenge and dismissal of the challenged juror. Any *Wheeler* challenge would be made at side-bar, and prior to the court issuing a ruling as to whether or not a prima facie showing of discrimination had been shown, the prosecutor would state his reasons supporting each challenge. (7 RT 1409-1411.) The prosecutor indicated he anticipated possible peremptory challenges to two African-American Prospective Jurors, Hunter and McBrayer. (7 RT 1411.) After providing his reasons for the anticipated peremptory challenge, Williams asserted a

Wheeler motion which the trial court denied, validating the prosecutor's reasoning regarding Hunter.[33] (7 RT 1415-1416.) The prosecutor noted he anticipated exercising a peremptory challenge as to Prospective Juror Fleming. (8 RT 1524.) Williams asserted a general *Wheeler* challenge which the trial court denied, reasoning that the prosecutor's explanation for the challenges to African-American prospective jurors was legitimate. (8 RT 1525-1526.)

A reviewing court is not obligated to consider the persuasiveness of the prosecutor's reasons where it finds that the defendant failed to meet the standard imposed by *Batson* and *Johnson* and it is not until the third step of the prima facie case process that the persuasiveness of the prosecutor's reasons becomes relevant, i.e., when the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. (*People v. Cornwell, supra,* 37 Cal.4th at p. 67.) However, whereas here, the prosecutor provides reasons prior to any finding of a prima facie case having been made, and the trial court also rules upon those reasons, the question of whether a prima facie case has been stated has been rendered moot. (*People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. 8.) Accordingly, on appeal, the People address Williams' *Wheeler* challenges from the perspective of a third-stage analysis without discussing his failure to state a prima facie case of discriminatory exercise of peremptory challenges below.

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[33] The trial court also validated the prosecutor's reasons for potentially exercising a peremptory challenge as to Prospective Juror McBrayer. (7 RT 1415-1416,) However, as noted above, the prosecutor never actually exercised a peremptory challenge as to Prospective Juror McBrayer. (See 8 RT 1422-1423, 1529-1530; 9 RT 1631-1632.) Accordingly, his claim of a discriminatory challenge to Prospective Juror McBrayer necessarily fails.

B. Williams Failed to Show the Prosecutor's Reasons Were Not Genuine Race-Neutral Reasons for the Exercise of Peremptory Challenges Against Prospective Jurors Hunter and Fleming.

The third step in a *Batson* analysis "involves evaluating 'the persuasiveness of the justification proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.' [Citation omitted.]" (*Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 974, 163 L.Ed.2d 824].) In determining whether the prosecutor's race-neutral reasons are credible, credibility can be measured by the prosecutor's demeanor, how probable or improbable the explanations are, whether the proffered rationale has some basis in accepted trial strategy. The trial court may draw upon it observations of voir dire, experiences as a lawyer and as a judge in the community, as well as the common practices of the particular prosecutor or the office that employs the prosecutor. (*People v. Jones* (2011) 51 Cal.4th 346, 360; *People v. Lenix* (2008) 44 Cal.4th 602.) The trial court is not required to explain on the record its ruling. If the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. (*People v. Vines* (2011) 51 Cal.4th 830, 849-850.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*Ibid.*, citing *People v. Bonilla* (2007) 41 Cal.4th 313, 341–342.) The United States Supreme Court has also emphasized that a state trial court's finding of no discriminatory intent is a factual determination accorded great deference. (*People v. Lenix, supra*, 44 Cal.4th at p. 614, citing *Hernandez v. New York* (1991) 500 U.S. 352, 364–365 [111 S.Ct. 1859, 114 L.Ed.2d 395].)

1. Absence of discriminatory intent is reflected by the composition of the jury selected and the prosecutor repeatedly accepting the jury with African-American jurors during the voir dire process

Circumstances demonstrating a lack of discriminatory purpose include the prosecutor not challenging several other African-American jurors, and the fact that African-Americans ultimately served on the jury. (*People v. Blacksher* (2011) 52 Cal.4th 769, 801; See also *People v. Clark* (2011) 52 Cal.4th 856, 906 [prosecutor repeatedly passed a prospective female African-American juror who ultimately served as a juror]; phase; *People v. Garcia* (2011) 52 Cal.4th 706, 748 "ultimate composition of the predominantly female jury, along with the relatively modest number of prosecution strikes used against women throughout jury selection, makes it difficult to infer purposeful discrimination under *Wheeler/Batson*."].) Here, the prosecutor's conduct of voir dire which included repeatedly accepting the jury with African-American jurors, and the ultimate composition of the jury selected, support the trial court's conclusion that the prosecutor's exercise of peremptory challenges was race-neutral.

In the first three rounds of voir dire, the prosecution challenged Prospective Jurors Saundefur, Smouse and Hunter. (7 RT 1422-1423.) The defense challenged Layton, Quiroz and Moran. (7 RT 1422-1423.)

After filling the empty seats in the jury box and examining new prospective jurors (7 RT 1423, 1483), the prosecutor stated that he anticipated utilizing a peremptory challenge as against Prospective Jurors Fleming and Marshall. (8 RT 1524.) During the fourth and fifth round of peremptory challenges, the defense excused Prospective Jurors Capps and Dotson, and the prosecution Fleming and Berlin. (8 RT 1528-1529.) With his sixth challenge, Williams challenged Prospective Juror Miller. (8 RT 1529.) The prosecution accepted the panel. (8 RT 1530.) With his seventh

challenge, Williams challenged Prospective Juror Parmer. (8 RT 1530.) For the second time, the prosecution accepted the panel. (8 RT 1530.) After Williams exercised his eighth challenge as against Prospective Juror Roher, the trial court called more prospective jurors to be seated and examined. (8 RT 1530.)

After the trial court's examination, both parties questioned the prospective jurors. (8 RT 1551-1584; 9 RT 1604, 1607.) Two jurors were excused by stipulation. (8 RT 1585-1587, 1588-1589 [Abrenica, Boss].) The defense asserted no cause challenges. (9 RT 1626.) The court granted the prosecution's single challenge for cause. (9 RT 1626, 1632 [*Morris*].) Following cause challenges, the court noted that the jury box included "a couple of African-Americans and perhaps [a] Hispanic[,]" and asked the prosecutor if he anticipated utilizing a peremptory challenge to any of these individuals. (9 RT 1626-1627.) The prosecutor indicated that he did not. (9 RT 1627.)

Back in the presence of the jury, the trial court invited the prosecutor to issue his sixth peremptory challenge. (9 RT 1631.) For the third time, the prosecution passed and accepted the panel. (8 RT 1530; 9 RT 1631.) With his ninth peremptory challenge, Williams excused Prospective Juror Phelps. (9 RT 1631.) The prosecution once again accepted the panel. (9 RT 1631.) Williams utilized his tenth challenge on Prospective Juror Thomas. (9 RT 1631.) For the fifth time, the prosecution accepted the panel. (9 RT 1632.) With his eleventh challenge, Williams excused Prospective Juror Brandt. (9 RT 1632.) The prosecution accepted the panel for the sixth time. (9 RT 1632.) The defense accepted the panel. (9 RT 1632.) As stated, contrary to Williams' assertion, none of the prosecutor's five peremptory challenges targeted McBrayer. (See 8 RT 1422-1423, 1529-1530; 9 RT 1631-1632.)

Next, the trial court began the selection process of the alternate jurors. By stipulation, the parties agreed to three alternate jurors. (9 RT 1633-1634.) The prosecutor noted that the three stipulated alternate jurors included an African-American and a Hispanic. (9 RT 1634.) The parties further stipulated to the dismissal of three of the remaining prospective jurors. (9 RT 1638 [Bonarigo, White, Becker].) The court called an additional six prospective jurors to be seated and examined, for purposes of selecting the final alternate juror. (9 RT 1638.)

After the trial court's examination, both parties represented to the court that they were prepared to accept a fourth alternate juror by stipulation. (9 RT 1638, 1657.) The trial court accepted the stipulation and seated the fourth alternate juror. (9 RT 1659.) With a jury seated, the court concluded the voir dire process. (9 RT 1659.) The jury that was selected included two African-Americans and one African-American alternate jurors were selected.

In support of his *Wheeler* objection as to Prospective Juror Fleming, Williams' counsel stated that he objected to the prosecutor's "desire" for a jury free of African Americans. (8 RT 1525.) The prosecutor immediately contradicted this assertion by representing to the trial court that in fact two African American jurors remained on the panel and that the prosecutor would not be challenging either prospective juror. (See 8 RT 1525-1526.) The trial court accepted this representation, noting for the record that two prospective jurors were in fact African-American. (8 RT 1525-1526.)

The prosecutor accepted the jury no less than six times with African-American jurors and the jury ultimately selected included African-Americans. While this is not conclusive, it nevertheless is "'an indication of the prosecutor's good faith in exercising his peremptories, and . . . an appropriate factor for the trial judge to consider in ruling on a *Wheeler*

objection . . . .'" (*People v. Hartsch* (2010) 49 Cal.4th 472, 487, quoting *People v. Snow* (1987) 44 Cal.3d 216, 225.)

2. The prosecutor's exercise of peremptory challenges to Prospective Jurors Hunter and Fleming were race-neutral

The trial court's denial of Williams' *Wheeler* motion as to Prospective Jurors Hunter and Fleming was proper as Williams failed to meet his burden of demonstrating the challenges were discriminatory. The record supports the trial court's conclusion that the challenges were based on race-neutral considerations.

(a) Prospective Juror Hunter

As to Hunter, the prosecutor expressed a number of concerns. First, Hunter stated he had an uncle in prison for drug charges. (7 RT 1412.) Second, Hunter represented that he believed African-American were "rarely[]" treated "fairly" in the court system and that his cousin and uncle had been "unjustly prosecuted." (7 RT 1413-1414; 14 CT 4160.) Third, in his questionnaire, Hunter responded, "not applicable" to questions asking his "general feelings" about the death penalty, life in prison without the possibility of parole and regarding his opinion if the death penalty was used too frequently. (7 RT 1413; 14 CT 4163-4164.) Hunter also initially "refused" to answer questions regarding his willingness to impose a death sentence. (7 RT 1413; 14 CT 4166-4167.) Williams asserted a *Wheeler* motion which the properly denied after concluding the prosecutor's reasoning regarding Hunter appeared legitimate. (7 RT 1415-1416.)

Hunters' beliefs regarding the treatment of African-Americans by the judicial system and the negative experience of a relative provided race neutral grounds for the exercise of a peremptory challenge is proper. (*People v. Lomax* (2010) 49 Cal.4th 530, 575; accord, *People v. Garcia* (2011) 52 Cal.4th 706, 749 [negative contacts with criminal justice system];

People v. Turner (1994) 8 Cal.4th 137, 171 [juror's negative experience with law enforcement].) Moreover, an advocate may legitimately be concerned about a potential juror who does not answer questions. (*People v. Howard* (2008) 42 Cal.4th 1000, 1019.) A juror's reservations regarding the death penalty is also a valid race-neutral reason for the exercise of a peremptory challenge. (*People v. Booker* (2011) 51 Cal.4th 141, 167.)

> [E]ven when jurors have expressed neutrality on the death penalty, neither the prosecutor nor the trial court is required to take the jurors' answers at face value. [Citation.] If other statements or attitudes of the juror suggest that the juror has reservations or scruples about imposing the death penalty, this demonstrated reluctance is a race-neutral reason than can justify a peremptory challenge, even if it would not be sufficient to support a challenge for cause.

People v. Lomax (2010) 49 Cal.4th 530, 572 [internal quotations omitted].) Accordingly, Hunter's responses, or lack thereof, regarding his views on the death penalty are also a legitimate race neutral basis for exercising a peremptory challenge.

(b) **Prospective Juror Fleming**

As to Fleming, the prosecutor stated that the challenge would be based on his feeling that Fleming was "strong antideath penalty," and carried an "anti law enforcement" and "anti court system bias."[34] (8 RT

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[34] Similarly, the anticipated challenge to Prospective Juror McBrayer, that was never in fact made, was based on concern with a "bias against law enforcement people." (7 RT 1418-1419.) Specifically, in his questionnaire, McBrayer had provided that he had two family members who had been victims of crime and in both instances the response of law enforcement had been "poor." (7 RT 1367-1368; 19 CT 5628-5630.) McBrayer further offered that overzealous prosecutors constituted one of the "most important problems" with the criminal justice system. (19 CT 5631.) He clarified that he had "heard" of prosecutors who, to enhance their reputations, had "withh[e]ld evidence" in order to generate

(continued...)

1524-1525.) Finally, the prosecutor stated that Fleming's questionnaire responses evidenced his views to be "religious based." (8 RT 1525.) Moreover, beyond his beliefs, as provided in his questionnaire, that law enforcement was "corrupt," the judicial system inept, and that African-Americans were "treated worse than any other race" and "never treated on equal ground," Fleming characterized himself as "strongly against" the death penalty. (11 CT 3039, 3041, 3050, 3055.) Fleming further confirmed that his anti-death penalty view was "based" on his religious principles. (11 CT 3055.) Williams asserted a general *Wheeler* challenge which the trial court denied, reasoning that the prosecutor's explanation for the challenge appeared legitimate. (8 RT 1525-1526.)

Fleming's voir dire response that law enforcement was "corrupt," and Fleming's assertion that he possessed and anti-death penalty stance as premised on his religious principles (8 RT 1524-1526; 11 CT 3039, 3041, 3050, 3055) provide a race-neutral reason for the exercise of a peremptory challenge. As noted above, in the discussion regarding Prospective Juror Hunter, a prospective juror's negative view of law enforcement and anti-death penalty views are a valid race neutral basis for the exercise of peremptory challenges. The trial court was entitled to find that these race-neutral reasons credible. Its determination should be affirmed.

(...continued)
convictions. (7 RT 1370.) He further opined that African-Americans were, generally, treated unfairly by the criminal justice system. (19 CT 5640.) The court had noted its concern about McBrayer's ability to be fair. When denying the prosecutor's challenge for cause: "[q]uite honestly, I would be afraid to have him no matter which side of the table he was sitting on," but ruled that McBrayers questionnaire and voir dire responses, did not merit his dismissal for cause. (7 RT 1408-1409.) The trial court credited the prosecutor's reasoning regarding McBrayer as "totally race neutral." (7 RT 1419; 8 RT 1524.)

X. EVIDENCE THAT CONYA L. HAD BEEN THREATENED WITH DEATH WAS PROPERLY ADMITTED AS RELEVANT TO HER CREDIBILITY

Shortly after Williams' attempted murder of Conya L., Conya L. fled because she feared for her safety. While in hiding, Conya L. received death threats and was informed that Williams was attempting to determine her whereabouts. Conya L. testified that she was nervous because she had received threats against her life and that the threats had impacted her memory. By stipulation, the jury was informed that no evidence existed that Williams had threatened Conya L. Williams claims that Conya L.'s testimony about the death threats was prejudicial and caused him to be denied a fair trial. (AOB 154-167.) As a sub-argument Williams also complains that the trial court errantly permitted testimony that Williams was a gang member, even though no evidence that Williams was a gang member was introduced at trial. (AOB 156-158.) For the reasons provided below, Williams' argument lacks merit and should be denied.

Evidence that a witness is afraid to testify or is fearful of retaliation for testifying, including that of the witness's demeanor itself, is relevant and admissible as to the credibility of the witness. (Evid. Code, §§ 210, 351, 780, subd. (a); *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450.) A witness's attitude toward presenting evidence is always relevant. (*People v. Green* (1980) 27 Cal.3d 1, 20.) A witness' fear of retaliation which affects the witness's testimony is relevant evidence. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) Accordingly, Conya L.'s testimony regarding her fear, based on the death threats she had received, was relevant and admissible, subject to Evidence Code section 352.

Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by

> the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The prejudice referred to in section 352 applies to evidence which uniquely tends to evoke an emotional bias against a defendant as an individual and which has very little effect on the issues. (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) In applying section 352, "prejudicial" is not synonymous with "damaging." (*Ibid.*) "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; accord, *People v. Wilson* (2008) 44 Cal.4th 758, 797.)

Six months after the murders of Gary and Roscoe, and the attempted murder of Conya L., Conya L. appeared for Williams' preliminary examination. (1 CT 25, 29.) At that hearing, she testified that she had received death threats. (1 CT 84.) During a subsequent pre-trial hearing, the prosecution presented additional information to the trial court regarding two separate death threats that Conya L. had received, during which Conya L. was told that she would be killed if she attempted to testify. (4 CT 909.) The prosecution represented to the court that Conya L. had been relocated before the preliminary hearing, based on a threat, and had to be relocated again after the hearing due to additional threats. (4 CT 909.) In a pre-trial statement to the trial court, Conya L. stated to the court that she felt as if she was "constantly" in danger as third parties warned her that Williams was making efforts to determine her whereabouts. (5 PTRT 1477-1478.)

During the prosecution's case-in-chief, the prosecutor represented to the trial court that he intended to have Conya L. testify that she had been threatened as the evidence was relevant to her "state of mind" and "demeanor as a witness." (11 RT 1944-1945.) The prosecutor stated that

the evidence would show that Conya L. learned of the threats through third parties and that no evidence specifically linked the threats to Williams. (11 RT 1944-1945.) Williams' trial counsel objected that the threat evidence would be prejudicial to Williams because the jury would "be led to believe that [Williams] had something to do with it[.]" (14 RT 2014.) Moreover, the defense argued that the evidence did not particularly affect Conya L.'s testimony or demeanor. (14 RT 2015.)

The prosecutor countered that he expected the defense to impeach Conya L. with inconsistencies that existed in her pre-trial statements and that the threat evidence would therefore be relevant to explain those inconsistencies because it would establish that Conya L. had "a lot going on in her head" because she had felt like a "hunted animal." (14 RT 2016.) The prosecutor reiterated that no evidence would be presented which attributed the threats to Williams and offered that he would elicit the testimony through leading questions in order to assure that Conya L. would not testify that the threats originated from Williams. (14 RT 2016.)

The trial court ruled that it would allow the evidence. It reasoned,

> But I do believe that a threat on somebody's life, no matter who makes it, until there's a resolution of all the cases, that threat does effect one's ability to recall. It effects one's ability to think about it. I think a death threat has a tremendous impact on a witness's demeanor, ability, especially with the facts that we know. . . . and we've got a third [robber] out there that none of us, at least I think, know who that person is.

(14 RT 2018.) With respect to Evidence Code section 352, the trial court ruled that "the probative value outweigh[ed] the prejudicial effect," such that the evidence would be allowed. (14 RT 2019.)

During direct examination, Conya L. testified that she had experienced nervousness while testifying because she had received death

threats in the case. (16 RT 2287.) The threats, which had occurred over the past seven years, had been delivered to Conya L. by third parties. (16 RT 2287.) Conya L. stated that her testimony has caused her to fear for her life and that fear had impacted her ability to recall certain events. (16 RT 2287.) During cross-examination, Conya L. confirmed that she had not received any "direct" death threats. (17 RT 2489.)

By stipulation, the parties agreed that there was "no evidence that [Williams] made a threat to any witness in the case." (23 RT 3063.)

Here, as the trial court ruled, and as the above case law supports, the threat evidence was highly relevant to Conya L.'s credibility. At trial, Conya L. testified that death threats over the course of seven years had caused her to experience difficulty recalling "exactly what happened[.]" (16 RT 2287.) Attacking Conya L.'s credibility was central to Williams' defense case. In closing argument, Williams' trial counsel argued to the jury that Conya L.'s accounting was nothing more than a "story." (24 RT 3276.) As to that "story," counsel argued, "[i]t's not factual. It's not something that's based on what happened." (24 RT 3276.) "I mean, all of that you have to weigh in with [Conya L.'s] general credibility as a witness." (24 RT 3296.) Further, given the parties stipulation that there was "no evidence that Robert Williams made a threat to any witness in this case," (23 RT 3063) the trial court's ruling that the probative value outweighed the prejudicial effect should be found to have been well within the sound exercise of the trial court's discretion. (See *People v. Burgener* (2003) 29 Cal.4th 833, 870.)

Williams appears to suggest that because no evidence linked Williams to the threats, the threat evidence was less relevant. (AOB 160-161.) That contention is unsupportable. (See, e.g., *People v. Burgener*, *supra,* 29 Cal.4th at pp. 869-870 ["Indeed, it is not necessary to show the witness's fear of retaliation is 'directly linked' to the defendant for the threat to be

admissible"].) "It is not necessarily the source of the threat--but its existence--that is relevant to the witness's credibility." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 870.)

Finally, even if the trial court erred in allowing Conya L.'s testimony, that error was harmless because it is not reasonably probable that had the evidence not been admitted Williams would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Mason* (1991) 52 Cal.3d 909, 947; *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.) Even without the challenged testimony, the jury would have been reasonably entitled to conclude that Conya L.'s sustained fear, as based not on the threat, but on the fact that she had been the subject of an attempted murder, would impact her demeanor and ability to recall the event. As discussed, the jury heard evidence that Williams made substantial, yet failed, efforts towards killing Conya L., applying two separate knives to her neck as part of his effort to kill her. Further, Conya L. testified that during the home invasion, Williams and his cohorts all wore gloves, but not masks. From these facts, coupled with the perpetrators allowing her to view the killings of Gary and Roscoe, the jury could reasonably conclude that Conya L.'s survival was not part of the robbers' plan, and that Conya L. understood this reality. Moreover, the jury was aware that the third cohort was never captured. Given these facts, the jury could reasonably conclude that Conya L. had spent seven years in fear and that such sustained fear would rationally affect her demeanor and recollection. Finally, as stated, the jury was specifically informed by stipulation that no evidence had been presented which suggested that Williams had threatened Conya L. If error occurred, it should be deemed harmless.

As part of his argument, Williams further asserts that highly prejudicial gang evidence was errantly admitted. (AOB 161-164.) This

assertion is contrary to the record. As discussed above, Robert Scott robbed banks with Gary. (18 RT 2523-2524, 2574, 2586.) Scott testified that two weeks before the murders of Gary and Roscoe, Williams pressed a gun into Gary's neck and threatened that he would kill Scott, Gary and Gary's family unless Gary turned over a portion of his bank robbing proceeds to Williams. (18 RT 2537-2543.) Scott testified that he was afraid of Williams. (19 RT 2747.)

Outside the presence of the jury, the prosecutor represented to the trial court that Scott's fear of Williams was based on Scott's belief that Williams was a "gangster." (19 RT 2748.) The prosecutor argued that Scott's fear of Williams was relevant to Scott's demeanor and credibility. However, the prosecutor *agreed* that gang evidence should not be admitted and therefore suggested that Scott's fear of Williams be sanitized such that Scott would explain his fear by testifying that he understood Williams to be a person willing to "jack" people, also know as a "jacker." (19 RT 2748-2750.) The trial court ruled that under Evidence Code section 352, this "narrow" explanation of Scott's fear would be allowed. (19 RT 2752.)

Accordingly, Scott testified that his fear of Williams was based on his opinion that Williams was a "jacker," who was willing to "jack anybody . . . for anything." (19 RT 2758.) Williams does not challenge the trial court's ruling. Rather, he claims that it was obvious to the jury "that Scott was using the term "jacker" as a substitute for gangster[.]" (19 RT 158.) However, Williams offers no evidentiary support for this unsubstantiated conclusion. As such, his claim is speculative and must be rejected. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 174 [rejecting argument based on speculation]; *People v. Hovey* (1988) 44 Cal.3d 543, 585 [rejecting, as speculative, argument that jury could have been favorably influenced by watching defendant's reaction to reading of testimony].)

XI. THE TRIAL COURT WAS NOT REQUIRED TO GIVE A LIMITING INSTRUCTION REGARDING CONYA L.'S DEATH THREAT TESTIMONY

Williams claims that the trial court erred by "denying defense counsel's request for a limiting instruction," providing to the jury that evidence that Conya L. had received death threats was to be considered solely for purposes of evaluation Conya L.'s credibility. (AOB 168-174.) Williams' argument fails because, although he did initially request such an instruction, he expressly withdrew that request when he accepted the prosecutor's offer to stipulate that no evidence had been presented that Williams had anything to do with the death threats. The trial court was not obligated to give a non-requested pinpoint instruction. And, even if it had been, any error in failing to do so would necessarily be harmless given the aforementioned stipulation.

Following the presentation of evidence, Williams' trial counsel asked the trial court to instruct the jury as follows:

> 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 . . . [and that] there is no evidence that the defendant Robert Williams was responsible for those threats.

(22 RT 3047.)

The trial court stated that it was concerned that the proposed instruction could be perceived as the court commenting on the evidence. (22 RT 3047.) The prosecutor, noting that evidence *did exist*, albeit not before the jury, which tended to prove that Williams *was involved* in the threats. Accordingly, the prosecution protested that the proposed instruction was therefore untruthful. (22 RT 3048.) The court inquired if the parties would be willing to enter into a stipulation providing that no evidence had been introduced that Williams was responsible for the threats.

(22 RT 3048-3049.) Williams subsequently accepted the prosecution's offer to enter such a stipulation and Williams withdrew his request for the special instruction. (22 RT 3049.)

The following stipulation was therefore read to the jury by Williams' trial counsel: "The prosecution and defense stipulate to the following: There is no evidence that Robert Williams made a threat to any witness in this case." (23 RT 3063.)

As Williams asserts, Evidence Code section 355 provides that "[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 according*." AOB 169, emphasis original, citing Evid. Code, § 355.) Williams acknowledges, but appears to nevertheless disregard, that there was no such request here because he unequivocally withdrew his request. (22 RT 3049.)

It is well settled that a defendant cannot complain on appeal of the failure of the trial judge to give a specific and particularized instruction to the jury where he did not offer or request such an instruction. (*People v. Nudd* (1974) 12 Cal.3d 204, 209, overruled other grounds in *People v. Disbrow* (1976) 16 Cal.3d 101, 116; *People v. White* (1958) 50 Cal.2d 428, 430; *People v. Knighton* (1967) 250 Cal.App.2d 221, 231.) Here, because Williams did not request the limiting instruction, his argument fails.

However, even if Williams had made such a request, and the trial court had subsequently erred by refusing to give the proffered instruction, any error should be deemed harmless because it is not reasonably probable that even had such a limitation been given, a result more favorable to Williams would have resulted. (*People v. Miranda* (1987) 44 Cal.3d at p. 83; *People v. Watson, supra*, 46 Cal.2d at p. 836.) As discussed, by stipulation the jury was specifically provided that there was "no evidence" that Williams had threatened Conya L. (23 RT 3063.) The jury was

instructed that it was required to accept this stipulation "as proven." (22 CT 6342.) It is presumed that the jurors followed the trial court's instructions. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 292; *People v. Panah*, *supra*, 35 Cal.4th at p. 453.) Accordingly, it is presumed that the jury did not consider the evidence of threats to Conya L. improperly. The argument should be rejected.

XII. THERE WAS NO JUROR MISCONDUCT

During trial, a spectator reported that she believed a juror to have been sleeping. The trial court, noting the defense's allegations during jury selection that the prosecutor was attempting to remove all African-American's from the jury, stated for the record that the purportedly sleeping juror, Juror No. 6, was an African-American. Williams' trial counsel requested that the court's action be limited solely to a general admonition. Trial counsel further stated the defense wished to waive any prejudice. Asked by the trial court if he agreed with this waiver, Williams confirmed that he did. The court therefore proceeded accordingly, instructing the jury to keep their eyes open in order to avoid the appearance of sleeping. Now, notwithstanding the fact that the court handled the matter precisely as Williams requested, Williams claims that the court erred by following his request and therefore denied him his right to an "impartial and competent" jury. (AOB 175-183.)

A. Williams Forfeited Any Challenge to the Retention of Juror No. 6

Initially, Williams has forfeited his right to have this issue considered on appeal because both he and his counsel agreed that Juror Number 6 should remain and waived any prejudice that he may have suffered. (19 RT 2753-2756.)

During the prosecution's case-in-chief, the prosecutor approached the trial court and reported that a trial spectator had reported to him that she

believed Juror No. 6 to have been sleeping during testimony. (19 RT 2752.) The court responded, "I've been watching, and I didn't really pick up on it. But I hadn't been staring." (19 RT 2753.) During a subsequent discussion, both defense counsel and the prosecutor represented that they had not observed a juror sleeping. (See 19 RT 2752-2758.)

Williams' trial counsel requested to hear from the spectator. (19 RT 2753.) The spectator was called and provided:

> 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. ¶ I noticed it already today. I mean, it's early. It's not after lunch. You know, he 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. ¶ I'm not the only one who has noticed. I'm not the only spectator who has noticed. ¶ I just really don't think it's fair to the defense or the prosecutor's case. I really don't think that is fair.

(19 RT 2753-2754.)

The trial court stated that because during voir dire the defense had alleged the prosecutor used his peremptory challenges to strike prospective jurors on the basis of bias against African-Americans, the court wished for the record to reflect that Juror Number 6 was an African-American. (19 RT 2754-2755.) Noting that it did not wish to "embarrass" any of the jurors, the court asked how the defense would like it to handle the situation. (19 RT 2755.) Williams' counsel responded, "I think a general admonition, to make sure everybody pays attention, is alert throughout the proceedings." (19 RT 2755.) The court agreed to the defense's request to provide an admonition, and also instructed its deputy to keep an eye on the jury. (19

RT 2755.) The prosecutor agreed to the stated course of action. (19 RT 2755.)

However, before admonishing the jury, the trial court engaged trial counsel and Williams in the following colloquy regarding the preservation of Williams' rights:

> Trial Court: And, Mr. Cormicle, I don't know if you've been watching the jurors. Probably not as much as the [spectator] has, but do you feel that your client's rights have been sacrificed by keeping that juror?
>
> Defense Counsel: 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.
>
> Trial Court: I haven't been – obviously haven't been watching them as close as [the spectator] has. ¶ Waive any defect? I know I'm asking you a tough question, but I have to, I think.
>
> Defense Counsel: My suggestion is to keep quiet.
>
> Trial Court: I think so. Any issue of whether he was asleep or not, you're willing to waive that at this point?
>
> Defense Counsel: Yes.
>
> Trial Court: And Mr. Williams agrees with you? I don't know that that's necessary, but we're going to do it anyway. ¶ Mr. Williams, waive – counsel waive (sic) any defect or prejudice, if, in fact, he was dosing off? Waive any defect or prejudice?
>
> Williams: No comment.

///

Prosecutor: Well, I think we have to make a factual basis.

Williams: I agree.

Trial Court: I'm sorry, sir?

Williams: I agree.

Trial Court: You waive any defect or any claim of prejudice that, in fact, this juror was dosing off on occasion?

Williams: To this point, yeah.

(19 RT 2755-2756.)

In *People v. Lewis* (2009) 46 Cal.4th 1255 the defendant argued that a juror should have been dismissed for misconduct, based upon a conversation the juror had with her husband during guilt phase deliberations. (*Id.* at p. 1305.) The *Lewis* court determined the issue forfeited because defense counsel agreed that if the trial court determined that the juror had not discussed with her husband any substantive deliberations of the jury, "we can put this matter to rest" and at no time did defense counsel object to the juror's continued service, or request a mistrial on the ground of juror misconduct. (*Id.* at p. 1308.)

In *People v. Foster* (2010) 50 Cal.4th 1301, this Court rejected the defendant's claim as similarly forfeited. There, a juror informed the court that he had been contacted by a third party. (*Id.* at pp. 1339-1340.) Both sides requested that the court inquire of the jury, which the court did. (*People v. Foster, supra,* 50 Cal.4th at p. 1339.) Following the inquiry, defense counsel stated that no action should be taken. (*Ibid.*) Citing the defense's failure to question the juror, object to the juror's continued service, or request a mistrial on the ground of juror misconduct, the *Foster* court ruled that the defendant had forfeited his right to have the claim considered on appeal. (*Id.* at p. 1341.)

In *People v. Stanley* (2006) 39 Cal.4th 913, on the second day of trial, it was brought to the trial court's attention that an article had appeared in that morning's edition of the local paper describing the opening statements that had been presented in court the previous day and discussing *Wheeler* arguments that had been addressed outside the presence of the jury. (*Id.* at p. 946.) One juror, who had read the article, was examined by the court and then defense counsel. (*Id.* at pp. 947-948.) As the juror stated that the article would not affect his ability to fairly judge the case, the court permitted him to remain. (*Id.* at p. 949.) Observing that the juror's inadvertent receipt of information outside the court proceedings constituted misconduct giving rise to a rebuttable presumption of prejudice, this Court nevertheless found that the defendant had waived his right to have the issue considered on appeal because his "his counsel failed to object to Juror C.'s continued service on the jury, and failed to request a mistrial on grounds of juror misconduct[.]" (Id. at p. 950.)

So too here, the claim has been forfeited because Williams neither objected to Juror No. 6's continued service nor requested a mistrial. Williams argues that he could not have forfeited the issue, however, because the court here did not have sufficient information as to whether or not the juror was actually sleeping. (AOB 182.) However, in *People v. Espinoza* (1992) 3 Cal.4th 806, this Court explained that the mere suggestion of juror "inattention" does not require a formal hearing disrupting the trial of a case. (*People v. Espinoza, supra,* 3 Cal.4th at p. 821; accord *People v. Bradford* (1997) 15 Cal.4th 1229, 1348.) The decision whether to investigate the possibility of juror bias, incompetence, or misconduct--like the ultimate decision to retain or discharge a juror--rests within the sound discretion of the trial court. (*Ibid.*) The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. (*Ibid.* citing *People v.*

Osband (1996) 13 Cal.4th 622, 675-676.) A hearing is required only where the court possesses information which, if proved to be true, would constitute "good cause" to doubt a juror's ability to perform his or her duties and would justify his or her removal from the case. (*People v. Bradford, supra*, 15 Cal.4th at p. 1348.)

In *People v. Espinoza, supra*, 3 Cal.4th at pp. 806, 821, this Court

> concluded that defense counsel's speculation that a juror might have been sleeping was insufficient to apprise the trial court that good cause might exist to discharge the juror, and therefore did not obligate the court to conduct any further inquiry. In *People v. DeSantis* (1992) 2 Cal.4th 1198, 1233-1234, we concluded that the trial court's "self-directed inquiry," which involved observing several jurors closely to determine whether they were asleep, and determining that none was dozing, was sufficient, and that a more formal hearing was not required under the circumstances.

(*People v. Bradford, supra*, 15 Cal.4th at p. 1348.) Accordingly, here, the trial court was not required to accept the speculative and unsubstantiated opinion of the court spectator. Indeed, neither the court, the prosecutor or the defense attorney, all of whom - unlike the spectator - were active participant in the case who possessed a stake in the matter, made the same observation. The court's decision to watch the jury and to instruct his deputy to watch the jury was reasonable under the circumstances. Moreover, defense counsel did not request the trial court make any inquiry of Juror Number 6. To the contrary, defense counsel requested the court give a general admonition as opposed to making any specific inquiry. (19 RT 2755.) The record offers nothing to suggest that anything subsequently occurred which would tend to prove that Juror No. 6 was sleeping and not fulfilling his duty to listen. This Court should find that Williams has

forfeited his right to litigate this issue on appeal. (*People v. Russell* (2010) 50 Cal.4th 1228, 1250 ["A claim of prejudicial misconduct is waived when the defendant fails to object to a juror's continued service and fails to seek a mistrial based upon prejudice"], emphasis added.)

B. There Was No Juror Misconduct

Even if the claim had not been forfeited, it would fail. In *People v. Bradford, supra*, 15 Cal.4th at p. 1349 the Court provided:

> We have observed that "although implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, not a single case has been brought to our attention which granted a new trial on that ground. Many of the reported cases involve contradicted allegations that one or more jurors slept through part of a trial. Perhaps recognizing the soporific effect of many trials when viewed from a layman's perspective, these cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial. (*People v. Lee Yick* (1922) 189 Cal. 599, 609-610; *People v. Ung Sing* (1915) 171 Cal. 83, 88-89; *Callegari v. Maurer* (1935) 4 Cal.App.2d 178, 184; *People v. Roselle* (1912) 20 Cal.App. 420, 423-424; . . .)" (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.)

(*People v. Bradford, supra*, 15 Cal.4th at p. 1349 [parallel citations omitted].)

Here, as in *People v. Espinoza, supra*, 3 Cal.4th at p. 821, there was a mere suggestion of juror inattention. The record does not demonstrate that Juror No. 6 slept at all. Indeed, the court's observations, as well as the lack of observations from counsel, do not support the conclusion that the juror was sleeping. Thus, this Court should not accept Williams' conclusion that Juror No. 6 slept during the trial. (See *People v. Nesler* (1997) 16 Cal.4th

561, 582.) Absent actual misconduct having occurred, then no presumption of prejudice applies to Williams' claim. Moreover, the court ensured no jurors were inattentive during the proceedings after the citizen report by watching the jurors, instructing its deputy to watch the jurors and admonishing all of the jurors regarding their duty to stay awake. Specifically, the trial court admonished the jury as follows:

> Okay. The jury has returned. Ladies and gentlemen, 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?

(19 RT 2757.)

Accordingly, Williams' claim should be denied.

XIII. THERE WAS NO PROSECUTORIAL ERROR

Williams contends that a pattern of prosecutorial misconduct deprived him of a fair trial. He cites six particular instances, none of which are supported by the record or the law. (AOB 184-194.) Respondent discussed the lack of merit to each alleged incident of misconduct individually, below.

The applicable standards regarding prosecutorial misconduct are well established.

> A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if his actions do not render the trial fundamentally unfair. Generally, a claim of

> prosecutorial misconduct is not cognizable on appeal unless the defendant made a timely objection and requested an admonition. In order to be entitled to relief under state law, defendant must show that the challenged conduct raised a reasonable likelihood of a more favorable verdict. In order to be entitled to relief under federal law, defendant must show that the challenged conduct was not harmless beyond a reasonable doubt.

(*People v. Blacksher, supra,* 52 Cal.4th at p. 828, fn. 35 (internal quotation marks and citations omitted; *People v. Clark* (2011) 52 Cal.4th 856, 960.).)

Williams argues that six instances of prosecutorial misconduct occurred. (AOB 184.) He is unable to show deceptive or reprehensible methods by the prosecution or establish that any alleged misconduct rendered his trial fundamentally unfair. Thus, there was no violation of Williams' state or federal constitutional rights.

Williams' first prosecutorial misconduct claim is largely based on the premise that a prejudicial discovery or *Brady* violation occurred by way of the prosecutor's alleged "systematic obstructions in discovery." (AOB 184.) This argument should fail because as discussed above in Arguments II and III, Williams' premise that the prosecutor committed *Brady* error is unsupportable. To support his claim of misconduct, Williams offers nothing more than the generalized assertion: "As set forth throughout this brief, [the prosecutor] viewed discovery as trench warfare and throughout the seven-year ordeal, he delayed, hid and refused discovery. (See *supra* Args I-IV.)." (AOB 185.) The lack of merit to these assertions has already been addressed in Arguments I through IV, which are incorporated herein by reference. For the reasons stated therein, Williams' assertions of delay and obstruction by the prosecution are untenable.

In his second claim, Williams claims that the prosecutor committed misconduct by "interfering with the appointment of defense counsel."

(AOB 184.) However, this alleged "interference" was directed not at him, but purportedly at his cohort Walker. (AOB 185.) Williams fails to explain how the prosecutor's alleged action involving a separately tried cohort effected or prejudiced him. (See AOB 185-186,191.) Accordingly, his claim lacks merit.

Next, Williams claims the prosecutor caused the public defender's office to declare a conflict thereby terminating its representation of him. (AOB 186-187.) Specifically, Williams states, "three years into the Public Defender's representation of Robert, [the prosecutor] disclosed that the Public Defender had already communicated with a confidential prosecution informant against Robert, thus creating a conflict of interest." (AOB 186.) Unfortunately, Williams does not cite to the portion of the record which allegedly depicts this purported "disclosure." Rather, he cites to the Public Defender's declaration of conflict. (AOB 186, citing 3 PTRT 879.) However, contrary to his assertion, a review of the record shows that when declaring the conflict, defense counsel specifically represented to the trial court, "I'm not at liberty to divulge, obviously, what the nature of the conflict is." (3 PTRT 879.) Notwithstanding counsel's lack of "liberty" to elaborate, counsel apparently felt compelled to editorialize that the conflict was purely the fault of the prosecution. (3 RT 879.) Counsel concluded, "Again, I do not believe that I can discuss the nature of any information that relates to this conflict." (3 PTRT 880.) As the Public Defender unequivocally expressed its inability to disclose the nature of its conflict, Williams' argument that the prosecutor created that conflict is unsupportable and meritless.

In his fourth prosecutorial misconduct claim, Williams argues that the prosecutor acted despicably by arguing to the trial court that Williams' *Faretta* status should be revoked as based on the prosecutor's belief that Williams was attempting to delay the proceedings. (AOB 187.) Williams

offers no authority for the proposition that a prosecutor's discussions with the trial court regarding the impact on the proceeding from continued self-representation by a defendant must reflect the preferences and perspective of the defendant. The prosecutor was entitled to express concern regarding Williams' continued self-representation without committing misconduct. (See , e.g. *People v. Harris* (2005) 37 Cal.4th 310, 342 [prosecutor did not commit misconduct in seeking determination before trial regarding potential conflict of interest between defendant and defense trial counsel rather than wait for issue to be raised on appeal].) As set forth in argument VI, incorporated herein by reference, Williams' *Faretta* status was properly revoked as based on his repeated efforts at delaying matters.

In his fifth prosecutorial misconduct claim, Williams alleges the prosecutor "misrepresented critical evidence to the court." (AOB 187.) First, he argues the prosecutor stated to the trial court that he had a tape recording of Walker stating that he had been with Robert Williams on the night of the murders, when, in fact, Walker only said he had been with "Rob" that night. (AOB 187; 5 PTRT 1230-1231.) Second, he complains the prosecutor told the court that the prosecution had not tested Williams' clothes that he was wearing at the time of his arrest in Las Vegas, but twenty days later corrected that the clothes had in fact been tested. (AOB 188; 5 PTRT 1236, 1284.) Williams' claims of misconduct are belied by the record. As to his tape recording claim, the record discloses that, while acting in pro per, Williams attempted to support his motion to disqualify the District Attorney by arguing that the prosecutor "lied" to the court when it represented that the "Rob" referred to in the tape was Williams. (5 PTRT 1230, 1232.) Williams fails to explain how the prosecutor's reasonable inference that the "Rob" in the tape was "Robert Williams" constitutes prosecutorial misconduct. Moreover, the trial court was not misled as it was independently familiar with the tape as the judge had listed to the tape.

(5 PTRT 1230.) Williams' suggestion that the prosecutor's incorrect assertion that the clothing had not been tested amounted to deceptive tactics by the prosecutor is belied by the fact that the prosecution corrected the record on that point at the next court hearing.

In his sixth claim of prosecutorial misconduct, without citation to the record, Williams argues that the prosecutor "delayed disclosing third-party culpability evidence that many of Gary William's former associates had motive to harm [Williams] and then compounded the error" by opposing Williams' many continuance requests. (AOB 189.) Presumably Williams reference to "third-party-culpability" evidence is to the FBI's investigative reports of non-related cases that Williams had hoped might lead to the discovery of admissible evidence. As discussed above in argument II, and incorporated herein by reference, the prosecutor had no duty to obtain the investigative reports of other law enforcement agencies regarding non-related cases. Because the prosecutor had no such duty, Williams' argument to the contrary necessarily fails.

Finally, as to all six prosecutorial misconduct allegations, Williams could not have been prejudiced because his rights were not violated.

XIV. WILLIAMS' CUMULATIVE ERROR CLAIM SHOULD BE REJECTED

Williams contends the cumulative effect of the trial court's alleged errors undermined the fundamental fairness of his trial and the reliability of his death sentence, therefore the guilty verdicts and death judgment should be reversed. (AOB 195-198.) As explained in the responses to Williams' individual claims (above), the trial court did not commit any errors, so there were no errors to accumulate. Accordingly, the cumulative error doctrine does not apply. (See *People v. Booker* (2011) 51 Cal.4th 141, 195; *People v. Jennings* (2010) 50 Cal.4th 616, 691; *People v. Beeler* (1995) 9 Cal.4th 953, 994 ["[i]f none of the claimed errors were individual errors, they

cannot constitute cumulative errors that somehow affected the . . . verdict"].)

Moreover, even assuming the trial court had erred in some respect, Williams has failed to show that he was in any way denied due process or a fair trial. (See *People v. Booker, supra,* 51 Cal.4th at p. 195 ["To the extent that there are a few instances in which we found or assumed the existence of error, we concluded that no prejudice resulted. We reach the same conclusion after considering their cumulative effect"]; 141 *People v. Mincey* (1992) 2 Cal.4th 408, 454 ["[a] defendant is entitled to a fair trial, not a perfect one"].) "[A] defendant is entitled to a fair trial but not a perfect one." (*Schneble v. Florida* (1972) 405 U.S. 427, 324 [92 S.Ct. 1056, 31 L.Ed.2d 340].) Therefore, Williams' claim of cumulative error should be rejected.

XV. THE TRIAL COURT PROPERLY EXCUSED JUROR NO. 1 PRIOR TO COMMENCEMENT OF THE PENALTY PHASE OF WILLIAMS' TRIAL

Following the guilt phase verdict, the trial court released the jury with the order to return in one month to hear the penalty phase of the trial. One month later, all but one juror returned. The missing juror telephoned the court and reported that he would not be in court that day, or the next, as he was dealing with a medical issue that might require his immediate admittance into a hospital. Reasoning that it possessed no basis to disbelieve the missing juror, following a discussion with the parties and a failed effort to contact the juror, the trial court relieved the absent juror and replaced him with an alternate juror. Williams contends the trial court's course of action constituted reversible error because the court should have sent all of the jurors home until it could conclusively determine that "an illness prevented [the missing juror] from performing his duties." (AOB 199-205.) Williams is incorrect.

Penal Code Section 1089 provides:

> 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 therefore, the court may order the juror to be discharged and draw the name of an alternate, who shall . . . be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

Once 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 whether the juror should be discharged. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1409 quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 821.) On appeal, the trial court's determination is reviewed for abuse of discretion. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1409; *People v. Cunningham* (2001) 25 Cal.4th 926, 1029; *People v. Ashmus* (1991) 54 Cal.3d 932, 987.)

Following the guilt phase of the trial, the jury reached its guilty verdict on September 17, 2002. (27 RT 3425.) Immediately thereafter, the trial court declared a recess and ordered the jurors to return on October 15, 2002 for the penalty phase of the trial. (27 RT 3439, 3441.)

On October 15, 2002, with the exception of Juror No. 1, the jurors appeared for service as ordered. (28 RT 3488, 3490.) As to the missing juror the court clerk stated that she had received a telephone message from the juror, left the day before, representing that the juror had stepped on a nail which had caused his foot to become badly swollen. (28 RT 2485.) The juror also stated in the message that he was unable to walk, had a doctor's appointment he needed to attend and desired to be excused from jury service. (28 RT 2485, 3490.) The juror's message concluded that he

would call the court in the morning, as well as fax a letter to the court from his doctor. (28 RT 3485-3486.)

As of the morning of October 15, 2002, the court had not received the faxed letter from Juror No. 1's doctor. (28 RT 3496.) Therefore, the trial court ordered a recess and asked the clerk to call the missing juror in order to determine his status. (28 RT 3488-3489.) Following the recess, the clerk reported that when she called the telephone number that the juror had provided her, she received a recorded message. The clerk therefore left a message requesting that the juror immediately contact the court. (28 RT 3489.) Given the circumstances, the court once again released the waiting jury, ordering the jurors to return that afternoon. (28 RT 3490.)

The trial court called the matter back to order at 1:30 p.m. on October 15, 2002. (28 RT 3496.) With the jury again waiting outside the courtroom, the clerk reported to the trial court that she had made contact with Juror No. 1 who had reported to her that his foot had become infected, a condition known as Osteomyelitis,[35] and that his doctor was considering immediately admitting him into the hospital for purposes of initiating intravenous therapy and conducting a bone scan. (28 RT 3496.) The clerk also stated that when she inquired as to the letter from his doctor, Juror No. 1 stated that the letter was in his possession and he would be able to fax it to the court the next day. (28 RT 3496.)

Based on the above, Williams' trial counsel requested that proceedings be suspended until the parties received "some idea when [the juror might] return." (28 RT 3496.) The trial court disagreed. Commenting that although it had not been provided a letter from Juror No. 1's doctor, the court stated that it had "no reason to disbelieve the juror when he says that he has to go in the hospital or go into the doctor

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[35] "Osteomyelitis" is an acute or chronic bone infection.

tomorrow for [a] procedure." (28 RT 3497-3498.) The court further provided that it was concerned with the fact that, at a minimum, Juror No. 1 was not present and would be absent through at least the next day. (28 RT 3497-3498.) The court cited its concern that it had specifically assured the remaining jurors, who were present and waiting in the hallway, that the matter would conclude the following day. (28 RT 3498.) The court therefore relieved the absent juror and replaced him with an alternate juror. (28 RT 3498, 3507.)

As discussed above, here, the trial court determined to discharge Juror No. 1 based on the juror's representations to the court clerk that he was too ill to proceed and wished to be excused, and on the juror's subsequent representation that his medical condition was so severe that it would likely require hospitalization. Williams claims that the court was not entitled to rely on its clerk and was required to gather stronger facts supporting a finding that the missing juror was in fact being truthful as to his illness. (AOB 203.) Confronted with a similar fact pattern, this Court recently rejected such a claim.

In *People v. Leonard, supra*, 40 Cal.4th at p. 1370, well into the guilt phase of a capital trial, a juror left a recorded telephone message with the trial court saying that the juror's father-in-law had died over the weekend. (*Id.* at pp. 1408-1409.) Thereafter, the court clerk telephoned the juror's home. (*Ibid.*) Unable to reach the juror, the clerk talked to the juror's wife who reported that her father had been killed in an automobile accident, that she and her husband would be attending the out-of-town funeral, and that her husband would be unavailable as a juror for the rest of the week. (*People v. Leonard, supra*, 40 Cal.4th at pp. 1408-1409.) Over the objection of both parties, the court discharged the missing juror and replaced him with an alternate. (*Id.* at p. 1410.) Similar to Williams, Leonard argued "the trial court did not conduct an adequate inquiry to

determine whether discharge of the juror was necessary, because neither the court nor the court clerk spoke to the juror himself." (*Ibid*; AOB 203.) This Court rejected this argument in *Leonard*:

> Although it would have been preferable for the clerk to have spoken to the juror himself, we conclude the juror's absence from court, combined with his recorded telephone message to the court explaining his absence and the information provided to the clerk by the juror's wife, was adequate to inform the court why the juror was not present, the reason for his absence, and the length of time he would be unavailable for jury service. No further inquiry was required.

(*People v. Leonard, supra*, 40 Cal.4th at p. 1410.)

Similarly in *People v. Ashmus* (1991) 54 Cal.3d 932, during the penalty phase of a capital trial, one of the jurors telephoned the trial court's clerks and requested discharge from jury service based on the unexpected death of his mother. (*Id.* at p. 986.) The court granted the missing juror's request and ordered him discharged without consulting the parties. (*Ibid.*) Ashmus complained that the trial court failed to follow procedure and that the record failed to provide a sufficient basis to support the trial court's action. (*Id.* at p. 987.) This Court disagrees in *Ashmus*, stating that under the circumstances, "it was not unreasonable for the court to act as it did." (*Ibid.*)

As the facts presented in *Leonard* and *Ashmus* support the conclusion that good cause so too existed here for the trial court to excuse Juror No. 1, contrary to Williams' assertion, the court was not required to conduct a hearing because "[t]he obvious purpose of such a hearing is to determine whether there is 'good cause' to excuse a juror." (*In re Mendes* (1979) 23 Cal.3d 847, 852 [when juror represented to the court that her brother had died, trial court was entitled to excuse her without consulting counsel or

conducting a hearing].) Williams' argument lacks merit and should be rejected.

XVI. THE TRIAL COURT PROPERLY DENIED WILLIAMS' REQUEST TO MODIFY CALJIC NO. 8.88

Williams claims that the trial court denied him his constitutional right to due process of law and a fair and reliable penalty determination by refusing his request for a modification to CALJIC No. 8.88. Specifically, he contends that his proposed modification, sought to instruct the jurors that they "must be convinced beyond a reasonable doubt that the aggravating factors outweigh[ed] the mitigating factors," before imposing the death penalty, constituted a correct statement of the law as to "the standard of proof" required to "guide" the jury's penalty phase deliberations. (AOB 206-212.) The trial court properly refused to give this instruction because it offered an incorrect statement of law.

Prior to introduction of the penalty phase evidence, the trial court and parties discussed jury instructions. (28 RT 3498.) Williams' trial counsel requested the following special instruction as to the standard of proof, "[a]fter 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." (28 RT 3498-3499.) The prosecutor objected that the proposed special instruction's use of the word "convinced" constituted a misstatement of law. (28 RT 3499.) The trial court responded that the standard of proof provided by CALJIC 8.88 was "persuaded," and not "convinced." (28 RT 3500-3501.) The court offered that it would provide the requested special instruction but would change the word "convinced" to "persuaded." (28 RT 3501-3502.) Williams declined the court's offer in lieu of the following language which he proposed and the court gave, "[i]t is entirely up to you to determine whether the death penalty is the appropriate punishment." (28 RT 3502, 3516; 22 CT 6448.)

The trial court instructed the jury with the following standardized CALJIC 8.88 concluding instruction:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life, without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event 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. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. 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.

> You shall soon retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(28 RT 3513-3514; 22 CT 6439-6440, emphasis added.)

This Court has repeatedly held that "CALJIC No. 8.88 provides constitutionally sufficient guidance to the jury on the weighing of aggravating and mitigating factors." (*People v. Howard* (2010) 51 Cal.4th 15, 39; see also, e.g., *People v. Butler* (2009) 46 Cal.4th 847, 873–875; *People v. Geier* (2007) 41 Cal.4th 555, 618–619.) Therefore, because CALJIC No. 8.88 properly informed the jury of its duty in weighing aggravating and mitigating factors, the trial court correctly denied Williams' proposed change to this standard instruction because the proposed special instruction misstated the law. Moreover, the claim that the prosecution must prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors has been repeatedly rejected. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 333; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1265 see also *People v. Panah, supra*, 35 Cal.4th at p. 499.)

In any event, even if the trial court erred in denying Williams' request to modify CALJIC No. 8.88, any such error was harmless. Given the overwhelming evidence of aggravating circumstances, and the paucity of mitigating circumstances, any error was harmless because even if the jury was instructed as Williams had requested, there is no reasonable possibility that he would have received a more favorable outcome. For the same reasons, any federal constitutional error was harmless beyond a reasonable

doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d].)

XVII. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE THE FEDERAL CONSTITUTION

In a series of arguments that have been repeatedly rejected by this Court, Williams contends California's death penalty scheme violates the Constitution. He provides no basis for this Court revisiting the merits of the arguments he raises.

First, Williams argues that the Eighth Amendment to the United States Constitution "prohibits affirmation of a death sentence unless guilt is proven beyond all doubt." (AOB 213-225 [Arg. XVII].) However, as he acknowledges, this Court, citing the United States Supreme Court, has ruled otherwise. (AOB 225.) There is no requirement, under the Eighth Amendment to the federal Constitution, to instruct on a higher standard of proof of guilt at the penalty phase of a capital trial. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1277 [noting that this Court has routinely rejected similar arguments]; *People v. Riel* (2000) 22 Cal.4th 1153, 1182.) Despite this Court's aforementioned opinions rejecting similar arguments, Williams invites the court to revisit the issue because purportedly "DNA testing and other post-conviction investigations" have exposed that a "significant percentage of capital cases are so flawed" that the innocent are routinely sentenced to death. (AOB 225.) Williams offers no basis for this Court to revisit its prior rulings rejecting his assertion of error.

Williams next argues that California's death penalty law fails to 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" in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 228-229 [Arg. XIX.) This claim has also been rejected in numerous decisions, and Williams gives this Court no

reason to reconsider them. (See, e.g., *People v. Farley* (2009) 46 Cal.4th 1053, 1133 ["[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment."]; *People v. Snow* (2003) 30 Cal.4th 43, 125; *People v. Robinson* (2005) 37 Cal.4th 592, 655; *People v. Kelly* (2007) 42 Cal.4th 763, 800; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

Next, contrary to Williams' assertion (AOB 259-260 [Arg. XX]), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley, supra*, 46 Cal.4th at p. 1133.) "Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401, alteration in original.) Again, Williams offers no reason for this Court to reconsider the above cited cases.

In his next argument challenging California's death penalty scheme, Williams asserts that 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." (AOB 233-249 [Arg. XXI].) To support this argument, he offers five markedly similar sub-arguments, which have all been rejected by this Court.

In his first sub-argument, he claims that he was entitled to have the jurors unanimously find beyond a reasonable doubt that one or more aggravating factors existed and outweighed any mitigating factors. (AOB

234-236.) This Court has previously held that there is no requirement that the jury be instructed during the penalty phase regarding the burden of proof for finding aggravating and mitigating circumstances in reaching a penalty determination, other than other crimes evidence, or that no burden of proof applied. (See *People v. Clark* (2011) 52 Cal.4th 769, 849; *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney* (2009) 47 Cal.4th 203, 268; *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Moreover, the Eighth and Fourteenth Amendments do not require the jury to unanimously find the existence of aggravating factors or that aggravating factors outweigh mitigating factors. (*People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. Hoyos, supra*, 41 Cal.4th at p. 926.) Williams has offered no persuasive reason to reconsider this argument.

In his second sub-argument, Williams similarly contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 236-241.) However, as discussed, this Court has determined on many occasions that section 190.3 and the pattern instructions are not constitutionally defective because they fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, e.g., *People v. Russell, supra*, 50 Cal.4th at pp. 1271-1272; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249-1250; *People v.*

Burney (2009) 47 Cal.4th 203, 267-268.) "[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.' [Citation]." (*People v. Ward* (2005) 36 Cal.4th 186, 221-222 [quoting *People v. Prieto, supra*, 30 Cal.4th at p. 263].) As this Court explained in *Prieto*, "in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto, supra*, 30 Cal.4th at p. 263 [quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 972 [114 S.Ct. 2630, 129 L.Ed.2d 750]; accord *People v. Virgil, supra,* 51 Cal.4th at pp. 1278-1279.) Williams gives this Court no reason to reconsider its previous holdings.

In his third sub-argument, Williams again asserts that his federal constitutional rights were violated because his death verdict was not premised on a unanimous jury finding that the aggravating circumstances outweighed the mitigating beyond a reasonable doubt. (AOB 241-242.) As discussed above, this Court has consistently rejected these claims. (*People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. Hoyos, supra*, 41 Cal.4th at p. 926; *People v. Russell, supra*, 50 Cal.4th at pp. 1271-1272; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249-1250; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.)

In his fourth sub-argument, Williams appears to reiterate his claim that he had a federal constitutional right to have the jury find beyond a reasonable doubt, before imposing a death sentence, that the aggravating factors outweighed the mitigating factors. (AOB 242-245.) As discussed above, this Court has consistently rejected this claim. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney* (2009) 47 Cal.4th 203,

268; *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Brown* (2004) 33 Cal.4th 382, 401.)

In his fifth sub-argument, Williams asserts that the California death penalty law violates his federal due process and Eighth Amendment rights because it does not require that the jury base a death sentence on "written findings regarding aggravating factors." (AOB 24-247.) Contrary to his assertion, "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Dunkle* (2005) 36 Cal.4th 861, 939, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord *People v. Foster* (2010) 50 Cal.4th 1301, 1365-1366; *People v. Gemache* (2010) 48 Cal.4th 347, 406.) Nor does the absence of such findings violate equal protection (*People v. Parson* (2008) 44 Cal.4th 332, 370) or a defendant's right to trial by jury (*People v. Avila* (2008) 46 Cal.4th 680, 724.) "Nothing in the federal Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation[.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 225.) Williams offers to reason for this Court to reconsider its previous decisions.

In his sixth sub-argument, Williams claims that the failure to conduct intercase proportionality review violates the Eighth Amendment. (AOB 247-249.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Foster, supra*, 50 Cal.4th at p. 1368; *People v. Hoyas* (2007) 41 Cal.4th 872, 927; *People v. Cornwell, supra,* 37 Cal.4th at p. 105; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

In his seventh and final sub-argument, Williams again argues that before relying on an aggravating factor in support of a death sentence, the jury was required to find the aggravating factor to be true beyond a

reasonable doubt. (AOB 249.) He is incorrect. (*People v. McKinnon* (2011) 52 Cal.4th 610, 697, citing *People v. Blair* (2005) 36 Cal.4th 686, 753 ["neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty."].)

Finally, Williams reasserts three of his aforementioned challenges for purposes of arguing that the cumulative impact of the perceived errors violated his federal constitutional rights. (AOB 226-227 [Arg. XVIII].) Specifically, he complains the statute does not meaningfully narrow the pool of murders eligible for the death penalty (AOB 227); the statute is overbroad because it has been applied in a manner that virtually applies to every feature of every murder (AOB 227); and, there are no safeguards in place that would enhance the reliability of the trial's outcome. (AOB 227.) For the reasons argued above, all three of these claims lack merit and have been rejected by this Court. However, as stated, for purposes of the instant argument he claims that the cumulative impact of the three alleged deficiencies reveal that California's death penalty statute is defective. (AOB 226.) This claim must fail because this Court has found that individually rejected claims "are no more compelling or prejudicial when considered together[.]" (See *People v. Garcia* (2011) 52 Cal.4th 706, 765 [discussing cumulative impact of numerous claimed error at defendant's penalty trial].)

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XVIII. CALIFORNIA'S CAPITAL SENTENCING SCHEME DOES NOT VIOLATE EQUAL PROTECTION

Williams contends California's capital sentencing scheme violates equal protection because capital defendants are afforded fewer procedural protections than non-capital defendants. (AOB 250-252.) To prevail on an equal protection claim, a defendant must establish that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Smith, supra,* 40 Cal.4th at p. 527, quotations and citations omitted.) Williams has not met his burden. "[B]y definition, a defendant in a non-capital case is not similarly situated to his capital case counterpart for the obvious reason that the former's life is not on the line." (*Id.* at p. 527, quotation and citation omitted). Thus, California's death penalty law does not violate equal protection because it does not require juror unanimity on aggravating circumstances, impose a burden of proof on the prosecution, or require a statement of reasons for a death sentence. (*People v. Gonżales and Soliz, supra,* 52 Cal.4th at p. 333; *People v. Carey* (2007) 41 Cal.4th 109, 136-137; *People v. Smith, supra*, 40 Cal.4th at p. 527; *People v. Davis* (2005) 36 Cal.4th 510, 571; see also *People v. Zamudio, supra*, 43 Cal.4th at p. 373 [death penalty law does not violate equal protection because sentencing procedures for capital and noncapital defendants are different].)

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

Williams contends that he was "deprived of a fair trial and 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." (AOB 253-254.) This Court has repeatedly rejected similar arguments and should do so again here. International law does not

prohibit a sentence of death where, as here, it was rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849 [rejecting claim "again"]; *People v. Gonzales and Soliz, supra*, 52 Cal.4th at p. 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Ward, supra*, 36 Cal.4th at p. 222; *People v. Elliot, supra*, 37 Cal.4th at p. 488.) Williams does not present any reason to revisit these holdings.

XX. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE INTERNATIONAL NORMS OF HUMANITY AND DECENCY OR THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION

Williams contends that the use of the death penalty as a regular punishment for a substantial number of crimes is contrary to international norms of human decency and that, consequently, the death penalty violates international law and the Eighth and Fourteenth Amendments of the federal Constitution. (AOB 258-260.) International law does not require California to eliminate capital punishment. (*People v. Blacksher, supra,* 52 Cal.4th at p. 849; *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Doolin, supra*, 45 Cal.4th at p. 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*Ibid.*) Instead, "[t]he death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)" (*People v. Doolin, supra*, 45 Cal.4th at p. 456, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.) Thus,

California's death penalty law does not violate international law or the federal Constitution.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: January 18, 2012

Respectfully submitted,

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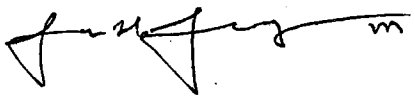
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 42,382 words.

Dated: January 18, 2012

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Robert Lee Williams** No.: **S118629**

I declare:

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

On January 18, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 18, 2012, at San Diego, California.

Olivia de la Cruz
Declarant

Olivia de la Cruz
Signature

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