SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

ROBERT LEE WILLIAMS, JR.
Defendant/Appellant.

AUTOMATIC APPEAL FROM THE JUDGMENT
OF THE SUPERIOR COURT OF RIVERSIDE

THE HONORABLE DENNIS A. MCCONAGHY

CSC No. S118629
(Riverside County No. CR64075)

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The guilt phase of Robert Williams' capital trial was dominated by three significant concerns: 1) the denial of a speedy trial; 2) the discovery delays and obstructions; and 3) the revocation of the right to self-represent.

In responding to Appellant's speedy-trial concerns, Respondent flatly asserts that "Williams caused the delay," and further that even if Robert's constitutional right to a timely trial was violated, there was no prejudice because the prosecution's case was "ironclad," even though it hung on the tenuous credibility of Conya Lofton. (RB 22.) Respondent's knee-jerk assertions aside, the reality is that Robert Williams' eighty-three-month pretrial marathon is a grueling testament to what can transpire when a prosecutor systematically delays discovery in his refusal to comply with the most basic rules of discovery and ethical pretrial conduct. A prosecutor who viewed discovery not as his duty in fairness to the accused and the criminal justice system, but instead as a competition to disclose as *little* as possible and, even then, only when compelled. A prosecutor who delayed trial by making representations to court and counsel which were untrue. A prosecutor who concealed third-party-culpability materials for *years* until they are accidentally discovered by the defense. And then compounded his error by insisting on immediately proceeding to trial after this discovery, thus precluding any opportunity for the defense to utilize the late-arriving third-party-culpability disclosures and so mount a viable defense. The delay was also contributed to by a trial judge who refused to recognize that trying two defendants in this capital trial was not feasible, even when it was apparent within the first months of pretrial that one defendant was adamant about bringing his case to trial while the other was not.

As to the second concern, Respondent is dismissive of the multitude of discovery delays and obstructions attributable to Prosecutor Ruiz. They began with Mr. Ruiz's successful efforts

to insulate the State's primary witness from any meaningful investigation as to her character and credibility, including her motivations in incriminating Robert, thus effectively precluding the defense from meaningful cross-examination of the linchpin witness. The discovery obstructions continued through the seven-year pretrial period, when in the months just prior to trial the defense accidentally discovered evidence of third-party culpability that the prosecutor had held in his possession for years without disclosure.

As to the revocation of Robert's constitutional right to represent himself, Respondent asserts that the revocation was proper in that Robert was engaged in dilatory tactics. Yet as the record reflects, during the ten-month period of self-representation, it was Prosecutor Ruiz who was solely responsible for any delays. His absence, due to his illness and his discovery delays, was the sole reason for the delays, even though Robert was cast as the culprit by the prosecutor and court.

With these clarifying facts in mind, Robert offers the following specific replies to Respondent's Brief.

GUILT PHASE ERRORS

ARGUMENT I

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

Respondent asserts, in part, that Robert's speedy-trial rights were not violated because he consented to seventeen of the nineteen trial continuances. Respondent's math is wrong. The record reveals that Robert directly opposed four continuances of the trial date and two continuances of the preliminary hearing. The record also reveals that a further eight

continuances, while admittedly at the insistence of defense counsel, were due to the prosecutor's discovery failures. Furthermore, the record is clear that additional continuances were the result of the court's failure to sever Robert's case from that of the co-defendant. Finally, there were additional delays caused by the revolving door of Robert's appointed defense counsel. Despite Respondent's characterization that Robert was somehow complicit in contributing to the extraordinary length of the pretrial period, the record belies this. Instead, the record is testament to the fact that Robert continually voiced his concerns, objecting to the almost unending series of continuances that resulted in an eighty-three month delay in his trial. Indeed, even the most cursory review of the record reveals Robert's on-going and profound frustration in bringing his case to a jury. Given the extensive briefing in Appellant's Opening Brief (pp. 29-73) and Respondent's Brief (pp. 22-50), it is neither necessary nor prudent to revisit the circumstances surrounding the successive continuances. It is, however, necessary to both address and correct Respondent's confusion as to the number of objections Robert made relating to continuing both the trial and preliminary examination.

Beyond Respondent's errors in tabulating the number of times Robert objected to continuances, Respondent has further opted to cast this issue in terms of the number of times Robert consented to continuances. Respondent suggests that because Robert reluctantly assented to *some* continuances, that is the end of the discussion. Somehow, Respondent concludes that a concession to a continuance denotes Robert's agreement to *that* continuance. (RB 42.) This logic is flawed and grossly presumptuous. The majority of continuances to which Robert did consent were forced upon him by circumstances beyond his control, and in most cases the continuances were instigated by the prosecutor. It is important to note that it was this same prosecutor who failed to provide timely discovery years into pretrial, and that it was this very

prosecutor who resisted severance of Robert's case from his co-defendant, thereby directly causing repeated delays and continuances. Furthermore, these delays were compounded by the appointment of numerous defense attorneys working for Riverside County's Criminal Defense Panel, the sole mechanism for providing alternate counsel and which chronically failed to appoint counsel who could and would provide adequate representation. With each new appointment there naturally arose the need for each new appointee to take additional time to review Robert's case in order to adequately prepare for trial.

a. Robert Objected Six Times to Continuances

It is essential to immediately disabuse this Court of Respondent's contention that Robert only objected to two continuances. The record established that Robert objected to two continuances of the preliminary hearing and to four continuances of the trial date.

The November 9, 1995, continuance of the preliminary examination to December 1, 1995, was opposed by Robert (CT 15; RPT 31-36.); and, again, on November 29, 1995, two days prior to the preliminary examination and following co-defendant Walker's motion for continuance, Robert objected once more to the continuance. (CT 15; RPT 31-36 or 37-45.) Defense counsel initially voiced Robert's opposition to this second continuance: "Mr. Williams prefers to have the prelim as set," but eventually withdrew his opposition to the continuance. (CT 16-17; RPT 37-45.) But, although Robert's attorney withdrew his opposition, Robert remained steadfast in his position, demanding a timely preliminary hearing. (CT 18; RPT 37-45.) Incredibly, however, Respondent states that Robert waived time.

On December 21, 1995, counsel for Walker once again moved to continue the preliminary examination. Robert, frustrated by the delays to date, refused to waive time and protested, "I want to come on and do this." (RPT 57.) While the trial judge was eventually able

to elicit a begrudging waiver from Robert, Respondent's assertion that "Williams again waived time...," fails to convey the essence of Robert's reluctance to ultimately concede to the waiver. (CT 18-21; RPT 52-64.) What is clear, however, is that as early as 1995, seven years prior to the 2002 trial, Robert repeatedly demanded timely proceedings.

On January 18, 1996, both Robert and Walker were arraigned, and counsel for both men sought to continue the trial date beyond sixty days. Robert refused. (CT 146-48; RPT 69-88.) Walker's counsel also moved to sever their cases, and in arguing the motion, Walker's counsel's comments foreshadowed Robert's efforts to bring his case to trial: "We cannot be ready within 60 days, and if Mr. Williams forces us to be going to trial within 60 days, I think my client would be severely prejudiced...." (CT 147; RPT 85.) Even though the continuance motion was denied, Robert's desire for a timely trial was certainly clear to the court, to defense counsel for both Robert and Walker, and to the prosecutor. Two weeks later, Walker's counsel continued his argument to sever the cases: "You have one [Robert] of which does not wish to waive time and one of which does wish to waive time, is unprepared." (RT 107.) The severance motion was continued; and even though the continuance motion was denied, Robert's resistance, even at this early date, underscores his ongoing efforts to oppose delays and get his case before a jury as expeditiously as possible. (CT 185; RPT 104-30.)

On March 1, 1996, Robert's counsel again requested to continue the trial date. Robert again refused. (CT 201-02; RPT 131-39.) During the ensuing *Marsden* hearing, Robert expressed to the trial judge his ongoing frustration over the denial of his right to a timely trial: "You always deny [my opposition to further continuance] anyway. What's the purpose of making another *Marsden*?" The judge asked, "I take it you want to continue to object to a trial date beyond the March 11 date, is that correct?" Robert replied, "Yes." The court continued the

trial another sixty days to May 6, 1996. (CT 201-02; RPT 131-39.) This marked the first continuance of the trial over Robert's objection.

The second continuance over Robert's objection occurred on May 3, 1996, as counsel for Robert and Walker once again moved to continue the trial date. Robert's reaction and position on the matter was unequivocal: "I'm not waiving no more time," to which the court responded, "And I do this, that is grant the 1050 motion [continuance] reluctantly because I know [Robert] wants a speedy trial." (CT 258; RPT 143-73.) This continuance was to span a further five months, extending until October 1996.

The next three and one-half month continuance motion took place on September 27, 1996. While Respondent is certainly correct in stating that Robert "waived time," this assertion yet again, belies the underlying circumstances of the waiver. During the hearing, Robert inquired of the court, "Okay. I'd just like to know that after the continuance, the January 27, ten days after that, after that is you going to continue this again, or is this it? ... You understand what I'm saying? But we might be ready. We might not be ready." (CT 320-36; RPT 346-66.) The court then explained the possibility of yet further continuances, to which Robert replied, "So if it does happen to be another continuance, it would be a short continuance?" It was with that understanding that Robert said, "I'll go ahead and waive time. It won't make any difference, but I'll go ahead and waive time." (CT 320-36; RPT 346-66.) Given these circumstances, while it is accurate to state that Robert consented to the waiver, it is, once more, a mischaracterization on Respondent's part to suggest that Robert's acquiescence represents willing consent.

The next three-month continuance to April 28, 1997, was the third continuance of the trial date over Robert's objection. On that date, defense counsel again moved to continue, and Robert once more voiced what he suspected would be a futile objection: "[I]t don't really make a

difference if I agree or not … I mean, it don't help me none to sit here and say no. I don't waive my time, because this thing's going to be continued…." (CT 357-67; RPT 381-90.) Curiously, Respondent characterized Robert's opposition to the trial continuance as assent. (RB 27.) Robert could not have been more adamant in refusing to waive time. (CT 357-67; RPT 381-90.)

In some respects, the fourth continuance to which Robert objected, ultimately leading to a seven-month delay, was the most notable. Respondent, understandably in an attempt to once again cast blame on Robert for pushing back the trial from July 20, 2001, to March 4, 2002, failed to acknowledge the precipitating circumstances for the continuance; specifically, the three-month absence of Ruiz during which, in the words of the trial judge, the case had been rendered " dead in the water." (CT 1183-91; RPT 1178-93.) Remarkably, it was Prosecutor Ruiz, whose illness-related absence brought discovery to a standstill, who now alleged that it was *Robert* who was engaging in "delay tactics," and, further, it was Prosecutor Ruiz who then successfully urged the judge to terminate Robert's *Faretta* status. (CT 1354; RPT 1335-51.) Respondent is quick to discuss other circumstances surrounding the events that transpired during that period (see RB 33-38), while conveniently ignoring the absence of discovery turned over to defense counsel during Mr. Ruiz's three-month absence, spanning from October, 2000 through January, 2001, a period of time during which discovery "came to a standstill." (*See* AOB 68.) Furthermore, Respondent ignores Prosecutor Ruiz's blatant and ongoing discovery obstructions that were instrumental in leading to the court's decision to continue the case to March 4, 2002. (*See* AOB 41-45.)

While Respondent is correct that there were nineteen continuances of the trial date, he is incorrect to suggest that Robert consented to seventeen of those continuances (see RB 22, 42-43). The record reflects that in addition to Robert's objections to the four continuances of the

trail date, he also objected to two continuances of the preliminary hearing. Those six objections to continuances comprised a nineteen-month delay.

b. Continuances Caused by Prosecutor's Discovery Obstructions

Recognizing Respondent's mischaracterization of the number of times Robert objected to the nineteen continuances, it is critical to clarify the reasons for the fifteen additional continuances of the trial date that accounted for approximately sixty-four months of delay. As this Court is well aware, a critical inquiry in assessing a speedy trial claim is identifying which party is predominantly responsible for the delay. (*Doggett*, 505 U.S. at 654; *Barker*, 404 U.S. at 531.) Respondent asserts that Robert brought a number of *Marsden* motions, and accordingly, accuses Robert of pitting his speedy trial rights against his right to counsel. (RB 43.) Apart from the implication that all *Marsden* hearings lack merit and are undertaken by an accused for the sole purpose of creating delay, it is not surprising, given the torturous eighty-three-month journey to a capital trial, that various conflicts with counsel materialized. Respondent, while attempting to place such commonplace occurrences at the forefront of the "blame" issue relating to delay, has simultaneously failed to address the primary culprit for this prejudicial delay, namely, that it was caused by Prosecutor Ruiz's trench warfare approach to discovery. And, indeed, eight of the continuances that Robert and his counsel were forced to seek, were the direct result of Mr. Ruiz's failures to provide this capital defendant discovery to which he was entitled.

The first continuance of the trial date due to Mr. Ruiz's discovery failures occurred in late March, 1997. Specifically, the prosecutor failed to provide witness contact information, and refused defense counsel access to the substance of jailhouse conversations between Mr. Walker and his girlfriend. (CT 837; RPT 472-93.) As a result of the prosecutor's lack of cooperation in providing discovery, Robert's counsel sought and received a continuance, moving the trial date

from April 28, 1997, to July 28, 1997, resulting in a three-month delay. (CT 794, 819-37; RPT 419-55, 472-93.) It is significant to note that this trial delay came about *solely* as a result of the State's ongoing discovery failures, a practice that was unfortunately to continue, soon leading to the postponement of this latest rescheduling of trial.

This second continuance of the trial date was also due only to Mr. Ruiz's discovery gamesmanship, and led to a further two and one-half month continuance from July 28, 1997, to October 10, 1997. (CT 914-17; RPT 573-605.) This delay was occasioned by Mr. Ruiz's continued resistance in providing witness contact information in the form of the aforementioned Walker-girlfriend jailhouse tapes, and a number of items listed in a defense memorandum. (*See* AOB fn 69; CT 894-95, 911-17; RPT 505-71.) Once again, this discovery-related delay was caused only by the State, and was separate from any other issues.

The third continuance of the trial date, while not solely resulting from Mr. Ruiz's discovery failures, must still, at least in part, be attributed to his deliberate delay tactics in producing discovery. On September 5, 1997, Walker's counsel conflicted from the case and newly appointed counsel informed the court that he would need six to twelve months to prepare for trial. (CT 1005; RT 730-47.) However, apart from Walker's change of counsel, Robert's counsel, again citing Mr. Ruiz's calculated discovery obstructions, moved to continue the trial date. The court, noting that discovery had "not been smooth," continued the trial to a "firm" date eight months hence on August 3, 1998. (CT 1005; RPT 730-47.) To be perfectly clear, however, this lengthy continuance was primarily related to prosecutorial discovery delays, and to some degree the trial judge's failure to sever Robert's case from Walker's. Given the multiple factors contributing to this delay and relating directly to the State's shortcomings, this delay should not be put at the feet of the accused.

The next significant delay, precipitated by Mr. Ruiz's discovery obstructions, caused the trial date of February 2, 2001, to be continued another two months, now moving the trial to April 3, 2001. As late as January 12, 2001, just three weeks prior to the trial date, the court admonished Mr. Ruiz for his latest response to Robert's discovery requests: "Don't wait until we come back into court to get [discovery] to him. Just send [discovery] out to him...." The court's acknowledgment that Mr. Ruiz's failures left Robert no choice but to request the two-month continuance is, of course, significant. (CT 1183-91; RPT 1178-93.) It is significant because this was now the *fourth* continuance directly attributable to the prosecutor's failure to comply with discovery.

Only weeks later, in an attempt once more to expedite discovery, the court attempted to shift discovery responsibility from Mr. Ruiz to his investigator. (RPT 1335-51.) Regrettably, that effort fared no better than previous efforts, and as of February 23, 2001, Robert *still* had not received the requested materials that Mr. Ruiz had previously conceded were discoverable. (CT 1208-12; RT 1213-19.) Consequently, three weeks later, on March 16, 2001, Robert, frustrated by the prosecutor's failure to provide discovery, moved to disqualify Prosecutor Ruiz, citing discovery obstruction. As a result, Robert was forced, yet again, to request a continuance of his trial date. (CT 1234-40; RPT 1228-52.) This latest two-month continuance, to June 4, 2001, marked the *fifth* continuance where the blame again rested squarely on the prosecutor's shoulders. (CT 1234-40; RPT 1228-52.) Remarkably, Respondent has instead attempted to characterize this delay as evidence of dilatory conduct by Robert. (RB 43-44.) The reality, however, is that Robert's efforts to disqualify Mr. Ruiz were the direct result of Mr. Ruiz failing to provide court-ordered discovery and, as such, these efforts were nothing less than reasonable

given the State's repeated failures to abide by timely discovery deadlines. (CT 1234-40; RPT 1228-52.)

On April 17, 2001, six weeks prior to the June trial date, Prosecutor Ruiz turned over seven boxes of discovery, only to have Robert's standby counsel determine that "some things were missing." (CT 1258; RT 1299-1311.) While Mr. Ruiz promised to produce those missing items, standby counsel, citing the missing discovery, was forced once more to request to delay the trial another seven weeks, to July 2001. (CT 1336; RPT 1312-27.) This was the *sixth* discovery- related delay; and, again, this delay was apart from any other issues.

Discovery delays continued to plague this case when, on January 23, 2002, Robert's counsel again found it necessary to move for a *seventh* discovery-related continuance due to non-receipt of discovery materials that Mr. Ruiz acknowledged were "appropriate." (CT 2162; RPT 1382-84.) This five-week continuance moved the new trial date to April 8, 2002.

On March 29, 2002, the trial was pushed back another two months, this time due to discovery issues regarding third-party liability. (CT 2185-87; RPT 1400-25.) The third-party liability issue spilled over to April 23, 2002, when defense counsel apprised the court that, "[Y]et again on Wednesday of last week I'm still receiving additional reports, significant reports that should have been turned over seven years ago but were not...." (RPT 1426-44.) As a result, the court granted defense counsel the *eighth* and final continuance caused by Mr. Ruiz's discovery obstructions. (CT 2249-65; RPT 1475-1504.)

As suggested in Appellant's Opening Brief, it is not possible to ascertain with absolute clarity how much time was lost or how to apportion blame due to the discovery-related delays caused by the State; however, it is Appellant's good faith estimate that twenty-two and one-half months are directly attributed *solely* to prosecutorial discovery obstructions.

c. Continuances Caused by the Court's Failure to Sever

While Respondent was generally dismissive in his discussion of the delays associated with Mr. Ruiz's obstruction of discovery, he *completely* ignored the significant delays caused by the court's failure to sever Walker's prosecution from Robert's. The conflicts over time waivers first surfaced in November, 1995,[1] and continued until the court acknowledged, some four years later, that these two capital cases could not be tried together: "I wish we would have thought of this a couple of years ago...." (CT 1146; RPT 1042-50.) Of course, defense counsel for both Robert and Walker had identified this concern several years previously, but their motions fell on the deaf ears of the judge.[2] The court's belated acknowledgement of the necessity for severance cannot be viewed in a vacuum. It was apparent as early as the preliminary hearing continuances that while Walker agreed repeatedly to waive time, Robert, in stark contrast and from the earliest months of pretrial, was adamant that his case be tried as quickly as possible.[3] This problem was, perhaps, most pointedly illustrated when Walker's counsel conflicted from the case on September 18, 1997, and Walker's new counsel announced that he estimated that he could be ready for trial "probably closer to 12 [months] than six." (CT 1005; RPT 730-47.) The court then continued the joint trial for ten months from October 10, 1997, to August 3, 1998. (CT

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[1] On November 9th, 1995, co-defendant Walker's counsel received a twenty-day continuance due to his participation in another trial. (RPT 32.) While Robert's counsel opposed this motion (CT 15; RPT 31-36), the continuance was granted, setting the preliminary hearing to December 14th, 1995. (RPT 37-45.) Robert opposed this continuance, and his defense counsel voiced this opposition to the court: "Mr. Williams prefers to have the prelim. as set." (CT15; RPT 31-36.)

[2] Despite initial efforts on January 18, 1996 by Walker's counsel to sever his client's trial (CT 147; RPT 85), and despite Robert's counsel's motion to sever the two cases on February 23, 1996, the court denied both requests. (CT 185; RPT 104-30.) Even as late as January 1999, the court continued to find "... good cause to keep the two of them [Robert and Walker's cases] together." (CT 1108-15; RPT 913-35.)

[3] On November 9, 1995 Walker's counsel obtained a twenty-one day continuance due to his obligation to another trial. (RPT 32.) However, Robert opposed the continuance. (CT 15; RPT 31-36.) On November 29th, 1995, the court granted Walker's counsel the continuance and Robert's counsel withdrew his opposition. (CT 16-17; RPT 37-45.) When Walker's counsel again requested a further continuance, Robert's attorney once more voiced Robert's opposition, but to no avail. The preliminary hearing was rescheduled to December 21, 1995. (CT 18; RPT 37-45.)

1005; RPT 730-47.) Despite the delays associated with the State having kept the cases consolidated, it was not until *two years* later that the court severed the cases. (CT 1146; RPT 1042-50.)

Just as it is difficult to offer a precise calculation as to the time lost due to the prosecutor's willful discovery obstructions, it is also difficult to offer an accurate estimate of the time lost because of the failure to sever Walker and Robert's case. The change of appointed counsel for both defendants, the differing timetables attributable to Walker's and Robert's counsel's representation of their client's respective guilt and penalty phases, coupled with the complexities of witness coordination, offer but a sample of the variables that must be regarded when gauging the total time lost in reaching trial. However, what can be stated with near certainty is that had the severance of the two defendant's cases occurred in 1996, Robert's trial would have commenced years earlier. This delay of Robert's right to a speedy trial does not weigh against the defense and was undeniably a significant factor in delaying Robert's trial.

d. Systemic Flaws in the Appointment of Alternate Defense Counsel Delayed Robert's Trial Twenty-Six Months

At the heart of Respondent's argument addressing the delays caused by the revolving door of defense counsel is Respondent's contention that Robert sought to replace each of the attorneys appointed to represent him as a delaying tactic. This comment merits three responses: First, it is inaccurate; second, as suggested earlier, requesting a *Marsden* hearing and attempting to better defend against criminal charges, let alone capital charges, should not be used to castigate an accused; and, finally, Respondent's assertion fails to respond to the allegation regarding the systemic breakdown of the alternate defense counsel system. [RB 43-44] The sorrowful record of ever-changing defense counsel for this capital defendant belies Respondent's assertion that somehow Robert was responsible for the myriad of lawyers thrust upon him. To be

clear, only *one* of Robert's *Marsden* requests for new counsel was successful. (CT 1140-41; RPT 1022-23.)

The conflict of the Public Defender following the first two years and nine months of representation appeared to have been clearly related to a discovery delay by the prosecutor.[4] (CT 1098; RPT 879-97.) Following the Public Defender's departure, Riverside County's Criminal Defense Panel (CDP) would be the sole mechanism for providing counsel for Robert.

To further rebut Respondent's assertion that fault lay with Robert when it came to the revolving door of defense counsel, we have only to heed Prosecutor Ruiz's commentary on the CDP made two years into the seven-year pretrial. Following the short-lived representation by several CDP lawyers, Mr. Ruiz found himself frustrated over the continuances necessitated by the preparation time required by each new CDP counsel: "And a year continuance on a case like this so CDP can keep it in house, I don't believe is appropriate ... that would be an abortion of justice...." (CT 1005; RPT 730-47.) In December 1997, Mr. Ruiz took it upon himself to attempt to recruit a non-CDP lawyer who could expeditiously get the case to trial.[5]

The reprehensible history of CDP's chronic failure to appoint counsel who could and would provide adequate representation for this capital defendant is set forth in Appellant's Opening Brief. (AOB 62-66.)

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[4] Before both Feiger and the Public Defender conflicted from the case, PD Supervisor Zagorsky acknowledged the relationship between Prosecutor Ruiz's unwillingness to timely comply with discovery requests and this ultimate conflict of counsel. Notably, Zagorsky stated that had Ruiz been forthcoming with discovery, this conflict could have been avoided. This latest turn of events also necessitated assignment of the Criminal Defense Panel to monitor the future representation of Robert in an attempt to avoid any repeat of this problem. (AOB 56-57.)

[5] Prosecutor Ruiz incited the objection of Walker's counsel, Mr. Peasley, whereby Peasley accused Ruiz of interfering with choice of defense counsel. (CT 1035-43; RPT 765-79). Ruiz had contacted a judge not presiding over the instant matter in an effort to find out about the availability of alternate defense counsel, counsel Ruiz felt might prepare the case for trial more expeditiously than Peasley had managed. (RPT 774.)

e. Robert's Assertion of His Right to a Speedy Trial

Despite Robert's ongoing assertion of his constitutionally guaranteed right to a speedy trial and adamant opposition to no fewer than *nine* efforts to delay, Respondent argues that Robert's claim fails because he did not file a formal motion to dismiss. (RB 50-51.) Respondent is mistaken.

The goal of the waiver principle is to ensure that issues are dealt with as they arise in order for them to be resolved at the trial level. (*People v. Saunders* (1993) 5 Cal. 4th 580, 589; *People v. Vera* (1997) 15 Cal. 4th 269, 275.) It is sound policy to resolve disputes at the trial level rather than at the appellate level. (*People v. Carpenter* (1997) 15 Cal. 4th 312, 351) Conversely, it is contrary to sound policy to defer issues with an eye to resolution at the appellate level. Robert's timely and ongoing objections to continuances were made at a time when the trial court had the ability to resolve the issue. The trial court, following Robert's *six* objections to continuances, was clearly aware of the speedy-trial issue raised and had the authority and obligation to recognize Robert's claim. Respondent's assertion that Robert's failure to bring a formal motion to dismiss in light of the undisputed assertion of that right is nothing less than quintessential form over substance.

It is undisputed that neither Robert nor any of his court-appointed lawyers filed a formal motion to dismiss; however, it is also beyond dispute that throughout the history of this case, Robert continuously asserted his right to a speedy trial. Further, requiring a defendant to assert this right and move for dismissal in order to preserve his Sixth Amendment right is inconsistent with the Court's concept of waiver of constitutional rights. (*Barker*, 407 U.S. at 525.) Additionally, the Court has asserted that a reviewing court should "indulge every reasonable presumption against waiver." (*Id.* (quoting *Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389,

393).) Given the chaotic nature of the misguided appointments of the various CDP lawyers, it is not surprising that a formal motion to dismiss for lack of a speedy trial was not lodged. As set forth above, simply finding a lawyer who could and would remain as counsel was problematic enough and, correspondingly, Respondent's assertion that formality should triumph over a basic constitutional guarantee is misguided at best.

f. The Denial of a Speedy Trial Prejudiced Robert's Defense

Respondent has opted to skirt past an essential teaching from *Barker*, namely, that in the event the other *Barker* factors are compelling, a specific showing of prejudice is not essential to finding a denial of speedy trial. Given the extraordinary eighty-three-month delay, the twenty-eight-and-a-half-month delay caused by the prosecutor's discovery gamesmanship, the delay caused by the trial court's failure to sever Walker's and Robert's case, and Robert's repeated demands for a timely trial, it is undeniable that the *Barker* factors in this case are compelling. (*Barker*, 407 U.S. at 522.) The *Barker* Court recognized that determining actual prejudice in the context of a lengthy pretrial cannot be measured with any certitude. (*Id.* at 521-22.) Indeed, citing to line and verse, specific violations proved to have been caused by lengthy delays are difficult to demonstrate, and are often based upon speculation and conjecture. And while recognizing that some of the specific difficulties arising from the eighty-three-month delay will, perhaps, never come to light, at least two instances of prejudice did surface.

First, any meaningful investigation into the third parties motivated to kill Gary Williams was compromised. Had Robert's trial occurred in 1997 or 1998, instead of 2002, and, accordingly, had discovery been completed prior to trial, the identity and whereabouts of those third parties would much more likely have been ascertained. By stretching pretrial discovery into 2001 and 2002, the task of investigating such third parties was rendered more problematic with

each passing month, let alone with each passing year. Respondent asserts that "the delay benefited Williams by allowing him time to identify and seek out" the third parties. (RB 48.) Such an assertion assumes a static universe, where people and circumstances forever remain in the same place. Reality, of course, is such that with the passage of time stretching from months to years, the meaningful investigation of people and events becomes increasingly difficult. Respondent asserts a time-honored prosecutorial adage, that "delay is not an uncommon defense tactic." (RB 47 citing *Barker*.) In truth, however, this one-size-fits-all assertion does *not* fit every circumstance—especially the circumstances arising in this case. Here, a delayed trial followed in the wake of delayed discovery, and in turn, this likely compromised any legitimate opportunity to identify those individuals with an interest in killing Gary Williams. These were individuals who had to be sought out, given that they would not come forward of their own volition when identifying themselves might well have led to their prosecution. Therefore, these were individuals who were likely to distance themselves from any investigation, given the opportunity. While it cannot be stated unequivocally that Robert would have been advantaged had he been apprised early on of the existence of those interested in killing Gary Williams, it cannot be denied that this information might have benefitted Robert.

The second specific prejudice to the defense was the evolution of Conya Lofton's testimony. In the weeks and months following the murders, Lofton offered varying accounts not only of her recollection of events leading to Robert's prosecution, but also in relation to her identifications of the defendants. However, when she finally testified seven years later, her testimony belied that initial uncertainty; instead, she testified with unfailing certitude. Lofton, the prosecution's sole percipient witness, underwent a striking metamorphosis during the seven-year delay. It was her revised testimony that propelled the State's case.

For a witness in a capital trial, indeed the *sole* percipient witness in this instance, to modify original recollections that were provided at a time when the events were fresh in her mind (and presumptively at their most reliable), suggests improper witness-coaching. Seven years was an unusually lengthy period of time to arrive at trial, and during those years Ms. Lofton was able to insure her testimony at trial would be truly "accurate," reflecting that which a well-prepared witness might provide. There was, of course, the assumption that as a well-prepared witness, Ms. Lofton would assist in the truth-seeking process of Robert's trial by testifying to what she recalled, *not* what, so many years later, she now claimed to be her most accurate recounting yet of the events of July 15, 1995.

As brought out in Appellant's Opening Brief, the *Barker* court enumerated "the interests of defendants which the speedy trial right was designed to protect." (AOB 69-73) Such interests include, in relation to the issue of Ms. Lofton's ever-changing witness accounts, the need to minimize "the possibility that the defense will be impaired" by issues of witness unreliability. (*Barker v. Wingo* (1972) 407 U.S. 514, 532.) The following summary lays out various aspects of Ms. Lofton's unstable testimony

At the preliminary hearing and at trial, Ms. Lofton identified two blue vehicles at the house on the night of July 15, 1995: a 1989 Cavalier and a friend's El Camino. At the preliminary hearing, Ms. Lofton stated that the only other vehicle she observed that night was a burgundy sedan outside Gary Williams's house. (AOB 20). Mr. Williams' neighbor, Michelle Contreras, testified that *four* cars left the home that evening, and she was able to describe them in detail: the Cavalier and the El Camino, as well as a light colored car and a lowered Chevrolet truck. (AOB 25.)

Ms. Lofton testified at the preliminary hearing and at trial that three men exited a burgundy vehicle and crossed the street to Gary Williams' house (CT 129), yet two days after the murders in a taped interview, Ms. Lofton testified that only two men exited the car and approached the house. (RT 2391-92.) Neighbor Contreras provided testimony at trial that *neither* of Ms. Lofton's accounts was correct, and that *four* men and *four* vehicles were present at the scene that night. (RT 2319-20.)

In terms of her ability to identify Robert with any precision, Ms. Lofton's recollections vary from being no more particular than finding him to be a heavy-set individual carrying a brief case (RT 2086-89.), to being shorter than 5' 8" (CT 99, 131.), to assessing that she was the same height as Suspect #1 (CT 132.), to the suspect being precisely 5'7" and 170 pounds at the time. (RT 2469-73.)

In relation to her claims of rape, Ms. Lofton claims that she was anally penetrated, later deciding that she was vaginally penetrated. At the preliminary hearing she stated that Robert removed a glove that he was wearing *after* inserting a finger into her vagina; at trial, however, she claimed that he removed the glove *prior* to her assertion of the digital penetration. (RT 2169-71.)

At one stage in her various accounts, Ms. Lofton maintained that the victims shot in the back of the head. (RT 3075.) At another juncture, she testified that Suspect #3 (as referred to during the trial) was the person who opened the vacuum cleaner bag looking for money (RT 2381.); at the preliminary hearing she claimed it was Walker who opened the bag; at Walker's trial it became Robert who opened the bag. (RT 2380-90.)

A month after her initial identification of the suspects, Ms. Lofton, now in Mississippi, identified Robert as Suspect #1, by way of police photographic identification. (RT 2362-64.) At

the same lineup, Ms. Lofton insisted that Suspect #3 was Shawn Ford, a man who was incarcerated at the time of the killings. (RT 2362-64.) Further, in terms of her certain identification of Robert, at the preliminary hearing Ms. Lofton said she was under the influence of medications administered at the hospital the night of July 15, 1995, when she gave a statement to the police; at that time, she admitted she could not be certain about her account. (CT 108-09, 93.) At trial, she stated that these same drugs did not render any effect upon her ability to clearly recall the events of that night. (RT 2372.) At the preliminary hearing, Ms. Lofton stated that she could not remember details of that first police interview conducted at the hospital and yet at trial she was able to provide an acute recollection of everything surrounding that questioning session. (RT 1935-40.) Ms. Lofton initially told investigators that three men were arguing over who would take Gary's shoes on the night of the killings and who the shoes might fit, but at the preliminary hearing and at trial she stated that the only person who was interested in the shoes was Suspect #3. (RT 104-05, 2122.)

Surely it is not necessary to emphasize further how significantly Ms. Lofton's remarkable malleability might have influenced the outcome of this capital case. Had jurors heard all of Ms. Lofton's various "certain" versions of events, Respondent could not state with any certainty at all that the jury might not have undertaken a rather different process of deliberation, one possibly rendering a different outcome for Robert.

While Respondent highlights Ms. Lofton's testimony that she was "positive that Williams ordered his cohorts to kill Gary and Roscoe before slashing her throat," and that in stating the same she is "being 100% positive [and has] no doubt in her mind," Robert would contend that, despite the above summary, Conya Lofton has shown, time and time again, that she was full of doubt. Respondent further asserts that somehow the long trial delays in fact *bolstered* Robert's

ability to more completely craft a trial strategy in order to alert the jury to Ms. Lofton's wavering on just about every significant issue relating to the night of the murders. (RT 39.) This is an odd claim, to say the least, considering that the prosecution successfully kept Ms. Lofton at all times well beyond defense counsel's reach, prohibiting development of a complete defense. In part, the prosecution insisted that Ms. Lofton must be kept hidden as a result of the alleged death threats she had received, but let us not forget that this fear was fueled in part as a result of the fact that "one of the three cohorts [was] at large," the very cohort that Ms. Lofton had identified as someone who was incarcerated at the time of the murders. Hence, Respondent's assertion that delaying the case might have "served to advance Williams' chances the prosecution might be adversely impacted by the passage of time" is illogical. The remarkably lengthy passage of time between the night of the murders and Robert's eventual trial did *nothing* to assist Robert's counsel in preparing a complete defense, and did everything to promote the prosecution's use of Ms. Lofton's evolved and "precise" testimony that rested in such sharp contrast with the many and various versions that predated this capital trial.

ARGUMENT II

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

It is the Respondent's position that it was not error for the State to refuse to turn over information known to, and possessed by, the prosecutor about specific dangerous criminals with specific motive to kill the decedent. (RB 51-52.)

Respondent characterizes the third-party culpability information as speculative and hence not worthy of disclosure. (RB 56.) Respondent reasons that Appellant is suggesting as

improbable the notion "that because Gary was a bank robber, he must have had enemies, then those enemies must necessarily have wanted to kill him." (RB 56.) It is, however, beyond speculation that Alan Hunter and Chris Moreno, members of the Palm Oaks Crips, were arrested during robberies planned by Gary, while Gary watched from afar and got away. (RT 2395-2410, 2556-68, 2574-2603.) It is beyond speculation that these two Crips wanted to kill or rob Gary at the time of Gary's murder. (RPT 1463-64.) It is beyond speculation that the prosecutor had in his possession documentation that Gary had gang associations with, among others, the Mexican Mafia. (RPT 2410, 2760, 1462-64.) It is beyond speculation that there was at least one jealous boyfriend of Conya Lofton who threatened Gary just prior to Gary's murder. (RPT 2442-62.)

Had Prosecutor Ruiz not withheld documentation of these matters until the eve of trial, developing a viable third-party culpability defense would not have been speculative in nature. Indeed, it is Appellant's contention that it was Mr. Ruiz's carefully timed revelation of this information that was alone responsible for the defense's inability to determine the import of this information. In addressing the State's obligation to provide exculpatory evidence, are we then to ignore the Supreme Court's teachings that the State has an affirmative obligation to expose evidence favoring the defense, especially if that evidence has the potential of exculpating the defendant (*Brady v. Maryland* (1963) 373 U.S. 83, 90.) It seems as though Respondent encourages such practice. Appellant strongly opposes Respondent's efforts to dismiss as purely speculative such compelling evidence as the established relationship between Gary, Hunter, and Moreno. Further, Appellant does not concede that it is nothing more than conjecture that Gary's past, evidencing association with known gang members, is something that would not have begged for further scrutiny by Robert's counsel in preparing his defense. Respondent, however, speculates, suggesting that nothing in these undisclosed reports could have assisted Robert's

case. Respondent decided that identifying particular individuals with specific motives to kill Gary at or about the time of Gary's murder would be of no assistance to the defense. (RB 51-59.) Further, even if the evidence of third-party culpability were not found to be wholly exculpatory, suppression of such information was still material to Robert's ability to present a complete defense. (*Cone v. Bell* (2009) 129 S.Ct. 1769, 1773.)

Respondent is in the unenviable position of continuing to have to defend the extensive history of Prosecutor Ruiz's shameful record of discovery obstruction and delays. For many years, Mr. Ruiz had in his possession the bulk of the information set forth above, and yet Robert had to rely upon pure happenstance that defense counsel would inadvertently come upon documents detailing significant third-party culpability in Mr. Ruiz's files.[6] Just months prior to the eventual trial date, the particulars identifying third parties with a motive to kill Gary were finally turned over to the defense. (RT 1431-33.) The timing of the turnover was problematic in two ways: First, seven years had elapsed since Gary's murder, and such an extensive time lapse would make efforts to locate those individuals who wanted Gary dead at least difficult; second, the late disclosure of information relating to third parties, taking place immediately prior to trial, precluded entirely the opportunity for defense counsel to engage in a meaningful investigation of Gary's identified co-conspirators. Further, this delay prohibited defense counsel's integration into Robert's defense of any potentially important information relating to third-party culpability that might have been found to exist.

Respondent attempts to defend Prosecutor Ruiz's conduct by focusing attention on a prosecutor's duty, or lack thereof, to obtain exculpatory information from other government

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[6] It was on April 23, 2002, that Attorney Cormicle, in the throes of reviewing prosecution materials, quite by chance came upon an FBI report, four pages in length related to Robert Scott and Gary's collaboration in a number of robberies.

agents on behalf of the defense. (RB 51-54.) However, the duty to *obtain* information is fundamentally different from a duty to *disclose* information the prosecutor already knows to exist or already possesses. From Mr. Cormicle's *ex parte* statements on April 25, 2002, the court was made aware of Mr. Ruiz's knowledge and possession of documents specifically relating to *Brady* material.[7] While Respondent asserts that Robert cannot show that Prosecutor Ruiz's discovery failure denied him production of possibly material and favorable evidence to a third-party culpability defense, Robert's inability to demonstrate such evidence, if it did indeed exist, was the result *only* of Prosecutor Ruiz's hand in what had now become his trademark gamesmanship in relation to producing or retaining discovery materials. Respondent declares that Prosecutor Ruiz was never "required to go on a fishing expedition for purposes of attempting to ascertain if Gary had enemies who may have wished to kill him." (RB 52.) However, Appellant asserts that turning over information the State already had in its possession hardly invoked any degree of exploratory or investigative exertion on Prosecutor Ruiz's part. Mr. Ruiz's failure to turn over *Brady* material in a timely manner denied Robert the opportunity to adequately investigate the information and mount a viable third-party defense. Consequently, Appellant contends that Prosecutor Ruiz's conduct unquestionably compromised Robert's due process right to receive a fair trial guaranteed to him by the Fourteenth Amendment.

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

ARGUMENT III

THE STATE'S FAILURE TO PROVIDE DISCOVERY OF MS. LOFTON'S WHEREABOUTS VIOLATED *BRADY* STANDARDS AND HENCE THE DUE-PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The defense's ability to challenge Ms. Lofton's veracity and the credibility of her testimony was a primary issue at Robert's trial. If Lofton's testimony were believed, then Robert would be convicted; if she were deemed incredible, Robert would be acquitted. Respondent's defense of the court's denial of access to Ms. Lofton offers three arguments while simultaneously failing to address the statutorily prescribed remedy for *precisely* the circumstances present in this case, specifically, that, pursuant to §1054.2, the requested information would be turned over only to defense counsel, who, as an officer of the court, would be obligated not to disclose the information to Robert.

In addressing Respondent's arguments, Appellant submits that Respondent, without necessarily misrepresenting the circumstances, nevertheless implied that any alleged threats against Conya Lofton were directly attributable to Robert. Respondent states on page 63 of his brief that "[i]n his sworn statement, Pradia provided that 'three men had unsuccessfully attempted to kill Conya L. by slitting her throat.'" Indeed, at the preliminary hearing and at trial, Ms. Lofton so testified, subsequently identifying Robert as one of the three men. [cite] However, as crafted in Respondent's brief, the language invokes at the very least the suggestion that at some point, but well after the murders, three men, including Robert, in fact attempted but failed to kill Lofton. This is misleading in that it implies that after the day of the murders Robert sought out and attempted to kill Ms. Lofton. On page 64 of Respondent's brief, Respondent wrote that Ms. Lofton, while addressing the court prior to trial, "indicated 'all the time' Williams sent her stressful messages and that she was routinely warned that Williams was eager to ascertain her

current address." Once again, as presented in Respondent's brief, this statement appears to suggest that Robert directly threatened Ms. Lofton. In fact, however, nothing could be more inaccurate. In order to accurately quote Conya Lofton and fairly contextualize her direct knowledge of any death threats, one only needs to consider the following statement: "People tell me all the time that the defendant has asked about my whereabouts. He inquires about my whereabouts. And he sends messages through other people to give to me." (RPT 1478.) Even to the extent that Ms. Lofton can be believed, this statement is a far cry from Respondent's implication that Robert at any time directly threatened her. The reality is, of course, that just as there were no death threats attributable to Robert, there was no direct communication between Robert and Ms. Lofton from which any reasonable claim that Robert threatened Ms. Lofton's life could arise. Apart from Ms. Lofton's above-referenced statement, the only evidence that she received death threats was in Detective Pradia's declaration where he contended that he "believ[ed] the death threats to be very real...." (4 CT 909.) However, Detective Pradia makes no mention of how these threats were delivered, nor at any time does he indicate who delivered them. The alleged threats, in sum, were to be viewed as analogous to backroom grumbling, and, as a result, should carry no weight.

Respondent's second argument in defense of the court's decision to bar access to Ms. Lofton is that had the court given defense counsel access to Ms. Lofton, then "it was unlikely that the defense could have gathered much 'reputation in the community' evidence even if provided that address," which it could have used to impeach Lofton. (RB 65.) Prosecutor Ruiz unequivocally concedes that one of the duties of the defense is to impeach the witness. (RPT 622.) Mr. Ruiz further acknowledged that a standard procedure by which to impeach a witness is by talking to members of the community where the witness lives in an effort to ascertain his or

her reputation within that very community. Such a procedure is a tried-and-tested manner by which to uncover whether or not a witness is inclined towards truth and honesty. (RPT 622.) Mr. Ruiz then went on to state that the defense has a right to adequately cross-examine a witness, an efficient cross-examination necessarily requiring thorough investigation of the witness's background. (RPT 623.) Of course, because the State denied Robert access to Conya Lofton, it remains entirely unknown what might have been learned had such an investigation been undertaken. Respondent finished this curious line of defense by arguing that since the defense already had some impeaching material on Ms. Lofton, then it logically followed that additional impeaching material was unnecessary, stating that "Williams was provided detailed information regarding Conya L.'s criminal history." (RB 64.) To assert that such material as provided should be more than sufficient to establish Mr. Lofton's true character, and that providing further materials to defense counsel would be nothing more than redundant, renders Respondent's proposition a difficult argument at best.

Respondent's third argument defending the court's decision to withhold from defense counsel the means to effectively prepare for the cross-examination of Ms. Lofton was that there was ample corroboration of Ms. Lofton's identification of Robert as one of the individuals involved in the murders. Respondent offers this argument in an attempt to rebut the notion that Ms. Lofton was, in essence, the whole of the prosecutor's case against Robert. Even Prosecutor Ruiz admitted the importance of Lofton's testimony, saying that his case "hing[ed] substantially, if not entirely, upon her [Lofton's] identification" of the individuals responsible for the crime. (RT 39.) Respondent, in attempting to pursue this strategy, chose to offer facts corroborating the claim that a crime did indeed take place, while failing to admit that the real issue was corroboration of Ms. Lofton's identification of Robert. To be very clear, there was absolutely no

corroboration of Ms. Lofton's identification of Robert. There were no other witnesses to the murders and no forensic evidence linking Robert to the murders. (RT 2996.) There was no physical or testimonial corroborating evidence to support Mr. Lofton's identification of Robert; consequently, her veracity and the reliability of her identification of Robert were issues of central concern throughout the investigation, pretrial, and trial.

Respondent, in defending the trial court's decision to bar access to Ms. Lofton, relied on this Court's decisions in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121 and *People v. Panah* (2005) 35 Cal.4th 395. While Respondent is correct in stating that *Alvarado* and *Panah* allow for withholding witness information from the defense in certain circumstances, these cases differ from the facts at hand in that in both cited cases there were credible allegations of potential injury to the witnesses. In *Alvarado*, not only were there credible connections between the defendant and the Mexican Mafia, a well-organized group known for eliminating those witnesses who cooperate with authorities, but each of the three witnesses were incarcerated in the same facility as the defendant and, further, one witness had already been physically attacked. (*Alvarado*, 23 Cal.4th at 1129.) In *Panah*, the prosecution obtained information that the defendant conspired to murder two witnesses, information that was credible enough to cause the prosecution to launch an investigation into the matter using an informant. (*Panah*, 35 Cal.4th at 455-56.) Unlike these two cases, and the clear link between the defendants and the threats, there was no credible evidence linking Robert directly to the threats made to Ms. Lofton. As such, the withholding of Ms. Lofton's information from the defense was improper and cannot be supported by the cases relied on by Respondent.

Finally, any potential concerns for the safety of Ms. Lofton could well have been addressed by providing her information solely to Robert's counsel. Most notably, Respondent

failed to show how disclosure of Ms. Lofton's whereabouts to *only* the defense counsel would in any way increase her risk of harm. Pursuant to §1054.2, defense counsel is prohibited from disclosing information regarding witnesses, obtained through discovery, to the accused. Further, there was no credible link shown between the threats made to Ms. Lofton and Robert or his counsel. The alleged threats Ms. Lofton received originated from a third party; consequently, it is more than conclusory to presume that discovery given to Robert's counsel would have increased any risk for Ms. Lofton from an unknown, unaffiliated third party. There was simply no "good cause" here to support the nondisclosure of her information to Robert's counsel.

The provision allowing disclosure of witness information to counsel *only* under §1054.2 adequately protects the witness while preserving the defendant's constitutional rights to confront and cross-examine witnesses. Ms. Lofton was not only a witness in the case against Robert, but she was the critical witness, one whose veracity and reputation were essential to the jury's determinations. As such, it was the defendant's right to the discovery of her information in order adequately to prepare for trial and cross-examination. Without a clear showing that such disclosure under §1054.2 would have placed her in any greater danger, the defense could and should have been allowed access to Ms. Lofton's whereabouts.

ARGUMENT IV

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

Once again, Respondent has mischaracterized Appellant's argument in an attempt to justify the state's refusal to supply Robert information with the potential to generate an effective line of cross-examination. Respondent writes, "Williams argues that the above cases support the

conclusion that criminal defendants must always (not withstanding Penal Code, § 1054.7) be provided the current addresses of all prosecution witnesses, including those threatened with death...." (RB 68.) Respondent's characterization is troubling in that it is not only inaccurate, but further that it posits an absurd position that there must be disclosure of witness whereabouts even when the witness is threatened with death. To be clear, it is Robert's position that if it had been established that credible threats were made by Robert and directed at Ms. Lofton, that it would indeed be foolhardy to disclose Ms. Lofton's whereabouts. However, there never existed any credible link between Robert and the threats allegedly made to Ms. Lofton. Consequently, Penal Code § 1054.7 and this Court's holding in *Alvarado* are inapplicable.

Furthermore, Respondent's reliance on *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 and *People v. Hammon* 15 Cal. 4th 1117 in no way supports denying the defense access to information with the potential to aid their client's defense. *Ritchie's* lead opinion states that trial courts have the right "to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." (*Id.* at p. 52.) In Robert's case, the issue of restricted questioning never even evolved because the defense was denied the opportunity to effectively investigate Ms. Lofton, and thus any concerns about restricting questions never materialized. The trial courts in both *Ritchie* had the advantage of having the evidence before them and were thereby able to evaluate fully its value in relation to their defense. Here, without inquiry having been made into Conya Lofton's reputation in her community, there was no way for the court to independently evaluate any potential value inherent in the information that could be garnered by disclosing her address. The trial court's ability to evaluate the materiality of available evidence in *Ritchie* and *Hammon* ensured that those defendants would not be unduly restricted from effective cross-examination because their trial judges could independently

determine if such evidence would lead to meaningful cross-examination. Robert's trial judge had no such evaluative opportunity, and, consequently, if providing Ms. Lofton's address might have led to development of an effective line of cross-examination, the arbitrary denial of that address denied Robert a chance to pursue that line of inquiry.

ARGUMENT V

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

As established throughout the trial, Conya Lofton was the primary witness in Robert's capital trial and as such, defense efforts to investigate her character and question her credibility were critical. Yet as set forth in Arguments III and IV, the State effectively stymied most efforts to investigate Ms. Lofton, her family, friends, co-workers, associates, and neighbors. Despite the best efforts of the prosecutor to block access to any part of Ms. Lofton's life, however, *some* information reflecting on her character and credibility was obtained by the defense.

The information the defense was able to unearth included 1989 and 1991 welfare fraud convictions, a warrant issuing from the second conviction for failure to pay a fine, Ms. Lofton's lie about her failure to pay the fine, two instances of providing false information on employment applications, a Medi-Cal fraud conviction, and providing false information to a state licensing board. (CT 6332-33; RT 3122-39.) Of these, the defense was specifically precluded from cross-examining Ms. Lofton on the 1994 warrant that issued from the 1991 conviction and her lie in attempting to explain why she failed to pay a fine that issued from that warrant. (CT 6332-33; RT 3098.)

Respondent's efforts to rebut the limitations placed by the court on the examination of Ms. Lofton create some factual confusion. To be clear, the court permitted the defense to prove

the underlying facts of the 1994 welfare fraud warrant but only with a significant caveat. Specifically that such an inquiry might, according to the judge, "open some doors" regarding evidence that Ms. Lofton might have been threatened by Robert. (RT 3098.) Given such a warning the defense was effectively precluded from the inquiry. Consequently Respondent's implication that "Williams' trial counsel elected not to introduce evidence of the subject warrant..." is misleading. (RT 71.) The court's ruling, not counsel's decision, was the determining factor.

Following the defense's restricted examination of Ms. Lofton, Prosecutor Ruiz effectively mitigated much of the impeachment. He solicited from Ms. Lofton that she bore a child out of wedlock at age seventeen with a "dead-beat" father, that she had no parental financial assistance, and that her ensuing legal problems all resulted from her dire financial straits. (RT 3128.) Through Mr. Ruiz's examination of Ms. Lofton, she was portrayed to the jury as a young single mother, all alone and trying to do the best she could for her baby. Mr. Ruiz's rehabilitation effectively blunted the defense impeachment of Ms. Lofton and may even have enhanced her character in the eyes of the jury.

It is Appellant's position that defrauding the welfare system in order to obtain financial and medical assistance when undertaken by a seventeen year old girl for the sake of her child is markedly different than lying about not being able to pay a fine when one has the means to pay. As to the former, the jury could well conclude Ms. Lofton's actions were understandable in that they were directed to feeding, clothing, sheltering, and obtaining medical services for her baby. The latter, however, is in truth about attempting to protect herself from punishment. At the time the warrant was issued for failure to pay the fine, Ms. Lofton was twenty, not seventeen, and even then it took her more than three years to comply with the court's order to pay. (RT 3138-

39.) The defense proffered that Ms. Lofton lied when she claimed she did not have the money to pay the fine, even though she had ample resources to comply with the court order. (RT 3139.)

Respondent, while in essence agreeing to the essential facts, attempts to muddy the issue by stating: "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 ...." Such a characterization fails to strike the point. The cross-examination point that was denied was that Ms. Lofton *lied* about not having money to pay the fine. Questioning on this precise point most certainly would have called Ms. Lofton's ability to be a truthful witness into question. The court however disagreed, "We're not going to get into that." (RT 3139.) Yet despite the court's ruling specifically limiting of cross-examination, Respondent asserts that, "No meaningful limitations were placed on Williams' ability to cross examine Conya L. or to tenaciously attack her credibility using her criminal history." (RB 67.)

The real thrust of Respondent's argument is that there was ample evidence, *apart* from this particular lie, to establish Ms. Lofton as a liar and as such, her lie about not having the funds to pay was unnecessary to establish her true character. Respondent writes, "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 . . . ." (RB 72.) In essence, Respondent is arguing that the defense was attempting to pile on the fact that the disclosure about the lie concerning her inability to pay was unnecessary, since she was already a liar in the eyes of the jury. However, the reality was that the only truly impeaching evidence was the lie about the failure to pay the fine. The material the defense was permitted to use did not accurately portray her character. Ms. Lofton had progressed from a destitute teenage mother to a woman with the

funds to meet her obligations, and yet she refused to do so and then offered a lie to explain her behavior. This was the only conduct that fully communicated her *true* nature as an untrustworthy witness.

ARGUMENT VI

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

Respondent's claim that Robert "forfeited his right to challenge the revocation [of his *Faretta* rights] because the record shows that he acquiesced to the revocation" is without merit and is not supported by the record. To claim Robert acquiesced to losing something he had fought to gain and for which he continued to fight is to ignore his efforts during the ten months of his self-representation during which he battled for discovery and worked to secure an expert witness and an investigator. In contesting Prosecutor Ruiz's efforts to have his *Faretta* status revoked Robert made his position to continue his self-representation clear:

> As far as our trial date stands now, I am ready to go to trial... I know my case... I know I'm in over my head, but the only reason I want to fight my case, because I don't want to go to trial with somebody like Mr. Gunn that don't have knowledge of the case, and go through arguments like this.

(RPT 1338-42.) These are not the words of someone acquiescing to forfeiting his right to represent himself. Rather these are the words of a man ready for trial, though fully aware of his inadequacies. Respondent seems to assert that because Robert was "over my head" he had somehow waived his *Faretta* rights, however as the Court advised in *Faretta*, "a defendant need not himself have a skill and experience of a lawyer in order to competently and intelligently choose self-representation." (*Faretta*, supra, 835.) Acknowledging that he may not have been up to the task was no revocation. Furthermore in the court's remarks in revoking Robert's *pro se*

status, he made it clear that revocation was due to Robert's alleged delay tactics not due to any acquiescence on Robert's part. "All of these have been delay tactics. And I'm going to remove him from his proper status." (CT 1354; RPT 1335-51.) Accordingly the issue is drawn and the issue is not about Robert's acquiescing to revocation but rather about the propriety of the court's decision in terminating Robert's constitutional right to self-representation.

Turning to the merits of the issue, it is Respondent's primary premise in asserting that the revocation of Robert's right of self-representation was proper depends on the notion that Robert intentionally delayed the trial. Indeed, several of Robert's claims are dependent on this Court's determination as to where the fault lies regarding the numerous delays which extended the pretrial period to eighty-three months. Robert is confident that following this Court's review of the pretrial, it will recognize that the bulk of the pretrial delay was caused by the prosecutor and the trial judge and that the trial court's revocation of his right to self-representation was erroneous.

Robert's ten-month period of self-representation began on August 16, 2000, and ran through June 28, 2001. (CT 1354; RPT 1335-51.) The court's comment upon taking Robert's waiver of counsel is significant: "One of the reasons for wanting to represent himself, because he wants to get it [his case] to trial...." (CT 1162; RPT 1120.) This comment is crucial in understanding the events that played out over the next ten months and speaks to Robert's desire to get his case to trial without delay, as opposed to Respondent's assertion that Robert was engaged in dilatory tactics throughout his ten-month *Faretta* period.

At the time of Robert's *Faretta* appointment on August 16, 2000, his trial was set for February 2, 2001. That six-month period leading up to the trial date was completely consumed by the State's discovery failures, yet Respondent attempts to deflect notice of these discovery

failures by instead addressing Robert's squabbles with his standby counsel. (RB 45-46.) As the record makes abundantly clear, when Robert was finally forced to seek a new trial date on April 3, 2001, the sequence of events clearly indicates that the blame for that continuance was *solely* on the prosecutor and in no way caused by any conflict between Robert and standby counsel. On October 6, 2000, one and-a-half months after his appointment and with a looming trial date of February 2, 2001, Robert had still not been provided the discovery that Mr. Ruiz had previously said he would provide. (CT 1167-72; RPT 1153.) At that hearing, Robert's standby counsel Mr. Gunn noted that Mr. Ruiz, despite previously representing that he would "make a whole new set of discovery," failed to provide that discovery. (RPT 1139, 1154.) Mr. Ruiz, not Robert, sought and received a continuance of the October 6 discovery hearing to November 3, 2000, in order to meet his discovery obligations. (CT 1173-74; RPT 1161.) Respondent, in referring to that same October 6, 2000, discovery hearing, failed to address the primary focus of that hearing, specifically, discovery. Instead, Respondent discussed Robert's interaction with his investigator and with defense counsel Mr. Gunn, while completely ignoring Mr. Ruiz's discovery delay. (RB 74.) It is noteworthy that Robert's concerns about Mr. Gunn and his investigator had no impact on any delays in getting the case to trial, whereas the discovery delay caused by Mr. Ruiz was the sole cause of the continuance.

At the next discovery hearing, on November 3, 2000, two and-a-half months after obtaining *Faretta* status, Mr. Ruiz was not present, and it was represented that he was ill. Accordingly, on the State's motion, the discovery hearing was continued another three weeks to await Mr. Ruiz's return. (CT 1177-78; RPT 1162-65.) At the November 22, 2000, discovery hearing, a stand-in prosecutor represented that Mr. Ruiz would be out "another 3 to 4 weeks." (CT 1179-80; RPT 1170.) The judge directed the stand-in prosecutor to provide discovery. (CT

1179-80; RPT 1171.) The court's directive went unheeded, as no discovery was forthcoming. Respondent, in his brief, failed to address any of the circumstances of either hearing, neither the delays caused by Mr. Ruiz's absence nor the state's failure to make any arrangement for discovery that Mr. Ruiz had previously promised to provide.

On January 4, 2001, six weeks after the judge's discovery admonition and four and-a-half months into Robert's self-representation, no discovery had been provided, and Mr. Ruiz had still not appeared. With the February 2, 2001, trial date rapidly approaching, a clearly frustrated judge urged the State to appoint another prosecutor and again commented on the State's discovery failure. (CT 1182; RPT 1175-76.) Once again, Respondent in his brief opted to completely ignore this hearing, which again focused entirely on the discovery delays caused by the prosecutor.

Mr. Ruiz reappeared on January 12, 2001, five months post-*Faretta.* During Mr. Ruiz's two and-a-half month absence no discovery had been provided. (CT 1175-91; RPT 1112-88.) Respondent's only comment regarding this hearing was a note that "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." (RB 75.) Note that Respondent in no way states that the delays were at the instance of Robert, and further note that there is no allegation of any dilatory conduct by Robert. At the hearing, Mr. Ruiz acknowledged, "I don't have [a] problem with any of the items Mr. Williams is seeking . . . ." (CT 1183-91; RPT 1178-93.) With the February 2, 2001, trial date less than three weeks away, and still without the discovery that had been promised since Robert's appointment as his own counsel, Robert was forced to request a trial continuance to April 3, 2001. (CT 1207; RPT 1196-1212.) The court,

acknowledging that the case "has been dead in the water...," again admonished Mr. Ruiz: "Don't wait until we come back to court to get them [discovery] to him." (CT 1183; RPT 1178-86.)

On January 26, 2001, Mr. Ruiz provided some discovery but failed to turn over two taped interviews, demanding Robert first provide payment. (CT 1204; RPT 1192-93.) Five days later, on January 31, 2001, the court attempted to transfer discovery obligations from Mr. Ruiz and ordered the District Attorney's investigator to facilitate what Mr. Ruiz could or would not do. (RPT 1335-51.) The efforts proved futile, unfortunately, and there was no indication the investigator initiated any contact with Robert. In addition, Robert could not complete any of his collect calls from jail to the investigator. (CT 1210; RPT 1241.)

A month later, February 23, 2001, because no discovery had yet been provided, the court ordered Robert to resubmit his discovery list to Mr. Ruiz. (CT 1208; RPT 1213-19.) A further three weeks later, on March 16, 2001, following Mr. Ruiz's withholding of Robert's arrest clothing and the test results of that clothing, Robert was again forced to seek a trial continuance from a trial date just three weeks hence. The court agreed and set the new trial date of June 4, 2001. (CT 1234-40; RPT 1228-52.) Instead of addressing the true causes for this continuance, Respondent again attempts to deflect the issue by discussing Robert's efforts to disqualify the trial judge and to recuse Mr. Ruiz. (RT 75-76.) Two observations are warranted: in the first place, neither effort delayed the trial date, and secondly, the motion to recuse Mr. Ruiz was warranted in light of his conduct, including his discovery failures and misrepresentations. (*See* AOB fn 26, 27, and 28.) In fact, Mr. Ruiz's claim regarding the testing of Robert's arrest clothing proved false. In March and April, 2001, following Robert's allegation that the clothing had been located and tested, Mr. Ruiz announced the "discovery" of a bag containing the clothing as well as test results establishing that no blood was found on the clothing. (CT 1251-

54; RPT 1281-84.) Given the subsequent events, Respondent's implication that Robert's efforts to recuse Mr. Ruiz as frivolous prove groundless. (RB 75-76.)

As late as April 17, 2001, eight months into Robert's ten months of self-representation, and now less than six weeks from the June 4, 2001, trial date, yet more discovery problems had surfaced. Mr. Gunn represented that in the seven boxes just turned over by Prosecutor Ruiz, "some things were missing." Mr. Ruiz responded that he would make those items available within the week. (CT 1258; RPT 1299-1311.)

Three weeks later on May 1, 2001, with the new trial date a month away, Mr. Gunn represented that the second stand-by counsel, Mr. Cormicle, could not be present until July. The judge asked Robert if he would be willing to reset the trial date for late July, to which Robert responded, "I didn't come here to request no time. I didn't ask for no continuance. I said, if you are going to continue it, I wouldn't oppose it." (RPT 1315.) The court then specifically inquired if Robert needed a continuance, to which he replied that he did not. (RPT 1315-16.) Nonetheless, the court continued the trial to July 30, 2001. (CT 1336; RPT 1312-27.)

Ironically, on June 28, 2001, Mr. Ruiz, whose illness from the proceedings and whose discovery obstructions had pushed back the trial claimed that Robert was engaged in "delay tactics" and urged the court to terminate Robert's *Faretta* status. (CT 1354; RPT 1335-51.) Robert responded by stating he was ready for trial and assured the court he was not seeking to continue the trial date. (CT 1354; RPT 1335-51.) Nonetheless, the court acquiesced to the prosecutor and revoked Robert's self-representation.

Self-representation is constitutionally protected. It shall not be terminated unless there is "serious and obstructionist misconduct." (*Faretta*, 422 U.S. at 834-35.) It cannot be seriously entertained on the record of this exhaustive pretrial and, in particular, of these ten months of self-

representation, that Robert's conduct was disruptive, let alone seriously disruptive, or that his conduct during those ten months threatened the core integrity of the trial. The record illustrates a defendant whose active participation in his own case revealed his desire to get to trial as quickly as possible. The trial judge erred in terminating Robert's self-representation and, as a result, Robert is entitled to a new trial.

ARGUMENT VII

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

Respondent's argument that Robert's right of self-representation was not violated by standby counsel's conflict with Robert is two-fold. First, there is no right of conflict-free standby counsel, and second, that even if there was such a right, since the conflicted counsel "never took meaningful control of the case," no harm occurred.

Mr. Gunn was first appointed as counsel for Robert on September 2, 1999. (RPT 1024-25.) Frustrated by his three denied *Marsden* motions, Mr. Gunn's lack of preparation, and a desire to get to trial, Robert brought a *Faretta* motion on July 14, 2000. The *Faretta* motion was granted on August 16, 2000, and Mr. Gunn was directed to remain as standby counsel, an action that Robert objected to on multiple occasions. (CT 1154, 1162; RPT 1094, 1103-49.) On October 5, 2000, Robert informed the court of his pending civil suit against Mr. Gunn for professional negligence. Though the court refused to remove Mr. Gunn at that time, Robert continued in his efforts to have Mr. Gunn removed as standby counsel on May 1, 2001, and again on June 15, 2001. (CT 1336, 1340-43; RPT 1328-29, 1335.) Robert argued that his civil suit against Mr. Gunn created a conflict of interest between them:

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

(RPT 1336.) Further, Mr. Gunn himself indicated that he too was concerned about a possible conflict with his remaining as standby counsel for Robert:

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

(RPT 1337.)

On June 28, 2001, Mr. Ruiz moved to relieve Robert of his *pro per* status, which the judge granted. (CT 1354; RPT 1335-51.) Following the revocation of Robert's *pro per* status, the court once again appointed Mr. Gunn as trial counsel. However, six weeks later, on August 20, 2001, Mr. Gunn once again raised concerns about "continuing the representation of [Robert], partly due to the malpractice suit that .... [Robert] filed against [Gunn]." (CT 1358; RPT 1365.) In declaring a conflict of interest, Mr. Gunn cited a change in law affecting his representation of Robert:

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

(RPT 1365-66.) The court acquiesced and appointed Mr. Cormicle as counsel for Robert. (RPT 1371.)

Respondent's assertion that there is no recognized right to conflict-free standby counsel is problematic. In essence, Respondent's position is that standby counsel's loyalties to and efforts on behalf of his client are irrelevant. Can it be Respondent's position that the only role of

standby counsel is to step in as counsel should the accused be stripped of his *Faretta* status? Are we to ignore the teaching of the Washington Supreme Court in *State v. McDonald* (2001) 143 Wash.2d 506, 511-12, that "standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege....." Further, are we to ignore the Supreme Court of the United States' definition of the role of standby counsel, that "the trial court has the authority to appoint standby counsel ... to explain court rulings and requirements to the defendant and to assure a defendant lacking in legal knowledge does not interfere with the administration of justice." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-78.) Standby counsel is considered to be a type of advisory counsel, one that is appointed by the court in order to be present during proceedings in an advisory capacity and to step in if the defendant's self-representation is terminated. (*Faretta*, 422 U.S. at 834 n.46; *McKaskle*, 465 U.S. at 177-78.)

To underscore Mr. Gunn's involvement, he was continuously active in the proceedings during his time as standby counsel. He was appointed to potentially step in if needed, and in this case, when he was appointed the trial court stated, "[O]bviously, I have appointed standby counsel because I think there is a better chance that you [Gunn] or Mr. Cormicle are going to end up trying this case." (RPT 1319.) Are we to deny a defendant the loyalty generally expected of counsel when it is situated in this role? Whether actively advising Robert or merely on the sidelines, the trial court appointed Gunn to step in should Robert's self-representation status end. Gunn had to be alert and aware and committed to his client to be ready to step in. Respondent's position that a conflict of interest would not interfere with this duty simply does not comport

with constitutional law in place to protect a defendant's right to conflict-free representation under the Sixth Amendment.

Failing to make the case that standby counsel need not be conflict free, Respondent falls back to the State's default position that the court's error in not appointing conflict-free standby counsel was harmless because the "conflicted attorney never took meaningful control of the case once William's *pro se* rights were terminated." (RB 83.) Mr. Gunn took over the case on June 28, 2001, and was finally conflicted from the case on August 20, 2001. Mr. Gunn's representation, both as counsel and as standby counsel, comprised 23 months and several significant developments, including numerous discovery obstructions by Prosecutor Ruiz. With a civil suit looming, Mr. Gunn's representation of Robert was significantly impaired—had Mr. Gunn effectively represented Robert during the pretrial period, and had the court ruled in Robert's favor, Robert maintains he would have been acquitted and would have prevailed in his civil suit against Gunn. By the time Mr. Gunn finally convinced the court to be relieved as Robert's attorney and appoint Mr. Cormicle in his place, the prejudice resulting from Mr. Gunn's participation in Robert's defense had already been realized.

ARGUMENT VIII

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

The acknowledgement of both this Court and the United States Supreme Court that prospective jurors sometimes initially demonstrate confusion about the intricacies of capital trials was all but lost on the trial judge while entirely ignored by the Respondent. In turn, both the trial judge and Respondent failed to heed the advice that merely experiencing initial concern or

hesitancy about their ability to impose a death sentence does not disqualify jurors from sitting on capital cases. (AOB pg. 139, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 653.)

In an ideal world, prospective jurors would respond to inquiries as to their ability to mete out a death sentence with a simple and direct, "Yes, I can impose the death penalty." The reality, as recognized by the United States Supreme Court, is that many prospective jurors struggle with such a query. For the first time in the experience of many citizens, they are forced to confront their feelings vis-à-vis capital punishment when pushed up against the hard reality of a death penalty trial. Prospective jurors with responses evidencing thoughtful concerns and even some initial hesitancy should be valued in sitting in judgment of life and death. Some angst and even some initial equivocation is often the norm and can never be the basis for disqualification. As the United States Supreme Court instructed in *Adams v. Texas* (1980) 448 U.S. 38, 50, to exclude a juror "where his only fault was to take [his] responsibilities with special seriousness" and who might harbor an inability to state positively whether or not his deliberations would be "affected" by the possibility of the death penalty, violates the *Witt* standard. (*Wainright v. Witt* (1985) 469 U.S. 412, 417.) Confusion, hesitancy and apprehension can cloud a prospective juror's initial response but is not necessarily determinative as that prospective juror works through the process with the assistance of inquiries from court and counsel. Most prospective jurors, even though it may be sometimes difficult, will come to understand their feelings and recognize whether they can follow the law. It is at the conclusion of the inquiries when critical decisions are made as to which prospective jurors are qualified to sit in these special trials and which are irrevocably opposed and thus unqualified to sit.

In excusing Prospective Jurors Wood and White, both African-Americans, from the capital trial of African-American Robert Williams, the trial judge not only failed to follow the

Witt standard that to disqualify a juror, his view must "prevent or substantially impair the performance of his duties..." (*Id.* at 424.), but further failed to adhere to the *Witt* admonition that some initial confusion and uncertainty are to be expected and should not necessarily be determinative. (*Id.*)

During initial questioning, it emerged that Mr. Wood did have some concerns about the death penalty but never concerns that evidenced an irrevocable unwillingness to follow the law. (RT 1400.) Respondent selectively pulled out responses that Mr. Wood made under questioning by the court without regard to the full thrust of that exchange and then summed up the exchange between the court and Mr. Wood as follows: "he [Mr. Wood] could not give the court his assurance that he could impose death under any circumstances." (RB 87.) Respondent's characterization ignored Mr. Wood's assurance that "if it's a heinous crime, probably. I don't know. But I can't just put it in cement, yes or no." And when further pressed by Prosecutor Ruiz as to whether he could vote for death if "warranted under the facts and the law," Mr. Wood replied, "[Most] likely I could if it's a heinous crime." (RT 1400.) In a death penalty scenario, a limitation to only impose death in the event of heinous crimes is no limitation whatsoever and no indication that this man was "irrevocably opposed to capital punishment." The trial judge, in dismissing Mr. Wood, misstated the standard: "If a person cannot say they would be able to vote for death that would be proper grounds for cause." (RT 1405-07.) Had the judge instead applied the correct standard and recognized that it was never established that Mr. Wood demonstrated an irrevocable unwillingness to follow the law and obey his oath, Mr. Wood would not have been excused.

On her juror questionnaire, Ms. White, the other prospective African-American Juror challenged by Prosecutor Ruiz and excused by the court, expressed her initial reservation in

imposing the death penalty but then through oral questioning said, "I thought about it. I would be able to vote for the death penalty.... I don't want to condemn anybody to death, but if the evidence is overwhelming, as you say, and that has to be the sentence, then so be it." (RT 1288-89.) Despite her answer, Mr. Ruiz, in a dogged attempt to disqualify her, asked, "Ms. White, can you come in here and sentence this man to death, if you feel it's warranted?" She responded, "I believe I would have a difficult time." (RT 1405.) That response, coupled with her earlier "then so be it" comment, made it clear that while opting for death would be difficult, she was willing to do so. Difficult is not "irrevocably opposed."

Respondent's fallback position, that the reviewing court should give deference to the trial court, is only applicable when the trial court's "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.) The court's decisions to dismiss Mr. Wood and Ms. White were not supported by the record. Moreover, the trial court misstated the *Witt* standard, undermining the basis for deferring to the trial court's decisions to dismiss these jurors for cause.

These two Prospective Jurors brought honesty and candor to the courtroom as they struggled with the difficult decision that they might be called upon to make. To dismiss them was reversible error.

ARGUMENT IX

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

Prosecutor Ruiz's efforts to purge African-Americans from the jury continued into the peremptory phase of jury selection. Respondent, prior to defending the prosecutor's use of

peremptory challenges as demonstrating no purposeful racial discrimination, offers two main arguments. First, she suggests that "Williams' complaint on appeal regarding Prospective Juror McBrayer is specious since . . . the prosecutor never even exercised a peremptory challenge against [him]." (RB 92.) And second, Respondent asserts that defense counsel never brought a *Wheeler* motion concerning that challenge. While Appellant acknowledges that it was at a somewhat unconventional stage of jury selection when the peremptory challenges were made and the *Wheeler* motions brought and ruled upon, it is, however, absurd to now claim that the prosecutor did not peremptorily challenge Prospective Juror McBrayer or that defense counsel never raised a *Wheeler* concern.

Prosecutor Ruiz's peremptory challenge of Mr. McBrayer was a somewhat involved process which began when the court denied the prosecutor's "cause" challenge of him. (RT 1409.) In denying the challenge for cause, the court stated: "Although I fully understand why you people to--might want to stipulate to [McBrayer], one of you might want to challenge him peremptorily. His answers were sufficient that I can't, in good conscience under the law, grant a challenge for cause." (RT 1409.) Mr. Ruiz then inquired, "[b]efore we bring the jury in, I've talked with Mr. Cormicle. And I do anticipate that there may be a few *Wheeler* motions, how do you want to handle that, once we start exercising perempts?" (RT 1409.) The court responded: "Correct me if I'm wrong, that federal case says that it doesn't take a prima facie showing any more before we get to asking the DA, 'What is your reason for doing so?' [¶] Do you both agree?" Both counsel agreed. (RT 1409-10.)

The court then outlined the process to be used for dealing with peremptory challenges: "So I think the safest way to avoid harm to either side, is that if there's going to be a challenge

on an African-American . . . we should do that at sidebar so we don't earmark that juror." (RT 1410-11.)

> Mr. Cormicle: I'm still a little unclear on how procedurally you wanted it [making a *Wheeler* challenge] to be done, though. You want-- after he would make a challenge? (RT 1411.)
> The Court: Before he makes a challenge on an African-American, we'll do it at side bar. (RT 1411.)
> Mr. Cormicle: That's what I was going to talk about. (RT 1411.)
> Mr. Ruiz: Judge, maybe I can--see, part of the problem I think it's pretty clear that there's going to be some jurors that I'm going to kick. I have no problem *stepping out of the ordinary procedure* and identifying those individuals now so that we can take up that issue. (RT 1411.)
> The Court: I think Mr. McBrayer is going to be one. (RT 1411.)
> Mr. Ruiz: Yes. And based on his questionnaire, there is no way I could not perempt--make a peremptory challenge as to Mr. Hunter, Chris Hunter. (RT 1411.)
> The Court: You know what? (RT 1411.)
> Mr. Ruiz: Specifically later, whenever, you want me to. (RT 1411.)
> The Court: Actually, do you see any objection to talking about the ones he [Ruiz] anticipates making now so that you can make your record and make the [*Wheeler*] motion, either have it granted or denied? (RT 1412.)
> Mr. Cormicle: I would suggest we do it now and save the jury from all of us. (RT 1412.)

Mr. Ruiz then offered his reasons for peremptorily challenging Prospective Juror Hunter, followed by Mr. Cormicle's *Wheeler* motion. (RT 1412-15.) The court then specifically denied the *Wheeler* motion as to Mr. Hunter. (RT 1416.) Following the ruling, Mr. Cormicle, perhaps still somewhat vague on the process being instituted by the court, initiated the following exchange:

> Mr. Cormicle: Even though we have talked as if the *Wheeler/Batson* motion was made, I don't think I actually satisfied it so I need to formally say I'm making that motion. (RT 1418.)
> The Court: And I think--Mr. Cormicle, correct me if I'm wrong, that when he [Ruiz] makes the [preemptory] challenge, you don't need to do so. Is that correct? You agree with that? (RT 1418.)
> Mr. Cormicle: Yes.
> Mr. Ruiz: And I would agree that the defense has made those [*Wheeler* motion] when we could do it.
> The Court: That it's timely?
> Mr. Ruiz: Yes, I would agree.

The Court then questioned Mr. Ruiz as to whether there was anyone else he would like to peremptorily challenge. Mr. Ruiz answered there were others, and went on to challenge Mr. McBrayer: Yes. Judge, sorry. But I do have to make a peremptory challenge as to Mr. McBrayer: I won't belabor the point. He's the last juror up against the wall." (RT 1418.)

> The Court: I think it is excellent. You've already stated your reasons of the challenge for cause. You're welcome to add to it. I think you said everything that needs to be said. (RT 1418.)
> Mr. Ruiz: You'll remember I challenged him for cause not on the death issue, but on his bias against law enforcement. (RT 1418-19.)
> The Court: And on every different question.
> Mr. Ruiz: Correct. I would-- I would put the defense on notice that when we get to that individual [McBrayer] I would be making a motion. I would be making a peremptory challenge as to him. And we can take that issue up now with respect to Mr. Cormicle's concerns about my *Wheeler* activity. (RT 1419.)

The Court, in inviting Mr. Cormicle to make his *Wheeler* challenge, said "[y]ou're welcome to be heard if you'd like. I think you may have already said it [basis for the *Wheeler* motion]. But you can add to it if you like, sir." (RT 1419.)

> Mr. Cormicle: I'll submit it as to McBrayer. (RT 1419.)
> The Court: For the same reasons that I stated on Mr. Hunter --and actually might have said the same thing on Mr. McBrayer during the challenge for cause--that I find there's a race- neutral reason in my opinion for either side to challenge Mr. McBrayer. But at least in dealing with the *People's challenge--peremptory challenge*, there are more race-neutral reasons to challenge Mr. McBrayer that we went over on the challenge for cause than there is on Mr. Hunter. [¶] So I would deny the [*Wheeler*] motion for him also. (RT 1419.)
> Mr. Ruiz: Yes. I think those are the only ones [peremptory challenges]. The defense would want to make a motion and make a record. And I don't mean to speak for him. I could be wrong. And we'll take it up if I'm wrong." (RT 1420.)
> The Court: Okay. I think that's probably the cleanest way of doing it. I like that. I hadn't considered doing it that way. For the record, if that is for the record--if it gets to Mr. McBrayer, there's a challenge made for cause, the record is clear that Mr. Cormicle has made a *Wheeler* motion, and that it's been heard, and the court will deem that motion being timely, even though it was premature. (RT 1420.)
> Mr. Cormicle: Actually, a peremptory challenge. I think you said challenge for cause.

> The Court: Actually, a peremptory challenge. I think you're correct. I did say that. Actually I meant peremptory challenge. I think you're correct, I did say challenge for cause. (RT 1420.)

The following day after the conclusion of the new challenges for cause Mr. Ruiz was asked if there were any other challenges. He responded, "[n]o, but we probably want to talk about the *Wheelers* that are going to be coming up right now. As for cause, no others." (RT 1523.)

> The Court: Okay. If I remember correctly, we have Mr. McBrayer and Mr. Marshall. (RT 1523.)
> Mr. Ruiz: Judge, I am not going to be exercising a peremptory challenge as to Mr. Marshall. I do have substantial *Wheeler* concerns about No 8. currently sitting in No. 8. I will not--Fred Marshall, two 'L's.' I just don't feel safe going there as to Mr. Marshall. [¶] However--well, *obviously Mr. McBrayer* I won't even--I don't think I need to argue Mr. McBrayer being a valid peremptory, non-race-based reason." (RT 1524.)
> The Court: Mr. Cormicle?
> Mr. Cormicle: I thought he argued it [basis for McBrayer peremptory challenge] yesterday, actually. Did you not?
> Mr. Ruiz: I argued cause yesterday, I thought. Did I argue- -
> Clerk: You argued.
> Mr. Ruiz: --*Wheeler*?
> Clerk: Yes, on peremptory.
> Mr. Ruiz: Okay. Then I really don't need to argue it.
> The Court: I think Mr. McBrayer--I think that I found many good reasons based upon his answers that were totally race-neutral, and were also the same reasons that some of the non-African-Americans were used. I think we already did that.
> Mr. Cormicle: That's correct your honor. (RT 1524.)

Though somewhat convoluted and unconventional, it is clear that Prosecutor Ruiz had exercised a peremptory challenge as to Mr. McBrayer. (RB 92.) The record clearly reflects Mr. Ruiz's own words: "I do have to make a peremptory challenge as to Mr. McBrayer." (RT 1418.) Mr. Ruiz relied on the same argument he used to challenge Mr. McBrayer for cause. The court reminded Mr. Ruiz that he had already stated his reasons for challenge of cause and granted him a second opportunity to reiterate his reasons for the peremptory challenge. (RT

1418.) Furthermore, the second day of challenges Mr. Ruiz once again attempted to peremptorily challenge Mr. McBrayer and had to be reminded by both the clerk and Mr. Cormicle that he had already made and argued his peremptory challenge. (RT 1524.) The transcript therefore reveals not once, but *twice* that Mr. Ruiz challenged Mr. McBrayer peremptorily, in direct contradiction to what the Respondent claims.

Respondent's second argument fails as significantly as the first. Respondent argues that Mr. Cormicle never argued his first step of the *Batson/Wheeler* motion. Once again the trial transcript established that after Mr. Ruiz challenged Mr. McBrayer peremptorily, the court turned to Mr. Cormicle to make his *Wheeler* challenge. Addressing Mr. Cormicle, the court said, "[y]ou're welcome to be heard if you'd like. I think you may have already said it. But you can add to it if you like, sir." (RT 1419.) In response, Mr. Cormicle said, "I'll submit it as to Mr. McBrayer." (RT 1419.) Just as Mr. Ruiz relied on the same argument he used to challenge Mr. McBrayer for cause, Mr. Cormicle followed suit and relied on the argument he had made during the unsuccessful challenge for cause. Respondent's claim that Mr. Cormicle did not bring a *Batson/Wheeler* motion is simply wrong.

What is completely clear is that the court, prosecutor, defense, and even the clerk, all understood that Prospective Juror McBrayer had been peremptorily challenged and that the court had heard and ruled on the *Wheeler* motion.

Respondent then turned to the substantive issue of whether there were race-neutral reasons for the peremptory challenges of Prospective Jurors Hunter, Fleming, and McBrayer. (RB 99-100.) He maintains that Mr. Hunter's challenge was justified because he failed Prosecutor Ruiz's self-concocted "three strike system." Mr. Ruiz explained, "[i]f an individual hits what I think are three negative answers, regardless of race, the three strikes and you're out,

basically are the wisdom of my approach." (RT 1412.) He claimed Mr. Hunter struck out because one, he had relatives in prison, two, on the questionnaire he stated that African-Americans are "rarely treated fairly in our courts," and three, that he had relatives who were unjustly prosecuted. (RT 1412-14.) Curiously, all three of the prosecutor's strikes arose from one answer offered by Mr. Hunter. On his questionnaire, Mr. Hunter, based on a statement made by some of his relatives, opined that African-Americans are treated "unfairly" and "unjust" in the criminal justice system. (RT 1413.) Under questioning by the court, Mr. Hunter conceded that most people who have run afoul of the law believe they were treated unfairly. The court then inquired further about Mr. Hunter's questionnaire answer, indicating he harbored a "mild racist attitude." Mr. Hunter explained, "I think I marked the wrong box. I don't have any prejudice." (RT 1339.) Under further questioning from the court as to whether or not his race would affect his "ability to be fair to both the People and the defendant if the defendant's African-American," Hunter answered, "No, it would not." (RT 1361.) Prosecutor Ruiz then asked whether he could "trust this system enough to make a life or death decision and vote this person to death, if you feel it's warranted on the facts and the law?" Mr. Hunter replied, "Yes." (RT 1401.) Prospective Juror Hunter's responses, especially in light of his extended dialogue with the court, demonstrated an acknowledgement that his views on racial "fairness" were unfounded and even erroneous. Given his candid and thoughtful responses and his assurances that he could be fair to both sides, there was no legitimate race neutral justification to challenge this juror.

Mr. Ruiz justified his challenge of Prospective Juror Fleming by use of a process quite apart from his three-strike system. "[A]s to the strategy I'm using. It's no great secret. If there is any juror that indicated on that check list that they're either moderately anti-death penalty or

strong anti-death penalty, I've got a peremptory challenge left, I'm going to make it as to that juror." (RT 1524-25.)

The court probed the reasons Mr. Fleming wrote in his questionnaire that the death penalty was used "too often," to which Mr. Fleming replied, "[w]ell, I feel that in a lot of situations the death penalty isn't necessary. And there have been mistakes made where people have been put on death row, and they found out that that person was not guilty. And I think that if there is an option of putting someone in prison without parole, that's a better option." (RT 1424.) Subsequent to further questioning, Mr. Fleming answered as follows: "Yes, there's situations" where "aggravating factors would so outweigh the mitigating factors that [he] would vote for death, knowing that [he] has the alternative to vote for life without the possibility of parole[.]" (RT 1426.) In response to his religious views, Prospective Juror Fleming clarified that "my religious belief is that I should abide by the laws of the land. If the laws of the land are for me to choose the death penalty, and there's no other option, then I have no other option, I have to choose the death penalty." (RT 1424-25)

Mr. Fleming was challenged based on his religion and anti-death stance regardless of his unequivocal position that he would abide by the law and vote for death if necessary. Mr. Fleming, while struggling with the complex question incumbent in capital punishment, had thoughtfully evolved his consideration of the concept to the point where he could follow the law of the land and abide by his oath. For Mr. Ruiz to assert that Mr. Fleming's candid and thoughtful answers were the basis for a legitimate race-neutral reason for exclusion was, quite simply, wrong.

As already set forth, the prosecution originally attempted to challenge Mr. McBrayer for cause and that challenge was denied. (RT 1409.) Mr. Ruiz then brought his peremptory

challenge, citing Mr. McBrayer's alleged bias against law enforcement. (RT 1419.) When questioned by the court, Mr. McBrayer stated, "Well, in America race prejudice exists, and as a black person or minority person growing up, you usually experience it, and I have experienced it. And it's no secret. It's a fact of American life." Through continued questioning by the court, however, he qualified his answer. "But your feelings don't run so deeply that you would be prejudiced against Mr. Ruiz or Mr. Cormicle or their side simply because of their race?" Answer: "No." (RT 1367-75.) When determining if it was Mr. McBrayer's view that some "prosecutors try to convict regardless of guilt," he was asked if he could "trust the system enough to vote for the death of Mr. Williams?" (RT 1370.) Mr. McBrayer responded: "Yes." (RT 1401.)

In denying the earlier challenge for cause of Mr. McBrayer, the court held ". . . [a]nd I don't think I can . . . grant a challenge for cause . . . . His answers were sufficient that I can't, in good conscious under the law, grant a challenge for cause." (RT 1408-09.) However, in ruling on Mr. Ruiz's peremptory challenge, the court found a race-neutral reason for the challenge based upon Mr. McBrayer's alleged bias against law enforcement, ignoring his insistence that race would not play a role in any decision while sitting on the jury. Mr. McBrayer was an honest man identifying a reality in America, while offering substantial assurances that he could follow the law and his oath. There was no legitimate race-neutral reason to challenge Mr. McBrayer. This Court should recognize the prosecutor's efforts for what they were--pre-textual covers for a far more sinister purpose.

ARGUMENT X

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

Death threats and gang-association testimony were put before the jurors for the sole purpose of tainting Robert as a violent and dangerous man, predisposed to commit the heinous crimes for which he was convicted. The challenge for the prosecutor was to contrive to put such evidence before the jurors, and the challenge for Respondents is to defend the trial court's acquiescence to the prosecutor's efforts to cast Robert in this light.

a. Death Threats

Respondent contends that the trial court properly admitted Ms. Lofton's testimony that she received death threats. Respondent further argues the alleged death threats impacted her memory and thus explain the remarkable degree of inconsistency in her accounts of the events of July 15, 1995. The trial court admitted Ms. Lofton's testimony of the death threats, stating that "a threat made on somebody's life, no matter who makes it ... that threat does affect one's ability to recall. It affects one's ability to think about it. I think a death threat has tremendous impact on a witness's demeanor, ability, especially with the facts that we know." (RT 2018.) In *People v. Green*, this Court noted that Evidence Code § 352 requires that the record "affirmatively show that the trial judge did in fact weigh prejudice against probative value" in order "to furnish the appellate courts with the record necessary for meaningful review" and "to ensure that the ruling on the motion 'be the product of a mature and careful reflection on the part of the judge.'" (*People v Green* (1980) 27 Cal.3d 1, 25, overruled on other grounds, quoting *Mercer v. Perez* (1968) 68 Cal.2d 104, 113.) In *Green*, a witness testified that the murder victim had revealed a conversation with Green during which Green had threatened to kill her. (*Id.* at 23.) This Court

recognized the following: "testimony that a defendant threatened his victim prior to committing the crime charged is a particularly sensitive form of evidence of the victim's state of mind." (*Id.* at 25.) However, this Court held that admission of the alleged death threats was an error. (*Id.*) Respondent also attempts to find support in *People v. Burgener* (2003) 29 Cal. 4th 833, 869-70, in which this Court found threat evidence relevant to a threatened witness' credibility. Respondent failed to point out, however, that Burgener himself was the source of the threats. Here the person delivering the alleged threats was never identified and to further distance Robert's case from *Burgener* there was a stipulation that Robert was not the source of any alleged threats. As such the probative value of the threat evidence was severely diminished while the prejudicial impact maintained its vicious bite. Here, the admission of death threats alleged by Ms. Lofton was erroneous for the following five reasons.

First, there is no evidence that Robert ever threatened *any* witness. By stipulation, the jury was informed that no evidence existed that Robert had threatened Ms. Lofton. The prosecution told the court that "she's got a lot going on in her head . . . she's worried about her life too. She feels like a hunted animal. So I will not be attributing these threats to Mr. Williams." (RT 2016.) The prosecutor's noble assurance that he will not attribute the alleged threats to Robert is to completely deny reality. It is only natural that the jurors are going to hang the alleged threats around Robert's neck the very moment they fell from the prosecutor's lips. In *People v. Terry*, the trial court allowed into evidence a telegram sent by the wife of the brother of the defendant's wife which threatened a witness in order to prevent him from testifying. (*People v. Terry* (1962) 57 Cal.2d 538.) This Court held the admission of the telegram to be error, and that merely sending the telegram proved nothing as to its authorization, and that its admission into evidence could "do no more than create a conjecture, surmise of suspicion that the act may

have, because it could have, been done. The life of even the most hardened criminal should not be staked on such a flimsy foundation." (*Id.* at 556-67.) In keeping with the court's reasoning, allowing these alleged death threats into evidence only confused the jury on the issues, and their possible probative value was greatly outweighed by their plainly prejudicial impact. Robert's jury was misled into thinking that he was somehow affiliated with the alleged death threats as it was the prosecutor's claim that the impact of the threats purportedly affected the witness's ability to testify against Robert at his trial.

Second, Respondent maintains that the death threats were admissible to prove Ms. Lofton's "state of mind" and demeanor as a witness, and to explain the inconsistencies in her testimony. (RT 1944-45, 2016.) It is clear that Ms. Lofton was understandably frightened and traumatized, however, Respondent is alleging that the record makes clear that the inconsistencies in Ms. Lofton's testimony were subsequent to death threats she allegedly received months *after* the night of the killings, when, in fact, Ms. Lofton's fear was undoubtedly instilled the *very night* of the killings. Ms. Lofton was molested; her throat was cut; she witnessed the death of her boyfriend and his father, and the suspects had not yet been detained. While safely in the hospital, she was put on pain medication and admitted to being "confused, dazed . . ." (CT 108-09.) She stated that she could not remember her responses to questions asked of her by officials because she was on pain medication. (CT 93.) The very next day after the horrendous events of which she was a part, Ms. Lofton got a gun because she feared for her safety. She subsequently fled, and later went into hiding. (RT 2336.) It was only while she was still in hiding that Ms. Lofton allegedly received the death threats about which she testified at trial. In short, the alleged death threats had nothing to do with the multitude of inconsistencies in

Ms. Lofton's testimony which occurred well before any alleged threats. The timeline of Ms. Lofton's changed statements and altered testimony lays this out with ample clarity.

Third, it is noteworthy that the inconsistencies and discrepancies in Ms. Lofton's testimony, which Prosecutor Ruiz and Respondent want to primarily attribute to her fear following the alleged death threats, began the very night of the murders, and well in advance of the defendant being detained or any alleged death threats ever being made.

1. Testimony by Ms. Sonya Jimmons, social worker, on the morning of July 17, 1995: At the hospital, Ms. Lofton's behavior was erratic, including "laughing" with visitors and staff, and not "mood appropriate" or "depressive," despite claiming she had been raped and witnessed the brutal killing of her boyfriend and his father. (RT 3066-74.) This behavior was ongoing. (RT3073.)

2. Testimony by Ms. Sonya Jimmons, social worker, on the morning of July 17, 1995: At hospital, she requested a pregnancy test even though she alleged to have been anally penetrated, and at some point she testified that the molestation was a finger penetrating her vagina. (RT 3075.)

3. Testimony by Ms. Sonya Jimmons, social worker, on the morning of July 17, 1995: Ms. Lofton inaccurately reported that the victims had been shot in the back of the head. (RT 3075.)

4. Testimony by Ms. Sonya Jimmons, social worker, on the morning of July 17, 1995: She reported she was face down on the floor when she was raped. (RT 3075.)

5. Testimony of Officer Kirkendall, July 15, 1998, immediately preceding Lofton's injuries: Ms. Lofton informed Officer Kirkendall that three men came into her house. (RT 1742-43.) In a taped interview two days after the murders, she claimed to have seen only two men exit the car and approach the house that night. (RT 2391-92.) The issue of how many people were involved was further confused by the testimony of a neighbor who recalled four men getting into four different vehicles at the approximate time of the murders. (RT 2319-20.)

6. While Ms. Lofton claims there was only one car, the burgundy sedan, outside Gary's house, the neighbor, witness Ms. Michelle Contreras, testified that she also saw a lowered Chevrolet truck at the approximate time of the murders. (RT 2325.)

7. On the night of the murders, Ms. Lofton described one of the vehicles at Gary's house to the officer as a 5.0 Mustang and later recanted the type of car that was at Gary's house, stating it was a Cavalier. (RT 2338, 2344-45.)

8. During a taped interview by Detective Amicone, two days after the murders: Ms. Lofton described Suspect #1, defendant Robert Williams, as 5'7" and 170 pounds. (RT 2469.) Ms. Lofton was asked by Detective Amicone to describe Rob and she responded, "Okay. I was probably taller than him". (RT 2469-70.) Robert was 5'11 ¾" and weighed 275 pounds at the time. (RT 3062.)

9. Ms. Lofton stated that neither Roscoe nor Gary had tape covering their mouths, and she pulled off the plastic bag covering Roscoe's head before she escaped. (RT 2296.) However, when police investigated the scene, the plastic bag remained covering Roscoe's head, and both of the victims' mouths were covered with duct tape. (RT 1886-87,1877, 2296-98, 2300; RT 2298, 2300.)

Given the timing of these discrepancies, it becomes clear that any alleged death threats did not serve as the inspiration for Ms. Lofton's inconsistencies. On the contrary, her inconsistencies can reasonably be attributed to her general inability to be truthful, admittedly coupled with the undeniably traumatic experience she had just endured.

Fourth, the alleged death threats were from an unidentified third person or persons. Let us not forget that Ms. Lofton testified that she was not directly threatened and, as this Court well knows, an alleged threat received by a witness from an unidentified person is not admissible. (*People v. Weiss*, 50 Cal.2d 535, 553.) In *People v. Weiss*, this Court found the trial judge to have erred in allowing testimony of an alleged threat received by the witness via telephone from an unidentified caller. (*Id.* at 553.) This Court reasoned that "the trial court [had] no more basis for assuming that the [unidentified threats], to show the witness had been intimidated, came from an agent of the defendant than from an agent of the prosecution." (*People v. Weiss*, (1958), 50 Cal.2d at 553.)

> If the attempt [to suppress witness testimony through threat] is made by a third person, not in the presence of the defendant or shown to have been authorized by him, it should at once be suspect as a mere purporting attempt to suppress evidence and in truth an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender.
> (*Id.* at 554.)

These unidentified death threats could very easily be the product of someone with ulterior motives, such as Scott, for example, who negotiated a deal in return for his testimony against Robert and who had the ability to make such communications even though he was incarcerated. (RT 2571, 2707, 2710-14, 2720.) Scott had "unrestricted access to [call] other people . . . who [he] would talk to about anything." (RT 2716-17.)

Lastly, Respondent contends that it was the alleged death threats from an unidentified third person or persons that impacted her ability to recall accurately. However, contrary to the Respondent's proposition, Ms. Lofton's recollection of the night of the murders actually *improved* at trial, well after the alleged death threats. For example:

1. Her ability to describe the details of a briefcase carried by one of the suspects as he approached Gary's home: During a taped interview taken by Detective Amicone, two days after the murders, Ms. Lofton claimed that one of the men coming toward Gary's house had a black brief case. (RT 2396.) She was unable to describe the briefcase with any specificity because she witnessed it from the upstairs window and it was nighttime. When asked whether she was asked specifics about the briefcase, she answered, "Black. I was upstairs." (RT 2397.) Subsequently, at trial she was able to describe the specific dimensions of the briefcase while using a measuring tape. (RT 2398.)

2. Gun case lying on the street: When initially questioned by police officers, Ms. Lofton did not mention the black gun case on the street, a detail she testified to at trial. (RT 2343.)

3. Ms. Lofton recalls seeing defendant in photographs at Gary's home prior to killing: Subsequent to death threats, Ms. Lofton informed Detective Thompson of a photograph she saw at Gary's home prior to the killing of whom she believed to be Suspect #1, the defendant. However, she neglected to mention her suspicion and the identity of defendant to Deputy Kirkendall the night of the murders or to Detective Amicone when interviewed at the hospital. She testified at trial that she had never seen Suspect #1 prior to the night of the murders. (RT 2470-74.)

Respondent further contends that even if the admission of the alleged death threats were prejudicial, such testimony is merely harmless error. In *People v. Mason*, despite the trial court's attempt to preclude the prejudicial inference by informing the jury that there was no reason to believe that the defendant was responsible for such threats, this Court noted that "the inference

persisted, however, that the defendant, himself, had been responsible for the threat. (*People v. Mason* (1991) 52 Cal.3d 909, 946-47 (discussing *Weiss*).) In *Mason*, this Court found no prejudice to the accused as there was specific and emphatic disavowal of the defendant's connection with any threat. (*Mason,* 52 Cal.3d at 947.) This Court further found that "[the threatened witness] expressly testified that the defendant was not connected with the threats in any way." (*Id.*) The witness who received the death threats "testified five times, unambiguously, that the defendant was not connected with the threats received in any way, directly or indirectly." (*Id.*) In the present case, Robert was not afforded such protections by the prosecutor or the trial court. Ms. Lofton *never* testified that Robert was not connected to the death threats, nor that the death threats might be attributed to someone else. Instead, the jury was left with the supposition (or at the very least the option) to suppose that Robert Williams was somehow responsible for the threats against Ms. Lofton because Ms. Lofton was testifying against him. Additionally, the jury could hardly overlook the fact that Ms. Lofton was the primary witness for the state, and the *sole* eyewitness of the murders on the night of July 15, 1995. There were *no* other witnesses and *no* physical evidence linking Robert to the murders.[8] (RT 2996.) The prosecutor insulated Ms. Lofton, its primary witness, from any meaningful examination as to her credibility and her ability to make eyewitness identifications, as well as to her motivation in incriminating Robert. There was no physical or testimonial corroborating evidence to support Ms. Lofton's account of events. In fact, a neighbor offered a markedly different account of the number of individuals, the number of cars, and the type of cars parked at Gary's residence on the night of the murders. (RT 2086; RT 1703-21.) Consequently, Ms.

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[8] Robert Scott alerted the authorities of an alleged threat to Gary prior to his murder. However, he was not percipient to the events of July 15, 1995.

Lofton's veracity and reliability were issues of central concern throughout the investigation, pretrial, and trial. Any and all alleged death threats, although relevant, are outweighed by prejudice, as they could have been the product of a third suspect, or possibly a fourth, who remains at large. Without more information about such alleged death threats, their introduction at trial was unnecessarily prejudicial. Such evidence presented an opportunity for the prosecutor to taint Robert as a ruthless and violent man in the minds of the jury. The trial court therefore erred in allowing Ms. Lofton to testify about unidentified death threats that she claimed impacted her memory and were the reason for her dramatically changed testimony.

b. Gang Affiliation

Evidence of a defendant's criminal disposition is inadmissible to prove he committed a specific criminal act. (Cal. Evid. Code §1101; see also *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240. This Court has recognized that "admission of evidence a of criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) It is well established that evidence of gang association "is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal. App 4th 1148, 1167.) But, it is also well established that gang evidence should *not* be admitted at trial where the sole purpose for its introduction is to demonstrate a defendant's criminal disposition or moral turpitude as a means of creating an inference that the defendant committed the charged offense." (*People v. Memory* (2010) 182 Cal.App.4th 835, 859 (citing *In re Wing Y.* (1977) 67 Cal.App.3d 69, 79).) Respondent contends that no evidence suggesting Williams was a gang member was introduced at trial. (RB 103.) Contrary to Respondent's contention, the prosecution strategically and successfully communicated to the jurors Robert's

gang affiliation by referring to him as a "jacker." First, the jury was informed that the deceased, Gary, was gang affiliated. (RT 1711.) The jury was aware that in addition to robbing banks, Gary was affiliated with the Crips gang and had various connections with the Mexican Mafia. (RT 1711.) Some of the individuals who had committed robberies with Gary were members of the 60 Crips gang. (RT 1711.) Gary himself claimed to be a member of the Palm Oak Crips gang. (RT 1688.) Second, Scott outside the jury's presence, offered to testify that he feared Robert because he was a gangster. (RT 2749.) Aware of the term's prejudice, the prosecution instructed Scott "not to refer to the defendant being a gang member or being a gangster," but instead to describe Williams as a "jacker." (RT 2748, 2750.) The trial court erred in allowing "jacker" to be used as a substitute for the term "gangster," since the term "jacker" is essentially used to describe a "gangster" or someone with gang affiliations, and hence is no less likely to carry with it the connotations of a gangster. Note the questions and responses during Scott's testimony:

> Q: He said he wanted his share. Well, are you familiar with the term "shake down"?
> A: Yeah.
> Q: Okay. Would that be a fair characterization of what Mr. Williams was saying?
> A: That means – well, to me a shake does means like a jack, like.
> Q: Okay. What's a jack?
> A: When somebody comes up to you and pulls a gun on you telling you he wants your rings or your jewelry or your money, that's a jack.
> Q: Had [defendant] ever participated in any jacks with you during this whole, you know, four or five year period?
> A: No.
> (RT 2545.)

> On Cross:
> Q: Why were you afraid of this guy, when you and Gary and your --- you guys were bank robbers? You had access to guns. You held up people. Why were you so scared of this guy?
> A: I – man, it don't take no tough man to rob a bank. I mean, that's what we was doing. We wasn't --- we wasn't --- we was little old bank robbers. We wasn't into, you know, going out shooting people, and you know, killing people. We wasn't into that.
> (RT 2747.)

> On re-direct:

Q: Why were you so scared of this guy?
A: Because he was a jacker. He --- he was crazy, you know.
Q: Well, you know, there's people --- there's crazy people that think they're Napoleon, people who think they're God. Is a jacker --- have you and I talked about this before you testified?
A: Yes.
Q: I explained to you that there was a limitation on your answer?
A: Yes, sir.
Q: Okay. When you use the term "jacker," do I understand correctly --- have you previously indicated that, in your opinion --- this is just limited to your opinion, not for the matter --- that he was somebody who would just rip off people?
A: He would jack anybody ---
Q: Okay.
A: --- for anything.

Q: When you use the term "jacker," do I understand correctly … that he was someone who would just rip off anybody?
A: He would jack anyone –
Q: Okay.
A: For anything.
(RT 2758-59.)

Although initially used to describe a robber, the meaning of "jacker" flourished, and came to clearly communicate to the jury that defendant was predisposed to commit murder because he was a "gangster." The meaning of the term was readily expanded from referring to a person who robs others, to standing as a definition for a person who is ruthless, scandalous, crazy, and will kill anyone. (RT 2749-50.) Third, during closing arguments, the prosecution used the term "gang" numerous times to describe the relationship between the deceased and the defendant. (RT 3612-14.) Specifically, the prosecution strategically mentioned that the killings were a response by Robert when Gary denied Robert entry into his "gang." (RT 3613.) Furthermore, the prosecution consistently referred to Robert as the "ringleader," as someone who was in a position of dominance and had the ability to "control" and force others, against their will, to participate in crimes, including the killings which the prosecution described as "his crime." (RT 3598, RT 3616, RT 3620, RT 3621, RT 3624, RT 3625, RT 3633.) Such language

more than suggests that Robert belonged to a gang in which he was the leader, and that he orchestrated this entire criminal venture. The expansion of the meaning of the term "jacker," coupled with the statements made by prosecution in closing arguments and knowledge of the deceased's gang affiliation, make clear that Scott was using the term "jacker" in his testimony as a *synonym* and not a substitute for "gangster."

Lastly, Scott had no personal knowledge of Robert being a "gangster," a "jacker," or affiliated with any gangs at all, yet used terms in reference to Robert that, by their proper definition, mean someone who robs another with a loaded gun. (RT 2545, 2749-50.) Scott's testimony was not based on anything he had ever seen or relating to anything about which he had personal knowledge, rather his testimony was based on speculation or hearsay.

The trial court erred in allowing the term "jacker" to be used. Such testimony is highly prejudicial and denied the defendant a fair trial. The Ninth Circuit in *Kenny v. Lockyer* (9th Cir. 2004) 379F.3d 1041 traced the case holdings that have firmly established that evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error.

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

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

the fundamental principles of our justice system to find a defendant guilty on the basis of his association with gang members); *United States v. Hankey* (9th Cir. 2000) 203 F.3d 1160, 1170).)

During closing argument, the prosecutor strategically used terminology to characterize the defendant as a gang member, knowing all the while that suggesting such affiliation was inadmissible and highly prejudicial. (AOB 165.) The message that Robert was a gang affiliate was clearly communicated to the jury and as a result, its admission was, without question, harmful error.

ARGUMENT XI

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

The trial court compounded its error in allowing the admission of death-threat evidence by failing to properly distance Robert from that damning evidence.

Prior to answering Respondent's argument, it is important to set forth both the defense's proposed instruction and the actual instruction given.

> PROPOSED INSTRUCTION: "There is no evidence that the defendant Robert Williams was *responsible* for those threats." (RT 3047 (emphasis added.))
>
> INSTRUCTION GIVEN: "There is no evidence that Robert Williams *made* a threat to any witness in this case." (RT 3063 (emphasis added.))

The instruction given was limited to discounting whether Robert personally made an alleged threat to Ms. Lofton. In so doing, it could well have left the jurors with the impression that even though Robert did not personally make any threats, he may have been responsible for any alleged threats. Being responsible for threats is as damning as actually making the threats and, in some respects, may be more prejudicial in that it implies that Robert was in a position to

have others do his vile deeds. As such, he was implicitly characterized as a threat even though incarcerated. The instruction given provided no insulation to Robert from the alleged threats, failed to accurately apprise the jurors of the actual evidence produced, and, most significantly, failed to dispel the prejudicial impact of the death-threat evidence.

It must be made clear that there was no evidence produced or even proffered that linked Robert to any threats. Respondent in his brief stated that such evidence did exist. (RB 109.) In reality, no such evidence was ever produced, thus suggesting that Respondent, in making his assertion, relied on Prosecutor Ruiz's unsubstantiated claim that "we do have evidence that the defendant was involved in threats...." (RT 3048.) Despite Mr. Ruiz's comment, nowhere in the lengthy record of this case was any evidence or testimony produced that in any way linked Robert to any alleged death threats.

Respondent attempts to sidestep this issue by asserting that Robert's counsel's withdrawal of the request for specific instruction constituted a waiver for the purposes of challenging the trial court's failure to give a specific and particularized instruction to the jury. (RB 109-110.) Respondent's assertion is wholly unsupported by the record. The defense specifically requested the limiting instruction and only withdrew this request following the court's refusal to give the particularized instruction and the subsequent insistence on a stipulation between the prosecution and defense. (RT 3047-49.)

Ironically, while the trial judge acknowledged that the defense's proposed instruction accurately reflected the limited purpose for which the testimony was offered, he believed it "not proper" because in his view, such an instruction would constitute the court's comment on the evidence and that would be improper. (RT 3047.) Even if the proposed instruction should be characterized as judicial comment, this Court has consistently held that judicial commentary is

proper as long as it is "accurate, temperate, non-argumentative, and scrupulously fair." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.)

Due to the probability that jurors would make false inferences from the death-threat testimony, and because of its acknowledged prejudicial effect, the requested instruction was the minimum necessary to guard against jury misuse of the testimony. As it was, Robert's fate was determined by a misinformed jury, violating his Sixth Amendment right to an impartial jury.

ARGUMENT XII

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

Respondent cites four cases from this Court (including three recent rulings) in support of its argument that this claim of juror misconduct is "forfeit because Williams neither objected to Juror No. 6's continued service nor requested a mistrial." (RB 115.) Respondent failed, however, to note that in all four cases Respondent has relied upon, there was, correctly, an appropriate level of inquiry by the trial court intended to ferret out the surrounding facts of any claimed misconduct prior to the court and counsel taking further action. With this in mind, Appellant contends that it is nothing less than a court's duty to intercede on behalf of a defendant when juror misconduct is suspected, and further that it is the court's duty to instantly suspend proceedings to make a careful inquiry into the matter. Appellant addresses all four cases in turn. Such inquiry results in the finding that in all four instances, the trial courts undertook the task of confronting instances of potential misconduct.

In the first case, *People v. Lewis* (2009) 46 Cal.4th 1255, the trial court, upon learning of the existence of potential misconduct, undertook to investigate the claimed misconduct, and only after carefully considering the inquiry and determining the absence of any basis for the claim, did

the court proceed with trial. (*Lewis*, 46 Cal.4th at 1305-08.) To reflect further, the *Lewis* trial court, upon notification that a juror conversed with her husband during guilt phase deliberations, undertook inquiry as to the content and extent of the purported conversation. Such careful inquiry was necessary as clandestine communications, contact, or for that matter any direct or indirect interference with a juror during a trial is, of course, presumptively prejudicial. While such a presumption is not conclusive, nonetheless a weighty burden rests upon the government to unfailingly establish that such contact with the juror was ultimately harmless to the defendant. (*Remmer v. United States* (1954) 347 U.S. 227, 229.) It is misconduct for jurors to communicate with other parties associated with the case. (See Pen. Code, sec. 1122; *People v. Jones* (1998) 17 Cal.4th 279, 310; see also *People v. Stewart* (2004) 33 Cal.4th 425, 510

Lewis's counsel only agreed to continue the juror's service and not seek a mistrial after receiving assurances by the court that investigations had led the court to deem that no misconduct had occurred. In contrast with *Lewis,* resolution of concerns with Juror No. 6 in Robert's trial did *not* prompt the court's participation in even the most minimal capacity. In Robert's case, the potential identification of juror misconduct did not give rise to any effort beyond the court's at best superficial self-inquiry as to its observations of Juror No. 6, with the judge making clear, "I haven't been—obviously haven't been watching them as close as [the spectator] has." (19 RT 2755.) Admitting that he had not been scrutinizing jury conduct in general, the judge then took to do no more than urge defense counsel and defendant alike to waive "[a]ny issue of whether [Juror No. 6] was asleep or not . . ." and to "waive any defect or prejudice, if, in fact, he was dozing off?" (RPT 2755-56.) With the court's admission that it did not know one way or another whether Juror No. 6 had been asleep, and with its decision not to investigate further but to press counsel and defendant to concede to join the court in skirting the

issue, this matter was, to say the least, hardly approaching the level of inquiry undertaken in *Lewis*.

In retelling the details of *Lewis*, Respondent selectively omits the court's efforts to inquire about Juror No. 9 which in that case were substantial: There was, initially, a discussion between the prosecutor and an investigator at the Riverside District Attorney's office, the District Attorney having been informed by the juror's husband of the scope of his conversation with his wife relating to the trial. The prosecutor subsequently notified the court of the juror's conversation with her husband; the prosecutor then requested a hearing to fully address the concern; the court held a hearing to examine the matter, and to determine whether or not there was any substantive discussion of the jury deliberations between Juror No. 9 and her husband, and hence evidence of actual juror misconduct. The trial court subsequently and carefully considered whether an admonition to the jury would be suitable recourse in this case; the court then made further effort to scrutinize this issue, requesting that Juror No. 9 come into court in order to respond to such specific questioning as deemed necessary to determine whether or not she could continue: "The trial court proposed to have Juror No. 9 come into court, and to 'simply ask her if she has any problems or feels that she can be fair to both sides to continue in the case.'" (*Lewis*, 46 Cal.4th at 1307.) Indeed, the juror was brought before the trial judge and ultimately questioned in some detail before the court and counsel for both the State and defendant, and it was ultimately agreed that Juror No. 9 was fit to continue deliberations. The Court also concluded that because counsel did not object, the claim was waived.

The degree of judicial scrutiny in *Lewis* is far removed from the *entirely absent* time and effort Robert's trial judge undertook during Robert's trial. For Respondent to claim that there has been forfeiture of a claim of juror misconduct because counsel and defendant agreed to waive

claims of defect or prejudice in the absence of diligent judicial inquiry in no way parallels the standards Respondent invokes by way of the *Lewis* decision. It is difficult to make an informed decision to object without being fully apprised of the concern. Without sufficient inquiry, Robert and his counsel were in the dark as to the true extent of the problem. While defense counsel, the prosecutor and Robert certainly acquiesced to waiving on this issue, the record makes apparent that the judge had no intention of undertaking reasonable inquiry. Correspondingly, this acquiescence demonstrates only evidence of Robert's desire to move along a trial that he thought by this late stage would never come to pass. Appellant thereby asserts that any such waiver as Respondent claims does *not* extend to exonerate this judge from the court's obligation to probe the trial spectator's disturbing observations that had been brought to its attention.

Unlike the uncertainty and trepidation with which Juror No. 9's husband approached the prosecutor in *Lewis*, the spectator in Robert's trial emphatically alerted the judge to what could hardly have been a more adamant or certain opinion relating to what she had observed in Juror No. 6: "He's been—a couple of times when he was nodding off, he was actually asleep." Further, she confirmed her belief that the juror "nodded off" and was "actually asleep." (RT 2753.) And, if the trial court did not feel sufficiently persuaded to warrant further investigation the claims of a single spectator's observations of a juror sleeping during a capital trial, then Appellant is only further bewildered as to why the court did not take up the matter with some vigor when the spectator alerted the judge to the fact that he was not alone in witnessing what had transpired: "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 court decided that in serving the defendant's right to a competent jury, it *still* need make no inquiry, even when confronted with a *second* spectator. Whether or not Robert or counsel

followed up with this second observer, (something Respondent further argues to be the basis for the defendant's full and knowing waiver), it is Appellant's position that inadequate investigation of this growing concern ultimately flowed from the judge when he failed to halt the trial and probe further in order to determine the potential harm that might befall Robert's right to a fair and competent jury.

Respondent next turns to *People v. Foster* (2010) 50 Cal.4th 1301, where the trial court, in contrast with Robert's trial, once more undertook a thorough investigation of potential juror misconduct after a juror indicated a third party had contacted him. As a result of its diligent investigation and inquiry into the matter, the trial court found no basis for misconduct, and consequently continued with the trial. (*Foster*, 50 Cal.4th at 1339-43.) As discussed in relation to Respondent's invocation of *Lewis*, the *Foster* court presents notable distinction when proffered in support of Appellant's concerns over Juror No. 6's misconduct. First of all, once Juror No. 9 in *Foster* notified the court of his contact with a third party (via his receipt during trial of notes left by a friend on the windshield of his car), the court undertook a formal hearing in order to inquire as to how grave a concern receipt of these notes might present. (*Id.*at 1339.) However, to do justice to the extent of the inquiry taken up by the court and concerning potential juror misconduct, Appellant feels it necessary to provide a rather more complete picture of the steps the *Foster* court undertook with its inquiry. Satisfied that Juror No. 9 felt he could continue in his position on the panel, the court was *still* not satisfied, and exhibited further concern with Juror No. 9's revelation that he had disclosed receipt of the notes to Juror No. 12. The court then proceeded to have Juror No.12 brought before counsel in order to fully ascertain that Juror No.12 did not feel his ability to be fair and impartial had been compromised. When Juror No. 12 confirmed as much, the court still admonished him not to speak to any other jurors, and he

readily agreed to this instruction. (*Id.* at 1340.) However, even when Juror No.12 admitted he could proceed, the court still did not stop probing the possibility of future potential juror misconduct, and now undertook inquiry of the *entire* jury panel. (*Id.*) It bears noticing, that the degree to which the court in Robert's trial avoided *entirely* any sort of meaningful inquiry of Juror No. 6, let along the entire jury panel, rests in stark contrast with the scrutiny the *Foster* court applied in order to insure a fair and competent jury.

While the spectator originating the concern over Juror No. 6's misconduct in Robert's trial was heard by trial counsel and the court, the second spectator identified as also having witnessed the sleeping juror was never questioned, not even in the most cursory manner. Further, Juror No. 6 was never held to account for his misconduct in front of any sort of formal tribunal, nor, unlike the *Foster* court, were the remaining jurors in Robert's capital trial asked to confirm or negate the concerns raised by the two spectators. This trial judge's sweeping declaration that it did not want to "embarrass" jurors by probing deeply into the matter is a painfully deficient approach. While Robert's trial judge did agree to grant a general admonition to the jury and delegate to the court's deputy the duty of insuring the jury remain alert, such prophylactic measures did not, in Appellant's estimation, come even close to what Respondent introduces by way of the *Lewis* or *Foster* courts' recognition and diligent handling of suspected juror misconduct. (19 RT 2755.) To recollect, but not restate, Appellant's comprehensive discussion of the issues raised by sleeping jurors in his opening brief, Appellant would only remind Respondent at this juncture that the inattentiveness of Juror No. 6 occurred during the cross-examination of Mr. Scott, a key witness in this capital case. Respondent cannot disregard the Ninth Circuit's clear position that "in failing to conduct a hearing or make any investigation into the 'sleeping' juror question, the trial judge abused his considerable discretion in this area."

(*United States v. Barrett* (9th Circ. 1983) 703 F.2d 1076, 1083.) The absence in Robert's trial of any formal process of review cannot be excused, regardless of Respondent's pointing the finger of blame at defense counsel and defendant's agreement to move forward with the trial. Sweeping jury misconduct under the rug with a general admonition to the jury as a whole is undeniably deficient and is to deny Robert his constitutional right to a competent jury.

This procedure of halting proceedings and carefully reviewing concerns relating to juror misconduct before resuming trial was adhered to in *People v. Stanley* (2006) 39 Cal.4th 913, the third case Respondent relies upon. After determining that no juror misconduct existed, Respondent correctly asserts that the court allowed trial proceedings to resume. (*Stanley*, 39 Cal.4th at 946-51.) However, to give no credit to the court's attentive approach to potential juror misconduct in *Stanley* is to ignore the events that transpired when it was discovered that Juror C had one morning read a newspaper story that reported opening statements for the defense and prosecution. Unlike Robert's trial, the Stanley trial judge undertook a period of careful and appropriately inquisitive inquiry of Juror C, specifically seeking the following information: Whether he had in fact read the paper; whether or not the juror recalled the article as making any allegations relating to the defendant's prior convictions (upon this issue the court questioned the juror *several* times); the court then permitted defense counsel to question the juror; the juror was asked whether he recalled any reference in the article to a discussion of the racial composition of the jury; he was asked whether reading the newspaper article might have affected him in any manner at all, and, finally, counsel asked whether the juror had read the newspaper article more than once. Upon completion of defense counsel's line of questioning, the court then returned to its own questioning. The court asked Juror C whether his reading of the article might affect his ability to serve as an impartial witness, and whether he could still sit with the jury and "call it the

way it is." (*Id.* 949.) Only after this final admonishment to the entire jury, did the court resume trial: "I want to caution you now please don't read those newspaper articles because what we want you to do is to decide this case only on what you hear in the courtroom …." (*Id.* at 950.)

At all times, the *Stanley* court's inquiry of Juror C was intended to probe the potential influence the newspaper article might have had upon his ability to diligently serve for the remainder of the trial. The court and counsel asked questions of Juror C that allowed them to determine, with more than sufficient certainty, that the court was proceeding in all fairness to the defendant, and that the rebuttable presumption of prejudice to the continuing proceedings had been satisfied. While the court inquired of Juror C whether he, "could still sit here and listen to it and call it the way you see it ...," such an inquiry was not made of Juror No. 6 in Robert's trial, even though this was a juror identified to the court by *two* disinterested spectators as someone who might have already missed listening to critical witness testimony. (*Id.* at 949.) Juror No. 6 was never confirmed by the judge as being in a position to satisfy the most fundamental duties during this trial, and it defies commonsense how a juror who might have been sleeping when he should have been awake, let alone alert, could ever be counted upon during deliberations. This was hardly someone the *Stanley* court would have even remotely held to be able to "call it the way you see it." If the judge in Robert's trial did not believe Juror No. 6 was sleeping, two spectators certainly believed that this juror had neither heard nor seen *anything* during what has been identified as key witness cross-examination testimony. The judge, accordingly, moved on with Robert's trial, without even minimal direct inquiry of Juror No. 6's potential misconduct. Appellant thereby does not concede that the waiver principle applies, given that the court did not fulfill even a minimal degree of judicial inquiry, evaluation, or, if necessary, mitigation resulting from juror misconduct. Without inquiry that reaches even the periphery of what was undertaken

in Respondent's citation to the *Lewis*, *Foster* or *Stanley* courts, the above-referenced trio of cases serve, ultimately, to firmly situate Robert's trial in stark contrast with Respondent's highlighting of tried-and-tested formulas by which courts might address juror misconduct. What *Lewis, Foster and Stanley* in turn *do* underscore is the manner in which Robert's court ventured so far *away* from what Respondent has put forth. Appellant hereby supports wholeheartedly Respondent's invocation of these cases as a lens through which to now assess the level of judicial inquiry undertaken by these three courts when confronting claims of juror misconduct. To suggest they bolster Respondent's allegation that Robert and his counsel forfeited their claim of juror misconduct is to posit a reading of *Lewis, Foster* and *Stanley* that simply does not exist.

To further underscore the court's mishandling of potential juror misconduct in Robert's trial, instead of making even the most modest inquiry of Juror No. 6 or any other jurors, the judge, instead, remarkably attempted to joke, when it quipped, "[m]aybe that is a clue to the lawyers that maybe they ought to be more interesting," and "I just caution you that sometimes trials get a little bit boring. Maybe you might have noticed. And I'm being very generous now." (RPT 2754; RPT 2757.) In the throes of trying a capital case, this judge suggested it was counsel's inability to proffer entertaining rhetoric that was the likely cause for the disengaged and perhaps sleeping juror. Such quips and banter have no place in *any* trial, least of all during the somber undertakings of a capital case, one ultimately rendering such a devastating outcome for this defendant.

Respondent, in defending the court's actions, next relies on this Court's decision in *People v. Espinoza* (1992) 3 Cal.4th 806, which states that an inquiry is necessary *only* where there is "good cause" to doubt a juror's ability to perform his duties. In *Espinoza*, the alleged misconduct was "defense counsel speculation that a juror might have been sleeping..." and

resulted in the court finding that existence of juror misconduct was "insufficient to apprise the trial court that good cause to discharge might exist," and hence "did not obligate the court to conduct any further inquiry." (*Espinoza*, 3 Cal.4th at 821.) However, this Court cites its then recent opinion in *People v. DeSantis* (1992) 2 Cal.4th 1198, to enunciate the following: "We have recently explained, however, that the mere suggestion of juror 'inattention' does not require a formal hearing disrupting the trial of a case. (*People v. DeSantis* (1992) 2 Cal.4th 1198, going on to clarify, "[o]nce 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. Burgener* (1986) 41 Cal.3d 505, 520)

Counsel's speculation in *Espinoza* is thereby far different from the *actual* observation by *two* uninterested persons in Robert's trial, individuals who reported their good faith belief that a juror was actually asleep. Under *Espinoza*, surely, then, Respondent in hindsight concedes that such "good cause" and "doubt" in Juror No. 6's "ability to perform his duties" were sufficiently present in Robert's trial in order to trigger judicial inquiry. There was no speculation here, and hence Respondent's efforts to deny that these two spectators' observations warranted pause for thought equivalent to the inquiry undertaken in both the *Espinoza* and *Burgener* courts, is illogical at best. Regrettably, these spectators demonstrated greater concern than Robert's trial judge that this capital trial proceed in a fair and competent manner, instead of the court so readily brushing off their reports of juror misconduct as not worthy of its time. *Espinoza* fails to support Respondent's argument that the judge's decision in Robert's trial to offer a quip, get a waiver, and move on demonstrated sound judgment.

As with most other appellate issues, whether an issue of juror misconduct can be raised, and precisely how such an issue is raised on direct appeal, depends substantially on what

transpired at the trial court level. Juror misconduct leads to a presumption that the defendant was prejudiced, thereby potentially establishing juror bias. (*Nesler, supra,* 16 Cal.4th at p. 578; *People v. Marshall* (1990) 50 Cal.3d 907, 949-951; *Carpenter, supra,* 9 Cal.4th at pp. 650-655.) However, "[t]he presumption may be rebutted by proof that no prejudice actually resulted." (*People v. Cooper* (1991) 53 Cal.3d 771, 835; *Hitchings, supra,* 6 Cal.4th at p. 118.) Ultimately, whether prejudice arose from juror misconduct is a question that at once invokes scrutiny of both law and fact, and is subject to an appellate court's independent determination. (*Carpenter, supra,* at pp. 658-659; *Nesler, supra,* at p. 582.) Whether an individual verdict must be overturned for jury misconduct further depends upon the type of misconduct.

As identified in Appellant's discussion of *Foster*, in cases involving the possible prejudice stemming from a juror's receipt of extraneous materials, or when there is juror exposure to information outside the court as seen in *Stanley*, when the presumption of prejudice is rebutted, the verdict will not be disturbed. Such verdicts will stand if the entire record, including the nature of the purported misconduct and the surrounding circumstances, indicate that there is no substantial likelihood that one or more jurors were actually biased against the defendant as a result of such claimed misconduct. (*In re Hamilton, supra,* 20 Cal.4th at p. 296; *People v. Harris* (2008) 43 Cal.4th 1269, 1303.) The strength of the evidence against the defendant is a factor to be considered. (*Carpenter, supra,* 9 Cal.4th at p. 654.) To conclude, then, Respondent has offered up that "[t]he 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." (RB 116.) Indeed, on this point Respondent is correct. The record offers nothing because the court chose not to determine whether such proof existed, and the record similarly offers nothing on account of the fact that the court failed to grant Robert diligent

inquiry into that which *two* spectators raised as potentially affecting his constitutional right to a competent jury. If, as Respondent asserts, the record "offers nothing" in support of possible juror misconduct, this is also only because this judge, after making a joke out of such serious allegations, sought immediately to obtain a waiver from the defendant and counsel in order to keep the trial moving along. In so doing, the court neglected what Appellant strongly suggests was an *independent* duty to halt the proceedings, inquire further of the two spectators, question Juror No. 6, question the other jurors, allow counsel to question the spectators and jurors, and only *then* make a reasoned decision on this issue. Heaping such risk upon a capital defendant as continuing with trial when such an unresolved matter as a sleeping juror remained intact, is demonstrative of a profound violation of Robert's Sixth Amendment right to an impartial and competent jury.

ARGUMENT XIII

THE PROCESUTOR'S PATTERN OF CONDUCT INFECTED THE PRETRIAL AND TRIAL WITH SUCH UNFAIRNESS AS TO RENDER ROBERT WILLIAMS' CONVICTION AND DEATH SENTENCE A DENIAL OF DUE PROCESS

This Court noted in *People v. Sup. Ct. of Contra Coast County* (1977) 19 Cal. 3d 255, 264-65 (superseded on other grounds) that "[i]ndividual instances of unfairness, although they may not separately achieve constitutional dimension, might well cumulate and render the entire proceeding constitutionally invalid." Respondent has opted to ignore the larger scope of Prosecutor Ruiz's failures in his duty as the "guardian of the defendant's constitutional rights" and instead has dealt with each concern piecemeal and thereby avoided the cumulative and consequently prejudicial impact of Mr. Ruiz's failures. (*People v. Sherrick* (1993) 19 Cal. App.

4th 657, 660.) Such a strategy, while understandable, does not fairly address the larger issue of whether the prosecutor's conduct taken as a whole served to deny Robert a fair trial.

Respondent characterized Appellant's assertion that Mr. Ruiz viewed discovery as "trench warfare" as nothing more than a "generalized assertion." (RB 119.) That "generalized assertion" was detailed in Arguments I though V in Appellant's Opening Brief and comprised some seventy-eight pages. Robert invites this Court to view those arguments in their own right, and also in terms of their value in evidencing a part of the consistent pattern of misconduct by Prosecutor Ruiz. Denial of access to Ms. Lofton, which prevented Robert's counsel effectively confronting the most important prosecution witness, in addition to being a stand-alone constitutional violation, was a harbinger of the prosecutor's efforts to gain a death conviction at the expense of Robert's right to a fair trial.

In addition to brushing aside the multiple discovery failures of Prosecutor Ruiz, Respondent is dismissive of Mr. Ruiz's *ex parte* communication with the appointing judge regarding appointment of defense counsel for co-defendant Walker. And while Respondent is literally correct that Mr. Ruiz's meddling directly involved the co-defendant and not Robert, it was symptomatic of his conduct throughout the eighty-three-month process, which failed to respect the duties and obligations prosecutors owe to the accused.

Respondent is also dismissive of Mr. Ruiz's conduct in withholding information that directly impacted the Public Defender's continued representation of Robert. To be clear, the "disclosure" occurred in April, 1998, three years into the Public Defender's representation of Robert, and resulted in the Public Defender's conflict from the case, which was a significant contributing factor in elongating the eighty-three-month pretrial. Respondent attempts to shrug

off Mr. Ruiz's conduct by asserting that there was insufficient support in the record to implicate Mr. Ruiz. Yet the record suggests otherwise. A Public Defender supervisor disclosed *in camera*:

> I do believe the Court should be aware that this conflict comes as a result, at least, of information that *we received recently from the prosecution*. Information we felt *should have been provided much earlier* in this case. And had that been provided, we would not be at the junction we are now, a conflict at this late stage in the case.

(RPT 879.)

Respondent is correct in that the precise nature of the disclosure was not put on the record, but it is not difficult to discern what transpired, given the timing of the disclosure, the Public Defender's explanation, and the Public Defender's immediate conflict from the case. To suggest that the record does not support Mr. Ruiz's withholding of information which significantly compromised and delayed Robert's trial is to turn a blind eye to the facts.

Prosecutor Ruiz's complicity in the revocation of Robert's *Faretta* status has been clearly documented in Appellant's Opening Brief. In an ironic twist, it was Mr. Ruiz, not Robert, who accounted for the delays during the ten-month *Faretta* period. It is of interest that Respondent characterized Appellant's argument on this point as "the prosecutor act[ing] despicably" in his role in terminating Robert's self-representation. Nowhere in Appellant's argument on this point does the word *despicably* appear. It appears Respondent believes that by using such powerful language, the error will somehow be mitigated by comparison. Frankly, given the deceptive conduct and disingenuous argument offered by Prosecutor Ruiz in forcefully arguing for termination of Robert's self-representation, perhaps *despicable* would indeed have been the more appropriate word.

Prosecutor Ruiz, as do all prosecutors, carries the heavy mantle of authority and thus in making representations to a court or jury must be fair and accurate. Yet on the two occasions set

forth in this argument, Mr. Ruiz made representations that were neither fair nor accurate. In the first, he represented, based on tapes he had listened to, that Robert was with Walker on the night of the murders. The tapes, however, only had the following statement: "I was with Rob that night." (RPT 1232.) As Robert himself pointed out, there were several different "Robs" that surfaced during the course of the investigation. Mr. Ruiz could certainly infer from the comment that the "Rob" reference was to Robert, but to make that inferential jump without qualification was misleading. Respondent attempts to discount any concern by explaining that since the judge had also listened to the tape, no harm occurred. Respondent's assertion misses the larger concern that this prosecutor engaged in careless and misleading conduct without regard for his special role as the "guardian of [Robert's] constitutional rights." Mr. Ruiz's second misrepresentation, regarding the clothing and test results, was dismissed by Respondent with the claim that "the prosecution corrected the record on that point at the next court hearing." (RB 122.) The prosecutor made misrepresentations that Robert's clothes were bloody and that the clothes had not been tested. He was wrong on both points, and his attempts to explain his misrepresentations, as set forth in Appellant's Opening Brief at page 188-89, offered no cover but only deepened the misrepresentations.

The last of Prosecutor Ruiz's acts of misconduct that have so far come to light involved his failure to disclose in a timely manner the third-party culpability evidence and then, once turned over, successfully urging the court to deny the defense sufficient time to assess and investigate the late-arriving materials. In this last and perhaps most grievous act of misconduct, Prosecutor Ruiz only admitted to possession of the materials when they were inadvertently discovered by the defense. These materials provided a viable basis for a third-party defense but were effectively excluded from the trial.

Prosecutor Ruiz took advantage of his powerful position systematically to deny Robert a fair trial through a series of unethical and biased actions. The cumulative effect rendered Robert's capital trial constitutionally invalid and the verdict and sentence unreliable.

ARGUMENT XIV

CUMULATIVE ERROR AT THE GUILT PHASE REQUIRES REVERSAL OF ROBERT WILLIAMS' CONVICTION

Respondent claims that no error occurred during the complicated and contentious guilt phase. Consequently, he did not respond to Robert's claim that the cumulative effect of the guilt-phase errors requires reversal and a new trial, instead reiterating his position that no errors occurred and, even if they did, they were harmless.

Given the quantity and quality of the guilt-phase errors, Respondent's cavalier response is remarkable. The litany of errors committed by the trial court and prosecutor wreaked havoc on the eighty-three-month pretrial as well as on the trial itself. The eighty-three-month delay effectively cost Robert his right to a speedy and fair trial and was primarily due to the prosecutor's discovery gamesmanship and the court's failure to sever Robert's case from the co-defendant until well past any point of reason. And while a specific showing of prejudice is not essential to finding a denial of speedy trial there were at least two instances of actual prejudice, specifically any meaningful investigation in to the third parties motivated to kill Gary Williams was irrevocably compromised and the nearly seven year delay witnessed the striking metamorphosis of Conya Lofton's testimony from a mass of contradictions into a certitude that served the state's case well. Furthermore, Prosecutor Ruiz's successful efforts to insulate the State's primary witness from investigation and effective cross-examination, as well as his

withholding of crucial information of third parties motivated to kill Gary Williams, effectively precluded any defense chances of mounting a viable defense.

Additionally, the court erred in failing to recognize that Prosecutor Ruiz "stacked the deck" by successfully moving to excuse two prospective African-American jurors, even though neither expressed views regarding capital punishment which would have prevented or substantially impaired the performance of their duties. This error was compounded when the court failed to check the prosecutor from preemptively challenging three other African-American prospective jurors.

Compounding the litany of consequential and prejudicial errors was the court's ruling allowing death-threat testimony and gang-affiliation evidence, which severely prejudiced Robert before his jurors.

And, finally, the trial court's unwarranted revocation of Robert's right to self-representation—not least at the urging of a prosecutor who was responsible for the very delay that was used as a pretext for the revocation—dramatically altered the course of the pretrial and trial.

The cumulative impact of these guilt-phase errors intensified the harm resulting from each separate error. The sorry record of this pretrial and trial cannot be said to have provided Robert with a fair trial. As a result reversal is required.

PENALTY PHASE

ARGUMENT XV

JUROR #1 WAS IMPROPERLY EXCUSED, DEPRIVING ROBERT WILLIAMS HIS RIGHT TO A COMPETENT, IMPARTIAL JURY AND DUE PROCESS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

As this Court emphasized in *People v. Barnwell* (2007) 41 Cal.4th 1038, "removing a juror is, of course, a serious matter, implicating the constitutional protection defendant invokes," and for which "a hearing is required." (*Id.* at 1051-52.) The seriousness of the matter is only exacerbated in a capital case: "The use of a single jury may help insure that the ultimate decision maker in the capital case acts with full recognition of the gravity of its responsibility throughout both phases of the trial, and will also guarantee that the penalty phase jury is aware of lingering doubts that may have survived the guilt phase deliberations." *People v. Nicolaus* (1991) 54 Cal.3d at 572 (citing *People v. Fields* (1983) 35 Cal.3d 329, 352.)

Respondent relies on *People v. Leonard* (2007) 40 Cal.4th 1370 and *People v. Ashmus* (1991) 54 Cal.3d 932, to support the trial court's decision in discharging Juror #1. In both *Leonard* and *Ashmus,* close family members had suddenly died. The *Ashmus* juror was affected by the "unexpected death of his mother" while in *Leonard*, the juror's wife reported that her father had been killed in an automobile accident, and that she and her husband would be attending the funeral and be unavailable for a week. In both cases, it was immediately certain that the jurors would be unavailable for a number of days. The sudden deaths in these two cases removed any doubt as to the jurors' unavailability.

Likewise, in the cases set forth in Appellant's Opening Brief, there were demonstrable and unambiguous circumstances before the various trial judges that rendered the decision to discharge unassailable. In *People v. Sanders* (1995) 11 Cal.4th 475, a juror collapsed in court and

required emergency medical treatment from paramedics. The paramedics informed the court that the juror's condition was due to high blood pressure and the corresponding stress that is inherent in a long and arduous trial. In *People v. Farnam* (2002) 28 Cal.4th 107, the court discharged four female jurors, one of whom was attacked in the presence of the others. Prior to discharging the jurors, the judge held two separate hearings in which all the jurors were questioned by court and counsel to determine if the attack would affect their ability to continue to serve as jurors. And, in *People v. Barnwell* (2007) 41 Cal.4th 1038, this Court found no error in the trial court's discharge of a juror who refused to follow the court's instructions during deliberation due to his expressed "disbelief of police officer testimony." (*Id.* at 1051-54.)

In *Sanders*, *Farnam*, and *Barnwell*, as well as the two cases cited by Respondent, the trial courts, prior to making the serious decision to discharge a juror, did so with the benefit of having a full and complete understanding of the circumstances before them. The discharge decisions in all five cases involved careful and thoughtful consideration. In contrast, the record here fails to establish a "demonstrable reality," with its absence of thoughtful consideration leading to the erroneous discharge of Juror #1. Following Juror #1's call to the court's clerk reporting that the juror may need hospitalization depending on the results of an exam to take place the following day, the judge was at a loss-- "We don't know how bad it is. And we don't have the doctor's report." Further, the record reflects the court's impatience: "[H]e's not here today ... he won't be here tomorrow. And we anticipated--told the jury we were going to get done tomorrow." (RT 3496-98.) Would waiting an additional day, especially in a death penalty case, in order to ascertain the extent of Juror #1's condition not have been prudent under these circumstances? Had the court observed the juror's condition, heard testimony from the other jurors, perhaps had the bailiff confirm the juror's condition, received a doctor's report, or spoken to the doctor or to

the juror personally and inquired if he might be able to get around on crutches or in a wheelchair, Juror #1's excusal might not have been an error. The record, however, is devoid of any such inquiry ever having been undertaken.

The trial judge made his decision without knowing what he needed to know or asking what he needed to ask. Recollecting his similarly hasty decision regarding dismissing the allegations that Juror No. 6 had been sleeping, the judge failed here to once more recognize the seriousness of the issue with which he was confronted, and, as a result, exercised poor judgment at Robert's expense. Robert was deprived of the input of a juror who had been a part of the guilt phase deliberations, who might have had some lingering doubt about Robert's involvement that may have affected the penalty deliberations.

ARGUMENT XVI

THE COURT FAILED TO PROPERLY INSTRUCT ON THE STANDARD OF PROOF PRIOR TO IMPOSING THE DEATH PENALTY

Appellant recognizes that "CALJIC No. 8.88 has been held by this Court to be constitutionally sufficient in providing guidance to the jury on the weighing of aggravating and mitigating factors." (*People v. Howard* (2010) 51 Cal.4th 15, 39.) However, perhaps it will be Robert's case that causes the Court to reconsider its position and recognize that, with a matter of this import, the term "*persuaded*" does not provide sufficient guidance to a jury, nor does it adequately acknowledge the gravity of the question being considered. It seems incongruous that in a shoplifting case the jurors must be convinced beyond a reasonable doubt of the accused's guilt, and yet in considering the question of life or death the standard is that they simply be "persuaded." Beyond that which is set forth in Appellant's Opening Brief, he has nothing further to add on this issue.

ARGUMENT XVII

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

Appellant reiterates his argument from the Opening Brief that the Eighth Amendment to the United States Constitution prohibits affirmation of a death sentence unless guilt is proven beyond all doubt. As set forth in Appellant's Opening Brief, it is beyond all doubt that innocent people are routinely sentenced to death, and the Eighth Amendment requires that we translate that knowledge into the appropriate burden of proof in cases where death is a potential outcome. Apart from that set forth in his Opening Brief, appellant has nothing further to add to this issue.

ARGUMENT XVIII

CALIFORNIA'S DEATH PENALITY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT ROBERT WILLIAMS' TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Robert reiterates his position that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Apart from that previously set forth in the Opening Brief, he has nothing further to add to this issue.

ARGUMENT XIX

ROBERT WILLIAMS' DEATH PENALTY IS INVALID BECAUSE IT PROVIDES NO MEANINGFUL BASIS FOR CHOOSING THOSE WHO ARE ELIGIBLE FOR DEATH

Robert reiterates his position 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. Apart from that previously set forth in the Opening Brief, he has nothing further to add to this issue.

ARGUMENT XX

ROBERT WILLIAMS' DEATH PENALTY SENTENCE IS INVALID BECAUSE IT ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Robert reiterates that § 190.3 (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments in that it has been applied in such a random and meaningless manner that almost all features of every murder have been characterized by prosecutors as "aggravating" within the statute's meaning. Apart from that previously set forth in the Opening Brief, he has nothing further to add to this issue.

ARGUMENT XXI

CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT OT A JURY DETERMINATION OF EACH FACTUAL PREPREQUISITE TO A SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Robert reiterates that California's death penalty statute does nothing to narrow the pool of murderers to the most deserving of death in either its "special circumstances" section (§ 190.2), or in its sentencing guidelines (§ 190.3). Apart from that previously set forth in the Opening Brief, he has nothing further to add to this issue.

ARGUMENT XXII

THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NONCAPITAL DEFENDANTS

Robert reiterates that California's sentencing scheme violates the equal protection clause of the United States Constitution by denying capital defendants the protections afforded

noncapital defendants. Apart from that previously set forth in the Opening Brief, he has nothing further to add to this issue.

ARGUMENT XXIII

THE VIOLATION OF ROBERT WILLIAMS' RIGHTS ARTICULATED ABOVE CONSITUTE VIOLATIONS OF INTERNATIONAL LAW AND REQUIRE THAT ROBERT'S CONVICTIONS AND PENALTY BE SET ASIDE

Robert reiterates his claim that the violations of his rights as set forth throughout this brief constitute violations of international law and require that his conviction and penalty be set aside. Apart from that previously set forth in the Opening Brief, he has nothing further to add on the issue.

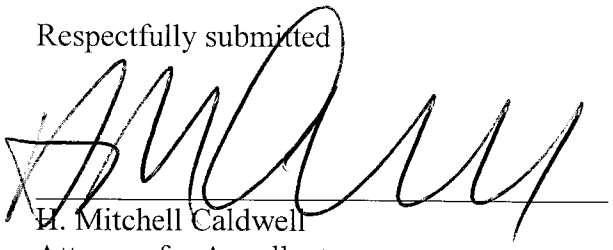
ARGUMENT XXIV

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALITY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Robert reiterates his claim that the death penalty, as a regular form of punishment, is contrary to international norms of humanity in violation of the Eighth and Fourteenth Amendments, and that its imposition violates the United States Constitution. Apart from that previously set forth in the Opening Brief, Robert has nothing further to add on this issue.

Dated: August 20, 2012

Respectfully submitted



H. Mitchell Caldwell
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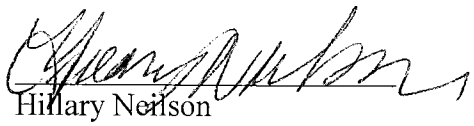
Robert Williams

I affirm that the computer generated word count is 29,631.

August 20, 2012



Hillary Neilson

PROOF OF SERVICE BY MAIL

Case Name: People v. Robert Lee Williams, Jr. No. 8118629

I am a citizen of the United. I am over the age of eighteen years; my business address is: 24255 Pacific Coast Highway – SOL, Malibu, California, 90263.

On August 20, 2012, I served the within Appellant's Reply Brief on interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, postage thereon fully prepaid, in the United States mail at Malibu, California, addressed as follows:

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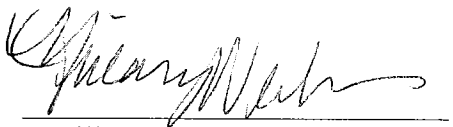
I certify under penalty of perjury that the foregoing is true and correct.

Executed on August 20, 2012, at Malibu, California



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