SUPREME COURT COPY

SUPREME COURT No. **S073205** **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	
v.	Riverside County Superior Ct. No. CR49662
JACK EMMIT WILLIAMS,	
Defendant and Appellant.	

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Riverside

HONORABLE TIMOTHY HEASLETT , JUDGE

OPENING BRIEF FOR APPELLANT JACK E. WILLIAMS

Volume I of II
Guilt Phase Issues
Pages 1-343

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SUPREME COURT No. **S073205** **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	)
	) Riverside County
v.	) Superior Ct.
	) No. CR49662
JACK EMMIT WILLIAMS,	)
	)
Defendant and Appellant.	)
_____	)

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

HONORABLE TIMOTHY HEASLETT , JUDGE

OPENING BRIEF FOR APPELLANT JACK E. WILLIAMS

STATEMENT OF APPEALABILITY

This appeal is automatic pursuant to the California Constitution, art. VI, section 11 and Penal Code section 1239, subdivision (b). Further, this appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF CASE

By an Information filed on August 19, 1994, appellant Jack Emmitt Williams was charged with eleven counts. (2 C.T. 352.)

Count I alleged that on or about May 19, 1993 Alsonso Dearaujo and Jack Williams murdered Yvonne Los in violation of Penal Code section 187. Count I further alleged the special circumstance that the murder was committed while Dearaujo and Williams were engaged in immediate flight after committing the crime of attempted robbery in violation of Penal Code sections 664/211, all within the meaning of Penal Code section 190.2(a)(17)(i). Count I further alleged that in the commission of the above offense Alonso Dearaujo personally used a firearm, a Beretta .380 caliber handgun, within the meaning of Penal Code section 12022.5(a) and 1192.7(c)(8). (2 C.T. 352.) Finally this count, and all remaining counts, alleged a principal was armed within the meaning of Penal Code section 12022(a)(1). (2 C.T. 352-359.)

Count II alleged that on or about May 19, 1993, Alonso Dearaujo and Jack Williams attempted to rob Yvonne Los in violation of Penal Code Section 664/211. (2 C.T. 353.) Count II further alleged that Alonso Dearaujo personally used a firearm during the offense within the meaning of Penal Code Sections 12022.5(a) and 1192.7(c)(8).

Count III alleged that on or about May 14, 1993, Alsonso Dearaujo and Jack Williams robbed James Garcia in violation of

Penal Code section 211. (2 C.T. 353-354.) Count III further alleged that during the robbery Alonso Dearaujo personally used a firearm within the meaning of Penal Code sections 12022.5(a) and 1192.7(c)(8).

Count IV alleged that on or about May 14, 1993, Alonso Dearaujo and Jack Williams attempted to kidnap Debby Phillips for the purpose of robbery, or aided and abetted such an act, in violation of Penal Code sections 664/209, subdivision (b). (2 C.T. 354.)

Count V alleged that on or about May 14, 1993, Alonso Dearaujo and Jack Williams attempted to kidnap Deena Nolin for the purpose of robbery or aided and abetted such an act in violation of Penal Code section 664/209, subdivision (b).

Count VI alleged that on May 15, 1993, Alonso Dearaujo and Jack Williams robbed Dale Nonies in violation of Penal Code section 211. (2 C.T. 355.) Count VI further alleged that during the robbery Jack Williams personally used a firearm within the meaning of Penal Code sections 12022.5(a) and 1192.7(c)(8).

Count VII alleged that on or about May 15, 1993, Alonso Dearaujo and Jack Williams attempted to rob Barbara DeGeorge in violation of Penal Code section 664/211. (2 C.T. 356.)

Count VIII alleged that on or about May 17, 1993, Alonso Dearaujo and Jack Williams robbed Patricia Smith in violation of Penal Code section 211. (2 C.T. 356.) Count VIII further alleged that during the robbery Alonso Dearaujo personally used a deadly

weapon, a knife, within the meaning of Penal Code sections 12022(b) and 1192.7(c)(23).

Count IX alleged that on or about May 17, 1993, Alonso Dearaujo and Jack Williams robbed Charles Estey in violation of Penal Code section 211. Count IX further alleged that during the robbery Alonso Dearaujo personally used a deadly weapon, a knife, within the meaning of Penal Code section 12022(b) and 1192.7(c)(23). (2 C.T. 357.)

Count X alleged that on or about May 20, 1993, Alonso Dearaujo and Jack Williams robbed Glen Brodbeck in violation of Penal Code section 211. This count further alleged that during the robbery Jack Williams personally used a firearm within the meaning of Penal Code sections 12022.5(a) and 1192.7(c)(8).

Count XI alleged that on or about May 20, 1993, Alonso Dearaujo and Jack Williams attempted to kidnap Glen Brodbeck for the purpose of robbery or aided and abetted such an act in violation of Penal code sections 664/209, subdivision (b). (2 C.T. 358.) This count further alleged Jack Williams personally used a firearm within the meaning of Penal Code sections 12.22.5(a) and 1192.7(c)(8). (2 C.T. 358-359.)

On December 6, 1994 appellant Williams was arraigned, pled not guilty to all counts and denied all special allegations. The prosecution announced it would seek the death penalty. (2 C.T. 370.)

Prior to voir dire, the defense argued a Penal Code section 995

motion that was denied on April 21, 1995. (2 C.T. 412) Motions for Change of Venue, Severance, and for Separation of Guilt and Penalty Phases were all argued and denied on November 13, 1997. (3 C.T. 717, 719.)

On November 13, 1997, however, codefendant Deaŕaujo's Motion for Separate Juries was granted. (3 C.T. 763.) Appellant Williams' Motion to Sever Non-Capital Counts was denied on December 8, 1997. (4 C.T. 804.)

Voir dire commenced on January 6, 1998. (4 C.T. 832.) Presentation of evidence in the guilt phase began on January 27, 1998. (18 C.T. 4995.)

On March 10, 1998 appellant filed a Penal Code section 1118.1 motion contesting the felony murder special circumstance and arguing that the evidence was insufficient to show the non-shooter was a major participant and did not act with reckless indifference. The motion was subsequently argued and denied. (19 C.T. 5038.)

Appellant Williams' jury retired to deliberate in the guilt phase on March 23, 1998. (19 C.T. 5055.) The jury returned its verdict on April 6, 1998. (18 C.T. 5069.)

As to Count I, the jury found appellant Williams guilty of first degree murder, found the robbery murder special circumstance to be true and found the principal armed enhancement to be true. (18 C.T. 5070-5071.)

The jury also found appellant Williams guilty of all other

counts (I through XI, inclusive) and found all personal use and/or principal armed enhancements to be true. (18 C.T. 5072-5091.)

On April 13, 1998 appellant's Motion for Mistrial on the grounds of juror misconduct was heard and denied. (19 C.T. 5253.) Appellant's motion to exclude the testimony of Ms. Loa was also heard and denied. (19 C.T. 5254-5258, 5268.)

Presentation of evidence in the Penalty Phase commenced on April 13, 1998. (19 C.T. 5242.) The jury retired to deliberate on May 6, 1998. (19 C.T. 5332.) On May 11, 1998, the jury returned a verdict of death as to Count I. (19 C.T. 5334-5335, 5353.)

At a sentencing hearing on August 24, 1998, appellant's Motion to Modify the Verdict was denied. The court imposed a total indeterminate sentence of 21 years 8 months plus death. (19 C.T. 5374.) Subsequently, the prison at San Quentin notified the court that the sentencing might be in error.

On September 2, 1998 the court vacated the sentence previously imposed as to Counts II through XI. The revised sentence imposed was 24 years 6 months to life plus death.[1] (19 C.T. 5406, 5409.)

The sentence was comprised as follows:

---

[1] The totals taken from both the Minute Order of the sentencing hearing and the terms indicated on the Abstract of Judgment, however, total 24 years 4 mos., not 24 yrs 6 mos. (19 C.T. 5409-5410.) The abstract of judgment needs to be modified to reflect the actual sentence.

Count I	death		
Count II		6 mos	1/3 term of 18 mos
Count III	1 yr		1/3 midterm
Count IV	2 yrs	4 mos	1/3 midterm
Count V	2 yrs	4 mos	1/3 midterm
Count VI	1 yr		1/3 midterm
Enhancement	1 yr	4 mos	1/3 of 4 yrs - PC section 12022.5(a)
Count VII		6 mos	1/3 midterm
Count VIII		8 mos	1/3 midterm
Count IX		8 mos	1/3 midterm
Count X	1 yr		1/3 midterm, stayed per PC 654
Count XI	9 yrs		Upper Term - Principal Count
Enhancement	5 yrs		Upper term, PC section12022.5(a)

The term imposed as to Count X as well as the term imposed for the Count X Penal Code section 12022.5(a) enhancement was stayed pursuant to Penal Code section 654. On Counts I through V, inclusive, and VII through XI, inclusive, the term of 1 year, 4 months (1/3 the midterm) was imposed for the Penal Code 12022(a) enhancement[2] and was stayed on all counts. (19 C.T. 5406-5408, 5409-5410.) All terms imposed were to run consecutive to one

[2] On Count I, however, the term of 1 year was imposed, not 1 year 4 months. (19 C.T. 5408.)

another.[3] (19 C.T. 5406-5408, 5409-5410.)

The Commitment to the Judgment of Death was signed by Judge Timothy J. Heaslet on August 24, 1998. (19 C.T. 5402-5404.) This appeal is automatic.

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[3] In addition, the court imposed a fine in the amount of $10, 000. (19 C.T. 5373, 5375

STATEMENT OF FACTS

Guilt Phase

Introduction

Almost all of the counts charged in the Information stem from a teenage "bull session," fueled largely by alcohol and marijuana. The session included appellant Williams, codefendant Dearaujo and several of their friends. The discussion took place at Natalie Dannov's home on May 14, 1993 and revolved around ways to raise money. Suggestions included legitimate ways to raise money but more often wandered to the commission of various types of crimes, particularly carjackings. The testimony on exactly what took place at this meeting is at best conflicting. Additionally, the testimony concerning the purpose of the endeavor was conflicting as well. There was some evidence to the effect that the proceeds from these endeavors would be used simply to party. Other evidence was to the effect that the proceeds were to be placed in a common account. When the account was sufficiently large, the proceeds would be divided up among group members to finance legitimate investments. It is the latter evidence that the prosecution relied upon to establish that the group discussions generated a conspiracy. Conspiracy was never charged as a separate offense, although the prosecution relied on it as a theory of conviction.

Additionally there was conflicting testimony on who was the actual leader of the group or whether there was a cohesive identifiable

group at all. Several members thought appellant was the leader, others refused to acknowledge appellant's authority and thought Mondre Weatherspoon was at least a co-leader. Some of the group did not consider themselves members of any specific identifiable entity, they just associated with each other on a casual basis as friends.

The members of the group included not only the codefendants, but James Handy, Mondre Weatherspoon, Christopher Lyons, George Holland, John Howell, Kiesha Lawrence, Andrew Cannioto, Anthony Post, Alfredo Gonzales (Chuey), Rodney Metoyer and Natalie Dannov. With the exception of appellant Williams, codefendant Dearaujo and Andrew Cannioto, all of the alleged group members eventually pled guilty to various felony offenses.[4] After pleading to these various offenses and receiving lesser sentences, these group members testified for the prosecution against appellant and codefendant Dearaujo.[5]

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[4] Lyons, accessory to murder, 2 armed robberies and attempted carjackings (19 RT 2608-2609, 2761, 2860); Holland, 3 counts, robbery and attempted kidnapping (1 RT 34-48; 21 RT 2963); Post, accessory to murder after the fact, 2 attempted kidnappings, 2 attempted armed robberies (24 RT 3404-3405, 3592); Gonzales, 1 count (1 RT 48-54); Handy, 2 counts, robbery, attempted kidnapping, firing a weapon (1 RT 55-63, 29 RT 3892); Weatherspoon, attempted kidnapping and 2nd degree robbery (29 RT 4019); McNair, 3 counts, attempted kidnapping (1 RT 63-71; 31 RT 4255); Howell, 3 counts (1 RT 74-83, 22 RT 3021); Dannov, accessory to armed robbery (23 RT 3187); Lawrence, 2 counts of accessory to attempted kidnapping with the intent to rob (39 RT 4735).

Andrew Cannioto was convicted of attempted carjacking. (29 RT 3876.)

[5] The evidence on each count was provided primarily by the actual participants. For ease of reference, the following is a list of the participant witnesses and references the cites of their testimonies: Lyons, 19 RT 2608 through 21 RT 2961; Holland, 21 RT 2962-3017, 23 RT 3195-3272, 24 RT 3299-3404; Dannov, 22 RT 3027 through 23 RT 3191;

Because of the loose connection between the participants and the indeterminate nature of the purported enterprise, not all of the meeting participants were present during each subsequent criminal episode, and most did not even know that any particular crime (or more likely an attempted crime) would even take place.

The most serious offense charged was a homicide. The homicide in this case was interracial. Defendant Jack Williams and his mentally challenged codefendant Dearaujo are black. The decedent, Yvonne Los was white.

On the evening of the shooting, appellant Williams secured a ride with some friends to a party in Anaheim, CA. Since there was not room in the vehicle for codefendant Dearaujo or his thirteen year old pal Christopher Lyons, the latter two volunteered to obtain a car and follow along. At their request, Mr. Williams purportedly provided a pistol and told them where to meet in the event that they obtained a vehicle.

Dearaujo and Lyons then walked to a nearby shopping center parking lot and looked around for a vehicle. As Yvonne Los drove into the parking lot to go to a fitness center, the two decided her car was a good choice. Christopher Lyons approached the passenger's

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Post, 24 RT 3404 through 26 RT 3626; Cannioto, 28 RT 3806-3877, 3890-18–3890-76; Handy, 29 RT 3891-4017; Weatherspoon, 29 RT 4018-4061, 29 RT 4099-4138, 4152-4254; McNair, 31 RT 4255-4280, 32 RT 4295-4322; Lawrence, 39 RT 4733 through 40 RT 4940; Howell and Gonzales did not testify; Metoyer testified only in an Evidence Code section 402 hearing.

side of the vehicle and Dearaujo approached the driver's side. Displaying the gun, Dearaujo told Ms. Los to unlock the door and get out. Ms. Los apparently refused and began to drive away. Panicked, the slow witted Dearaujo shot at the car as it started to move. Unfortunately, the bullet shattered the side window and struck Ms. Los severing her carotid artery. She died within minutes. Lyons and Dearaujo fled across a nearby field into the darkness.

Since Mr. Williams was not present at the Los homicide and obviously had no intent to kill, the prosecution's theory of criminal culpability was solely one of vicarious liability. The prosecution urged that Mr. Williams was either an aider and abetter or a coconspirator to felony murder (robbery).

Understandably, the jury was perplexed about the reach of vicarious liability, not only with regard to the homicide but the felony murder special circumstances as well. That is, the jury was concerned about whether liability attached to a person who was not present, did not participate and certainly did not know a homicide would take place. Additionally the jury was concerned about whether Mr. Williams should face the death penalty even if there was criminal liability. The numerous jury notes asking about the extent of vicarious criminal culpability, the extended contentious deliberations culminating in the improper dismissal of the only holdout juror and jury notes inquiring about the practical effect of a sentence to life without parole all attest to the jury's struggle with these issues. The trial court's failure to properly handle the contentious jury

deliberations or properly instruct the jury in response to its numerous inquires effectively steered the jury toward an inevitable conviction and death sentence.

Additionally, the issue of race colored virtually every aspect of this trial. Not only did it affect the jury's deliberations by stifling a full assessment of the evidence, but it resulted in the dismissal of the only black jurors (one of which was the lone holdout juror) during the guilt phase. The problem of race also prejudiced the penalty phase deliberations. The voluminous victim impact evidence pointedly contrasted a very high achieving and sympathetic white decedent with the more modest achieving and purportedly criminally inclined black defendant. Moreover because of the sheer volume of this victim impact evidence - including evidence from Ms. Los' birth through her death and beyond - this emotional onslaught completely overwhelmed any realistic notion of a jury's principled deliberations.

Finally, the trial court forced defense counsel to proceed at penalty phase despite an obvious conflict situation. The Public Defender's office previously represented several prosecution witnesses and possessed information that would be highly beneficial to Mr. Williams in cross examining these witnesses. When the conflict came to light during a vigorous defense objection to proceeding forward, the trial judge ordered the head of the Public Defender's Office not to reveal the information to trial defense counsel (a senior attorney in the Public Defender's Office) and refused to let trial defense counsel withdraw. The error is reversible

per se.

For ease of understanding, appellant first will describe the relationships among the witnesses. While somewhat complex, those relationships fostered the pivotal meeting at Dannov's house and guided the subsequent criminal offenses. Appellant then will address the actual counts in chronological order beginning with Count III, a robbery offense that took place on the evening **before** the meeting at the Dannov residence.

PROSECUTION EVIDENCE

Background Information - Personal Relationships

In May 1993 Natalie Dannov lived with her mother in Moreno Valley. (22 R.T. 3027.) Her mother worked out of town and was only home on Saturday and Sunday nights. (22 R.T. 3027.) Natalie Dannov was 17 years old, was not attending school and was not working. (22 R.T. 3027-3028.) Cathaleen Roberts, a friend from church camp, was staying with Dannov. (22 R.T. 3028, 3030.)

Around May 10, 1993, Roberts introduced Dannov to appellant Williams. (22 R.T. 3029.) In the next few days, Dannov developed a romantic relationship with Williams. (22 R.T. 3031.) Once or twice appellant brought Weatherspoon, Dearaujo and Holland to the house to watch television and talk. (22 R.T. 3032.) Dannov knew two other members of the group, Howell and Lawrence, from high school. She knew Post because he sometimes came to the church youth group with Holland. (22 R.T. 3033.)

Dannov and Williams' friends began hanging out at Dannov's house because there was no supervision there. (21 R.T. 2974.) They would drink, talk, listen to music, and just "kick back." (21 R.T. 2976; 24 R.T. 3417; 29 R.T. 3901-3903; 29 R.T. 4029.) Dannov testified these friends did not use drugs or drink alcohol at the house. (22 R.T. 3033.) However, the testimony of virtually every other person involved contradicted her claim.

Christopher Lyons testified that he was 13 years old at the time of the incidents in May 1993. He had not attended school since mid-February of that year and was having real problems at home. (19 R.T. 2613, 2701, 2771-2772, 2786, 2865-2866.) At the time of trial, he was 18 and had known codefendant Dearaujo (aka "Junior") for about 14 years because they lived in the same neighborhood. (19 R.T. 2610.) He also knew Metoyer, Howell and Lawrence. Sometimes, they used to play basketball at Metoyer's house. (19 R.T. 2612.)

In May 1993, Lyons and codefendant Dearaujo had been hanging around on a daily basis for two weeks and on a regular basis for about a month or two. Before that time, Lyons was going to school every day and befriended a number of children his own age who did not commit crimes. Nevertheless, when Dearaujo came over and asked if Lyons wanted to start riding bikes with him again, he [Lyons] quit going to school every day. (19 R.T. 2919.)

Lyons met Williams through Dearaujo a couple of months prior to mid-May 1993. (19 R.T. 2613, 2700, 2762.) Starting in mid-May

though, Lyons began partying a lot. Sometimes he smoked marijuana and drank alcohol, including during parties at Dannov's house. (19 R.T. 2613-2614, 2767.) Most times when Lyons was with the group there was always a focus on getting high with alcohol, marijuana, or a combination of the two. (21 R.T. 2888.)

At the time of trial Lyons still considered Dearaujo a friend and wanted to continue that friendship. Lyons testified that he knew what the word "bias" meant but did not consider himself prejudiced towards Dearaujo. (19 R.T. 2920.) Nevertheless, Lyons admitted that although he would not lie, he might slant things a little bit if he thought it would help Dearaujo. (19 R.T. 2921.)

Lyons testified that he looked up to Williams (21 R.T. 2912) and wanted to earn respect (a "G stripe") from Williams and the group that gathered at Natalie's house. (21 R.T. 2921.) Because of the way he carried himself and talked and because he carried a gun on a regular basis, Lyons imagined appellant might have been a member of a gang and therefore likely was a dangerous person. (21 R.T. 2889.) As a 13-year old boy, this mental image of danger was attractive to Lyons. (21 R.T. 2889-2890.) Lyons testified that he wanted to emulate the type of person he thought Williams was. (21 R.T. 2890.) At one point, appellant referred to Lyons and Dearaujo as his personal bodyguards, although a large part of that role was simply being an errand boy. (21 R.T. 2891.) Lyons testified that it never crossed his mind to upset or disregard appellant. (21 R.T. 2891-2892.)

Mondre Weatherspoon and appellant both carried themselves the same way. Lyons thought of them equals although Mondre was older. Lyons testified that George Holland was older too, but not on equal level with appellant and Mondre. (21 R.T. 2949.)

Randy Metoyer testified that he was 14 or 15 in May 1993. He was a sophomore or freshman in high school. (33 R.T. 4382.) There was a basketball hoop hooked onto the front of his house. Many of the members of the group located in the neighborhood would congregate at this house to use it. (33 R.T. 4381-4382.)

Another member of the group and neighbor of Rodney Metoyer, George Holland testified that prior to his arrest, he and Williams were really good friends. They grew up together in the same neighborhood and did pretty much everything together. (21 R.T. 2965-2966.) They liked to party. Holland drank a little and was a drug user. (21 R.T. 2966.) Holland also knew Howell, Lawrence, Metoyer, Post, and Cannioto from school and the neighborhood. They were a tight-knit group. (21 R.T. 2965-2968.) Although Holland knew Dearaujo from the neighborhood from about 1991, they did not hang out together. (21 R.T. 2970.) Dearaujo introduced Lyons to Holland in early May 1993. (21 R.T. 2973.) It was also in early May that Holland met Weatherspoon, Handy and McNair and first went to Dannov's house. (21 R.T. 2969, 2973.) Holland met Dannov through Cathaleen Roberts, Holland's girlfriend at the time. (21 R.T. 2973.)

Holland was among the oldest of the group; he was 18 at the time of the incidents in 1993. (21 R.T. 2966-2967, 2972.) He had been expelled from school and was not employed. He was living with his mother and two sisters. (21 R.T. 2976.) Sometimes his sister, Lawana, would hang out with Holland. She had a yellow Ford Fiesta which she sometimes let him use. (21 R.T. 2977.)

Anthony Post testified that in May 1993 he was attending school. He was in the 9th grade at Moreno Valley High. He did not have a job and his mother was pretty strict. (24 R.T. 3405, 3410; 25 R.T. 3440.) He lived in the same neighborhood as Williams and Williams had been one of his best friends for two or three years. (24 R.T. 3407, 3410.) They drank alcohol together. (24 R.T. 3390.) Post's other good friends were Holland and Howell. (24 R.T. 3410.) Post looked up to Holland and Williams because they were older. (24 R.T. 3415.) Although he, too, knew of Dearaujo, Post had not been around him much. In early May, Dearaujo introduced Post to Lyons. (24 R.T. 3409, 3411.) Post and Metoyer were both at Moreno High and they frequently hung out together at school. (24 R.T. 3412.)

Prior to May 14, 1993, Post had been to Dannov's house four or five times. (24 R.T. 3416-3417, 25 R.T. 3442.) While there, he and the others listened to music, ate, messed around and drank. (24 R.T. 3416.) In addition to Dannov's house, Post and his friends also hung around at Post's, Holland's, Howell's and Metoyer's houses in May 1993. (25 R.T. 3441.) After May 14, 1993, Post more or less disassociated himself from the group. (24 R.T. 3392.)

Andrew Cannioto (Drew) testified that he was 13 years old in May 1993. (28 R.T. 3807, 3812.) He met Williams through Metoyer. Metoyer and Cannioto grew up together and Metoyer was Cannioto's closest friend. (28 R.T. 3808, 3810.) In May 1993, Cannioto was living in Big Bear but during January through May 1993 he stayed with Metoyer every other weekend. (28 R.T. 3810.) During his visits, Cannioto became acquainted with some of Metoyer's friends. (28 R.T. 3811-3812.)

When Cannioto first met Williams, Cannioto thought Williams was pretty cool. (28 R.T. 3816.) Cannioto also knew Howell, Holland and a few others. Metoyer had a basketball hoop at his house and they used to play ball, kick back and drink beer there. Cannioto did not remember how they got the beer. (28 R.T. 3813.) Sometimes they would play video games and walk places, but they pretty much stayed in the general neighborhood around Metoyer's house. They had to walk anyplace they went. (28 R.T. 3817.) Cannioto met Dearaujo one day when they were playing basketball. They were also both playing video games at a doughnut shop once. (28 R.T. 3819-3820.)

Cannioto went to Dannov's house for the first time on May 14, 1993. He was told there was going to be a party. (28 R.T. 3821.)

James Handy testified that in 1993 he was in the 11th grade and attending school. He was 17 years old and lived in an apartment with his mother and sister. (29 R.T. 3895-3896.)

Handy and Williams had been in school together. He considered Williams a friend, but his closest friends in 1993 were Weatherspoon (Dre), Gonzales (Chuey) and McNair. (29 R.T. 3894.) Handy met Lyons in mid-May. (29 R.T. 3897.)

Handy had been to Dannov's once prior to the meeting on May 14th. (29 R.T. 3899.) He was invited by Williams and Weatherspoon; they were hanging out, drinking gin. (29 R.T. 3901.) Handy was smoking marijuana back then, but does not remember if he smoked at Dannov's. (29 R.T. 3901-3902.)

In May 1993 Mondre Weatherspoon was 17 years old. (29 R.T. 4021.) He and Williams went to high school together and were close friends. (29 R.T. 4021.) Weatherspoon was also closely associated with his cousin, McNair, and with Handy and Gonzales. (29 R.T. 4021.) He knew Holland, Howell, and Lawrence from the neighborhood and met Dearaujo through Williams in early May. (29 R.T. 4023-4025.)

Weatherspoon was a heavy drinker, and drank four or five times a week. His preference was gin. (29 R.T. 4027.) The first time he went to Dannov's house was two or three weeks prior to his arrest. (29 R.T. 4025.) There was a party and he was drinking gin. (29 R.T. 4025, 4027.) He also smoked marijuana in those days, but not at the May 14th party at Dannov's. Between that first time and his arrest, Weatherspoon was at Dannov's house three or four times. (29 R.T. 4028.) At Dannov's they discussed forming a gang,

although he had been thinking about it for two or three weeks prior to that time. The party was not organized in order to promote the idea of a gang, it just happened. Once formed, the gang would commit legal or illegal activities to make money. He contributed ideas as did others. Some of the ideas were robberies and selling drugs. (29 R.T. 4035.) He and Williams were the main players. He considered himself to be one of the leaders. (29 R.T. 4033-4034.) He certainly did not take orders from Williams. (31 R.T. 4213.) Weatherspoon also testified that he was not going to commit any crimes because he did not need to. He already had something of a reputation and respect, similar to that of appellant and Steve McNair. (29 R.T. 4042-4043.)

Steve McNair testified that he was Weatherspoon's cousin and that he knew Williams, Holland and Post from school and met Dearaujo at Dannov's house. (31 R.T. 4255-4256, 4260-4261.) McNair's other friends at that time included Handy and Gonzales. (31 R.T. 4257.) In May 1993 he used to drink three or four 40-ounce beers a day. (31 R.T. 4258.) McNair was 17 years old. (31 R.T. 4255.)

McNair testified that he was rarely at Dannov's house. (31 R.T. 4257.) He was there on May 14th. (31 R.T. 4261-4262.) A discussion began about forming a crew called the Pimp Style Hustlers; he just listened. (31 R.T. 4263-4264.) He never agreed to join the Pimp Style Hustlers. He didn't say anything. (31 R.T. 4265.)

Martin Silva, homicide investigator for the County of Riverside

presented aerial photographs and maps showing the proximity of the homes of the individuals above to each other and to the locations of the various incidents. (23 R.T. 3277-3295.) In so doing, he also outlined the route taken on a jury tour of the area. (23 R.T. 3277-3295.)

Count III[6]

During the day on May 14, 1993, Williams, Dearaujo and Lyons were at Dannov's house . She heard them talking about a robbery committed at a Circle K. (22 R.T. 3039-3040.) According to Dannov, the robbery was committed by Dearaujo with Williams' gun, a .380 Beretta, People's exhibit 10. (22 R.T. 3040-3041.) Dannov had seen the gun prior to May 14th. Sometimes Williams had the gun in his belt and other times it was in a drawer or under a couch or mattress in Dannov's house. (22 R.T. 3042-3043.) Williams gave some of the money from the robbery to Dannov and Roberts for groceries.[7] (22 R.T. 3041.)

Weatherspoon testified that the night of the robbery, he was driving his father's Ford LTD. (30 R.T. 4125.) Williams and Dearaujo were with him and by chance they ended up at the Circle K.

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[6] Primary testimony is that of Mondre Weatherspoon.

[7] Lyons did not testify to anything concerning the Circle K robbery. Weatherspoon, however, testified he was the driver for the Circle K robbery, and was with Williams and Dearaujo. (31 R.T. 4214.)

(30 R.T. 4127.) It was Weatherspoon's impression that Dearaujo had never committed an armed robbery before, so Weatherspoon and Williams were giving Dearaujo advice. (30 R.T. 4130.)

Williams gave Dearaujo the gun and he and Weatherspoon told Dearaujo to cover his face, pull the gun out and tell the clerk to put the money in a bag. (30 R.T. 4131.)

Dearaujo was in the Circle K for about 5 minutes before he returned to the car. Weatherspoon could see from the bag that Dearaujo had been successful. (30 R.T. 4133.) The men split up the money in a parking lot. (30 R.T. 4135.)

James Garcia testified that during the early morning hours of May 14, 1993, he was working the graveyard shift at the Circle K on Maude Street in Riverside. (27 R.T. 3729-3731.) About 1 a.m., the door chime rang and Garcia looked up to see who entered the store. (27 R.T. 3737.)

Garcia saw a person wearing a black-colored hooded sweatshirt with the hood up. Garcia estimated the man was about 5'6" tall and 18 to 20 years old. He was dark-eyed with a light dark complexion. (27 R.T. 3738-3739.) The man pointed a gun directly at Garcia and told Garcia to give him all the money or he would "blow my f__ ing head off." (24 R.T. 3737.) Garcia emptied the cash register and at the man's direction put the money in a bag and laid the bag on the counter. (27 R.T. 3740-3741.)

The man then told Garcia to turn around and count to 100.

Garcia turned and began to count. (27 R.T. 3742-3743.) As soon as Garcia heard the door chime, he called the police and locked the door. (27 R.T. 3743.) Garcia did not hear any vehicles leaving the area after he heard the door chime. (27 R.T. 3744.) The police arrived within 5 to 10 minutes of Garcia's call. (27 R.T. 3745.) Officer Warren Holm responded to the call at 1:14 a.m. and interviewed Garcia. (31 R.T. 4283.)

In court, Garcia identified Dearaujo as the man who robbed the Circle K. (27 R.T. 3745-3746.)

Counts IV and V[8] and the Meeting

Around 8 or 8:30 the evening of May 14, 1993, the day after the Circle K robbery, Williams, Weatherspoon, Handy, Holland, Cannioto, Post, Gonzales, Lyons, Lawrence, Howell, Metoyer, and Dearaujo went to Dannov's house. Dannov and Roberts were not expecting them; they just started showing up.[9] (22 R.T. 3033.) Howell and Lawrence arrived somewhat later than the others. (24 R.T. 3428, 3429; 28 R.T. 3890-37; 29 R.T. 4047.)

At some point, what started out as just another gathering with

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[8] Primary testimony for these two counts is that of George Holland. (pp 2962-3017, 3195-3272, 3299-3404 .)

[9] However, on cross examination, Dannov testified that Williams sent out word that day and made telephone calls telling people about the meeting. (22 R.T. 3140.)

Dannov recognized Dearaujo, Lyons, Weatherspoon, Holland, Howell, Lawrence, Gonzales, Handy, Roberts, Metoyer, McNair, Cannioto, Post and herself in People's exhibit 5. (22 R.T. 3032.)

alcohol present turned into a meeting. Williams turned down the music and started a discussion. The discussion turned to money making activities, including carjackings, robberies, selling drugs, or as Mondre Weatherspoon explained it, just "doing dirt"[10] (See generally, 19 R.T. 2701-2704; 20 R.T. 2979-2993; 21 R.T. 2983, 2988; 22 R.T. 3037; 24 R.T. 3429; 28 R.T. 3824; 29 R.T. 4035; 31 R.T. 4262.) Weatherspoon testified that the group discussed both legal and illegal ways of making money, but he testified only about the illegal methods. (29 R.T. 4034.) The object was simply to make money quickly. (24 R.T. 3330) Williams did most of the talking, but once in a while Weatherspoon, Dearaujo and others would interject comments. (22 R.T. 3046; 24 R.T. 3464; 28 R.T. 3825, 3827; 29 R.T. 4035.)

The primary prosecution witness, Christopher Lyons, thought the purpose of the crimes was to get money to have fun. (19 R.T. 2706.) Mondre Weatherspoon testified to essentially the same thing. (29 R.T. 4034.) Natalie Dannov thought the purpose was to make money which would be used to buy a house, buy guns, and invest in stocks. (22 R.T. 3047, 3052, see also People's Exhibit 68, p. 45.) In any event, no one voiced any opposition to the idea of committing crimes to obtain money. (19 R.T. 2707; 20 R.T. 2992; 21 R.T. 2999; 22 R.T. 3047-3048; 29 R.T. 4043; 31 R.T. 4265.)

Natalie Dannov testified that Williams demonstrated how to

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[10] 29 R.T. 4197-4199

carjack a vehicle using an imaginary car. He used the handgun in his demonstration. She testified further that Williams told the group that people who resisted should be shot. (22 R.T. 3046-3047.) Steve McNair heard a comment about popping a resister but does not recall who said it. (31 R.T. 4272.) Dannov also testified that appellant mentioned kidnapping as a possible way to make money. Kidnapped victims could be put into the trunks of their own cars when the cars were carjacked. (21 R.T. 2995-2996; 22 R.T. 3050.) Both Holland and Post admitted though that by the end of the meeting there was no real plan to commit any particular crime. (24 R.T. 3316. 25 R.T. 3561.)

The general consensus was that the group would be called the Pimp-Style Hustlers. (19 R.T. 2703-2704, 2794-2975; 21 R.T. 3004; 22 R.T. 3048; 28 R.T. 3840; 31 R.T. 4264.) Members who successfully committed crimes could earn respect in the form of "G" stripes. (19 R.T. 2796; 21 R.T. 3004; 22 R.T. 3051; 28 R.T. 3841; 29 R.T. 4040.) Dearaujo told Lyons that he (Dearaujo) earned a stripe for the previous Circle K robbery. (19 R.T. 2707, 2714.)

About fifteen minutes after the meeting ended, everyone except Dannov and Roberts got into Howell's van and left to commit a carjacking in the parking lot of a nearby Kmart.[11] (19 R.T. 2709, 2717; 22 R.T. 3055; 23 R.T. 3195.) Howell was driving and

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[11] In May 1993 the only members of the group who had access to cars were Holland, Gonzales and Howell. (22 R.T. 3056, 29 R.T. 4028.)

Lawrence was in the passenger seat. (19 R.T. 2718.) Holland, Weatherspoon and Williams were in the bench seat behind the front seat and the rest of the group was sitting on the floor of the van behind the bench seat. (19 R.T. 2718; 23 R.T. 3195.)

Holland estimated they arrived at the parking lot, about a mile or two from Dannov's house, around 9 or 9:30 p.m. (23 R.T. 3199.) En route to the parking lot and after they arrived, they talked about the carjacking. Williams and Weatherspoon said that Holland was the oldest and that he should do it. (19 R.T. 2718-2719; 23 R.T. 3203.) Williams asked for volunteers to assist Holland. When there were none, Cannioto was selected. (19 R.T. 2718-2719; 23 R.T. 3207.)

Holland and Cannioto exited the van and walked around in the parking lot looking for a likely target. Holland had the Beretta and Cannioto had a knife. (23 R.T. 3208.)

While Holland and Cannioto walked around the parking lot, the van remained stationery. Eventually Holland heard Howell and Lawrence, among others, direct him to two females walking towards a vehicle. (19 R.T. 2703; 23 R.T. 3210-3212.) Holland and Cannioto walked towards the vehicle as the women were getting into the front seat. Holland went to the driver's side and Cannioto to the passenger side. (19 R.T. 2723; 23 R.T. 3214, 3216.) When Holland reached the car, he knocked on the window. The woman rolled the window down and Holland asked her to get into the backseat. (23 R.T. 3217-3219.) When the woman refused, Holland showed her the gun. (23 R.T.

3222.)

Deena (Nolin) Meza's testimony largely confirmed that of Holland. She testified that on the evening of May 14th, she and her friend, Debbie Phillips, went to a night club in Moreno Valley. Deena was driving Debbie's white Daihatsu and Debbie was riding in the passenger seat. (27 R.T. 3786-3787.) When they left the club about 10 p.m Deena was again driving. She entered the car, started it, and turned on the radio. Debbie also entered the car on the passenger's side. (27 R.T. 3798.)

Suddenly a man stuck a gun into Deena's open window and told her to get into the back seat. (27 R.T. 3790-3791.) Another man went to the passenger side of the car. (27 R.T. 3791.) In response to the gunman's order, both women exited the car, but Meza told Debbie not to get into the back seat. (27 R.T. 3791.) The keys were still in the ignition and the engine was running. Meza told the man with the gun to take the car, take the purses, take whatever he wanted, but the women were not leaving. (27 R.T. 3792.)

More than once the man with the gun told Meza to get into the car; more than once she refused to do so. (27 R.T. 3793-3794.) Suddenly, Debbie began running back towards the bar. The man with the gun ran too, towards Alessandro street.[12] (27 R.T. 3795.)

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[12] On cross examination Meza testified that the other man ran towards Alessandro. She did not see which direction the man with the gun ran. When the man with the gun began to run, so did Meza. (27 R.T. 3083-3984.)

Meza left the car running and ran to the night club as well. Friends inside the club called the police.[13] (27 R.T. 3797.) She described the assailant as young, light complected with a full goatee and mustache. People's exhibit 64 is a drawing of the man with the gun. (27 R.T. 3796.) People's exhibit 10 looked like the gun. (27 R.T. 3797.)

When the women began running, Holland and Cannioto began running towards the van. (19 R.T. 2723-2725; 23 R.T. 3222.) The occupants of the van told Holland and Cannioto to get away from the van and keep running, so they ran elsewhere. (19 R.T. 2724-2725; 23 R.T. 3223.) Then the van drove out of the parking lot. (19 R.T. 2725-2726.)

Holland and Cannioto ran towards a housing tract and a drainage ditch. They hid in the ditch for a few minutes before starting back to Dannov's house. The gun was in Holland's pocket. (23 R.T. 3223-3224.) As they started to cross Alessandro they were picked up by Williams, Weatherspoon and McNair. Williams was driving

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[13] Deputy sheriff Lori Marquette testified that she was dispatched to take a report of an attempted carjacking about 11 p.m. on May 14, 1993. She made contact with two female victims. (27 R.T. 3751, 3758-3759.) The attempted carjacking took place in the parking lot in front of Dilly's bar on the corner of Alessandro and Perris. (27 R.T. 3758-3760.) She was told that one of the suspects was a male Hispanic and the other was a male Caucasian. (27 R.T. 3764.) The suspect who held the gun was a white male with both a mustache and a goatee. (27 R.T. 3780-3781.)

Marquette summoned William Davies, a forensic technician, to do a composite sketch and lift fingerprints. (27 R.T. 3761; 3775.) Davies lifted two noncomparable latent prints. (27 R.T. 3777-3778.)

Holland's sister's vehicle. (23 R.T. 3227.) Holland estimated it was about a half an hour after the attempted carjacking. (23 R.T. 3227.) Williams drove to Dannov's house. (23 R.T. 3227.)

At Dannov's house, Holland shaved his mustache and goatee, then cleaned up a bit and changed his clothes. He also returned the gun to Williams. (23 R.T. 3228-3229.) Then Holland, Williams, Weatherspoon, McNair and Cannioto went to a hotel where Holland's sister had a room. (23 R.T. 3228.) They didn't stay at the hotel long. (23 R.T. 3231.) With Holland driving his sister's car, he, Weatherspoon, McNair and Williams went in search of another car to carjack. (23 R.T. 3232.) They stopped in a Food 4 Less parking lot, were unsuccessful in finding a suitable target and resumed driving. (23 R.T. 3234.)

Count VI

Eventually they drove through a residential neighborhood. They spotted a mini-van and followed it waiting for it to stop. It did not do so until it pulled into a garage. Consequently, the foursome continued their search. (23 R.T. 3237-3238.) They drove until they passed a parked Ford Escort with a man and a woman leaning against it. (23 R.T. 3239.) Holland pulled around the corner, stopped the car, and Williams and Weatherspoon got out. (23 R.T. 3240.) From his location, Holland could not see the Ford Escort. In approximately 5 minutes the Escort passed by Holland with Williams driving. (23 R.T. 3241-3242.)

As planned, Holland followed the Escort up towards Theodore Street. They took the back roads and drove about 10 miles before Williams stopped. (23 R.T. 3243.) The foursome went through the Escort looking for anything of value before pushing it into a ravine. The only thing Holland could remember taking from the car was a toy gun (People's exhibit 61). (23 R.T. 3243-3244.)

After they went through the Escort, everyone got into Holland's sister's car and returned to the hotel. (23 R.T. 3244.) Holland estimated they arrived at the hotel around 11:15 or 11:30 p.m. They kicked back and drank. (23 R.T. 3244.)

Dale Nonies testified that in the early morning hours of May 15th, about 1 a.m., he and his girlfriend, Genalyn Doronio, were standing in the driveway of her home. (32 R.T. 4383; 34 R.T. 4452.) Nonies' white Ford Escort was parked in front of the driveway. (32 R.T. 4285-4286; 34 R.T. 4453.) They had been in the driveway for a little while when they noticed two black males in their late teens or early twenties coming down the street towards them. (32 R.T. 4286; 34 R.T. 4455.)

The two men were just walking along the curb and at some point they crossed the street and came towards Nonies and Doronio. (32 R.T. 4287-4288; 34 R.T. 4456.) One of the men asked Nonies if he had any cigarettes then one of them said, "nice car." When Nonies turned around to say, "thanks" the man was pointing a gun at him. (32 R.T. 4288; 34 R.T. 4451.) Then the man told Nonies the gun was

cocked and loaded and told Nonies to give him the keys. Nonies did so. (32 R.T. 4288; 34 R.T. 4451.) Then the man told Nonies to give him his wallet. (32 R.T. 4289.) Nonies asked the men to take the money and leave his wallet. The man without the gun removed the money and threw Nonies' wallet on the ground. (32 R.T. 4289-4290; 34 R.T. 4458.) Because Nonies asked, the men took only the keys to the car and left his house keys. (32 R.T. 4290; 34 R.T. 4458.)

The men then got into Nonies' car and drove off. (32 R.T. 4290; 34 R.T. 4460.) As soon as the men were out of sight, Nonies and Doronio went inside and called the police. (34 R.T. 4460.)

Looking at People's exhibit 5, Nonies thought Weatherspoon looked familiar. He also said Williams looked familiar as the gunman. (32 R.T. 4290-4291.) Doronio did not think she would be able to identify either of the two men. (34 R.T. 4460.)

The police called Nonies a couple of days after the carjacking and informed Nonies they had found his car. The radio was gone as were his sunglasses and the car bra on the hood was ripped.[14] (32 R.T. 4291-4292.)

Count VII

On May 15, 1993 Anthony Post and George Holland were in front of Holland's house when Williams came by and asked Post's

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[14] Deputy sheriff Brian Mehlbrech received a call concerning the recovery of a stolen vehicle about 10:50 a.m. on May 15, 1993. The Ford Escort was located in a remote area of Moreno Valley about 10 miles from the central area of Moreno Valley. (34 R.T. 4462-4464.)

assistance in obtaining a car in which Williams could go to the high school prom that night. (25 R.T. 3478.) Williams had his tuxedo with him. (25 R.T. 3565.) Post suggested that Williams call Howell. Williams did so and Howell soon arrived in his van. (25 R.T. 3479, 3481-3482.)

Williams and Post got into Howell's van; Holland stayed behind. (25 R.T. 3483.) Williams had his gun in his waist. The goal when the trio left Holland's house was to carjack a car. (25 R.T. 3484-3485.) Williams told Howell to drive towards the movie theater. (25 R.T. 3484.) En route, Howell intentionally ran into the back of a woman's truck to make her stop and get out. (25 R.T. 3479, 3485.) Williams handed the gun to Post and told Post that while Williams talked to the woman, Post should take the truck. (25 R.T. 3485.)

The woman exited her truck and Williams and Howell got out of the van. Post, however, did not get out of the van. He refused to participate. (25 R.T. 3486, 3479-3480.) The woman looked at the back of her truck, said there was no damage, got back into her truck and left. (25 R.T. 3487.) Williams and Howell got back into the van and the trio drove off. (25 R.T. 3487.)

Shortly, Howell dropped off Williams and Post. They walked around some neighborhoods, tried unsuccessfully to get a van from a woman recycling cans, and eventually arrived in the parking lot of the Edwards Cinema and Yoshinoya restaurant. (25 R.T. 3488-3490,

3492.) Prior to the attempt at the recycling bins, Post returned the gun to Williams. (25 R.T. 3488.)

In the parking lot, Williams spotted a woman and her little girl who had just exited their car. He told Post the woman would be an easy target because she still had her keys in her hand. Post was reluctant to participate but yielded to Williams' enthusiasm and approached the woman showing her the gun. (25 R.T. 3491-3492, 3494.) Post told the woman to give him her keys; she answered, "No", and ran with her daughter into the movie theater. Post also ran, but in another direction. (25 R.T. 3491-3492, 3501.)

Post ran through a nearby field, hiding the gun under some rocks before getting to the other side. Williams met him and they switched shirts and hats and Post took Williams' tuxedo pretending he was en route to the cleaners with it. (25 R.T. 3503.) Post waited about 20 or 30 minutes until it got dark before returning to the field to retrieve the gun. (25 R.T. 3503-3504.)

As they walked towards Post's house, they passed a gas station and a girl Williams knew gave them a ride to Post's house. (25 R.T. 3504.)

Barbra DeGeorge testified that on May 15, 1993, she took her daughter Lisa to the movies. (28 R.T. 3879.) It was just before dark when they arrived at the parking lot. (28 R.T. 3881; 28 R.T. 3890-6.)

As DeGeorge pulled into a parking space, Lisa told her there was a man standing close by just walking back and forth, that maybe

they shouldn't park there. (28 R.T. 3883; 28 R.T. 3890-7.) DeGeorge told Lisa not to worry about it, parked the car and turned off the engine. (28 R.T. 3883; 28 R.T. 3890-8.) DeGeorge and Lisa got out of the car and a male, 16 to 18 years old, called DeGeorge over to him. (28 R.T. 3894; 28 R.T. 3890-8.) When DeGeorge was almost up to the man, he told her to give him her car keys, lifted his shirt and put his hand on an object in his waistband. (28 R.T. 3884-3885.)

DeGeorge told Lisa to run; DeGeorge also ran and did not look back. Both ran towards the theater where they met DeGeorge's father. (28 R.T. 3885; 28 R.T. 3890-12.) When DeGeorge arrived home later that evening, she called the police. (28 R.T. 3890.) She was unable to provide a description of her assailant. (28 R.T. 3890-2.) About a year after the incident, Lisa saw a picture of the man in the newspaper. (28 R.T. 3890-14.)

Counts VIII and IX

Christopher Lyons testified that on May 16th, he and Dearaujo were at Dannov's house when they planned an armed robbery. (19 R.T. 2729; 22 R.T. 3061-3062.) The intended target was a liquor store, Classy B's. (19 R.T. 2730.) Williams suggested robbing Classy B's and Lyons wanted to commit the robbery. He thought it would gain him favor with Dearaujo and Williams. Dearaujo wanted to assist. (19 R.T. 2732, 2734.) The plan was to use Williams' gun and Dannov volunteered to donate one of her stockings as a mask.

(19 R.T. 2735.) Roberts also contributed a stocking for the masks. (19 R.T. 2736; 22 R.T. 3064.)

When Dearaujo and Lyons left Dannov's, both had masks. Dearaujo had the gun and Lyons had two knives. (19 R.T. 2738.) Upon arriving at Classy B's, they found they did not have the nerve to commit the robbery. (19 R.T. 2742.) They were starting back home when they saw two people in the L.A. Times building. (19 R.T. 2744.) Lyons decided to rob the two people. When Dearaujo hesitated, Lyons took the gun from Dearaujo, put on his mask and entered the building. (19 R.T. 2744-2745.) Dearaujo followed, also wearing a stocking mask and carrying Lyons' two knives. (19 R.T. 2745.)

After taking a purse and a wallet from Patricia (Smith) Estep and Charles Estey at gun and knife-point, Dearaujo and Lyons ran from the building.(19 R.T. 2746, 2749-2750.) They ran towards Dannov's house but stopped en route at James Handy's. (19 R.T. 2752-2753.) Williams and another man were at Handy's also. Lyons gave the stolen property to Williams. (19 R.T. 2754.) Williams went through the purse and gave Lyons an identification card and a credit card; Williams kept the money. (19 R.T. 2756.) Williams told Dearaujo and Lyons they had done a good job. (19 R.T. 2757.)

Charles Estey testified that around 11 p.m. on May 17,1993, he and his mother, Patricia Estep, were in the office of the L.A. Times on Alessandro Boulevard and Heacock. (33 R.T. 4325-4326; 33 R.T.

4352-4353.) Estey was the distribution owner and his mother was working with him at the time. (33 R.T. 4326; 33 R.T. 4353.)

Both Estey and Estep were at their desks, facing away from the door when they heard two men enter the workplace. (33 R.T. 4328.) One of the men was wearing a stocking mask; the other was not. (33 R.T. 4329.) The man wearing the mask was carrying a gun. (33 R.T. 4328, 4330.) Estey estimated the men were in their teens and based on their hair and complexions thought they were both Latinos. (33 R.T. 4329, 4348.)

The men rushed towards Estey and his mother and quickly said something which indicated this was a robbery. (33 R.T. 4330.) The man without the mask had a knife and placed it against Estep's back telling her not to look at him. (33 R.T. 4331; 33 R.T. 4354.) The men then told Estey and Estep to get against the wall, then against another wall and finally to get on the floor. (33 R.T. 4331, 4333.)

The men then told Estey to give them his money and he gave the man with the gun his wallet. (33 R.T. 4335, 4336; 33 R.T. 4354.) Estey also handed the men Estep's purse. (33 R.T. 4336.)

The man with the knife then said, "Let's cap (or pop) them and get out of here.[15]" (33 R.T. 4336-4337; 33 R.T. 4354, 4358.) Estey

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[15] Deputy Sheriff Allen spoke to Estey and Smith and wrote a report regarding the robbery at the L.A. Times. There is nothing in his report about "capping them." (33 R.T. 4368.) Estey gave Allen a description of the suspects. He said both had stocking masks, one had a gun and one had a knife. Estey was not able to give any further description at that time. (33 R.T. 4368.)

responded by offering the men his car keys saying to take the money and the car and go. It appeared to Estey that the two then just got nervous and ran from the building. (33 R.T. 4338; 33 R.T. 4357.) They did not take Estey's car keys. (33 R.T. 4337-4338.)

Estey waited until the men were out of sight then called the police.[16] (33 R.T. 4340.)

Neither Estey nor Estep could identify either of the men. (33 R.T. 4341-4342; 33 R.T. 4356.) Estep did identify People's exhibit 53 as her checkbook. (33 R.T. 4356-4357.)

Counts I and II

In May 1993 Paul Petrosky was living in military housing at March Air Force Base. He lived in one half of a duplex with his children. (17 R.T. 2289.) His fiancee, Yvonne Los, lived in the other half of the duplex with her two children, Patricia and Michelle, four and eight years old, respectively. (17 R.T. 2289-2290.)

Early in the day of May 19, 1993, Ms. Los left to run some errands and to work out in the gym at the Family Fitness Center. She left her children in the care of Petrosky and expected to return somewhere between 8 and 9 p.m. that day. (17 R.T. 2290.) As of 9 o'clock that evening, Petrosky had not heard from Ms. Los, so he drove to the Family Fitness Center to locate her. (17 R.T. 2290-2291.) Upon his arrival at the center, a police officer informed

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[16] Deputy sheriff Allen responded, contacted the victims and drove around the area looking for suspects. None were found. (33 R.T. 4359-4362.)

Petrosky that Ms. Los had been shot. (17 R.T. 2291.) Petrosky returned home where he had left Ms. Los' children in the care of his oldest son. (17 R.T. 2291.)

Ms. Shannon Walsh testified that she was an employee of Family Fitness Center in May 1993. She got off work around 7:30 p.m. the evening of May 19th. (17 R.T. 2297-2298.) She spent about thirty minutes at the tanning salon in the same shopping center before going to her car in the parking lot. (17 R.T. 2298.) As she walked up a set of steps towards her car, Walsh saw two young men next to a car across from where her car was parked. She estimated she was about twenty feet away from the young men. (17 R.T. 2303.)

The young men, dressed in very baggy dark blue jeans and flannel-type shirts and dark ball caps, were telling a woman [Ms. Los] to get out of her car. (17 R.T. 2303, 2332-2333.) Because of their skin and hair color, Walsh thought the young men were Hispanic. (17 R.T. 2332-2333, 2334.) She estimated them to be between 13 and 15 years of age. (17 R.T. 2342.)

As Walsh approached her car, she was facing towards the rear of Ms. Los' car. (17 R.T. 2304.) One of the young men was standing on the driver's side of Ms. Los's car and was talking to Ms. Los. (17 R.T. 2304.) Ms. Los' window was closed. (17 R.T. 2304.) The other young man was standing next to the door on the passenger side of the car. (17 R.T. 2304-2305.) He was rattling the door and attempting to enter the car. (17 R.T. 2305.) The engine in Ms. Los' car was not running. (17 R.T. 2304.)

Walsh heard the young man on the driver's side say, "Get out of the car. Get out of the f___ car." He was speaking in a low, but aggressive tone. (17 R.T. 2305.)

During this time the other young man was looking at Walsh. (17 R.T. 2305.) Walsh opened her car door while continuing eye contact with the young man on the passenger side of Ms. Los' car. (17 R.T. 2306.) The young man on the driver's side had his right arm over the roof of Ms. Los' car as if trying to hide a gun. (17 R.T. 2306.)

Walsh got into her car and observed the scenario through her rearview mirror, not sure what to do. (17 R.T. 2307, 2348.) She could not hear anything, but it appeared that the young men were not going to leave until Ms. Los exited her car. (17 R.T. 2307.) Walsh estimated that after seven or eight minutes, perhaps less, she decided to leave the area. (17 R.T. 2308, 2336.)

As soon as Walsh started her car, she heard Ms. Los' car start. (17 R.T. 2308-2309, 2530-2531.) Walsh put her car into reverse and slowly began to back out. (17 R.T. 2310.) As she did so, she saw Ms. Los' car start to roll and saw the man on the driver's side of Ms. Los' car jump. Immediately thereafter Walsh heard a gunshot. (17 R.T. 2310, 2314, 2338, 2352.) Ms. Walsh froze, halfway out of her parking section. The young men stopped, looked at her, looked back at Ms. Los then ran towards a field adjacent to the parking lot. (17 R.T. 2311, 2312-2313, 2338.)

Suddenly Ms. Los' car bunny-hopped backwards and hit a parked car. (17 R.T. 2312.) Ms. Los' car then rolled forward and the horn began honking, intermittently, like someone tapping on the horn. The front window of Ms. Los' car was shattered. (17 R.T. 2312, 2315-2316.)

By this time another woman arrived en route to the Family Fitness Center. (17 R.T. 2309.) In answer to the woman's inquiry about what happened, Walsh responded that a lady had just been shot. (17 R.T. 2309-2310, 2319.)

The arriving woman asked Walsh if Walsh wanted her to call 911. Walsh was afraid to call because the young men ran to a field and she didn't know where they were. (17 R.T., 2310.) The two women drove their individual cars to a Circle K where the other woman called 911. (17 R.T. 2310, 2319, 2356.) Walsh then returned to the scene because she was the only witness. The police were there when she arrived. (17 R.T. 2310, 2324.)

After she spoke to the police, Walsh saw two boys and two girls come from the field where the two young men had run. (17 R.T. 2326.) All four were Hispanic. (17 R.T. 2326.) There were also youngsters at the bottom of the parking lot as well as other people. (17 R.T. 2327-2328.) The people who came from the field made Walsh nervous. (17 R.T. 2328.)

Walsh assisted the police in putting together a composite drawing (People's exhibit 33, 18 R.T. 2449) of the young man on the

passenger side of Ms. Los' car. (17 R.T. 2328; 2432-2438; 18 R.T. 2445.) She did not assist with a sketch of the boy on the driver's side because she did not get a good look at him. She stated she would not recognize the young man on the driver's side if she were to see him in the court room this date. (17 R.T. 2330.) Neither boy was wearing a mask or anything over his face. (17 R.T. 2333-2334.)

In May 1993, Gregg Plamondon lived in Moreno Valley. (17 R.T. 2361-2362.) His wife frequented the tanning salon near the Family Fitness Center off Alessandro. On May 19, 1993 he took his wife to the tanning salon around 7 p.m. (17 R.T. 2362.) It was dark and the lighting was very poor in the parking lot, so Plamondon accompanied his wife. (17 R.T. 2363.) As they pulled into the parking lot, Plamondon noticed two young men in baggy clothing standing in a shadow area near the salon. (17 R.T. 2364.) Plamondon went into the tanning salon with his wife and stayed in the lobby to wait for her while she tanned. (17 R.T. 2367.) About four or five minutes later he heard a pop, like a firecracker. (17 R.T. 2367, 2385-2386.) The pop was followed by a car honking which seemed to be coming from the parking lot area in front of the fitness center. (17 R.T. 2367.) Plamondon looked out the door but did not see anything. (17 R.T. 2367, 2386.) He heard the horn honk eight to ten times. Then he heard a car crash, like one car bumping another, and the honking stopped. (17 R.T. 2368, 2371.)

After he heard the crash, Plamondon went outside and saw a Mustang sitting on the median. (17 R.T. 2369, 2386-2387.) He

scanned the parking lot but didn't see anyone. (17 R.T. 2369.) He approached the Mustang, in which there were no occupants, and saw a Taurus [sic]. (17 R.T. 2369-2370.) Approaching the Taurus, Plamondon saw the window on the Taurus had a small hole in it on the driver's side and the window was shattered around the hole. (17 R.T. 2370-2371.)

Inside the Taurus, Plamondon saw a female (Ms. Los) in the driver's seat. (17 R.T. 2372.) She was slumped forward. (17 R.T. 2372.) Plamondon observed what appeared to be a bullet wound on the left side of Ms. Los' neck. (17 R.T. 2373.) He opened the door, which was unlocked, to see if Ms. Los was breathing. He could not find any signs of life and could not get a pulse. He spoke to Ms. Los but got no response. (17 R.T. 2373, 2387-2388.)

Plamondon ran to the Family Fitness Center and asked a person inside to call 911. (17 R.T. 2375.) Then he returned to the car and put direct pressure on Ms. Los' wound. He spoke to her again, but again, got no response. (17 R.T. 2375.) As he returned to the car, Plamondon scanned the area but saw no foot traffic. (17 R.T. 2375-2376.) He did see two cars leave the area. (17 R.T. 2374, 2390-2391.) He did not remember telling the detectives that one of the vehicles, a 90's model GM or Pontiac turned westbound onto Alessandro and the lights were not turned on until the car got onto Alessandro. (17 R.T. 2390.) After the incident he did not see any youths fitting the description of the two he saw prior to entering the tanning salon. (17 R.T. 2392.)

Plamondon estimated that the first police officer arrived about four minutes after he found Ms. Los. (17 R.T. 2376.) Plamondon stayed at the scene until he spoke to the detectives. (17 R.T. 2377.) During that time the paramedics arrived, took Ms. Los from her car and placed her on the pavement. Someone covered her. (17 R.T. 2378.)

Mr. Gary Thompson, investigator for the Riverside Sheriff's department was summoned from his residence on May 19, 1993 at approximately 10:30 p.m. (17 R.T. 2394.)

When he arrived at the crime scene at 10:50 p.m., sergeants Brown, Thorne and Higgins were present and the yellow crime-scene tape was in place. (17 R.T. 2395.) Thompson's duty was to document the crime scene, collect any physical evidence located within the scene and assist the forensic technicians. (17 R.T. 2397.)

Ms. Los was still at the crime scene when Thompson arrived; she was lying next to a Mercury Sable on the pavement in the parking lot. (17 R.T. 2398.) At the rear of the Sable, Thompson found and collected a .380 caliber casing. (17 R.T. 2399-2400, 2407.)

Two latent left thumb prints (People's 11F) were lifted from the Mercury Sable from the outside of the driver's door, near the door handle. (17 R.T. 2418-2419; 2429, 2431.) People's exhibit 37 is a 10-print rolled fingerprint card. (17 R.T. 2427.) Latent print examiner Shawn McGowan (17 R.T. 2424) examined People's 11F and People's 37-P3 and determined they were made by the same

person. (17 R.T. 2428.) People's exhibit 42 is two thumb prints rolled from co-defendant Dearaujo by McGowan just prior to his testimony. (17 R.T. 2429.) McGowan compared the prints in People's exhibit 42 with those in People's exhibit 37 and determined they were made by the same person. (17 R.T. 2430.) The same person made all three impressions. (17 R.T. 2430.)

On May 24, 1993 forensic pathologist Christopher Swalwell (18 R.T. 2450) performed an autopsy on Yvonne Mary Los at the Riverside County Coroner's Office. (18 R.T. 2451.) He determined Ms. Los died due to a gunshot wound to the left side of her neck. The wound severed the major artery causing her to bleed to death. (18 R.T. 2453.) Dr. Swalwell opined that Ms. Los died within a few minutes of being shot. (18 R.T. 2457.) He stated there was no reason why Ms. Los would not have remained conscious until she lost enough blood to go into shock and pass out. (18 R.T. 2458.)

Dr. Swalwell observed stippling marks on Ms. Los' left upper shoulder and the side of her left wrist. (18 R.T. 2454.) He also observed some marks he described as psuedo stippling which were consistent with glass fragments. (18 R.T. 2454, 2455.) He estimated the barrel of the weapon which inflicted the wound on Ms. Los' neck would have been between one to three feet of the entry point. (18 R.T. 2456.) The bullet pierced through the skin and through the carotid artery on the left side, transecting it, then grazed the front of the spine and continued through some muscles until it rested underneath the skin on the right side of the neck. Dr. Swalwell

recovered the bullet and delivered it to law enforcement. (18 R.T. 2457.)

Criminalist Paul Sham, expert in firearms analysis for the State of California Department of Justice, received a partially disassembled .380 caliber Beretta, People's exhibit 10, in May 1993. (18 R.T. 2464-2466, 2470.)

After documenting its condition, Sham reassembled the Beretta and test fired it. It functioned properly using .380 auto caliber reference ammunition. (18 R.T. 2466, 2474-2475.) Once this semi-automatic weapon is loaded with the eight cartridge magazine, to fire the weapon one must pull back on the slide to release the first round into the chamber. (18 R.T. 2468, 2471, 2483.) Once the slide is moved forward, the hammer remains in the cocked position and the gun can be fired continuously until all the ammunition has been exhausted. (18 R.T. 2469-2470, 2483.)

The weapon has a safety on it, but one must release the slide to put on the safety. (18 R.T. 2472, 2484.) Once the weapon is in the cocked position, the safety can be reactivated. (18 R.T. 2484.) When the Beretta is fired, a cartridge case and a bullet are ejected. (18 RT. 2472.)

Sham examined the expended .380 caliber casing contained in People's exhibit 41. (18 R.T. 2474-2475.) He compared that shell casing with the test-fired casings from People's exhibit 10. (18 R.T. 2475-2476.) Sham opined the expended cartridge case collected from

the crime scene was fired by the Beretta pistol, People's exhibit no. 10. (18 R.T. 2477.) People's exhibit 44 is a copy of a photograph taken through a comparison microscope. (18 R.T. 2475-2476.)

Sham also compared one of the test fired bullets from People's exhibit 10 with a bullet submitted under case no. MVR93139-300. (18 R.T. 2477.) The bullet in People's exhibit 46 is an expended bullet from case no. MVR93139-300. (18 R.T. 2477-2478.) In comparing the expended bullets, Sham did not find sufficient agreement of the two patterns to conclude positively that the bullet in case no. MVR93139-30 was fired from People's exhibit 10. He did opine that People's exhibit 10 probably fired this latter bullet. (18 R.T. 2478-2481.)

Circumstances Surrounding Appellant's Involvement

The prosecution called Grades Johnson who testified that he was nineteen or twenty years old in May 1993, two or three years older than Williams.[17] (18 R.T. 2494-2495, 2576 .) He knew Williams from school (continuation school for Mr. Johnson) and identified him in court. (18 R.T. 2495-2496, 2581.) Johnson considered Williams a friend and associated with him on a regular basis. (18 R.T. 2496-2497, 2578.)

The night that Ms. Los was shot, Johnson and his friend, Randy, were walking, headed no where in particular, when they saw Williams trimming a bush in his front yard. (18 R.T. 2498-2500,

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[17] Beginning testimony of Grades Johnson.

2559.) It was still light out. (18 R.T. 2558.) Johnson had been drinking earlier in the day, two 40-ouncers and an Old English 800, and smoking marijuana. (18 R.T. 2501-2502, 2558, 2559.)

After they saw Williams, the three men went around the corner to a friend's house to shoot baskets. (18 R.T. 2501-2503, 2559.) The friend who lived in the house was present, but Johnson did not remember if he joined them. He remembered there was a fourth player, a slim fellow with short blonde hair. (18 R.T. 2501-2503, 2561.) The original players were appellant, Johnson, Randy and Dearaujo. (18 R.T. 2581.) The group played basketball at the hoop in front of the garage until it got dark about 8 p.m. (18 R.T. 2504, 2561.)

After they played basketball, Johnson and Randy decided to walk to Gordy's Market to purchase some more beer. (18 R.T. 2506, 2584.) As they started to leave, Williams was standing by the front door of his house and Dearaujo was at the house of the friend who had the basketball hoop. (18 R.T. 2507.) Johnson noticed a black Plymouth Duster stop on the corner of Ramsdale near Gordy's Market. (18 R.T. 2504-2506, 2561, 2564.) Kimberly Coble was driving and Mike and Terill were with her. They were all in the front seat of the car and were talking about going to a party. (18 R.T. 2507, 2562.)

Johnson and Randy decided to join Kimberly, Mike and Terill.

(18 R.T. 2508.) There was no back seat in the car. (18 R.T. 2509.)[18] There was a stereo in the car and speakers in the side windows so one could not see out. The front windows were down and it was cold in the car. (18 R.T. 2509-2510.) The car was facing Alessandro and was parked on the correct side of the road with the engine running. (18 R.T. 2514.)

As Johnson entered the car, Williams approached with Dearaujo and another Hispanic. Johnson told Williams to get in. (18 R.T. 2511-2512, 2562, 2585.) Johnson and Randy sat in the back on the middle back part where the seat should have been. (18 R.T. 2509.) Williams asked if Dearaujo could join them. (18 R.T. 2511, 2513.) The response was negative. (18 R.T. 2511, 2513.) The others would not have included Williams either except for Johnson's insistence. (18 R.T. 2589, 2590.)

After about five minutes of conversation, Williams got into the car (18 R.T. 2514, 2586-2587) but Dearaujo and the other person headed back towards the house. (18 R.T. 2516.) From his position, Johnson could not have seen if Williams handed anything to Dearaujo or the other person. (18 R.T. 2516.)

Johnson was not sure what happened after Coble drove to Fastrip, a liquor store on Sunnymead and Heacock in Moreno Valley,

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[18] Kimberly Coble testified there was a bench-type back seat. (26 R.T. 3646.) She also testified that the car was not a Duster but a black Chevy Nova. (26 R.T. 3646.)

where someone bought liquor. (18 R.T. 2517-2521, 2565.) He had been drinking pretty much the whole day, mostly 40-ouncers and Night Train, and was smoking marijuana with Randy in the car. (18 R.T. 2519-2520, 2562.) He did remember going to the Taco Bell on Alessandro around 10 or 11 p.m.. (18 R.T. 2524.) Ambulances and police cars were coming down Alessandro Boulevard en route to the Family Fitness Center and the group parked in the Taco Bell lot. They left the car at the Taco Bell and walked to the Family Fitness parking lot. (18 R.T. 2525- 2526, 2531, 2568.) They stayed at the scene until told to leave by the police. (18 R.T. 2532-2533, 2605.)

During cross examination, Johnson testified that when they heard the sirens they were headed back to Mike's house. (18 R.T. 2590.) They were also going to drop off Williams at the location of his choice, a house on the corner of Ramsdale and Delgado. (18 R.T. 2591, 2599-2600.) Williams exited the Duster then got back into the car when the emergency vehicles passed by. (18 R.T. 2591-2592, 2600-2601.)

Johnson remembered seeing a Mercury Sable with shattered glass in the window and a covered body on the ground. (18 R.T. 2529.) Williams did not say anything at that time about whom he thought was responsible for the happenings at the fitness center. (18 R.T. 2531.)

Back at the Taco Bell, the group re-entered the Duster in the same seating arrangement. (18 R.T. 2537-2538.) They drove back to

the neighborhood talking about the crime scene. (18 R.T. 2539.) At the corner near to the house where they played basketball, Johnson and Williams exited the car. (18 R.T. 2539.) After conversing with Williams for a while, Johnson re-entered the car and Williams started walking towards his home. (18 R.T. 2539.) As he did so, Dearaujo and two or three other people approached Williams from the back yard of the house where they had played basketball. (18 R.T. 2540.) One of the others was the same one who had been with Dearaujo earlier when Dearaujo and Williams approached Coble's car. (18 R.T. 2541.)

Williams, Dearaujo, Dearaujo's earlier companion, and another Caucasian male and female talked. (28 R.T. 2542.) The female was crying, almost hysterical. (18 R.T. 2542-2543, 2594.) Dearaujo and his earlier companion were laughing and the other Caucasian male was jumping around. (18 R.T. 2543.) Williams was trying to calm down the group. (18 R.T. 2544.)

Johnson exited the car, but Williams waved to him not to approach. Johnson could not hear any of the conversation between Williams and the others. (18 R.T. 2544-2545.) Eventually Williams returned to the car but did not tell Johnson anything other than "he had to handle his business." (18 R.T. 2546-2547.) Johnson encouraged Williams to re-enter the car, but Williams did not do so. Eventually Johnson re-entered the car and Coble drove off. (18 R.T. 2547-2548, 2550.)

Kimberly Coble's recollection differed. In May 1993 Coble had access to a black Nova which belonged to Debretta McDonald, Coble's best friend's older sister. (26 R.T. 3646.) About 3 p.m. on May 21st Terrill, Mike, Williams and Johnson were dropped off at Coble's house by a man in a pick-up truck. (26 R.T. 3649.) Coble had not met Williams before that time. (26 R.T. 3650.)

The group talked for a while then decided to get McDonald's car. The pick-up truck driver took the group to McDonald's where Coble borrowed the Nova. (26 R.T. 3650.) Coble remembered that en route there was a discussion about crimes during which Williams said he didn't have to commit crimes because he had someone to do it for him. (26 R.T. 3654.)

After they picked up the Nova, the group drove around looking for a party to go to and eventually they went to a house requested by Williams. (26 R.T. 3652, 3657.) Williams exited the car, spoke to two individuals, one of whom was Dearaujo, then got back into the car saying they would meet his friends back there in about fifteen minutes. (26 R.T. 3657, 3660, 3664.)

At Williams' direction, Coble then drove to the Taco Bell on Alessandro. (26 R.T. 3663.) They purchased food and left. (26 R.T. 3664.) En route back to Williams' friends' house they saw police cars coming down Alessandro. (26 R.T. 3665.) Everyone wanted to turn around and see what happened, so they did so. (26 R.T. 3665.) Coble parked the car in the parking lot of the Family Fitness Center

and everyone exited the car. Terrill asked someone what happened and was told a lady had been shot. (26 R.T. 3667.)

After ten or fifteen minutes they returned to the car and drove back to the house. (26 R.T. 3670.) There they sat in the car for a minute waiting for Williams' friends. Soon Dearaujo and the man who had been with him approached the car. (26 R.T. 3671-3674.) One of the friends said they shot the lady. When Terrill asked why, one of them answered that she saw his face. (26 R.T. 3672.)

Williams exited the car, spoke to his friends for a few minutes then re-entered the car. (26 R.T. 3674, 3676.) Coble drove the group around, stopped to purchase some alcohol, then parked and drank for a while. About midnight, Coble started dropping people off. Terrill was the last to exit the car. (26 R.T. 3676.)

At no time prior to May19, 1993, did Williams ever tell Johnson about a group called the Pimp-Style Hustlers. (18 R.T. 2578-2579.) They never discussed organizing a group to conduct armed robberies, carjackings, ATM robberies or train robberies and Johnson never saw Williams with a gun. (18 R.T. 2579.) Johnson did see Williams in the company of other young people, but he thought those young people were pretty much the same age as Williams, 15 years old or older. (18 R.T. 2579.)

Christopher Lyons testified in a way that pulled all of the foregoing information together for the prosecution. He testified that on May 19, 1993, he and Dearaujo participated in a homicide that

occurred at the Family Fitness Center in Moreno Valley.[19] (19 R.T. 2609.)

Lyons first saw Dearaujo that morning pretty early. They were best friends and used to hang around together almost every day. At the time, Lyons had known Williams a couple of months. (19 R.T. 2611, 2700.) Lyons knew Metoyer, Howell and Lawrence and used to play basketball sometimes at Metoyer's house. (19 R.T. 2612.) Lyons opined he and Dearaujo probably went to Metoyer's house on the day of the homicide. (19 R.T. 2612.)

The plans on the day of the homicide were just to hang out with everyone else. There was some discussion in front of Howell's house about going to a party in Anaheim. (19 R.T. 2614-2616.) At some point some friends of Williams came by in a black car and Williams talked to the occupants. (19 R.T. 2616-2618.) Then Williams called Dearaujo over to the car and told Dearaujo to get a car so that they could all go to Anaheim to a party. (19 R.T. 2619.) Dearaujo answered by saying "okay" then turned to Lyons and asked him to come along. (19 R.T. 2619-2620.) On cross examination, however, Lyons admitted telling police that Williams did not order them to get a car, instead, he and Dearaujo actually **volunteered** to get a car. (20 R.T. 2833.)

Lyons and Dearaujo started walking towards the Family Fitness center. Lyons testified that at that point, their intent was "To rob a

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[19] Beginning testimony of Christopher Lyons.

car, steal a car." (18 R.T. 2621.) Lyons had a knife which he always carried. (18 R.T. 2621.)

Soon thereafter, Williams called Dearaujo back to the car. (19 R.T. 2620-2621.) Lyons heard them talking about what kind of car they might get. (19 R.T. 2622.) At that point, Williams gave Dearaujo a gun (People's 10), a jacket and a blue handkerchief. (19 R.T. 2623-2624.) After they obtained the car, they were to put the driver in the trunk and meet Williams by a trash can in the parking lot of Gordy's Market. (19 R.T. 2624-2625.)

When queried about why the gun was being given to them, Mr. Lyons responded that the idea was to "Demand [a car] from the owner, try to scare them out of their car." (18 R.T. 2622), if necessary, by threatening them with a gun or knife. (18 R.T. 2622.) When questioned specifically about the homicide and whether he thought he would be doing an armed robbery to steal a car, Lyons admitted that he did not know what his intent was at that time. He wasn't sure that he had any specific intent other than to obtain a car to drive to Anaheim for a party. (21 R.T. 2904.)

It was getting dark when Lyons and Dearaujo started walking again towards the Family Fitness center. (19 R.T. 2626.) They cut through a field and when they reached the parking lot they waited near the entrance to the fitness center. (19 R.T. 2627-2630.) There were not too many people in the parking lot. (19 R.T. 2630.)

The two watched Ms. Los drive into the parking lot from

Alessandro Street and decided it was her car they would carjack. (19 R.T. 2632-2633.) Lyons put on his stocking mask and Dearaujo took out the gun as they approached Ms. Los' car. (19 R.T. 2634.) Dearaujo tapped on the driver's side window with the gun and told Ms. Los to be quiet. (19 R.T. 2636.) Ms. Los locked her car door. Dearaujo told Lyons to approach the car from the other side and they tried, unsuccessfully, to open the locked doors. (19 R.T. 2638.)

As they continued to yell at Ms. Los to open the door, she started her car and began to back up. (19 R.T. 2639.) It appeared to Lyons that Dearaujo then panicked and shot Ms. Los. (19 R.T. 2639, 2643; 21 R.T. 2909, see also 2840.) Lyons testified that he was very surprised when he heard Dearaujo actually fire the gun. He then panicked when he saw Dearaujo was panicked. (21 R.T. 2909, see also 2840.)

Lyons did not remember the car moving backwards before Ms. Los was shot, but he remembered hearing her car hit another car and the honking of the horn. (19 R.T. 2643-2644.) As soon as Dearaujo shot Ms. Los, he began running and Dearaujo followed. (19 R.T. 2644.) By the time Lyons heard Ms. Los' car hit the other car, he was in the field. (19 R.T. 2644.) The two ran across the field, through the parking lot of the adjacent building, jumped the wall between an apartment complex and some businesses and ran to Handy's apartment. (19 R.T. 2646.)

When there was no answer to their knock, the couple went to

Dannov's. (19 R.T. 2647.) Again there was no answer to their knock, so they hid the gun and the jacket in some bushes before walking to the next neighborhood. (19 R.T. 2648-2650.) They took the long way from Dannov's to Metoyer's house to avoid the Family Fitness center. En route they heard sirens. (19 R.T. 2652.)

When they knocked on the door of Metoyer's house his parents answered the knock and told them Rodney was sleeping. (19 R.T. 2654-2655.) They went next door to John Howell's and Kiesha Lawrence's house, jumped the gate and knocked on the window of Howell's and Lawrence's room. (19 R.T. 2655-2656.) Lyons and Dearaujo asked if Howell or Lawrence knew where Williams was. (19 R.T. 2656-2657.)

Dearaujo told Lawrence that he shot someone. Lawrence became hysterical then started giving Dearaujo advice. (19 R.T. 2658.) While the foursome was in the back yard, Metoyer opened his window and they informed him of the homicide. About ten minutes later, George Holland drove up driving his sister's car. (19 R.T. 2658-2660.) Holland drove to the Family Fitness Center to see what was happening. (19 R.T. 2660.) At some point, Williams arrived as a passenger in the black car he had entered earlier that day. (19 R.T. 2661-2662.) Dearaujo approached the car and told Williams he shot a lady. (19 R.T. 2662, 2665.) Williams asked Dearaujo where the gun was and Dearaujo informed him they hid the gun. (19 R.T. 2665.)

Holland returned while the black car was still there. (19 R.T.

2666.)

Holland gave Lyons and Dearaujo a ride to a friend's house (Tony Post), but Post told them they could not spend the night. Consequently, Lyons and Dearaujo went to their respective homes for the night. (19 R.T. 2669-2669.) They walked home from Post's. The next time they met was the next day at Dannov's house. (19 R.T. 2669.) They arrived in mid-afternoon. (19 R.T. 2670.)

Lyons testified that except for Dearaujo and Williams, he could not recall who was at Dannov's the day after the homicide. They were watching television and partying. (19 R.T. 2672.) He did not recall any talk of stripes on that occasion. (19 R.T. 2673.) Nevertheless, he recalled that a murder was worth two stripes and the next day Williams said he and Dearaujo got two stripes for the murder of Ms. Los. (19 R.T. 2673-2674.)

Lyons admitted that he and Dearauojo were willing to do the Los robbery because they wanted to earn a "G" stripe. They were not treated with respect at home or in the group. (21 R.T. 2895.) Aside from appellant, no one in the group even paid attention to them. Appellant was going to solve some of a 13-year old boy's problems. Lyons told the jury that he thought this was a dream come true. Lyons looked up to appellant. (21 R.T. 2895.) Appellant handed out "G" stripes. (21 R.T. 2883.) A robbery would give power and respect to both him and Dearaujo. (21 R.T. 2895.) Lyons not only felt good about getting a stripe from appellant; he was thrilled. Appellant was

Lyons' hero. (21 R.T. 2912-1913.) Lyons testified that he felt he had really arrived. (21 R.T. 2913.)

Appellant did not testify in the guilt phase of his trial. Nevertheless, the prosecution played a tape of his statement to the police (prosecution exhibits 69 A & B) and the jury followed along by reading a transcript of the tape (prosecution exhibit 68.) The tape reveals that when responding to general questioning by Det. Wilson about the Los homicide, appellant admitted that he knew Mr. Lyons and Mr. Dearaujo were "goin' jacking." (Prosecution exhibit 68 at pp. 28 and 29.) Appellant explained that "jacking" does not mean carjacking. It simply means a robbery or a theft offense of some sort. (Prosecution exhibit 68 at p. 74.) When pressed by Det. Wilson, however, concerning his specific knowledge and intent at the time he gave Lyons and Dearaujo the gun, appellant said that he knew that the two were "gonna do dirt." (Prosecution exhibit 68 at p.32.) He explained that "dirt" simply meant a crime of some sort, not necessarily even a robbery or a "jack." (Prosecution exhibit 68 at p. 42.) Appellant went on noting that he would provide the gun to Lyons or Dearaujo for whatever purpose they intended, criminal or not. His exact words were that he would give them the gun anytime "they needed it - any time somebody have fun with somebody - whatever - you know, it don't matter." (Prosecution exhibit 68 at p. 32.) Indeed, there was testimony that he provided the gun to Mondre Weatherspoon who simply went out in Natalie's back yard and squeezed off a few rounds into the air (19 R.T. 2694) and later shot a

round into the air in front of Chuey's apartment. (31 R.T. 4164.)

When the prosecutor took over the questioning, he asked appellant if "the idea was to get another car so [Lyons and Dearaujo] could go with you [to Anaheim], right?" (Prosecution exhibit 68 at p. 39.) Appellant agreed and admitted that he provided the weapon for that purpose. (Prosecution exhibit 68 at p. 40.) Further, in response to the prosecutor's questions about why members of the group would carry the gun and show it to potential victims, appellant said that the gun was to show that "we meant business and everything." (Prosecution exhibit 68 at p. 70.)

The point of forming the group, however, was to raise cash and then to save and invest it. (Prosecution exhibit 68 at p. 46.) The group members were supposed to take the proceeds of any criminal enterprise and put them in the general fund. (See, e.g., prosecution exhibit 68 at p. 50.)

Kim Coble, the driver of the black Duster (Nova) testified that she refused to take Dearaujo with them to a party because there were too many people in her car and she did not know Dearaujo. When appellant, Lyons and Dearaujo were talking among themselves, it was her impression that appellant's friends (Lyons and Dearaujo) were simply supposed to get another car and meet them again in about 15 minutes. She had no idea that anyone was going to steal a car. (26 R.T. 2707-2708.)

Counts X and XI

During the get-together at Dannov's the day after the homicide, the gun was still in the bushes.[20] At Dearaujo's directive, Lyons retrieved the gun and took it to Williams. (19 R.T. 2676.) Then Williams, Weatherspoon, Handy, Gonzales, and Lyons walked to Taco Bell to commit another carjacking. (19 R.T. 2679, 2684, 2689.) They walked from Dannov's house taking the same route Lyons and Dearaujo took after Ms. Los' shooting. (19 R.T. 2684-2685.) When they arrived at the Taco Bell parking lot, Lyons stayed back in the bushes with Gonzales. Williams, Weatherspoon and Handy were going to surround and take a car. (19 R.T. 2689, 2691.) Lyons did not watch what happened. (19 R.T. 2689.) He saw Williams walk towards a car then he heard a couple of shots and everyone, including Lyons and Gonzales, started running. (19 R.T. 2692-2693.)

Mondre Weatherspoon testified that he did not remember much about what happened. He did not know what kind of car was in the lot. (31 R.T. 4168) There was some conversation between Mondre and appellant and they agreed on taking the car, but Weatherspoon did not know if the decision was just his and appellant's. He was not sure if they wanted the car for a specific reason. He certainly did not remember any conversation concerning how to commit the carjacking. (31 R.T. 4169.) The next thing he remembered was the man getting out of the car and running. (31 R.T. 4169.) Weatherspoon could not remember if anyone approached the car or if anything

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[20] Lyon's testimony continued.

happened before the man started running. (31 R.T. 4169-4170.) In that regard, he did not remember if James Handy approached the man at all. He did not see Handy touch the man or take anything from him;. Weatherspoon ended up with the man's keys but does not remember if he did that on his own or if someone directed him to do so. (31 R.T. 4171.)

Appellant was standing close to the driver's side door with the gun. (31 R.T. 4170.) When the man began to run, appellant fired a shot. Weatherspoon did not know where appellant aimed and could not remember which way appellant was pointing the gun. He guessed it was in the general direction of the man. (31 R.T. 4172.) On cross examination, Weatherspoon admitted that as the group approached the Taco Bell, he had the gun. (31 R.T. 4227.) Weatherspoon also admitted that he didn't think he was facing appellant when the shot was fired and didn't see what direction the shot was fired. Further, he did not recall if he heard the bullet strike anything. (31 R.T. 4228.)

James Handy testified that he knew someone in the group had the gun that night but he did not know who. (29 R.T. 3936.) As they passed through the parking lot of the Taco Bell, they saw a man sitting in a white car. Handy heard the man getting ordered out of the car. The man got out and walked towards Handy. Handy searched him and took some items out of the man's pocket then walked away; (29 R.T. 3945.) As he was walking away, he had his back towards appellant. Handy then heard a shot. The shot came from the direction of where appellant had been. Handy did not look back, he ran home

(29 R.T. 3950.)

The group returned to Dannov's and Weatherspoon fired the gun into the air in Dannov's back yard. (19 R.T. 2694.) Lyons, Dearaujo and Williams spent that night at Dannov's. (19 R.T. 2694, 2696.) The next morning the police came to Dannov's house to investigate the gunshots in the back yard. Lyons was still there, but did not talk to the police at that time. (19 R.T. 2696-2697.) The gun was in the attic where Lyons put it after Weatherspoon fired it. (19 R.T. 2697.)

On the evening of May 29, 1993, Glynn Brodbeck was waiting in the parking lot of the Taco Bell for his fiancee to get off from work. (34 R.T. 4466-4467.) Brodbeck was driving a white 1989 Ford Tempo, four door. The windows were up, the radio was on and the engine was turned off. (34 R.T. 4468.)

Brodbeck had been waiting for about 15 minutes when he noticed in the side-view mirror someone walking behind his car. (34 R.T. 4469.) Brodbeck felt uneasy so he started the car, but did not leave. He didn't want his fiancee to walk into something. (34 R.T. 4469.)

A man walked up to the driver's side window of the car, tapped on the window and told Brodbeck to roll down the window and turn off the car. (34 R.T. 4470.) At that time, Brodbeck saw a second man with a gun near the one who had tapped on the window. (34 R.T. 4470-4471, 4477.) A third man was standing up against the

back door of the car. (34 R.T. 4470.) All three men were young black males. (34R.T. 4470-4471.)

The man with the gun told Brodbeck to give him his wallet. Brodbeck reached for his wallet, realized he did not have it with him and relayed that information to the gunman. (34 R.T. 4471.) In response the gunman told Brodbeck to get out of the car, keep his hands up and look away from the gunman. (34 R.T. 4472, 4478.) While the gunman pointed the gun at Brodbeck, one of the other men frisked Brodbeck from behind and reported to the gunman that Brodbeck did not have a wallet. That same man removed a pack of cigarettes from Brodbeck's pocket. (34 R.T. 4472, 4481.) In the interim the man who tapped on the window took the keys from Brodbeck's ignition and opened the trunk of the car. (34 R.T. 4472, 4481.)

At that point Brodbeck was worried and began running towards the drive-in window of the Taco Bell. (34 R.T. 4472-4473.) As he ran he slipped, heard a shot and heard something like a bullet whistle by him. (34 R.T. 4472-4473, 4483-4484.) Brodbeck banged on the drive-in window when he reached it. He never looked back. The Taco Bell employees let him in and called the police. (34 R.T. 4485-4486.)

About 30 minutes after the incident, Brodbeck was interviewed by the police. (34 R.T. 4487.) He assisted the police in a search of the area and they located a shell casing underneath a nearby car and

his keys elsewhere in the parking lot. (34 R.T. 4488-4489, 4496-4497.)

Brodbeck identified Williams in a line-up and in court as one of the three men, the one with the gun. (34 R.T. 4486, 4492, 4496.)

Deputy Sheriff Aguirre was dispatched to the Taco Bell on Alessandro at 11:37 p.m. on May 21, 1993 [sic]. He spoke to Brodbeck, searched the parking lot and located what appeared to be a .380 caliber casing. (33 R.T. 4436-4437.) He placed the casing into evidence at the Moreno Valley police station under report no. 93140273. (33 R.T. 4437.) He searched for but found no latent fingerprints on the vehicle. (33 R.T. 4438.)

The following morning deputy Aguirre was dispatched to an address on Betts Avenue. He received two calls: the first at 2:55 a.m. and the second at 5:55 p.m. Both calls were for shooting a weapon in county limits. (33 R.T. 4439.) On the first call there was no reporting party to contact and deputy Aguirre could find no evidence and no suspect so he cleared the call. (33 R.T. 4439.) On the second call Aguirre spoke to the reporting party who told Aguirre he heard the shots from a house directly east of his. (33 R.T. 4440.) Deputy Aguirre looked over the fence and could see shell casings on the patio of the house next door. Consequently, he went to the house and contacted the occupant, Natalie Dannov. (33 R.T. 4440.)

Dannov told Aguirre she knew nothing about anyone shooting a gun in her back yard. (33 R.T. 4440.) She gave permission to

Aguirre to search her home for any evidence of such activity. (33 R.T. 4440.) Aguirre searched for a gun and ammunition. He found neither. (33 R.T. 4443-4444.) He did not search the attic. (33 R.T. 4445.)

Aguirre saw the casings, but having no witnesses to the gun being shot left the casings in place. (33 R.T. 4440-4441.) At that time he had no reason to connect the casings with the homicide that occurred a couple of nights previously. (33 R.T. 4441.) Additionally, he did not have enough information to make an arrest. (33 R.T. 4441.)

The Arrests and the Tape of Williams' Statement to Police

Around 5:30 or 6 p.m. on May 22, 1993 Rodney Metoyer, Sr. became aware of a commotion in front of his residence. (33 R.T. 4382.) Some detectives in undercover cars came to the house and said they were arresting the boys in the driveway in regards to a murder in the Family Fitness Center parking lot. (33 R.T. 4382, 4384.) Mr. Metoyer believed the police took Rodney, Williams and a boy named Chris or Tony. (33 R.T. 4383.)

Later that night Dearaujo brought an athletic-type bag to Metoyer's house. Dearaujo said the bag belonged to Williams and asked Mr. Metoyer to give the bag to Williams the next time he saw him. (33 R.T. 4384, 4387.) Mr. Metoyer looked inside the bag and saw some checks that had neither Williams' or his father's name on

them[21]. Suspicious, Mr. Metoyer immediately called the police. (33 R.T. 4384-4385.) Detective Collins responded to the call and collected the bag. (33 R.T. 4384-4385.)

Rodney Metoyer was detained, but not arrested. Mr. Metoyer picked up Rodney at the police station late that night. (33 R.T. 4387-4388.)

Detective Collins inventoried the items found in the bag he recovered from Mr. Metoyer. Among the items in the bag were a blue baseball cap, numerous pieces of clothing, a pair of shoes, a couple of checkbooks, one bearing the name Steven Ruiz and another bearing the name Patricia Lee Smith, and part of a Press Enterprise newspaper. (33 R.T. 4400-4401.)

Detective Collins contacted Kiesha Lawrence on May 22, 1993 as part of his investigation into Ms. Los' death. He transported Lawrence to the Moreno Valley police station for an interview. She was released then re-contacted by Collins about 8 that evening. (33 R.T. 4393-4395.) When she was re-contacted, Lawrence gave Collins some information as to the whereabouts of Williams and Dearaujo. (33 R.T. 4395.) When Collins responded to Lawrence's neighborhood, he found Rodney, Post and Williams in front of Metoyer's house. (33 R.T. 4395-4396.) Collins took everyone into custody except Dearaujo. (33 R.T. 4396.) The suspects were taken into custody without incident. (33 R.T. 4397.)

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[21] People's exhibits 53 and 60. (33 R.T. 4386.)

In response to a contact from Detective Collins, Deputy sheriff Lumpkin responded to 12569 Indian Street, the address of Christopher Lyons. When she arrived Lyons was detained in the back of a patrol car. (33 R.T. 4410-4411.) Lyons signed a permission slip and deputy Lumpkin searched the house and Lyons' room without a search warrant. The only item removed from the room was a black baseball cap with a purple bill. (33 R.T. 4411-4413.)

Investigator Thompson participated in the interview of Williams on May 22, 1993. (35 R.T. 4522.) The tape recording of that interview was played for the jury. (35 R.T. 4522.)

Detectives Thompson and Wilson were in the room with Williams as was Deputy District Attorney Pacheco. (People's exhibit 68.) They interviewed Williams on May 22, 1993 and again on May 24, 1993. (People's Exhibit 68, at.) On both dates, Williams was read his *Miranda* rights, affirmed that he understood them, and said he would talk to the detectives. (People's Exh. 68, at - 2, 55-56.)

Williams said he knew he was being interviewed in connection with the homicide at the Family Fitness Center. (People's Exh. 68, at pp 2-3.) Around 5 o'clock that day, Williams, Junior (Dearaujo) and Lyons were at Metoyer's house. Williams and Dearaujo were playing basketball and Lyons was standing off to the side. (People's Exh. 68, at pp 5, 8.) Williams planned to go to Orange County [Anaheim] later that day with his partner, G, and some others. (People's Exh. 68, at p. 8.) Dearaujo and Lyons wanted to go, too, but the black

Duster in which Williams was going did not have room for Dearaujo and Lyons. (People's Exh. 68, at pp 8-9.) Consequently, Dearaujo and Lyons planned to get a car and follow the black Duster to Orange County. (People's Exh. 68, at pp 9, 39.) The plan was that they would get a car, meet Williams in the black Duster in the parking lot of Gordy's, then proceed to Orange County. (Exh. 68, at pp 9, 28-29.)

Williams found out about the shooting at Metoyer's house. (People's Exh. 68, at pp 4, 8.) When they heard the sirens, the group in the black Duster was en route to Gordy's and they stopped to check out what was happening in the Family Fitness Center parking lot. (People's Exh. 68, at p 8.) When they arrived, the police were taping off the area.[22] (People's Exh. 68, at p 28.) The group left the parking lot, returned to Metoyer's and saw Dearaujo and Lyons. Dearaujo said he shot a woman. (People's Exh. 68, at pp 4, 8.) Then the group in the black Duster went to Orange County. While there, Williams met a girl named Cindy and left with her phone number and address. (People's Exh. 68, at pp 3-4, 8, 41.)

At the time, of the shooting the group was using two guns: a Deuce Five and a .380 caliber handgun. The latter belonged to G, but Williams was holding it. (People's Exh. 68, at pp 9, 15.) Both

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[22] Later in the interview Pacheco told Williams that Junior said while he was jacking the woman he looked over and saw Williams in the car. Williams reiterated that Junior did not see him because they were in their own neighborhood when the shot was fired. Williams and friends arrived at the fitness center parking lot when the police were taping off the area. (Exh. 68, at p 39.)

Dearaujo and Lyons were playing with the .380 that night. Williams stated he gave it to one of them. (People's Exh. 68, at pp 10-11, 29, 32, 40.) He told the detectives he had not seen the gun since the shooting; that Lyons was the last one with the gun. Lyons got the gun from the bushes and took it to Dannov's house. (People's Exh. 68, at pp 12, 20.) Gonzales (Chuey) had shells for it and Dearaujo got some shells from his father. (People's Exh. 68, at pp 10-12.)

Later, however, Williams told the detectives the .380 caliber handgun was the same gun he used in the carjacking of a Ford Escort the next day and that he got the gun before an incident at Taco Bell. (People's Exh. 68, at p 29, 41, 42.) Weatherspoon took the gun after they carjacked the Escort. (Exh. 68, at p 41.)

Williams told the detectives the only robbery he was involved in was the robbery at Taco Bell. Weatherspoon (Dre), Handy (James), and Lyons were with him. (People's Exh. 68, at pp 12-14, 15.) Later in the interview, Williams elaborated. There was one man involved in the Taco Bell incident. (People's Exh. 68, at p 30.) The man was sitting in his car when Williams approached and pulled the .380 caliber gun. At the same time, Weatherspoon knocked on the car window. (People's Exh. 68, at p. 30.) Williams told the man to get out, step away from the car and walk to the curb. Weatherspoon took the car keys and popped the trunk. (People's Exh. 68, at p 30.) Williams got into the driver's seat of the car and asked Weatherspoon for the keys. Weatherspoon threw the keys to Williams then told Williams to come and look at something in the trunk. When Williams

exited the car to do so, Gonzales (Chuey) yelled something. (People's Exh. 68, at pp 30-31.) Williams looked up to see the man running to the corner, so Williams fired one shot straight up into the air. Then everyone started running. (People's Exh. 68, at pp 30-31, 43.) It was never William's intent to put the man into the trunk. (People's Exh. 68, at pp 31-32.)

Dearaujo and Lyons were doing a lot of robberies (jackings) at the time. (People's Exh. 68, at pp 15-16.) After the robbery [of a man and a woman] in a building, Lyons and Dearaujo gave a wallet and purse to Williams. Williams split the money up and gave Handy the purse and wallet. (People's Exh. 68, at 16.) The next day they took the bus to the plaza where they ate pizza and played video games and Williams bought a Juan G tape. (People's Exh. 68, at 16-18.)

Everyone went to Dannov's house to drink and smoke marijuana. (People's Exh. 68, at p. 5.) They also had some meetings at Dannov's house when they were "just bullshittin" about a bunch of stuff including robberies. Everyone was coming up with suggestions on different things. (People's Exh. 68, at 17-18.) Holland, Howell, Lawrence, Gabriel, Metoyer, Post, Weatherspoon, McNair (Money), Roberts and Dannov were there. (People's Exh. 68, at 18.) Metoyer asked Williams what he would do if "they didn't give up the car" and Williams said he might get scared and bust (shoot). Williams did not recall saying, "just shoot 'em". (People's Exh. 68, at p. 19.) The group did not have a name. (People's Exh. 68, at p. 21.)

The Saturday morning after Taco Bell, Dannov woke up Williams when the police were knocking on the door. Williams got up and opened the door to the police. (People's Exh. 68, at 21.) Anytime the group was at Dannov's, the gun was in a drawer. (People's Exh. 68, at p. 23.) The only time Williams handed the gun to anyone was when he handed it to Dearaujo or Lyons on Ramsdale by Gordy's the night of the homicide. (People's Exh. 68, at pp. 22-23.) Before the robbery behind Classy B's one of them got the gun by themselves. (People's Exh. 68, at p. 23.)

Holland had the gun at an attempted carjacking at K-Mart. Cannioto (Drew) was with Holland and had a knife. (People's Exh. 68, at p. 24.) They went to a car door and tapped on the window and the next thing Williams knew two girls were getting out of the car. One of them got into the backseat and the other started running. Then Cannioto started walking away from the car and the other girl started running. Finally Holland started running. (People's Exh. 68, at p. 25.)

Williams and Gabriel walked towards the neighborhood looking for Holland and Cannioto and found them on Bay Avenue by Gonzales' (Chuey's) house. (People's Exh. 68, at p 25.) Then they went to the Comfort Inn and got drunk and crashed. (People's Exh. 68, at p 25.)

At this point, Williams remembered that he and Weatherspoon (Dre) carjacked a white Ford Escort from a man and his girlfriend.

(People's Exh. 68, at p 25.) They arrived at the area of the carjack in Holland's sister's car with Holland driving and either Lyons or Post along. (People's Exh. 68, at p. 25.)

Williams approached the couple. After saying it was a nice car, he asked the man for the keys. (People's Exh. 68, at p. 25.) Weatherspoon asked for the man's wallet. The man readily gave up both, but asked to keep his house keys and his wallet after handing the money inside to Weatherspoon. (People's Exh. 68, at p 27.) Williams and Weatherspoon took only the car keys and the money.[23] (People's Exh. 68, at p 25.)

Weatherspoon got into the driver's seat and Williams into the front passenger seat. They drove the car out to Gilman Springs Road where they pushed the Escort into a ditch. (People's Exh. 68, at pp. 25-26.)

Returning to the commercial robbery that Dearaujo and Lyons committed, Williams thought they were going to commit a robbery before it happened; they volunteered to rob a business. However, the target was supposed to be Classy B's. (People's Exh. 68, at pp. 27-28.) Gonzales (Chuey) said there was only one clerk. (People's Exh. 68, at p. 28.) They were supposed to meet at Dannov's afterwards to split up the loot. (People's Exh. 68, at p. 28.)

Williams also gave an account of the Circle K robbery

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[23] At first Williams did not recall how much money they took from the wallet. Then he remembered it was eleven dollars. (Exh. 68, at 26-27.)

committed about two weeks prior to the police interview. He, Weatherspoon (Dre) and Junior (Dearaujo) went to the Circle K in Weatherspoon's car, a big gray LTD. Junior went into the store while Williams and Weatherspoon waited in the car. (People's Exh. 68, at p. 33, 35, 37.) Initially they thought about robbing another store, but Williams said there were too many police over by that store. For that reason, they went back to the Circle K. (Exh. 68, at p 34.) Junior said he wanted to commit the robbery because he wanted "G" stripes. (People's Exh. 68, at p. 35.) Williams handed Junior the gun and Junior went into the Circle K. After a few moments, Dearaujo ran from the store, got into the car and the car pulled out onto the street where they popped the trunk. Dearaujo threw the gun into the trunk and they drove off. (People's Exh. 68, at pp. 35-36.)

The take from the store was thirty-five dollars and some food stamps. Williams gave Weatherspoon five dollars for the gas and gave the rest of the money to Dannov to buy dinner. (People's Exh. 68, at pp. 36-37.)

Returning to a discussion of the meeting at Dannov's house, Williams said everyone was sitting in a circle. Williams and Weatherspoon (Dre) were talking about different ways to get cash. (People's Exh. 68, at p. 44.) Weatherspoon was talking about selling bud (marijuana). At the meeting, everyone joined in, suggesting different things. (People's Exh. 68, at p. 44.) Williams' plan was not to split the money but to keep it and let it grow, eventually investing it so they could all become businessmen. (People's Exh. 68, at p. 45.)

There was no name for the group. Williams guessed the name the detectives were alluding to was "Pimp-Style Hustlers", a rap-style group. (People's Exh. 68, at p. 45.) People were coming up with different names at the meeting, but Williams didn't want any names; that's why there wasn't one. (People's Exh 68, at p. 45.)

The meeting at Dannov's house was about a week and a half before the Family Fitness Center incident. (People's Exh 69 p. 45.) The only participants were to be Williams, Weatherspoon, Dearaujo and Lyons, but people just started showing up. (People's Exh 68, at p. 46.)

Williams did not graduate from high school. He attempted to get his G.E.D. through independent studies, but he failed to do so. He was working at his father's automobile repair shop and at his landscaping job and could not devote the time to his studies. (People's Exh. 68, at p. 47.) He quit living with his parents about two months ago [two months prior to the interview] when they raised his rent and he needed money to go to the prom. (People's Exh. 68, at p. 47.)

Finally, Williams discussed another robbery that took place on May 15, 1993. (People's Exh. 68, at p. 47.) Williams was going to the prom and needed a car. Tony (Post) wanted to do something to get his stripes. (People's Exh. 68, at p. 48.) John (Howell) drove over to Williams' house and picked up Williams and Post. The trio drove around for a while then Howell had to go home. He dropped

off Williams and Post at the Stater Brothers market off of Perris and Sunnymead Boulevard. They walked for quite a while before ending up in the movie theater (Festival) parking lot. (People's Exh. 68, at pp. 48-49.) Post had the gun because Williams had shorts on and was holding his suit for the prom. (People's Exh. 68, at p 49.)

In the parking lot, Williams sat on the curb and Post walked up to a lady and her little girl just exiting their car and walking towards the theater. (People's Exh. 68, at p. 49.) Post said something to the woman which caused her to walk back towards him then she started running back towards the theater. (People's Exh. 68, at pp. 49-50.) The little girl hesitated then began running also after her mother called to her. At the same time, Post began running towards Williams. (People's Exh. 68, at, at p. 50.) Williams could not see that well, but he did not believe Post pulled out the gun during the incident. (People's Exh. 68, at p. 50.)

Williams did not run. He watched Post run around the corner from the Yoshinoya restaurant then Williams got up and walked towards the field into which Post ran. (People's Exh. 68, at p. 51.) Post threw the gun into the field as he ran. It started raining and Williams sent Post back to retrieve the gun. Post did so and gave the gun to Williams. (People's Exh. 68, at p. 51.) As they were walking, a friend of Williams, Christine, picked up the two and gave them a ride home. (People's Exh. 68, at p. 51.)

Williams did not go to the prom; he went to Post's house then

went to his girlfriend's house. (People's Exh. 68, at p. 52.)

Williams explained that he was witnessing the attempted robbery by Tony Post because everyone who committed a crime to get "G" stripes had to have a witness. (People's Exh. 68, at p. 52.) Holland or Gabriel suggested that requirement during the meeting. (People's Exh. 68, at pp. 52-53.) At the fitness center incident, Lyons was the witness. (People's Exh 68, at pp. 53-54.) Williams reiterated he was not in the parking lot when it happened and did not see the shooting. In addition, Dearaujo and Lyons were a team; they didn't need a witness because they committed a robbery before. (People's Exh. 68, at p. 54.)

Thompson, Wilson and Pacheco interviewed Williams again on May 24, 1993. (People's Exh. 68, at pp. 55-56.) During the second interview, Williams merely clarified who was present at each incident and the parts each person played in the various offenses. (People's Exh 68, at pp. 55-79.)

DEFENSE EVIDENCE

Testimony of Kiesha Lawrence presented by Codefendant Dearaujo

Kiesha Lawrence Howell testified for co-defendant Dearaujo. (39 R.T. 4733.) She testified reluctantly and felt threatened because she had cooperated with the police. (39 R.T. 4739-4740.)

Lawrence-Howell opined that prior to May 1993 she thought Williams was associated with a gang. She knew Williams for

eighteen months to two years prior to her arrest.[24] (39 R.T. 4740, 4884.) During the time prior to May 1993 she saw Williams use signs associated with the Grape Street Crips. (39 R.T. 4741-4742.) At the time neither Lawrence or Howell were involved with a gang. (39 R.T. 4742.)

In May 1993, Lawrence had known Dearaujo about a year and a half[25]. Dearaujo would go to Howell's house or they would walk around the neighborhood together with Lawrence. (39 R.T. 4742.) Lawrence opined that Dearaujo was slow because he could not read or write very well and would ask her to tell him what street signs and posters said. (39 R.T. 4743.) To Lawrence, he seemed to be a little bit slow-witted. (39 R.T. 4743.) Prior to May 1993 Lawrence knew Dearaujo's friends to be limited mostly to Howell. (39 R.T. 4743.)

At that time, Lawrence hung out at the donut shop by Gordy's Market. She saw Dearaujo there often. (39 R.T. 4760.) A lot of the individuals involved in these incidents used to hang out at the donut shop. (39 R.T. 4761.) Lawrence also knew Holland, Post, Weatherspoon, Gonzales and Cannioto prior to April 1993. (39 R.T. 4879, 4898-4900.) She met Lyons about the end of April that year and described him as a weird guy. (39 R.T. 4876.)

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[24] On cross examination Lawrence testified that she did not mention specifically to Detective Silva that Williams belonged to the Grape Street Crips, but Silva knew. Lawrence told Silva that Williams was in a gang other than the group at Dannov's house. (39 R.T. 4876-4877.)

[25] Lawrence knew Dearaujo as Junior. (39 R.T. 4743.)

About the last week in April 1993 everyone started hanging around together. (39 R.T. 4744.) The group gathered at Dannov's house because there was no supervision on the weekdays. They would go to Dannov's house and watch television, smoke marijuana and relax. (39 R.T. 4745, 4788-4789.) Lawrence opined that the whole group looked up to Williams and took orders from him. (39 R.T. 4890, 4930.) Weatherspoon was Williams' right-hand man. (39 R.T. 4890-4891.)

About mid-May most of the individuals involved in these incidents were at Dannov's house. Lawrence and Howell arrived as things were wrapping up. (39 R.T. 4745-4746, 4763, 4773-4774.) Lawrence did not remember if she smelled marijuana when she entered the house. There were empty alcohol bottles on the counter, 40-ounce bottles and some 22 or 24-ounce cans of beer. (39 R.T. 4896.) Holland and most of the people there were talking about carjackings and stripping down cars. Later that night everyone except Dannov and Roberts left in Howell's Ford van to commit a crime.[26] (39 R.T. 4746, 4782-4783, 4789.) It was Williams' idea to commit the crime. (39 R.T. 4746, 4748.) Lawrence did not see a gun in the van that night, but she had seen Williams with a gun two or three times previously. (39 R.T. 4785-4786, 4791.)

Howell first drove to Pinky's parking lot right by the Family

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[26] On cross examination Lawrence testified that everyone in People's exhibit 5 except McNair and Handy were at Dannov's house. (39 R.T. 4907.)

Fitness Center. (39 R.T. 4792.) When no likely targets were seen, Howell drove the van to the Kmart further down on Alessandro. (39 R.T. 4794, 4799.) Holland and Cannioto exited the van and looked for a target. They walked all the way down towards the cinema and started back to the van when everyone began yelling and pointing to two young women. (39 R.T. 4801-4802, 4909.) Holland went to the driver's side of the women's vehicle and Cannioto to the passenger's side. (39 R.T. 4803.) Lawrence did not see a knife in Cannioto's hand; she did see Holland pull a gun. (39 R.T. 4804, 4909.)

The next thing Lawrence was aware of was that two women were screaming that Holland and Cannioto could have the car, but they couldn't have them [the women]. (39 R.T. 4806.) When the women screamed, Holland and Cannioto started backing away and the women ran towards Dilly's. (39 R.T. 4806.) Holland and Cannioto ran back towards the van, but Lawrence held the door handles down and told them to run elsewhere. (39 R.T. 4748, 4807.)

Howell drove the van from the parking lot. They drove around for a minute in an attempt to locate Holland and Cannioto then drove to Williams' house where everyone except Howell and Lawrence exited the van. (39 R.T. 4807.) En route, Williams said that the next time the targets would not give up the car to "cap" (shoot) them[27].

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[27] On cross examination, however, Lawrence testified that the quote, "Anybody who sees your face when you're carjacking, cap them." was taken from Dearaujo. She never heard Williams say those words and did not remember telling detective Wright otherwise. (39 R.T. 4914.)

(39 R.T. 4819, 4821.) Howell and Lawrence went home and stayed there the rest of the night. (39 R.T. 4807-4808.)

They saw some of the group the next morning, Saturday, at the motel where the group spent the night. (39 R.T. 4808, 4925.) While there, Holland told Lawrence that after she and Howell left, he, Williams, Weatherspoon and McNair carjacked a white Ford Escort. (39 R.T. 4810.)

On Sunday, at Holland's request, Lawrence, Howell, Holland, Metoyer and Williams went to see the Escort to get the rims. The car was not there. (39 R.T. 4810-4811, 4927.) She testified that this was possible even though she admitted that she and Howell were grounded on Saturday after Howell returned to the house with the van an hour and a half late. (39 R.T. 4812-4813.) Howell was scheduled to work on Sunday but they went out to look at the Escort instead. (39 R.T. 4814.)

Later Howell told Lawrence that in attempting to get a car for Williams to take to the prom on Saturday they attempted to carjack a truck but Post did not follow through. Howell did not tell her they tried to carjack a woman and a child that same afternoon. (39 R.T. 4812-4813.)

Lawrence remembered seeing Dearaujo on May 19, 1993. She saw him early in the day then later that night. (39 R.T. 4750-4751.) It was about 10 p.m. that night when she saw Dearaujo and Lyons. (39 R.T. 4751-4752.) Dearaujo said he shot someone and Lyons

confirmed that. (39 R.T. 4752, 4846-4847.) Williams drove up as a passenger in a black Duster right after Dearaujo and Lyons arrived. (39 R.T. 4754, 4854-4855.) Dearaujo and Lyons left with Williams in the car after Dearaujo got a sleeping bag from Metoyer. (39 R.T. 4756, 4858.)

Lawrence opined that Dearaujo was afraid of Williams, looked up to him. She based her opinion on her observances of Dearaujo getting picked on and punched not only by Williams, but also Holland and many other people on the block, including Howell[28]. Dearaujo gave the others cigarettes and money. (39 R.T. 4758-4759, 4934.)

Sometime after Ms. Los' death, Lawrence called Williams and asked him what he was going to do. Williams told her he had it under control, he'd take care of it. (39 R.T. 4867, 4936, 4938-4939.) Lawrence was not convinced. (39 R.T. 4867.)

On May 23, 1993 Lawrence called the police and told them where to find Williams. (4767.) She was very nervous, afraid that Williams might do something to her. She did get threats both in and out of jail. (39 R.T. 4766-4767.) Lawrence did not like Williams then and still does not. She believed it was Williams' fault that Dearaujo was in trouble. (39 R.T. 4768-4769, 4911.)

Detective Collins interviewed Kiesha Lawrence on May 22, 1993. He confirmed that People's exhibit 70 was a transcript of that

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[28] On cross examination Lawrence testified it was common for the group to wrestle with one another. (39 R.T. 4880.)

interview. (41 R.T. 4957.) People's Exh. 69 was the tape of the interview and the tape was played for the jury.

Testimony of Jason Domke Presented by Appellant Williams

Jason Domke testified for appellant Williams. He had known Christopher Lyons since the 6th grade. Both were thirteen years old in 1993. (36 R.T. 4548-4549.) A couple of days before Lyons' arrest, Lyons asked Domke and Domke's cousin, Jeremy, to stay the night at Lyons' house. (36 R.T. 4550.) Lyons showed Domke a knife and asked Domke if he and Jeremy would go "jacking" with him. (36 R.T. 4550.) Lyons pulled out the knife and held it about five inches from Domke's and Jeremy's neck. They were just messing around. (36 R.T. 4550-4551.) Lyons told Domke and Jeremy to go "jack people, and like to rob them and stuff." (36 R.T. 4551.)

Later Domke, Jeremy and Lyons rode their bikes to Dannov's house. Lyons went into the attic, handed down a gun and a bag of shells then took the gun and put it into his waistband. (36 R.T. 4553-4554.) The trio then went to Post's house where Lyons handed a gun to Post through a window. (36 R.T. 4554.)

PENALTY PHASE

PROSECUTION EVIDENCE

Michelle Yvonne Los was a Staff Sergeant, stationed at March Air Force Base at the time of her death. Ms. Los' parents, two of her siblings, both of her children, her fiancee and her ex-husband testified for the prosecution in the Penalty Phase of the trial.

Testimony of Paul Petrosky, Ms. Los' fiancé

Paul Petrosky met Ms. Los in Incirlik, Turkey when they were both stationed there. (52 R.T. 6090.) They became friends and stayed in touch through various transfers until both were assigned to March Air Force Base when their relationship became more than friendship. (52 R.T. 6091.)

Petrosky and his children lived on one side of a duplex on base. Ms. Los and her two children, Patrick and Michelle lived separately in the other half of the duplex. Petrosky testified that he and Ms. Los planned to be married in the spring of 1994. (52 R.T. 6092.)

Petrosky praised Ms. Los as a great mother and a very dedicated employee. (52 R.T. 6092-6095.) She consistently went above and beyond her normal duties to start a new clinic and care for a disabled youngster in her spare time.[29] (52 R.T. 6096-6097.) Petrosky said his life would never be the same without her and that he would be haunted by Ms. Los' memory. (52 R.T.6108.)

For several weeks after Ms. Los' death, if Petrosky or other family members were with Ms. Los' young son, Patrick, and left momentarily to go into another room, Patrick would follow then stay by the door until the member reappeared. (52 R.T. 6109.) Her

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[29] During a lunch break Mr. Petrosky informed the district attorney it was difficult for him to describe Ms. Los and/or his life with her in brief sentences in answer to specific questions. The district attorney granted Petrosky's request to just elaborate and Petrosky did so, giving a one-page narrative about unconditional love. (52 R.T. 6107-6108.)

daughter, Michelle became withdrawn. (52 R.T. 6109.)

Petrosky stayed in Ms. Los' home for the length of time it took to put her personal belongings together, take care of the financial matters, make sure the children were taken care of and escort Ms. Los' body to Iowa via air transport. (52 R.T. 6109.) He also made arrangements for the car to be cleaned, fixed and made usable again. The latter task took a long time and the smell of blood remained even after the carpet and upholstery were replaced. (52 R.T. 6110.)

In closing Petrosky said he hoped no one in the court room ever had this type of incident happen to them. (52 R.T. 6112.)

Family Testimony

At the time of trial, Richard and Rose Holschlag, Ms. Los' parents, had been married thirty-seven years. (47 R.T. 5487, 5489.) Of their six children, Yvonne Los was the oldest,[30] David was the youngest and Susan was the second youngest. (47 R.T. 5489; 5501; 5510; 5522.) All the children were raised on the family farm in New Hampton, Iowa. (47 R.T. 5490; 5501; 5510; 5522.) The family had always been very close. All the remaining children now live within twenty miles of Mr. and Mrs. Holschlag. (47 R.T. 5492; 5510; 5516.)

In high school, Ms. Los was a candy striper. (47 R.T. 5490-5491; 5502; 5514.) She was a big help to Mrs. Holschlag and looked

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[30] Mr. Holschlag identified Ms. Los in People's exhibit 71, 71-D and B. (47 R.T. 5490.) The photos were taken about the time Ms. Los graduated from high school. (47 R.T. 5490.)

after the other children when the family business took Mrs. Holschlag away from the home. (47 R.T. 5501; 5510; 5522-5523.) Yvonne volunteered for many things in which she helped others. (47 R.T. 5501-5502.)

The family was looking for options for Ms. Los' continuing education so she could become a nurse. During her senior year in high school, in 1979, a military recruiter came to her school. (47 R.T. 5503.) In the middle of her senior year Ms. Los signed up with the Air Force as a means of obtaining her RN degree. (47 R.T. 5491; 5503.)

Following basic training in Texas and a tour at Scott Air Force base in Illinois, Ms. Los was transferred to Turkey. Subsequently she had tours in Germany and at March Air Force Base in California, as well as participating in operation Desert Storm. (47 R.T. 5503-5504.) Ms. Los was in the service for fourteen years and continued to do volunteer work while serving in the Air Force. (47 R.T. 5492; 5504-5505.)

Mr. and Mrs. Holschlag found out about Yvonne's death about 3:30 a.m. on the morning of May 15, 1993. They went to each of their children's homes to inform them of Yvonne's death. Then they made funeral arrangements and waited for Yvonne's body to be returned to Iowa. (47 R.T. 5493; 5506-5507; 5517.) They visit

Yvonne's grave often and place fresh flowers there.[31] (47 R.T. 5496.)

The military honored Yvonne with a special ceremony during which they placed her picture, the flag and some of her commendations in the lobby of a new military apartment building named after Ms. Los, Los Hall . (47 R.T. 5496-5498; 5512.) The military flew the Holschlags to the ceremony. (47 R.T. 5496.) In Iowa, Ms. Los had a military funeral with a twenty-one gun salute. (47 R.T. 5518.)

David identified several of the photographs in People's exhibits 71 and 72: the church, the elementary and high schools, Ms. Los' father, Ms. Los and Patrick and Michelle, the whole family at David's grandparents home, Ms. Los' graduation photograph, the hospital where Ms. Los volunteered as a candy striper, photographs of Ms. Los on active duty, photographs of the grave site, military photographs of Ms. Los' co-workers in the military, the flag given to Ms. Los' parents after the grave site ceremony, and a photograph of Ms. Los' wedding. (47 R.T. 5513-5515.)

David considered going into the Air Force after high school graduation because of Yvonne's accomplishments. She was a very positive person and helped many. (47 R.T. 5513.) She was a leader; she helped others, putting their needs above her own. (47 R.T. 5520.)

Yvonne's children, Patrick and Michelle were six and eleven

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[31] Ms. Los' parents purchased eight grave sites in the town cemetery. (47 R.T. 5495.)

years old, respectively when Ms. Los died. (47 R.T. 5498; 5549.) Mr. Holschlag did not believe that Patrick fully understood what was happening at his mother's funeral; Michelle, however, did understand. (47 R.T. 5498.) The Holschlags do not get to see Patrick and Michelle very often now as the children are living in Germany. (47 R.T. 5507; 5517.) Last August the children were in Iowa for a short visit. Michelle seemed to have accepted her mother's death; Patrick seemed to realize for the first time the full implications. After visiting her grave, he was stoic at first and then came apart. (47 R.T. 5508.)

David opined that Michelle had a stepmother now and he knows she is being raised well, but that it had to be difficult for Michelle. (47 R.T. 5519-5520.)

Susan (Holschlag) Baker remembered that as the eldest of the children Ms. Los had some special responsibilities in the family. (47 R.T. 5522.) When Ms. Los began serving in the Air Force, their relationship changed tremendously and they became very, very close, calling each other about twice a month. (47 R.T. 5523.) She related events of Ms. Los' wedding day, births and baptisms in the family, Ms. Los' award for Mom of the Year, and an emergency search and rescue operation in Ethiopia. (47 R.T. 5523-5527.)

Ms. Baker was devastated when told of Ms. Los' death. Ms. Los was going to be home for Christmas that year because she knew Ms. Baker was pregnant. (47 R.T. 5528.) Ms. Baker said she thought

of Ms. Los daily. (47 R.T. 5529.) When Ms. Baker saw Michelle, here for the trial, Ms. Baker was struck by how much Michelle reminded her of Ms. Los at Michelle's age. (47 R.T. 5530.)

Nigel Los, Ms. Los' ex-husband, testified that he first met Yvonne at Scott Air Force base in 1979. They were both on active duty at the time. (47 R.T. 5531-5532.) They were married in 1980 and had two children, Patrick and Michelle. (47 R.T. 5532.) Their marriage ended amicably in 1988. (47 R.T. 5533.) At the time of his testimony Mr. Los was still active duty military, stationed in Ramstein, Germany. (47 R.T. 5534.)

Mr. Los described Ms. Los as a very dedicated person, 100% committed to the military and doing the best she could for other people. (47 R.T. 5532.) She achieved quite a bit during her tenure in the service, making the rank of staff sergeant. He opined that achieving that high rank could be quite difficult in the medical career field. Ms. Los received an extremely rare award at Weisbaden Air Base, an award which requires a good deal of community involvement and practice work. (47 R.T. 5533.)

Ms. Los was a good mother and always placed her children very high on her priority list. They did things as a family. (47 R.T. 5534.) Mr. Los opined it was difficult for Ms. Los to be away from her family in Iowa. Nevertheless, as far as he knew, she intended to make the military her career. She wanted both of the children to be able to attend college. (47 R.T. 5535.)

A couple of weeks prior to Ms. Los' death, Mr. Los was vacationing in Canada. He had re-married and wanted his son to meet Patrick and Michelle. He took Patrick, Michelle and his son to Las Vegas for a week and returned them to California about four or five days before Yvonne was killed. (47 R.T. 5536.)

When Patrick and Michelle arrived in Germany after the shooting, Mr. Los provided counseling for both children. Patrick was young enough he "just went with the flow", but it took Michelle four to eighteen months before she became totally part of the family. (47 R.T. 5538, 5541.) It took her four months to come to terms with the fact that on the night of Ms. Los' death, Michelle had a big argument with her mother. (47 R.T. 5542.)

The process of moving to Germany was difficult for both children. They had to decide which of their possessions they would take and they had to be medically cleared. (47 R.T. 5539-5540.) Having limited themselves to only the most important items because of weight restrictions, it was even more difficult on Michelle when there was a mix-up and none of her possessions arrived in Germany until two months later. (47 R.T. 5540-5541.)

Mr. Los opined that Michelle did not want to love again; she had a hard time just opening up. It was equally difficult on Mr. Los' new family. When he and his son left for Canada they were a family of three. When he returned they were a family of five. Luckily their landlord built an addition on the house to provide a room for

Michelle. (47 R.T. 5540.) Initially, however, she had to sleep in the dining room. (47 R.T. 5540-5541.)

Patrick Los was ten years old when he testified. He did not know why he was in court. He saw the photographs of his mother, but he did not remember her very well. He did remember she took him special places on his birthdays, would read him stories before bed and took him to a particular Mexican restaurant. (47 R.T. 5546.) He did not remember that he and Michelle wrote about his mother so she could win a Mom of the Year award. (47 R.T. 5547.)

He was pretty small when his mother died and did not remember how he found out she was dead. (47 R.T. 5547.)

Michelle was fifteen years old when she testified. (47 R.T. 5549.) She vividly remembered the night her mother died. They had a disagreement that day about Michelle's leaving the room when they were talking and Ms. Los' fiancé came into the house. (47 R.T. 5550.) Michelle got angry and went to bed without saying good night. She went to sleep that night wishing she could go live with her father. (47 R.T. 5551.) The next morning Michelle was awakened by her mother's fiancé's niece. Michelle got dressed and went to the living room. There she saw Paul (her mother's fiancé), Paul's sons, and his niece. They told Michelle her mother was dead. (47 R.T. 5551.)

Later that day Michelle's father came for her and Patrick. It was very disorienting to prepare for the trip to Germany. Michelle

started missing her mother right away and thinks about her daily. (47 R.T. 5552-5553.)

Michelle did not remember much about the funeral, but she did remember the wake. Her mother's make-up was done wrong and it did not seem to Michelle that that was the way her mother would have wanted to look. Also, there was one rosary that her mother wanted to be buried with and it was not there. (47 R.T. 5554.)

Michelle tries to remember things her mother said. Her mother was involved in everything Michelle did, work, church, shopping and cooking together. Her mother always made time for the children even though she had a very busy schedule. (47 R.T. 5554-5555.) Michelle thought her mother came in ninth in the Mother of the Year contest in the year Michelle and Patrick wrote about her. (47 R.T. 5555.)

The first time Michelle went to her mother's grave it was hard. Now it is a special place and Michelle feels closer to her mother there. She has her mother's birthday written down and she prays an extra prayer on that day. (47 R.T. 5556.)

Testimony of co-workers

Margaret Foltz and Christopher Reusch, both on active duty in the United States Air Force, knew and worked with Ms. Los. (52 R.T. 6079-6080; 6084-6085.) In two quarters in 1988 Los was recognized as NCO (non-commissioned officer) of the quarter then competed and was recognized as the NCO of the year. (52 R.T. 6082.) As a supervisor of twelve to sixteen enlisted personnel, Los

was outgoing, understanding and very knowledgeable of her job. (52 R.T. 6086.)

During the Gulf conflict, her unit was sent to Weisbaden, Germany where she was in charge of the intensive care section. (52 R.T. 6087.) Reusch identified prosecution exhibit 83 which was a videotape of the dedication ceremony at Los Hall on March Air Force base. Over defense objection, the tape was played for the jury. (52 R.T. 6089)

County Jail Incidents

During the nearly five years that appellant spent waiting for his trial to convene, he was continuously incarcerated in the Riverside County jail system and periodically moved from facility to facility. He was in the Indio jail several times during the period of March 1994 through December 1998.

At the time of his testimony, Donald Deloney was in prison serving time for two counts of robbery. He had been convicted of other felonies as an adult and had served prison time and time in C.Y.A. for a homicide. (49 R.T. 5836-5837, 5840-5841, 6115-6116.) At the time of his testimony, he was 35 years old. He noted that of those 35 years, he spent 19 years in custody,14 of those in state prison and the balance of custody time spent in Soledad, Folsom (new and old), Centinela, Corcoran and Lancaster. For the homicide, he served time in Youth Authority Preston. (49 R.T. 5837.)

In 1994 he was incarcerated in the Riverside County jail while

his robbery case was being tried. (49 R.T. 5838.) Mr. Deloney was moved from place to place in the jail system because of his violent activities in custody. (49 R.T. 5839, 6120-6121.) By prison standards, Deloney had committed some pretty heavy crimes and his fearsome reputation was well known. (49 R.T. 5841.)

Deloney testified that he met Williams when both were housed in tank 4-A, a protective custody tank.[32] (49 R.T. 5839, 5843-5844, 6138.) Deloney averred that appellant approached him and soon they became "running buddies", or associates. (49 R.T. 5840-5841.)

Deloney further testified that sometimes in custody there are people in a particular housing section that sort of control that section. (49 R.T. 5845-5846.) Because of his experience and his aggressive and violent behavior, Deloney said he was always one of those people. Such was the case in tanks 4-A and 15[33]. (49 R.T. 5846-5847, 5877, 6143.) Deloney said he believed Williams' status was the same. (49 R.T. 5846-5847.) There are certain privileges that go along with being the individuals who run a particular tank. Deloney noted that you don't have to ask too much for anything and when you do ask, you don't have to be worried about being rejected or turned down. (49 R.T. 5846, 6139.) The whole time Deloney was in tank 4 he had no money of his own, but never lacked for commissary items.

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[32] Registered nurse Carl Smith testified that in 1994-1995 a cell block was called a tank. (48 R.T. 5707.)

[33] The Hispanics in the racially integrated tank 15 had their own leader. (49 R.T. 5878.)

(52 R.T. 6140-6141.) Usually Deloney would obtain those items using other people's commissary cards but sometimes he would obtain things from people through gambling. (52 R.T. 6141.)

In tank 15, Deloney witnessed appellant assault another inmate so that Deloney could get a more favorable bunk. (49 R.T. 5848, 5861-5862.) In tank 4-A they repeatedly used another inmate's commissary card. [34] (49 R.T. 5849.) In tank 15 there was no machine to utilize the commissary cards so Deloney and Williams forced inmates to gamble or simply give them items and/or money. (49 R.T. 5876.)

Inmates in custody manufacture weapons (shanks) from pencils and razors using anything plastic that can be melted or anything that can be used for tying to make a sticking object. (49 R.T. 5854-5856.) Deloney saw Williams in possession of shanks while they were housed at the Riverside County jail. One was a toothbrush with a razor attached to it and one was a long pencil that could be described as a shank. (49 R.T. 5856.)

Due to their assaultive conduct, Deloney and Williams were relocated to tank 15. (49 R.T. 5860-5861.) There they continued their association and intimidation for a couple of more months until

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[34] The cell doors were open during the times the inmates had access to the day rooms. (49 R.T. 5852.)

someone wrote a kite[35] on them and they were moved to tank 13. (49 R.T. 5861-5862.) Tank 13 was a high-powered, high-custody housing unit used to segregate the most violent criminals from the general population. (49 R.T. 5862.) Deloney opined it was a kind of status symbol to say you were from tank 13. (49 R.T. 5863.) In tank 13 multiple cell doors are not unlocked at the same time. (49 R.T. 5863.) Each inmate is in his cell twenty-three hours per day. There are two bunks in each cell. Inmates are let out for an hour at a time to use the telephone and shower. (49 R.T. 5864.) For a month, Deloney's cell mate was Williams. (49 R.T. 5864.) After that month, Deloney returned to state prison. (49 R.T. 5864.)

Deloney admitted that while he was in custody, he committed assaults and robberies not only with Williams, but also with Benjamin Coffee and some other individuals whose names Deloney could not remember. (49 R.T. 5839-5840.) During those associations, Deloney estimated they robbed thirteen or more fellow inmates. Two of those robberies were reported to the law enforcement deputies in the jail. (49 R.T. 5865.)

Deloney testified he observed Williams getting oral copulation while in the jail, but Deloney believed the sexual relations were

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[35] Alan McHan described a kite as a piece of paper with a name, booking number and problem written on it. The initiating inmate sticks the paper in the door and a deputy collects it. (48 R.T. 5816.)

consensual.[36] (49 R.T. 5869.) Further, he saw Williams go into unauthorized cells numerous times. (49 R.T. 5870.)

From May through August 1994 at one time or another inmates Martin Sanchez, Michael Hanna, Alan McHan, Dale Foster, David Ramirez and Christopher Willis were housed with Williams in either the Riverside County jail or the Indio County jail, or both. (48 R.T. 5644; 5672; 49 R.T. 5735; 5810; 53 R.T. 6185; 6200.)

Martin Sanchez was housed with Williams in tank 15 C-1 in May 1994. (48 R.T. 5645.) There were approximately thirty men in tank 15 C-1 with a racial mix of about 10-10-10 of white, brown and black. (48 R.T. 5646.)

Sanchez had been in the jail several days when one evening another inmate dropped off a one-unit issue of five packs of coffee in the property box of one of Sanchez's "homeboys." (48 R.T. 5647, 5663.) The next morning when the homeboy did not have any coffee, Sanchez mentioned that some had been left for him. The homeboy was subsequently told that Williams took the coffee. (48 R.T. 5649-5651.) A fight then ensued between the homeboy and Williams. (48 R.T. 5653.)

Later that day or the next day there was an incident between Sanchez and Williams because Williams held Sanchez responsible for the earlier fight. (48 R.T. 5653-5655.) A sheriff's deputy entered the

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[36] The incident that Deloney observed occurred in the day room in 4-A; he also observed sexual advances in the day room in tank 15. (49 R.T. 5870.)

cell during the fight between Williams and Sanchez. When the two ignored his verbal command to break it up, the deputy called for back-up. (48 R.T. 5658-5659.) It took three or four deputies to break up the fight. The deputies handcuffed Williams and Sanchez and took them to segregation in another tank. (48 R.T. 5659.) When interviewed individually, both men told the deputies there would be no further altercations if they were returned to tank 15 C-1, so the deputies did so. (48 R.T. 5660.)

Deputy Daniel Wilder was on patrol duty in the Riverside County jail on May 14, 1994. (48 R.T. 5621.) He recalled the incident between Sanchez and Williams. (48 R.T. 5627.) He confirmed that at the time tank 15 C-1 was a mixed-race tank. (48 R.T. 5623-5624.) He also stated it was a low power tank; there were not a lot of sophisticated individuals in tank 15 C-1. (48 R.T. 5624.) He also confirmed it took several deputies to break up the incident, but did not recall the incident as being really physical. (48 R.T. 5629-5630.) Wilder wrote out one portion of the report of the incident. Sanchez did not wish to press charges or talk about the incident. There is a code of not snitching in the jail system. (48 R.T. 5630-5631.) Jail assaults rarely get prosecuted unless something really traumatic happens. (48 R.T. 5631-5632.)

On May 25, 1994 Alan McHan was housed in tank 15 C-1 in the Riverside County jail. (49 R.T. 5810-5811.) He identified appellant Williams as being in tank 15 C-1 at the time. (48 R.T. 5811.) The racial make-up in the tank was mixed, but with a

majority of blacks. (48 R.T. 5811.) In custody quite frequently there are specific individuals who become the "shot -callers" in a particular tank. When McHan was in tank 15 C-1, Williams was the shot-caller and he had others assisting him.[37] (48 R.T. 5812-5813.)

McHan recalled a day when a gentleman with some Swastika-type tattoos (Michael Hanna, 49 R.T. 5735) arrived in the tank. (48 R.T. 5816.) Both McHan and Hanna are Caucasian. (48 R.T. 5817.) Immediately after Hanna arrived, McHan heard an altercation. He turned to see Williams and a white guy walking away from Hanna. Hanna was standing by the door of the tank with his mouth bloody. (48 R.T. 5818.) Hanna hadn't been in the cell for five minutes and still had his property in his hand; he hadn't selected a bunk yet. Hanna was beating on the door to get the attention of a deputy. (48 R.T. 5820.)

Immediately a deputy removed Hanna from the cell. McHan was called out and questioned and told the deputies basically what he related in court. (48 R.T. 5820-5821.)

McHan identified himself not as the "shot-caller" of the whites in tank 15 C-1, but as the white inmate who ran down the tank rules with incoming white inmates. (48 R.T. 5829.)

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[37] On cross examination and again on redirect, McHan stated that Williams looked familiar as the man known as "Boxer" and the man who called the shots for the tank. (48 R.T. 5830-5833.) McHan got into a fight when he stuck up for another white inmate whom Boxer told to mop the floor. (48 R.T. 5833.) In court McHan identified Williams as Boxer. (48 R.T. 5834.)

Michael Hanna's account of the events on May 25, 1994 varied somewhat from that of McHan. (49 R.T. 5735.) Hanna testified that he entered the tank, looked around and selected an empty top bunk. (48 R.T. 5736-5737.) Hanna had a verbal altercation with one of the black inmates, sat on his bunk, and was called down by one of the Hispanic inmates. Hanna believed the cause was his Swastikas. (48 R.T. 5738.) Hanna got down from his bunk and a physical altercation ensued. (48 R.T. 5741.)

During the fight, deputies arrived in the cell and separated Hanna and the Hispanic and pulled Hanna from the cell. In a subsequent interview, Hanna identified his assailant.[38] (48 R.T. 5749-5750.) Hanna did not press charges and the deputies placed him in another tank. (48 R.T. 5750.) Hanna's nose was split open during the altercation. (48 R.T. 5752.)

Hanna believed the man in People's exhibit 80 (Williams) was the shot-caller with respect to the incident. (48 R.T. 5742.)

Deputy sheriff Brent Jenkins responded to cell block 15 C-1 during an inmate altercation on May 25, 1994. (49 R.T. 5754-5755.) In May 1994, cell block 15 C-1 was a protective custody tank. Offenses that would qualify an inmate as a protective custody inmate include rape, child molest, and informant (snitch). (49 R.T. 5756.)

Jenkins' report indicated that the suspects in the incident were

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[38] Hanna later testified he did not identify his assailant by name, just by race. (48 R.T. 5753.)

McHan and Williams and the victim was Hanna. Hanna was injured during the altercation and was taken to the nurses station for a bloody nose. (49 R.T. 5737.) Jenkins interviewed Hanna after the incident. Hanna identified McHan as the inmate who hit him, but declined to press charges. (49 R.T. 5760, 5762-5763.)

On August 18, 1994 Dale Foster was in custody in the Riverside jail. (48 R.T. 5672.) He was housed in tank 15 C-1. (48 R.T. 5673.) When he came for court appearances, Williams was housed in tank 15 C-1. Other times he was in the Indio jail. (48 R.T. 5675.) Foster believed August 1994 was the second time he was in the same tank as Williams. (48 R.T. 5675.)

Foster did not remember any communication between himself and Williams during their first stay in tank 15 C-1. In August, however, Williams decided he wanted Foster's bunk. (48 R.T. 5676.) Foster told Williams the bunk was occupied and Foster was not going to give it up. (48 R.T. 5678.) Foster was seated at the table in the day room when Williams proceeded to pull Foster's mattress off the bunk to replace it with his own. (48 R.T. 5679-5679.) Foster got up and replaced his mattress then returned to his seat at the day room table. (48 R.T. 5680.) Shortly thereafter, Foster got up to use the restroom and was hit from the side by Williams. (48 R.T. 5681.) Foster's eye was slit open. (48 R.T. 5681.)

Correctional officers saw Foster's eye through the window in the door and entered the day room. Foster was pulled out and taken

to see the nurse. Stitches were required, so Foster was put into a holding cell then medicated so his eye could be tended. (48 R.T. 5682.) Once the eye had been stitched, Foster was transferred to the new jail, an individual housing cell. (48 R.T. 5682.) He did not press charges. (48 R.T. 5683.)

Two days later Foster was in a holding cell waiting to go to court and Williams showed up. Foster asked Williams why he had acted as he did and Williams said he did not know why and apologized. As far as Foster was concerned, it was over. (48 R.T. 5684.)

Carl Smith, registered nurse, saw Foster on August 18, 1994. (48 R.T. 5704-5705.) He was apparently hit in the eye while wearing glasses. Either the frame or the glass broke the skin resulting in a superficial laceration but a lot of blood. (48 R.T. 5706.) Worried about a sub orbital fracture, Smith had Foster transported to Riverside General Hospital for x-rays, a tetanus shot and sutures. (48 R.T. 4706-5707.)

Christopher Willis met Williams in the Riverside County jail sometime in 1994. They were housed in the same tank. Then, at some point Willis, then Williams, was moved to Indio, housing unit 3. (53 R.T. 6200-6201.) Willis considered Williams a good friend and was not comfortable testifying. (53 R.T. 6202.)

Housing unit 3 was a mixed race, protective custody tank. Along with Williams and Willis, Mark Heinzen, Michael Schecter

and David Ramirez were inmates in housing unit 3. (53 R.T. 6202-6203, 6215.)

Williams and Heinzen argued frequently. Willis opined that Williams did not get along with Heinzen because Heinzen was gay. (53 R.T. 6204, 6207.) On July 14, 1994 the arguing became physical. Willis was not sure, but he believed Williams threw the first punch. (53 R.T. 6209.) There was blood all over. (53 R.T. 6209.) Heinzen was swinging at Williams, but was not landing any blows. (53 R.T. 6210.)

Willis entered the fight when Schecter tried to pull Williams off. Willis could not tell whether Schecter was trying to end the fight or join it, so Willis joined the fight. (53 R.T. 6210, 6220-6221.) The fight ended when others, including deputies, separated the men and individuals held Willis, Williams and Schecter. (53 R.T. 6210-6211, 6222-6223.) No one had to hold Heinzen who was bleeding profusely around the nose area. (53 R.T. 6211.) Subsequently, Willis was transferred to another tank. (53 R.T. 6211.)

David Ramirez, also in custody in Indio jail on July 4, 1994 gave the same account of the episode. From Ramirez' vantage point Williams started the fight and Ramirez told that to law enforcement. (53 R.T. 6185-6199.)

Deputy Thomas Brewster was assigned to the Indio jail on July 4, 1994. (50 R.T. 5923-5824.) At some point that day, Brewster heard a loud banging coming from the door of housing unit three. (50

R.T. 5925.) Brewster and another deputy responded to unit three and opened the door. (50 R.T. 5926, 5932-5933.) Heinzen was at the door, his face was bleeding profusely and he was out of breath; it appeared he had just been assaulted. (50 R.T. 5926.) When Brewster asked Heinzen what happened, Heinzen responded that Christopher Willis and Jack Williams beat him up. (50 R.T. 5926, 5933.)

Brewster placed Willis, Williams and Heinzen in separate holding cells, interviewed them then took Heinzen to the John F. Kennedy Hospital in Indio. (50 R.T. 5926-5928, 5934.) Heinzen received three stitches to close the laceration above his nose. (50 R.T. 5928.)

When Brewster interviewed Williams, Williams stated he hit Heinzen first then Heinzen tried to fight back. Williams said he punched Heinzen about four times in the head. (50 R.T. 5936.)

Regarding another incident, Mark DePriest testified that on January 3, 1995, he was incarcerated in Riverside County jail. (49 R.T. 5765.) He was housed in tank 4-A, a protective custody tank. (49 R.T. 5966, 5969.) There were two bunks in each cell and a door to each cell. In the middle of the cells there was a day room in which there were some tables and chairs, a televison, two vending machines and two telephones.[39] In the center of the day room was a pod, a glass enclosed area in which a deputy observed the day room

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[39] DePriest stated that People's exhibit 78 appeared to be an accurate diagram of tank 4-A. (49 R.T. 5966.)

activities. (59 R.T. 5766-5768, 5785-5786.)

Some deputies kept the individual cell doors locked at all times. Other deputies would leave the doors open for two or three hours at a time. Frequently all the cells doors were open allowing the inmates to go at will to the day room. (49 R.T. 5774, 5791.) However, no inmate was to enter another inmate's cell. (49 R.T. 5795.) From his vantage point the guard could see the day room and the doors of the cells. He could not, however, see into the cells. (49 R.T. 5774-5775, 5784.)

DePriest testified that during his incarceration in tank 4-A two inmates, the persons depicted in People's exhibits 77 and 80 (Deloney and Williams, respectively), ran the cell. (49 R.T. 5769, 5787.) The two took whatever they wanted by force, especially Williams, who took Depriest's cell mate's commissary card on a daily basis. (49 R.T. 5770, 5772.) Each day, after he was through using it, Williams would throw the card underneath the cell door and announce that he would be back for it the next day. (49 R.T. 5772.) Williams had a toothbrush with a razor blade connected to it. He threatened DePriest's cell mate with the shank and assaulted him several times. (49 R.T. 5770.)

Williams attempted to take DePriest's commissary card once, and DePriest resisted. Williams did not attempt again. DePriest's cell mate was more timid and often refused to exit his cell. (49 R.T. 5776-5777.) He told DePriest he was afraid of Williams and that on

one occasion he was sexually violated by Williams.[40] (49 R.T. 5778-5779.)

DePriest was asked at one point to give a statement to law enforcement about Williams. DePriest did so. This was after a deputy took DePriest's cell mate's commissary card from Williams. (49 R.T. 5780.) Shortly thereafter, DePriest was released from the jail. (49 R.T. 5780.)

In January 1995, deputy Leo Marin was assigned to the Robert Presley detention center in Riverside. (50 R.T. 5889.) He agreed People's exhibit 78 was an accurate diagram of tank 4-A. (50 R.T. 5891.) In the center P.O.D. control is a control panel used to operate the doors to both the top and bottom tier areas. It also controls the doorways that lead into the pod area. When inside the P.O.D. control one can see the upper and lower tiers and the actual cells.[41] However, it is difficult to see behind the commissary machines and the hot water dispenser. (50 R.T. 5891-5892.)

When Marin was on duty he would open all the cell doors at ten minutes before the hour. 950 R.T. 5892.) That would allow all the inmates in the day room to take their bathroom breaks, get water, etc. At the top of the hour he would direct the inmates to lock their

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[40] On cross examination DePriest testified that when his cell mate (Goodfield) was sexually assaulted he just told Depriest he was hurt. This was shortly after DePriest arrived in pod 4. (49 R.T. 5806.)

[41] If the cell doors are open, a deputy can see into each respective cell from the central P.O.D. area. (50 R.T. 5898.)

cell doors and the doors would remain closed for the next fifty minutes. [42] (50 R.T. 5893.) There was some discretion and not all the deputies ran the tanks in the same manner. Nevertheless, the hard and fast rule with all deputies was that no inmate enter the cell of another. To do so was an infraction. (50 R.T. 5893-5894.)

On January 3, 1995 Marin assisted deputy Sanders during an incident in tank 4-A. Marin was told a fight had occurred. Goodfield was the inmate involved; DePriest was a witness and the suspects were Williams and Deloney. (50 R.T. 5894.)

As part of the investigation into the incident deputy Marin brought Williams' commissary box, the box issued to inmates in which to keep their personal property, to the nurse's station. (50 R.T. 5895.) The box was so full it could not be closed. Among the contents was a yellow, no. 2 pencil jammed into the handle of what had been a broken plastic Bic razor handle. The item would be characterized as a shank in the jail. (50 R.T. 5896, 5909, 5921.)

Deputy Marin testified he was familiar with People's exhibit 84, a record showing commissary usage by time and booking number. (53 R.T. 6225, 6228.) On pages four and five items drawn on Goodfield's commissary card are noted. From Marin's nine years experience in the jail system the withdrawals on Goodfield's card are

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[42] On cross examination Marin stated that if a cell door was open and the inmate closed it slowly and did not let the door slam, the door would stay slightly ajar and would not lock. That was permissible on Marin's shift during the time the doors were unlocked. (50 R.T. 5906.)

a bit unusual. (53 R.T. 6231.) The record indicates that during a two hour period, Goodfield used the card thirty some times. (53 R.T. 6231-6232.)

Another jail incident occurred in December 1995. Arturo Alatorre testified that during that month he was serving time in the Riverside County jail. (48 R.T. 5577-5578.) He believed he was in tank 19, as was Williams.[43] (48 R.T. 5578.) At the time, there were about twenty men in tank 19, a mixed-race tank. (48 R.T. 5581, 5594-5595.)

Unfortunately, one of the two telephones in the day room was not functional. Consequently, the inmates set up schedules of ten or fifteen minutes a day per inmate for use of the one working telephone. (48 R.T. 5581-5582.) Each racial group had a coordinator. (48 R.T. 5582.) The schedule changed each day and was posted by the telephone. (48 R.T. 5598-5599.)

On December 29th, Alatorre's fifteen minute time slot followed Williams'. (48 R.T. 5583.) When Williams' time elapsed, Williams remained on the telephone. Alatorre had an important call to make to his employer and hinted politely that Williams' time was elapsed. (48 R.T. 5583-5584, 5601.) When Williams continued to use the telephone, Alatorre again mentioned the time and Williams reacted by initiating a fight. (48 R.T. 5586.)

Williams walked towards Alatorre and swung at him. Alatorre

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[43] Alatorre identified Williams in court. (48 R.T. 5578.)

grabbed Williams and took him to the floor where he held him in a Nelson. Williams' head was on his chest and Alatorre was just holding him in that position. (48 R.T. 5587.) Alatorre did not want to fight, but felt he had no choice. His release date was December 31st but if he didn't fight back either Williams or his ethnic group would "roll him out." (48 R.T. 5588.) Consequently, Alatorre held Williams in the Nelson until chow came a few moments later. (48 R.T. 5588.) The inmates in the tank announced they were going to eat and after the meal Williams and Alatorre would continue the fight. (48 R.T. 5588, 5613.)

As soon as the plates were removed, the fight renewed. (48 R.T. 5589.) Alatorre again secured Williams, he did not want to do anything that would jeopardize his release, and held Williams down until deputies arrived at the cell. (48 R.T. 5589-5590, 5616-5617.)

The deputies told Alatorre to break it up, but Williams continued to punch Alatorre, so Alatorre continued to hold Williams. Then another inmate, Alfredo, broke up the fight and the deputies opened the door and told Williams and Alatorre to come out. (48 R.T. 5590-5591.) Alatorre was interviewed by two deputies to whom he told nothing. Alatorre was returned to his cell. He did not see Williams again. (48 R.T. 5592.)

The Mario Loa Incident: Testimonies of Mario Loa, Lisa Alvarez and Latrissa Garrison

In September 1991 Mario Loa was dating a girl named Lisa.

Lisa lived in an apartment on Heacock in Moreno Valley with her roommate, Latrissa Garrison. (48 R.T. 5709; 50 R.T. 5953.) Around 8:00 p.m. on September 21st, Loa, Latrissa and Lisa were in Lisa's bedroom talking when Loa looked up and saw an African-American male, Latrissa's brother Greg Brown, enter the apartment. (48 R.T. 5713-5714, 5939; 50 R.T. 5953, 6027, 51 R.T. 6037, 6040-6042.) The front door was open as were the two windows in the bedroom.[44] (50 R.T. 5954; 51 R.T. 6041.) Lisa dated Brown prior to her acquaintance with Loa, but had not dated him for a few months in September 1991. (50 R.T. 5953-5954; 51 R.T. 6039.)

Latrissa left the bedroom to speak with her brother, closing the bedroom door behind her. (48 R.T. 5714, 5723; 50 R.T. 5955; 51 R.T. 6042.) Latrissa returned saying her brother wished to speak to Lisa. Lisa left Loa alone in the bedroom and left the room to speak to Brown. She, too, closed the door behind her. (48 R.T. 5714, 5723-5724, 5940; 50 R.T. 5955-5956, 6028-6029; 51 R.T. 6043.)

A couple of minutes later Greg banged on the locked door saying he was going to kick the door down and kick Loa's a__ and that he was going to kill Loa.[45] (48 R.T. 5714-5716, 5725, 5941; 50 R.T. 6030; 51 R.T. 6043.)

Loa took the threats literally and attempted to exit the room through the window. Loa was not fast enough and Greg approached

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[44] Latrissa testified the windows were closed. (51 R.T. 6040-6041.)

[45] Latrissa did not hear the threats. (51 R.T. 6056.)

the window from the outside. He was carrying a knife.[46] (48 R.T. 5716, 5942-5943; 50 R.T. 6031-6032; 51 R.T. 6046.) Loa then opened the bedroom door and exited the apartment by running through the living room to the front door. Appellant Williams was blocking the front door, but Loa ran through Williams, knocking him down. (48 R.T. 5717, 5727-5728, 5944-5945.) Loa kept running and appellant Williams gave chase.[47] (48 R.T. 5717-5718, 5946-5948.)

Loa reached the gate, but was unable to open it before being jumped by Williams. Williams held Loa down while Greg kicked him. (48 R.T. 5718; 51 R.T. 6048-6049.) Loa got free, struggled with Greg who was wielding the knife, and ran free when Latrissa pushed Greg. (48 R.T. 5719-5719, 5731-5732; 51 R.T. 6049-6050.)

After hiding for about twenty minutes behind a fence, Loa received aid from a man then drove to the hospital to get his finger stitched prior to going home. (48 R.T. 5720-5721; 51 R.T. 6052.) Prior to the incident, Loa did not know Williams or Greg. (48 R.T. 5721.) He described both men to the officers and identified Greg. He was not asked to find Williams in the photo line-up. Loa learned Williams' name from Latrissa. (48 R.T. 5951.) Latrissa knew

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[46] At this point Lisa Alvarez went to her son's room and stayed there until the police arrived. (50 R.T. 5957-5959.)

[47] On cross examination Mr. Loa stated that he did not tell the detective that Mr. Brown (Greg) pulled him to the ground. What is in the report is not what happened. (48 R.T. 5948.) Williams pulled Loa down and Brown arrived at the gate after Loa was on the ground. (48 R.T. 5949.)

Williams because he lived across the street from her parents until the summer of 1994. (51 R.T. 6037.)

The Trina Portlock Incident: Testimony of Trina Portlock

Ms. Portlock met appellant Williams around 1991 or 1992 through Mondre Weatherspoon. Portlock knew Weatherspoon from school. (53 R.T. 6177-6178.) Portlock was not dating Williams, just knew him, Weatherspoon, McNair and others. (53 R.T. 6179.)

Sometime in 1992 Weatherspoon, Portlock, Williams and another woman were going somewhere when a disagreement broke out between Portlock and Williams. Portlock did not remember what the disagreement was about, but it resulted in a physical altercation. (53 R.T. 6180.) Williams broke the antenna of Portlock's car and her hand came down on the antenna. (53 R.T. 6180-6181.) Portlock's hand was bleeding; she did not remember if Williams hit her in the mouth. (53 R.T. 6181.)

Portlock did not immediately report the incident to the police, but Williams' sister did so. About a week later, so did Portlock. (53 R.T. 6181-6182.) After reviewing a copy of the police report, Portlock stated that if the report said Williams hit her in the mouth, then that's what she told the police. She did not know why Williams hit her in the mouth. (53 R.T. 6181-6182.) On cross examination Portlock recalled telling investigator Silva that she hit Williams during the incident. (53 R.T. 6183.,)

The Trina Johnson Incident: Testimony of Keith McKay

On January 13, 1992 officer Keith McKay, Riverside County Sheriff's department, was stationed as a patrol officer in Moreno Valley. (50 R.T. 5886.) On this date he took an incident report from Trina Johnson. (50 R.T. 5886.)

Officer McKay met Johnson at a street corner where she reported she had been battered by her ex-boyfriend, Jack Williams (appellant). (50 R.T. 5887.)

Johnson had been hit in the face, in the mouth area and said the incident occurred on January 3, 1992. (50 R.T. 5887.)

McKay did no further investigation. (50 R.T. 5889.)

DEFENSE EVIDENCE - PENALTY PHASE

Family Testimony

Jack Emmit Williams, Sr. identified his wife, his youngest son Adrian, his daughter Felicia, appellant and his next to oldest daughter in a family photograph. (43 R.T. 6261-6262.) Mr. Williams did not recall when the photograph was taken. (43 R.T. 6262.)

When appellant was in the first grade, the family was residing in Riverside. They moved to Moreno Valley in 1981 or 1982. At that time the family was still one unit and Mr. Williams and his wife were employed. (43 R.T. 6262-6263.)

Mr. Williams had more than one job. At some point he was a business owner; he had an automotive repair shop in Perris. Out of

that shop they also ran landscaping and did minor repairs and maintenance on thirty to thirty-two houses and mobile homes. (43 R.T. 6263.)

Mr. Williams was aware that appellant had some problems in middle school. He did not remember any problems with the law at that time. (43 R.T. 6263-6264.) Later on, however, there were some. Whatever problems there were, they were taken care of. (43 R.T. 6264.)

Mr. Williams also knew appellant had some school attendance problems. He was not sure what year appellant dropped out of high school. (43 R.T. 6264.) With the aid of counselors, they enrolled appellant in an alternative school, a continuation school where he could go to school half a day and work half a day. Eventually, though, appellant dropped out of that also. (43 R.T. 6264.)

When he was about seventeen, appellant began working with his father in the landscaping business. (43 R.T. 6265.)

During this time there was a minor substance abuse problem with Mrs. Williams. She would visit her relatives out of state for months at a time. (43 R.T. 6265.) Sometimes she would take the younger children and sometimes she would not. (43 R.T. 6265-6266.) Appellant remained with his father during these times. Mr. Williams did not know that appellant was having any substance abuse problems. (43 R.T. 6266.)

Mr. Williams was acquainted with most of appellant's friends,

including Mondre Weatherspoon, George Holland, and John Howell. (43 R.T. 6267.) He didn't know the friends that well. He heard Holland had some criminality problems and that Howell liked to drink, but Williams was not aware of any substance abuse problems with appellant's friends. (43 R.T. 6267.) When appellant turned eighteen he was still living at home sometimes. He was not working on a full-time basis but was still working with Mr. Williams sometimes. Mr. Williams did not know where appellant lived when he wasn't living at home. (43 R.T. 6267.)

Prior to his son's arrest, Mr. Williams would describe him as a normal kid. He was carefree, liked to joke, liked to fish, liked to watch Mr. Williams work on the cars and liked to play basketball. (43 R.T. 6267.) Basketball was his favorite thing. (43 R.T. 6268.)

Until he was arrested, Mr. Williams was not aware of any violent behavior on appellant's part. (43 R.T. 6268.) Appellant's arrest and trial has had a devastating effect on Mr. Williams' life. (43 R.T. 6268.)

Felicia Williams described her brother as a helpful, respectful person, well-liked in the neighborhood. (53 R.T. 6246, 6250.)

Character Witnesses

One of appellant's neighbors in 1987 was Rahin Brown. (53 R.T. 6253-6254.) Brown saw Williams on a regular basis and they were friends. They played basketball and football in the street and had been in each other's homes. (53 R.T. 6255-6256.) At the time of

their friendship, Williams had a yard cleaning, landscaping business. (53 R.T. 6256.) Brown was acquainted with Williams' family and would speak to his father every now and then. (53 R.T. 6255-6256.)

When Brown left home he joined the United States Navy then went to college. (53 R.T. 6256.) While in the service Brown was stationed abroad but still had contact with Williams. (53 R.T. 6257.) That contact continued when Brown returned home and enrolled as a day student at California Baptist College. (53 R.T. 6256-6257.)

Brown was never aware of any bad behavior on Williams' part and did not believe that he was a substance abuser. (53 R.T. 6257-6258.) Prior to his arrest, Williams was always there for Brown and Brown's family; he was like a family member. (53 R.T. 6258-6259.)

At the time of his testimony, Brown was aware of Williams' convictions. In spite of them, Brown remained friends with Williams and believed he had good qualities. (53 R.T. 6259.)

Velma McDowell was not appellant's neighbor, but she did live next door to appellant's grandmother. (54 R.T. 6452, 6430.) Williams visited Ms. McDowell in her home and would sometimes mow her lawn and tell her to just pay him when she got the money. (54 R.T. 6430.) He was always respectful to her, would help her son do things and would run errands for Ms. McDowell. (54 R.T. 6454.) She described Williams as "just a good kid." (54 R.T. 6454.)

Wendy Pospichal was Williams' seventh grade social studies

teacher and his eighth grade U.S. History teacher.[48] (54 R.T. 6283-6284.)

Williams did not do too well at the beginning of the year, but Pospichal believed that was due in part to some absences. She remembered Williams as being very social and well-liked and willing to work with her after school hours. (54 R.T. 6285-6286.) He was absent frequently and late at times, but he was not disrespectful or a problem in the classroom. (54 R.T. 6285.)

The only contact Pospichal had with Williams' parents was a visit to their home one day after school. Williams wanted her to meet his family. (54 R.T. 6285.)

Appellant Williams was in Linda Adame's sixth grade class at Sunnymead Middle School. (55 R.T. 6385-6386.) She really liked Williams as a student; she remembered his personality, his smile. Williams was always respectful to Ms. Adame and the other adults. (55 R.T. 6387.)

Williams did not turn in his homework a lot, but Ms. Adame realized he did not have a lot of help at home. She attempted at times to contact his parents, but did not remember them coming to conferences. She did not believe she ever met Williams' parents. (55 R.T. 6387.)

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[48] Appellant was retained as a seventh grade student and Pospichal taught him social studies in the second seventh grade year. Halfway through the year appellant was promoted and she became his U.S. history teacher. (54 R.T. 6284.)

Williams had difficulties with math and his reading level was a little lower than it should have been, but he was a good student in and out of the classroom. Adame remembered no behavior problems. (55 R.T. 6387.)

The Hanna Incident

Martin Silva, senior investigator for the district attorney's office in Riverside, interviewed Michael Hanna on March 19, 1998 concerning an incident that occurred in the jail on May 25, 1994. (53 R.T. 6277-6278.)

Hanna indicated he saw a white inmate enter a cell and talk to a group of white inmates. Following that conversation, the white inmate approached and struck inmate Hanna. (53 R.T. 6278-6279.)

In connection with this same incident, Silva also interviewed inmate McHan. At the time, it was Silva's belief that McHan was the white man accused of striking Hanna. (53 R.T. 6279.) McHan denied doing so. (53 R.T. 6279.)

The Mario Loa Incident

Detective Gary Thompson was assigned to the case involving Mario Loa and interviewed Loa at the Moreno Valley police station on October 1, 1991. (53 R.T. 6270-6271.)

Thompson did not remember the particulars of the interview, but stated his report reflected the substance. During his testimony Thompson refreshed his memory by reading the report. (53 R.T. 6272-6274.) The report stated that Brown grabbed Loa at the gate,

pulled him to the ground and threatened him with a knife, making stabbing or jabbing motions towards Loa. (53 R.T. 6274.)

On cross examination Thompson stated that Loa said there were two men involved. Initially Loa identified Brown. Sometime later Lao found out the name of the other suspect was Williams, and so informed Thompson. (53 R.T. 6275.)

On redirect, Thompson admitted that his report did not reflect that Williams was involved with Brown in an assault on Loa by the gate. (53 R.T. 6276.)

Prison Classification System

Anthony Casas, private investigator and litigation consultant, was previously employed by the California Department of Corrections. (54 R.T. 6289.) During the last few years of his twenty-three year career with the CDC, Casas was the associate warden at San Quentin State Prison. (53 R.T. 6295.) He has dealt with the prison classification system at both ends: when the inmate is first delivered to the system in the reception center and when re-classification is necessary due to prison conduct. (53 R.T. 6295-6296.) Since his retirement, Casas has maintained his contact with persons who work within the department of corrections and also with law enforcement.[49] (53 R.T. 6297.)

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[49] Casas has qualified as an expert in the court of law of California in regards to individual adjustment to custodial setting and an inmate's potential for same. (53 R.T. 6300-6301.) This court qualified Casas as an expert. (53 R.T. 6301.)

Within the classification system, there are four levels of confinement: Level 1 is essentially an open institution. In Level 1 facilities there are no security perimeters, no fences. A Level 2 facility is a fenced facility with some armed coverage, but as in Level 1,there is dormitory-style living. A Level 3 facility is individually celled with armed coverage both inside and out. A Level 4 facility has individual walled cells with armed coverage both inside and out. (53 R.T. 6298-6299.)

Casas became familiar with appellant's case by reviewing material provided to him and through two interviews with Williams. Casas opined that as a life without parole inmate, Williams would be sent to a Level 4 facility. There might be a time if population pressures were such that he might be placed through a departmental review board into a Level 3 facility, but only as long as that emergency situation existed. (53 R.T. 6300.) The only Level 3 facility in which Williams might be placed in an emergency situation would be a facility with a lethal electric fence plus armed coverage. (53 R.T. 6300.)

With respect to Level 4 facilities, there is a wall and within the wall is the cell construction. Within the housing units there are grille gates , locking mechanisms and the individual cells. A wall around the entire housing complex is supported by gun towers. (53 R.T. 6304.) The cells are concrete block construction with the toilets and washbasins secured. The lighting structure is built into the ceiling. (53 R.T. 6306.) In the newer facilities, cells are opened

electronically. In the older facilities, by turn-key. (53 R.T. 6307.)

If an inmate in a Level 4 facility commits offenses repeatedly and is a danger to prison staff or other inmates, that inmate will be transferred to a security housing unit for a period of time. (53 R.T. 6308-6309.) A person serving life without the possibility of parole in a Level 4 facility is allowed to leave his cell at feeding time, yard time and visiting time. (53 R.T. 6309.) In most cases meal time is a central dining facility; however, not in security housing units. In the dining facility the inmates are normally told where to sit and are watched. (53 R.T. 6309-6310.) Cells have either video observation or, in the older institutions, staff periodically walks the tiers. (53 R.T. 6310.)

Assaults take place everywhere within the prison system. If an inmate assaults another, the perpetrator goes before a disciplinary committee or is referred to the district attorney. (53 R.T. 6312-6313.) Inmates who are management problems are put into two-man cells in several institutions but can still go out on the yard with other inmates. Because of the population pressures, nothing is cast in concrete within the prison system. (53 R.T. 6339-6340.) While catching an inmate in possession of a weapon (prison manufactured), is a very serious offense, mere possession is not considered an act of violence. Many inmates are fearful of the system and arm themselves for defense purposes. (53 R.T. 6344-6345; 55 R.T. 6419.)

Casas believes that gang affiliation in one of the four major

prison gangs is the best indication that an inmate will be a management problem. (55 r.T. 6406-6407.)

In Casas' opinion Williams is not an unusual case; he would adapt and do well in a Level 4 institution. (53 R.T. 6317, 6337-6339, 55 R.T. 6392.) In Casas' opinion Williams is not a sophisticated prison inmate; he would be a babe in the woods in a Level 4 facility. (55 R.T. 6396.) The kind of infractions Williams has committed during his incarceration in the Riverside County jail are not the kind of violence he will be exposed to in prison. (55 R.T. 6396-6399, 6408-6409, 6424-6425.) In addition, Williams does not fit the profile of the kind of individual who causes management problems in state prison.[50] (55 R.T. 6412.)

PROSECUTION REBUTTAL EVIDENCE

Inmate Facilities

Correctional officer Martin Trochtrop was familiar with People's exhibit 111, a copy of appellant Williams' pink card. (55 R.T. 6466, 6468.) A pink card is a card that travels with an inmate throughout the county jail. It contains his first and last name, his booking number, his most predominant charge, photograph and a quick reference to his housing location and any disciplinary action attributed to that inmate. (55 R.T. 6468.)

According to People's exhibit 111 Williams was first assigned

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[50] On cross examination Casas stated he was not aware that Williams possessed weapons inside the Riverside County jail. (55 R.T. 6418.)

to tank 2-A on December 29, 1995. He was subsequently rehoused to the third floor, general population, on January 13, 1996 then rehoused to administrative segregation in the old jail on February 22, 1996. Although he was rehoused several times between then and November 9, 1996, Williams had been in administrative segregation continuously since February 22, 1996. (55 R.T. 6469, 6488.)

Deputy Trochtrop was sitting inside the P.O.D. control room on April 25, 1998 when he observed Williams slide a folded piece of paper between a door which connects day room 1 to day room 2. (55 R.T. 6470.) Trochtrop entered day room 2 and retrieved the paper, People's exhibit 110 (photocopy). (55 R.T. 6470-6471.)

The note concerned Trochtrop because it said Williams had some cigarettes and needed a lighter, both of which are contraband in jail. (55 R.T. 6473.)

Trochtrop requested assistance and permission to conduct a cell search and was granted both. (55 R.T. 6373-6474.) During the subsequent search of Williams' cell, Trochtrop retrieved two pieces of plastic mirror in a homemade envelope, a partially sharpened piece of plastic mirror, a clear piece of plastic fully sharpened to a point, a dollar bill and a newspaper dated December 27, 1997. (55 R.T. 6478.) These items were concealed within a ceiling light fixture. (55 R.T. 6477–6478.) Although the pieces of plastic were not fully sharpened, they could have been used to fashion weapons. The fully sharpened piece was a fully completed weapon, a shank. (55 R.T.

6481.) No other inmates except Williams and his cell mate, Lester Wilson, had access to the light fixture. (55 R.T. 6484.) No tobacco was found. (55 R.T. 6490.)

Samuel Francis, correctional officer at the California Institution for Men in Chino, California, has worked for the CDC for over seventeen years. (55 R.T. 6494.)

He described the basic routine of a correctional officer at a Level 4 facility. The day shift begins with feeding the inmates. Then, inmates with job assignments, medical appointments, or counselor appointments, etc. are escorted to those destinations. (55 R.T. 6496-6497.) After all the inmates have been fed, they may go out to the recreation yard for approximately an hour to an hour and a half while tier tenders or trustees clean the housing unit. During that time the correctional officers search as much as possible of the cells, all common areas, shower stalls, etc. (55 R.T. 6497.) In Level 4 facilities they are searching primarily for weapons. Francis opined there is no reason for an inmate to have a weapon other than to use it against an officer or another inmate. (55 R.T. 6494.)

On a typical day shift, if he only worked one tier, Francis might come into contact with thirty-four to fifty inmates. If they had yard time that day he might come into contact with anywhere from two hundred to some four hundred inmates. Yard time randomly results in face-to-face contact during searches. (55 R.T. 6498, 56 R.T. 6535.) The officers who walk the tiers are not armed. (55 R.T.

6499.)

During his career, Francis has been injured by inmates three or four times. (55 R.T. 6503.) Possession of a shank in one of the most serious offenses there is within the prison system. Francis considered inmates who repeatedly possess weapons very dangerous. (55 R.T. 6405-6505.) Sexual assault on another inmate is punishable by one year loss of good-time credit. (55 R.T. 6505-6506, 56 R.T. 6541.) Such punishment would mean nothing to an inmate serving life without the possibility of parole. (55 R.T. 6506.)

There are usually inmates in a custodial environment who dominate other inmates. An inmate gains his "shot-caller" status either by being involved in a large gang who gives him permission to run a particular tier or housing unit, or by reputation. (55 R.T. 6509.) If Francis were to find an incoming inmate with a homicide charge had been in various tanks in the county facility where he had possessed weapons and robbed, instigated assaults and sexually assaulted other inmates, Francis would be concerned that the incoming inmate might be an administrative problem in the prison system. (55 R.T. 6510-6511.) Francis opined such an inmate in a Level 4 facility would continue to demonstrate his propensity for violence. (55 R.T. 6512.)

Francis stated that the prison gangs do not play as big a role as people might think. He estimated maybe five percent of prisoners are members of organized prison gangs. There are four registered gangs

by the Department of Corrections, but there are many other gang members in prison. The total inmate population was approximately 123,000 at the present time. (55 R.T. 6513.) EME, one of the most well known and largest of the prison gangs, currently had 160 established members. (55 R.T. 6514.)

ARGUMENT

GUILT PHASE ISSUES

I.

BY IMPROPERLY DISMISSING JUROR #12 FOR PURPORTED MISCONDUCT, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS HIS RELATED RIGHTS UNDER THE CALIFORNIA CONSTITUTION.

Introduction

It is a violation of Constitutional magnitude to dismiss a juror without good cause. Juror #2 reported to the court that Juror #12 made a remark to the effect that the truth about the robbery of Mr. Brodbeck at the Taco Bell lay in the parking lot and that everyone else was just lying. Juror #12 denied making the remark, no other juror heard it and juror #2 admitted it was ambiguous. Nevertheless, the trial judge dismissed juror #12 for misconduct.

Even conceding that the remark was made [which the defense does not], the remark does not constitute misconduct. It was not an improper reference to the evidence or the merits of the case. It was instead merely a passing commentary on the general state of the

conflicting evidence that this court has declined to characterize as misconduct. Under these circumstances, the trial court abused its discretion by improperly dismissing a sitting juror.

More importantly, it appears that race played some role in the dismissal decision . Juror 12 was one of only two black jurors on the panel. Earlier, in the trial, Juror #12 outspokenly complained that only black witnesses were shackled in the courtroom. The white witnesses were not. Despite this obvious disparity in plain view of all the participants, the trial judge was apparently unaware of it. Moreover, when the court finally made its official inquiry into the matter, the focus was on the way Juror #12 raised the issue rather than the sheriff's deputies whose unfettered discretion in shackling witnesses actually caused the problem.

In context, it appears that the misconduct ruling was merely a vehicle for dismissing an obstreperous juror rather than an appropriate sanction for an actual transgression.

The trial court's error in improperly dismissing a sitting juror for misconduct compels reversal of all of appellant's convictions.

Factual Background

Juror #12 and juror #10 were the only two black jurors originally empaneled in this case. (11 C.T. 3013, 7 C.T. 1940) All of the other jurors were white (16 C.T. 4319, 4 C.T. 838, 4 CT 867, 4 C.T. 896, 4 C.T. 925, 11 C.T. 2927, 11 C.T. 2955, 11 C.T. 2984, 8 C.T. 19672, 13 C.T. 3623.) as well as all but two of the five

alternates. (11 C.T. 3040, 8 C.T. 1972, 16 C.T. 4377.) Those two described themselves as Hispanic. (11 C.T. 3071, 16 C.T. 4348.)

Juror 12 was a 62 year old black female. She had an MA degree in Education and was a retired special education teacher. Her ex-husband was with the Compton Police Department. Her daughter worked in juvenile hall. She never served on a jury before. (11 CT 3010 -3039.)

After several days of testimony, on February 26, 1998, the court and the parties convened in chambers. (30 R.T. 4062.) The court informed that one of the deputies received a note from juror # 6 on appellant's jury [the red jury] expressing concern about remarks made by one or more of the other jurors. (30 R.T. 4063.)

Juror 6 was summoned to chambers and explained that on the previous morning when the jury came in, witness James Handy [who is black] was brought into the courtroom wearing handcuffs. When juror #6 asked juror #12 how she was doing, juror #12 replied, "I'm pissed right now." When juror #6 asked why, juror #12 made a gesture indicating the handcuffs. (30 R.T. 4062-4063.) Juror #6 responded that there must be a good reason for that. Juror #12 said that she knew what the reason was. (30 R.T. 4063-4064.)

After lunch that same day, another juror approached juror 6 and said that juror #12 opined that the reason Handy was in handcuffs was because he was black. (30 R.T. 4064.)

None of the counsel had any questions for juror #6. (30 R.T.

4064) Juror 6 was then excused to the jury room. (30 R.T. 4064.)

The deputy District Attorney, Allison Nelson, informed the court that the previous day she was having a disagreement with the deputies. For the very first time that morning, they refused to unhandcuff the witnesses before bringing them into court. (30 R.T. 4065-4066.) Except for that day, all the other in-custody witnesses have been unhandcuffed. Leaving witnesses handcuffed was a complete change in the procedure and the prosecutor told the deputies that she thought it would look very unusual. (30 R.T. 4066.)

While in chambers on another matter, the prosecutor was told there had been some verbal exchange between the witness and the defendant; then, yesterday afternoon, Mr. Weatherspoon, the only other black in-custody witness was forced to display both of his handcuffs in front of the jury. The prosecutor then noted,

"On a bunch of levels, it could create issues on the trial, one of which is these witnesses are so dangerous the court personnel is more concerned about them being dangerous than the defendants who are looking at the death penalty. I think that it was problematic to suddenly change the policy and handcuff these people. And now that the jurors have been talking about things they have no business talking about, they shouldn't have been discussing it all, because it does -- we don't -- don't know how many issues that we need to address with all the jurors on the red panel that had lunch together." (30 R.T. 4066.)

The trial judge court responded that both the red and blue panels witnessed the same thing. (30 R.T. 4066.)

The prosecutor expressed concern that there may now be some perception among jurors that there was racial motivation for the way the inmates were handled. (30 R.T. 4067.)

Defense counsel Wright opined that the comments probably had nothing to do with the merits of the case and maybe an admonition to not discuss it would suffice. (30 R.T. 4067-4068.)

The prosecutor suggested that jurors be questioned individually. She also wanted to know if juror #12 thought she could still be impartial or whether she believed the government was treating African American witnesses differently. (30 R.T. 4068.)

After additional argument, the court consented to have juror #12 seen in chambers and took a waiver of the defendants' personal presence when that conference took place. (30 R.T. 4069.)

While the attorneys were consulting with their clients concerning a waiver of personal presence in chambers, the trial court consulted the deputy out of the presence of the parties. The court reported that it was informed that restraints were left to the discretion of the individual deputies. (30 R.T. 4070.) The deputy stated that witness Handy had a problem with appellant and they exchanged words in the courtroom. Defense counsel Wright disagreed saying there was no exchange. The court replied that it thought the witness and Mr. Williams exchanged unpleasantries. Mr. Wright responded

that the exchange was not with Mr. Williams. (30 R.T. 4070.) In fact, the exchange of words was with codefendant Dearaujo. (30 R.T. 4070.)

The prosecutor interrupted noting that all the in-custody witnesses had ankle shackles on, but until the previous day, they all had the waist chains taken off when they testified. (30 R.T. 4070-4071.)

When juror #12 entered the courtroom, the judge initially apologized for singling her out for examination. He then explained that another juror informed that juror #12 was distressed that some of the witnesses were handcuffed while others were not and that juror #12 thought it was because of race. (30 R.T. 4072.) Juror #12, acknowledged that she expressed that concern but did not think it would affect her ability to be fair. (30 R.T. 4072.)

The court responded that it was discovering that there was no policy regarding shackling. Instead, individual deputies had control over security procedures. (30 R.T. 4072.) The court further explained that it was the court's inattention that caused the apparent disparity in witness treatment and the court should have seen to it that all in-custody witnesses were treated the same. That is, all witnesses from state prison should have been handcuffed. The court admonished juror #12 that she should not let this incident affect her ability to be impartial. (30 RT 4073-4074.)

Juror #12 reiterated that she could be impartial, but she did

wonder about the issue. She also said she realized her mistake that she was not supposed to give her opinions to others. (30 R.T. 4072-4074.)

The court again apologized, noting that people can be sensitized to things, depending on their backgrounds and he had been insensitive to the witness issue. (30 R.T. 4074.)

There were no further questions from any counsel and juror #12 was excused from chambers. (30 R.T. 4074.)

The prosecutor then told the court she would like to find out who else was present and heard juror 12's remarks. The court cautioned that interviewing all the jurors would cause the rest of the jurors to wonder what remarks were made. (30 RT 4076.) The prosecutor disagreed, but urged the court to give some explanation concerning the handcuff issue. (30 R.T. 4075.) Finally, the prosecutor asked to reserve the right to ask more questions of juror #12. (30 R.T. 4075.)

After further argument, the court agreed to interview juror #7 who initially reported juror 12's remarks. (30 R.T. 4077.) When called into the courtroom, Juror #7 said there were three or four other jurors in the conversation during lunch. As to the conversation itself, juror #7 said she thought the shackles were there because those witnesses were more dangerous. Juror #12 replied in the negative. She said to watch and see as the witnesses come through, "you'll notice the black ones are in shackles." (30 R.T. 4078.) Juror #7

looked at the next man. He did not have shackles on his feet, so she decided juror #12 was wrong. (30 R.T. 4079.) Although juror #7 was not positive, usually the people with whom she had lunch were jurors #12, #6, #5 and possibly #10. (30 R.T. 4080.)

Juror #7 said she and juror #10 both experienced stress when Handy and Dearaujo exchanged words. They felt it might be safer if they moved to the back row of the jury box. The incident made juror #7 very nervous. (30 R.T. 4080.)

Juror #7 also could not comment on whether or not juror #12 could be impartial. When the jurors talked about the incident, they noted how uneasy they all were when the witnesses and defendants "go at each other." It made the jurors uneasy enough that they looked around more when getting in and out of their cars. (30 R.T. 4080-4081.)

After juror #7 exited chambers, defense counsel Wright observed that it seemed like the jurors had been talking among themselves quite a bit. He further observed that the court's extended inquiry bordered on the improper. In his view, a firm admonition would be in order at this point. (30 R.T. 4081,)

Defense counsel Belter noted that the red and blue juries did not seem to interact and therefore, he had no comment or questions. (30 R.T. 4082.)

The prosecutor said she needed to talk to some of her colleagues and do some research because she never had anything like

this come up before. (30 R.T. 4082.)

The court stated that it did not wish to send the jury home without saying something about the handcuffing. The court further noted that this case illustrates that reality seemed to be the function of the jurors' perception which might not always square with the facts. He noted that the previous witness [Mondre Weatherspoon - who is black] was obviously and thoroughly restrained. (30 R.T. 4083.)

The court proposed telling the jury that whether a prisoner is restrained or not is a function to some extent of their custodial status. That is, whether they're in local custody or in the custody of the state prison and whether or not there are any concerns on the deputy's part as to the necessity for restraints; but, in any case, status of restraint is not a factor which should interfere in any way with the jury judging the credibility of a witness. (30 R.T. 4083.)

After further argument and a comment from the bailiff that there was no consistent shackling policy and that the jail officials would abide by any ruling the judge made (30 R.T. 4083-4094) the court noted that it was in a dilemma. The more the trial highlighted the shackling issue, the more it might affect the jury. (30 R.T. 4095.) The court ruled that Monde Weatherspoon would be uncuffed for the remainder of his testimony but would have leg shackles when on the witness stand. (30 R.T. 4095-4096.)

When both juries returned to the courtroom the court explained the handcuffing of witnesses noting that he had been remiss in failing

to notice the problem or instituting a consistent policy. The judge further explained that the handcuffing had nothing to do with the credibility of the witness. Finally the judge admonished jurors not to converse about the merits of the trial and asked if anyone felt that the handcuffing problem compromised their ability to be fair. Hearing no complaint, the judge had witness Weatherspoon resume the stand. (30 R.T. 4096-4099.)

Soon thereafter, the prosecution moved to exclude juror #12 on the ground that she could not be fair and impartial. In support of its claim the prosecution noted the comments about the shackling of African American witnesses. Further, the prosecutor expressed concerned that juror #12 was prejudiced against it for actions over which it had no control. The prosecutor noted that there were only two black witnesses and both appeared in restraints. (31 R.T. 4140-4143.)

Defense counsel Wright objected noting that Juror #12 never expressed any bias against the prosecution. To the contrary, she stated that she could be fair. It was juror #7 who instigated the whole issue and even juror #7 admitted that juror #12 was merely responding to his inquiry. (31 RT 4146-4147.) Additionally, there were apparently several jurors who were involved in the discussion in one way or another. Thus, placing the onus on juror #12 was not appropriate, particularly since a full inquiry about the origins of the issue was not made. An admonition would cure any harm, particularly since the Sixth Amendment guaranteed the defendant the right to be tried by

the impaneled jury. (31 R.T. 4148-4149.)

The court deferred ruling until all parties had a chance to read the transcripts dealing with the issue. The court admitted, however, there was no change in policy in the courtroom the previous Wednesday when the witnesses were handcuffed; there simply was no policy at all. The shackling depended solely on the individual deputy and what that person thought the security concerns were. (31 R.T. 4149.)

When discussion resumed on the challenge to juror #12, the prosecution argued that juror #12 denied telling other jurors about her bias, admitting only that she wondered about the court's shackling practices. (31 RT 4205.)

After more discussion of whether to dismiss juror #12, the prosecutor urged that juror #12 should be excluded for her remarks and was likely prejudiced against the prosecution. Defense counsel Wright continued to object and observed that the court never actually asked juror #12 exactly what she said and it is not clear from the record who initiated the conversation. Further, juror #12 never said who she held responsible for shackling the black witnesses. Finally, she expressed her understanding of what happened and her willingness to obey the court's instruction. (31 RT 4209.)

The court ruled that juror #12's comments were not misconduct per se as they pertained to ancillary matters rather than the merits. (31 RT 4209.) Further juror #12 seemed satisfied with the court's

explanation. (31 R.T. 4211) Therefore, the removal request was denied. (31 R.T. 4212.)

Several days later, Juror #2 reported to the bailiff that juror #12 made some disturbing comments. (37 RT 4573.) Juror #2 was then invited into chambers with the judge and counsel to explain. Juror #2 said that after Mr. Brodbeck testified about the Taco Bell incident, "one of the jurors made a comment that as far as she was concerned, the only truth lied in the parking lot and that everyone else was just lying." (31 R.T. 4574.) The court ascertained that the comment was made by juror #12 subsequent to the last occasion when the court spoke with juror #12. (31 R.T. 4575.)

The matter was put over for several more days. When the court reconvened to discuss the issue, the prosecutor suggested that it was not necessary to make an inquiry of juror #12, but if an inquiry was to be made, then it should be limited to whether she made the statements attributed to her by juror #2. There should not be an inquiry as to whether she is able to be fair and impartial. (38 R.T. 4617.) The judge replied that it was within his discretion to conduct an inquiry and he intended to do so. (38 R.T. 4618.)

Defense Counsel Wright urged the court to question all the jurors. (38 R.T. 4619.) The judge responded that he might do that to find out if she tainted anyone else, but that was a separate issue. (38 R.T. 4619.) Defense counsel Wright stated that he was NOT asking that juror #12 be excused, but he was not opposed to examining her.

(38 R.T. 4619.)

Juror #12 was then examined out of the presence of the other jurors. (38 RT 4620.) At first juror #12 did not recall what comments the court was referring to. (38 R.T. 4621.) After the comment was read to her, juror #12 denied making it, although she heard someone make a similar comment. (38 R.T. 4621) What she heard was that someone said everyone is lying except the judge. (38 R.T. 4622.) The comment was made sometime after the witness on the Taco Bell incident took the stand and all the jurors were exiting the building. Juror #12 then volunteered that she is an opinionated person and sometime it rubs people the wrong way. (38 R.T. 4624) Nevertheless, being singled out by the court on two occasions has not affected her. (48 R.T. 4625.)

At the conclusion of the examination the judge determined that he would have to question the entire jury about this incident. (38 R.T. 4628) The following examination took place with each juror separately.

Juror #1 said he didn't hear anything about the credibility of any witness. (39 R.T. 4686-4687.)

Juror #2 repeated the allegations she made before. (39 R.T. 4687- 4692) The remark was made as the jury was assembling in the hallway outside the courtroom. Juror #2 admitted, however, that the statement - the only truth lied in the parking lot and everyone else is just lying - was somewhat ambiguous. (39 R.T. 4689-4691.)

None of the other jurors or alternates heard any similar statements. (39 R.T. 3692-4722.) Alternate juror #3 volunteered that she heard some discussion among other jurors that one of the jurors had her mind made up. Alternate juror #3 had no personal knowledge of that though. (39 R.T. 4712-4718.)

At the conclusion of the juror interviews, the prosecutor renewed her request to have juror #12 dismissed. (39 R.T. 4722-4728.) Initially, the judge deferred ruling. (39 R.T. 4727) After more discussion, however (39 R.T. 4728), the judge concluded that the issue of juror misconduct revolved around a credibility contest between juror #2 and juror #12. The judge stated that he thought juror #2 [who was also white] was more credible and therefore he dismissed juror #12. (4729-4731.)

Standard of Review

Under California law, Penal Code section 1089[51] and Code of Civil Procedure section 233 (former Pen. Code, § 1123[52]) permit a

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[51] In pertinent part, Penal Code section 1089 states: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, ... the court may order him to be discharged and draw the name of an alternate...."

[52] As here relevant, section 233 provides: "If before the jury has returned its verdict to the court, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, the court may order him to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If ... there is no alternate juror..., the jury shall be discharged and a new jury then or afterwards impaneled and the cause may be tried again. Alternatively, with the consent of all parties,

trial court to dismiss a juror before the jury returns its verdict if the juror becomes ill or upon a showing of good cause is found unable to perform his or her duty. (*People v. Burgener* (1986) 41 Cal.3d 505, 519 [disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 749].) Of course the court has some discretion in this area, but that discretion is not unlimited. (*People v. Roberts* (1992) 2 Cal.4th 271, 324 - 325.) The court must make a determination whether good cause exists to discharge the juror and the reasons for discharge must appear in the record. (*Ibid.*) In this regard, the inability to perform the juror's functions must appear as a "demonstrable reality." (*People v. Collins* (1976) 17 Cal.3d 687, 696.) In *People v. Cleveland* (2001) 25 Cal.4th 466, Justice Werdegar explained that because of the need for additional protection of an accused's constitutional right to a jury trial, "we more accurately have explained that, to affirm a trial court's decision to discharge a sitting juror, "[the] juror's inability to perform as a juror must 'appear in the record as a demonstrable reality.' " [Citations.] Such language indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror. Therefore, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate. (*People v. Cleveland, supra*, 25 Cal.4th at pp. 487-489 (conc. opn. of

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the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew."

Werdegar, J.)

Thus, "[t]he trial court has at most a limited discretion to determine that the acts show an inability to perform the functions of a juror." (*People v. Compton* (1971) 6 Cal.3d 55, 60; *People v. Collins* (1976) 17 Cal.3d 687, 696.) A trial court's ruling will be reversed if it "cannot withstand scrutiny under the precise language of section[] 1089." (*People v. Compton, supra*, 6 Cal.3d at p. 60.) Accordingly, the purported good cause must be such that it "actually renders [the juror] 'unable to perform his duty.'" (*Id.* at p. 59.) Perhaps more significantly,"The court must not presume the worst." (*People v. Franklin* (1976) 56 Cal.App.3d 18, 26.)

In determining whether misconduct occurred, an appellate court must accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. Nevertheless, whether prejudice arose from juror misconduct, is a mixed question of law and fact subject to an appellate court's independent determination. (*People v. Nesler* (1997) 16 Cal.4th 561, 582

The Nature of "Good Cause" to Dismiss a Sitting Juror

There is no statutory definition of 'good cause' for removal of a deliberating juror. Certainly juror misconduct would be cause for removal, but the misconduct must be serious and wilful. *(People v. Daniels* (1991) 52 Cal.3d 815, 864; *People v. Bowers* (2001) 87 Cal.App.4th 722, 729.) Further, juror bias may not be presumed but

must appear on the record. (*People v. Williams* (1997) 16 Cal.4th 153, 232.)

In *People v. Daniels* (1991) 52 Cal.3d 815, 864 this court noted that a juror my be removed for serious and wilful misconduct even if this misconduct is "neutral" as between the parties and does not suggest bias toward either side. Moreover, discussing the case with persons outside the jury would constitute serious misconduct. *(People v. Halsey* (1993) 12 Cal.App.4th 885, 982-893.)

Nevertheless, mere conversation among jurors outside the jury room, even if it involves some aspect of the case does not necessarily prove misconduct. (*People v. Majors* (1998) 18 Cal.4th 385, 420-425.)

A recital of the facts in *Majors* is instructive because they parallel the facts of this case. In *Majors*, there were three allegations of juror misconduct, although only two are relevant to the issue here. Juror Mohr allegedly told a member of the defense team "that while he and some other jurors were in favor of imposing the death sentence, some of the other jurors were leaning toward life without parole. Mr. Mohr stated that he explained to them that it was general knowledge that nobody sentenced to death was actually executed in California. I believe Mr. Mohr said nobody within the past 15 years." There was some question concerning whether juror Mohr actually made the remark, but this court assumed without deciding that he did. Nevertheless, citing *People v. Cox* (1991) 53 Cal.3d 618, 693, 696,

this court found the remark did NOT constitute misconduct. The remark was simply a passing comment on a matter of general knowledge. (*Majors*, at pp. 421-422.)

Jurors Miller, Mohr and Swafford also discussed some aspects of the case, although the evidence concerning what was discussed was sketchy. As this court explained:

> "Both Swafford and Mohr testified that the discussions did not relate to the evidence in the case. Miller's testimony was vague and contradictory, at some points suggesting that the discussions related to the evidence and at other points stating '[o]ur discussion was not about the trial.' Even when defense counsel asked a highly leading question about whether Swafford had expressed a particular opinion, Miller could only reply that the opinion was "somewhat like that."
>
> The trial court made no specific findings as to jurors other than Miller and Swafford. The evidence as to these jurors, however, is even more equivocal. Although Miller testified that he heard them expressing opinions, he could not recall what these opinions were, repeatedly referring to them as 'speculation.' " (*Id.*, at pp. 424-425.)

Summing up the foregoing, this court referred to a decision it rendered more than a century ago, noting: "'[t]he law does not demand that the jury sit with the muteness of the Sph[i]nx, and when jurors are observed to be talking among themselves it will not be presumed that the act involves impropriety, but in order to predicate

misconduct of the fact it must be made to appear that the conversation had improper reference to the evidence, or the merits of the case.' *(People v. Kramer* (1897) 117 Cal. 647, 649)" (*Id* at p. 425)

Here, juror 12's allegedly improper comment was "the only truth lied in the parking lot and that everyone else was just lying." (31 R.T. 4574.) Even if she made that exact comment - a matter not at all clear from the evidence - the remark does not constitute misconduct. The comment does not appear to favor the witnesses from either side. More importantly, however, the observation does not appear to be anything more than a general comment on a situation apparent to all the jurors. That is, because of the discrepancies in witness testimony about what happened, the evidence from the scene in the parking lot was the critical evidence.

The defense notes that Mr. Brodbeck testified that he was told to get out of the car, frisked and several items were taken from him. (34 R.T. 4472, 4481.) Then as he ran towards the Taco Bell, he slipped, heard a **single** shot and heard something like a bullet whistle by him. (34 R.T. 4472-4473, 4483-4484.)

Lyons testified that although he was at the scene, he did not watch what happened. (19 R.T. 2689.) He saw Williams walk towards a car then he heard a **couple** of shots and everyone, including Lyons and Gonzales, started running. (19 R.T. 2692-2693.)

Weatherspoon testified that he was not aware that Mr. Brodbeck was frisked or searched and did not remember if James

Handy approached Mr.Brodbeck at all. He did not see Handy touching the man or take anything from him. Further, although Weatherspoon ended up with Brodbeck's keys and opened the trunk of the vehicle, he did not remember if he did that on his own or if someone directed him to do so. (31 R.T. 4171.) Most importantly, although he heard a single shot, he did not see how the shot was fired.

James Handy testified that he frisked Mr. Brodbeck and took some items from him. He walked away, however, and did not see the shooting. (29 R.T. 3945.)

Deputy Aguirre said he found a single shell casing in the parking lot near where Mr. Bodbeck's car had been. (33 R.T. 4436-4437.)

Given the discrepancies in testimony about how many shots were fired and what actually took place during the incident, it is abundantly clear that not all the witnesses could be telling the truth. Thus, not only juror #12, but all of the jurors would have to conclude that somebody was lying, or at the very least, grossly mistaken. Therefore, far from being an opinion on the merits of the evidence, juror # 12's comment was merely a general observation on the state of the case; an observation probably shared by the rest of the jurors.

Even if that were not so, as juror #2 recognized, the statement is at best ambiguous. (39 R.T. 4689-4691.) At worst, it was mere "speculation" on the weight of the conflicting evidence at that point in trial; a type of speculation that this court has declined to

categorize as misconduct. (*Majors* at pp. 424-425.)

There is an additional factor at work here though, the factor of race. Juror #12 was singled out twice for interrogation. The first time she was questioned for being outspoken in her denunciation of official conduct by the state in shackling only black witnesses. Indeed, the state's conduct was so improper that not only did the trial judge concede the error, he took remedial action to correct it by instructing the jury. (30 R.T. 4097-4100.)

The most distressing aspect of this incident, however, was that the trial judge simply didn't recognize the racially disparate treatment of witnesses when it occurred. (30 R.T. 4073, 4075.) It had to be pointed out to him by a black juror. (30 R.T. 4075.) Moreover, although the improper conduct was initiated by sheriffs deputies - uniformed representatives of the state - there was no censure, or at least none that was conveyed to the jury. The trial court's official inquiry into misconduct was conducted of the jurors - not the deputies - particularly the black juror who raised the issue. Juror #12 was not only singled out for examination (30 RT 4072), she was specifically admonished not to let the incident affect her ability to be impartial. (30 R.T. 4074-4075.) The unmistakable message from the court was that it was not the errors of court officials that caused concern, but rather the fact of the complaint from a black juror.- no doubt an especially irritating complaint because it was justified.

The second transgression was for making an ambiguous

comment about the state of the case, a comment that she denied even making. Juror 12's outspokenness obviously made an impression on the court. She was one of only two empaneled black jurors in this case and they were the only two that the court excused for cause over objection.[53] Dismissal for the innocuous comment made here was not only improper, but served as a signal that criticism from a black juror was not favored, or , as juror #12 herself phrased it "an opinionated person [] sometimes [] rubs people the wrong way." (38 R.T. 4625.) Moreover, since no juror other than juror #2 even professed to hear the purported remark, certainly it did not taint the jury.

It is notworthy that when the black witnesses were shackled in court and the white ones were not - all at the virtual whim of the sheriff's deputies - that concededly grossly improper courtroom misconduct drew only a mild cautionary instruction from the judge. However, the trial court's sanction for a mere passing commentary on the state of the conflicting evidence - and an ambiguous comment at that - was dismissal. Thus, in context, it appears that the misconduct allegation against juror #12 was more of a vehicle to get rid of an obstreperous juror rather than an appropriate sanction for any wrongdoing.

Prejudice

Jury service is a protected right for every citizen to participate

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[53] The dismissal of juror #10, the only other black juror is discussed at length in Issue II, *infra*.

in the democratic process and it cannot be abridged except under the most compelling circumstances. (Cf. *Powers v. Ohio* (1991) 499 U.S. 400, 406-407 [11 S.Ct. 1364, 113 L.Ed.2d 411].) Excusing an empaneled juror without good cause deprives a criminal defendant of his right to a fair trial under the Fifth and Fourteenth Amendment Due Process clauses as well as the Sixth Amendment right to trial by jury. (Cf. *Crist v. Bretz* (1978) 437 U.S. 28, 35-36 [98 S.Ct. 2156, 2160-2161, 57 L.Ed.2d 24]; *Downum* v. *United States* (1963) 372 U.S. 734, 736 [83 S.Ct. 1033, 1034, 10 L.Ed.2d 100].) Indeed, the right to a trial by jury in criminal cases is such a fundamental feature of the justice system that it is protected against state action by the Due Process clause of the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 147-158 [88 S.Ct. 1444, 1451, 20 L.Ed.2d 491].) It also violates the Eighth and Fourteenth Amendment requirements for reliability in the guilt and sentencing phases of a capital trial. (Cf. *Beck v. Alabama* (1980) 447 U.S. 625, 638, 643 [65 L.Ed.2d 392, 403, 406, 100 S.Ct. 2382].)

Moreover, fundamental due process, and the right to a fair and impartial jury entitles a criminal defendant to be tried by the jury originally selected to determine his guilt or innocence. (Cf. *Downum v. United States*, *supra*, 372 U.S. at p. 736 [83 S.Ct. at p. 1034, 10 L.Ed. 2d 100].) Because this "valued right" is so fundamental (*Ibid.*), reversal may be required where the trial court excuses a juror without good cause. (Cf. *People v. Hamilton* (1963) 60 Cal.2d 105, 122-126 [disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d

631, 649], see also *People v. Armendariz* (1984) 37 Cal.3d 573, 584; *People v. Wheeler* (1978) 22 Cal.3d 258, 283; both quoting *People v. Riggins* (1910) 159 Cal. 113, 120.)[54] Indeed, "[T]he essential feature of a jury ... lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen ...." (*Williams v. Florida* (1970) 399 U.S. 78, 100 [26 L.Ed.2d 446, 460, 90 S.Ct. 1893.]) "[T]he interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him" lies at the heart of the right to trial by jury. (See *Apodaca v. Oregon* (1972) 406 U.S. 404 [32 L.Ed.2d 184, 92 S.Ct. 1628.])

Based on the foregoing, the court's dismissal of juror #12 whose purportedly improper comment appears to be nothing more than a passing comment on the state of the case significantly departed from the statute's requirement of good cause for discharge. Because the record fails to unmistakably show juror #12's inability to fulfill her duties as a juror, her discharge violated appellant's right to a full and fair trial by an impartial and unanimous jury as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments.

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[54] In *People v. Riggins, supra*, 159 Cal. 113, the court stated:

> "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (Id., at p. 120.)

Arbitrary deprivation of the right to a unanimous verdict guaranteed by California law similarly deprived appellant of his right to due process of law as guaranteed by the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343 [arbitrary deprivation of state guaranties constitutes a federal due process violation].)

For these reasons, appellant's conviction must be reversed and his sentence set aside.

II.

BY IMPROPERLY DISMISSING THE HOLDOUT [AND ONLY REMAINING] BLACK JUROR, JUROR #10, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS HIS RELATED RIGHTS UNDER THE CALIFORNIA CONSTITUTION.

Introduction

As appellant noted in the previous issue, it is a violation of Constitutional magnitude to dismiss a juror without good cause. Moreover, special caution is required when the juror is dismissed during deliberations. Even greater appellate scrutiny is required when the dismissed juror is not only a holdout juror but the only remaining minority juror in a cross racial prosecution. Here, all of those conditions existed. Nevertheless, the causes for dismissal of juro #10 cited by the trial judge were either unsupported by the evidence or dismissal was vastly out of proportion to the juror's purported activities during deliberation. Further, the investigation undertaken by the trial judge was deficient in a critical respect; he failed to make any inquiry of the offending juror before dismissing her and failed to take any action (or even investigate) her allegations of misconduct by other jurors during deliberations. The trial judge simply "presumed the worst" regarding the allegations other jurors

made about juror #10 and acceded to their demands that she be dismissed. Under these circumstances, the trial court abused its discretion by improperly dismissing a deliberating juror. The error compels reversal of all of appellant's convictions.

Factual Background

Although the facts pertinent to this issue are quite lengthy, the extended recital is necessary in order to explain both the legal and emotional context in which juror #10 was ultimately dismissed.

Juror 10 was a black female. She was single and 34 years old. She completed high school and two years of college. She was employed as a customer service representative for Amtrak where she handled irate customers and answered policy questions for sales agents and supervisors. She served on a jury before and the jury reached a verdict in a second degree murder case. She also reported positive experience with law enforcement. (7 CT 1937-1969.)

Several days after the only other black juror, juror #12 was replaced by an alternate, the jury began deliberations. (18 CT 5055.) On the third day of deliberations (18 CT 5058) juror #10 asked to meet with the trial judge. When invited into court with the judge and counsel, juror #10 inquired whether jury service was considered community service because she had a hearing in Los Angeles on another matter and she was afraid that her driving privileges might be in jeopardy. (45 RT 5308.) The judge replied that he had no idea. (45 R.T. 5308) As she was about to return to the jury room, she

asked the judge "What is not deliberating? If you don't have comments, is that considered not deliberating?" (45 RT 5311.) The following colloquy then took place:

> THE COURT: Not deliberating is just what it sounds like. A person just sits there with their, figuratively with their arms closed, and they just don't discuss the case or the law with the other jurors. It's like they have pulled away and they won't talk about it period.
>
> JUROR NO. 10: Okay.
>
> THE COURT: Because the law expects the jury to continue discussing and exchanging ideas, discussing the facts and the law.
>
> JUROR NO. 10: Even if you come to a lock down?
>
> THE COURT: No, at some point, I mean –
>
> JUROR NO. 10: You have nothing more to say?
>
> THE COURT: Well, as long as you're communicating with -- as long as a juror is communicating with the other jurors, even if to say, "I've made up my mind and I'm not going to change it," that is still deliberating.
>
> JUROR NO. 10: Okay.
>
> THE COURT: It's when a person cuts themselves off, and like a little kid sticks their finger in their ear and won't participate at all.

JUROR NO. 10: Oh, okay. I'll make a note of that. (45 R.T. 5311-5312.)

Juror #10 then returned to the deliberation room. (45 R.T. 5311.)

Out of the presence of the jurors, the prosecution objected to the court's formulations. (45 R.T. 5311-5312.) The judge clarified that he meant that juror #10 did not have to say the same things over and over again. As long as the juror is listening and participating, that constitutes deliberations. (45 R.T. 5312.)

The prosecutor urged that the court was incorrect. A juror was not permitted to simply announce that his or her mind was made up. The juror had to continue to go over the evidence with an open mind. (45 R.T. 5312.)

The court admitted that it was at a loss for authority at the moment but offered to bring juror #10 back for reinstruction. The prosecutor agreed because her understanding of the law was that a dissenting juror was required to continue going over the evidence with other jurors. She could not simply announce that she made up her mind and refuse to discuss the evidence anymore. (45 R.T. 5312-5313.)

Defense counsel Wright continued to disagree with the prosecutor's interpretation of the law and stated that in his view, the court properly instructed juror #10. (45 R.T. 5312-5313.)

The parties took a short recess to look at the case law. (45 R.T. 5315.) When the court reconvened in chambers, the prosecutor reiterated her position that a juror could not simply announce that her mind was made up. (45 R.T. 5316.) The prosecutor requested that juror #10 be instructed to disregard the court's previous instruction and if the jury had further questions on the meaning of deliberation it should bring those questions to the court. (45 R.T. 5316.) Defense counsel continued to object to the prosecutor's argument noting that once the evidence has been covered and a juror has reached an opinion there is no point in continuing to rehash the same material. (45 R.T. 5316.)

The court brought juror #10 back into court and told her that it might have given her the wrong impression about deliberations. The court suggested that if the jury had a problem with deliberations, it should direct a note to the court to that effect. Juror #10 was then excused again. (45 RT 5318, see also 19 C.T. 5153.)

On the 10th day of guilt phase deliberations, juror #10 [who was by then the lone black juror after juror 12 was excused] called in sick. She told the court clerk that she was quite ill. The clerk asked if juror #10 could make it the following day. Juror #10 purportedly replied that she was not sure and would call back late that afternoon. (45 R.T. 5349.) When the rest of the jurors discovered the problem, they were upset and felt that juror #10 was simply feigning illness, so they made their concerns known to the bailiff, who, in turn informed the court. (45 R.T. 5349.) The judge then convened a hearing to

discuss the matter. (45 RT 5349.)

The prosecutor opined that juror #10 was chronically late, a claim that defense counsel Wright disputed. (45 R.T. 5350.) Mr. Wright also objected to asking the jury about their frustrations because there were only eleven jurors present. (45 R.T. 5351.)

The prosecutor expressed considerable irritation because she spent a great deal of time and money to make arrangements for witnesses to be available for the penalty phase and any substantial additional delay would be costly. Further, the delay might cost her certain witnesses. (45 RT 5353.) She therefore suggested talking to the jurors to find out what their concerns were. (45 RT 5355.)

The judge proposed asking the jury foreman to write down the jury's concern and the parties could work from there. Defense counsel Wright objected on the grounds that such an inquiry could get into deliberation matters and not all the jurors were present. The Judge overruled the objection and asked for something in writing from the foreman. (45 RT 5357-5359.)

The subsequent note from the jury foreman [juror #3] read,

> "Regarding juror #10 - She does not pay attention to discussion, she appears to be asleep most of the time, doesn't participate constantly has an attitude towards others. Furthermore, we've completed the written voting on counts 1-11. She has been seen writing information on paper & taking it out with her to lunch. When she returns from lunch she changes her opinion on how she

voted and has questions on the legal terminology. This has happened more than once. [Emphasis in original] Upon her return from lunch she mentioned at the table that "my lawyer can put holes on [sic] this interview." She has also stated that she wants to prolong this due to the fact that she doesn't want to return to work. This unnecessary delay has caused financial hardship for juror 11.

There is [sic] a number of issues that other jurors would like to discuss with you. Sorry for the inconvenience.

Juror #3

4/1/98"

(19 C.T. 5168-5169.)

After reviewing the note, the prosecutor urged that juror #10 was clearly engaged in misconduct. (45 RT 5359.) She suggested that the judge talk to the jurors immediately and then talk to juror #10 when she returned the next day. Defense counsel Wright agreed to the proposed procedure. (45 R.T. 5360.)

The court first called the foreman [juror #3] into court to discuss the note. Juror #3 said that the jury was frustrated. The procedure the jury adopted was to go around the table and let everyone speak. When other people were speaking, juror #10 had her eyes closed. When the discussion arrived at juror #10, she would announce that she had nothing to say. (45 RT 5364.) The judge asked

whether juror #3 could tell if juror #10 was actually sleeping or just had her eyes closed to concentrate. (45 RT 5365.) Juror #3 did not answer that directly, noting simply that juror #10 would ask questions about things the jury just finished discussing. (45 RT 5365.)

Juror #3 then complained that after the jury finished discussions and voted on a charge, juror #10 would come back later, change her mind and ask technical questions. (45 RT 5365.) Further, when she disagreed, the foreman would ask her to write out what she thought so that they could discuss the reasoning behind her stand on an issue. She refused to do that. (45 RT 5366.) She "just clams up". (45 RT 5366.)

The court then inquired about the claim that juror #10 took written information from the jury room. (45 RT 5366.) Juror #3 replied that he never actually saw her do that. Some other juror claimed that she wrote notes and took them with her. Juror #3 did observe juror #10 **frequently writing notes to herself on jury instructions and on the counts**. (45 RT 5367.) In that context, however, juror #10 would come back from lunch and want to revisit counts on which the jury already voted. She would bring up all sorts of technical questions. (45 RT 5368.) When she returned from lunch the previous day, juror #10 said "My lawyer can put holes in this interview [of appellant]." (45 RT 5368-5369.)

The court then asked about the claim that juror #10 wanted to prolong the trial. (45 RT 5369.) Juror #3 replied that juror #10 said

she wanted the trial to go on but she never specified why. Other jurors thought it was because she did not want to go back to work and perhaps wanted to file a stress claim. (45 RT 5369.)

Juror 3 stated again that "when [juror #10] disagrees, we try to find out why she disagrees and she won't tell us why she disagrees. **She just says my opinion is this and that's it."** (45 RT 5369.)

The prosecutor then questioned juror #3 concerning whether in his opinion juror #10 was deliberating, (45 R.T. 5370.) Juror #3 reiterated that juror #10 makes statements but will not discuss the reasoning behind them. She just says that is what she believes. (45 R.T. 5370.) **In his opinion, juror #10 "[did] not accept [the majority's] views at all" and was thus failing to deliberate.** (45 R.T. 5371.) Defense counsel Wright asked if the disagreements in reaching opinions on the counts were related only to juror #10 or were there disagreements among other jurors as well. (45 RT 5372.) Juror #3 replied that in two weeks of deliberations, the jury has been consciously trying to put aside personal feelings and stick to the law, this was especially true after another juror [juror #9] was excused because she could not put aside her personal feelings.[55] [45 RT 5373.)

Additionally, the issue of race came up during deliberations. As foreman, he tried to put a stop to the talk but he was not sure he

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[55] Juror # 9 was excused at her own request because the trial made her emotionally distraught. She could not keep her meals down and she could not put aside her personal feelings. (45 R.T 5321-5327.)

was entirely successful. (45 RT 5373.) In any event, juror #10 may have taken it a little personally. (45 RT 5373.) There was also a little blowup in the jury room during deliberations. The foreman apologized and he thought most people accepted his apology, but he did not know for sure. (45 RT 5373.)

After juror #3 was excused, juror #1 was called into chambers. (45 RT 5374.) Juror #1 opined that juror #10 occasionally slept during deliberations. (45 R.T. 5375) When asked directly if he could be certain that juror #10 was actually sleeping, juror #1 replied "She never opened her eyes for a good 15 minutes, I'd say. We went through two-and-a-half people talking before she even opened her eyes again." (45 RT 5376.) The court then inquired whether there was anything about what juror #10 said that would lead him to believe whether she was actually asleep. That is, whether she lost the " the thread of the conversation." Juror #1 replied that he could not say. (45 RT 5376.) The court asked whether this type of incident happened on more than one occasion. Juror #1 stated that it only happened on one day that he was aware of. (45 RT 5376.) In response to further questioning by the court, juror #1 said he had no knowledge of juror #10 trying to prolong deliberations. (45 R.T. 5377) and no knowledge of juror #10 bringing anything in writing in or out of the courtroom. (45 R.T. 5377.) Juror #1 admitted that juror #10 does express her opinions, but she refuses to discuss the basis for them and refuses to say why she will not discuss the basis for those opinions. (45 R.T. 5377-5378.)

After juror #1 left, juror #2 entered chambers. (45 R.T. 5380.) When asked if juror #10 slept during deliberations, juror #2 replied that juror #10 pulled a baseball cap down over her forehead and covered her eyes so no one could see them. She then curled up in her chair. (45 R.T. 5380.) When the jurors went around the table asking for opinions, she said she had nothing more to contribute. (45 R.T. 5380-5381.) Sometimes she would just go to the restroom and stay there so the rest of the jurors couldn't do anything while she was gone. (45 R.T. 5381.)

Juror #2 admitted, however, that at the beginning of deliberations, juror #10 was arguing. Later when things got more complicated and other jurors would ask her to back up her position or prove it, she would simply say "When I have something to say, I'll say it, and I don't want to say anything right now so I'm not saying it. You guys talk about what you want, but I'm not gonna say anything," (45 R.T. 5382.) Additionally, juror #10 writes information down on little pieces of paper and sometimes comes back after lunch with all these legal terms that no one has heard before. (45 R.T. 5383)

When queried about juror #10's comment concerning appellant's admissions, juror #2 said that at some point juror #10 was holding the transcript of the police interview of Williams and said "my lawyer could put holes through this." (45 R.T. 5384) Juror #2 admitted, however, that she was speculating about where juror #10 got that information or what prompted her comments. (45 R.T. 5384.)

There was some commentary about long deliberations. Juror #10 said that she was going to be paid no matter how long deliberations took. (45 R.T. 5384.) When juror #2 said that deliberations were going relatively quickly, juror #10 said don't count on it, especially with regard to the counts that were yet to be deliberated. (45 R.T. 5384-5385.)

Juror #2 also noted that there were occasions when other jurors had to explain the meaning of words because juror #10 did not understand. (45 R.T. 5385.) Juror #2 then asked whether she could share some instances that happened during deliberations before the two alternates were placed on the jury and deliberations began anew. (45 R.T. 5385) The court said yes. (45 R.T. 5386.)

Juror #2 said that juror #10 realized she was the only African American in the room. For that reason, she wanted to double check everything. Further, she felt "picked on" because of that. **The rest of the jurors told her not to bring race into it because that was not the issue. (45 R.T. 5386.) Juror #10 then said she wouldn't bring race into deliberations.** (45 R.T. 5386)

Defense counsel Wright probed whether juror #10's problems were similar to the problems of the previously dismissed juror. Juror #2 replied in the negative. Juror #2 opined that the previous juror was having problems with her feelings that interfered with the law. She also considered whether the death penalty was appropriate even though they were only in guilt phase. (45 R.T. 5387.) The parties then raised questions about how long juror #10 stayed in the

bathroom. Juror #2 estimated 3-4 minutes although it varied. (45 R.T. 5388.) Juror#2 also noted while she was gone, two or three other jurors would have enough time to state their opinions on the issues and juror #10, so the absences could be lengthy. (45 R.T. 5388.)

Upon further questioning, juror #2 said that juror #10 was very concerned that she did the right thing, so she had to double check everything. (45 R.T. 5389.) The trial judge inquired if juror #10 was just being very careful and doing deliberations her own way or merely taking a position and refusing to change. (45 R.T. 5391.) The juror could not really answer that question but noted that on occasion after a vote is taken Juror #10 would return from lunch with additional questions and new views on the issue. When the jurors as a group attempted to grill her about this new view, she refused to discuss it further. (45 R.T. 5391.)

After the court finished with juror #2, juror #4 was interviewed. (45 R.T. 5393.) Juror #4 said that juror #10 **spent a lot of time flipping through the instruction booklet and writing little notes.** While doing that she did not appear to be on target with the other folks. Although juror #10 might be sleeping at times, he could not say for certain. (45 R.T. 5394.) On one occasion juror #10 apparently misunderstood what was going on and voted exactly the opposite of what she clearly intended. (45 R.T. 5394.) Then, after she realized what happened, she changed her vote. (45 R.T. 5395.) Juror #4 found that very frustrating. Additionally, he noted **that juror #10 sometimes wanted to reopen votes that were already settled**. (45

R.T. 5395.) The court inquired whether juror #10 was willing to discuss the evidence or the law that supported her position. (45 R.T. 5395-5396.) Juror #4 replied that juror #10 would argue that the other jurors could not prove what they said. When the other jurors came up with specifics, juror #10 would say "I don't believe it." (45 R.T. 5396.) Juror #4 also complained that juror #10 quibbled about points of law but did not seem to know the meaning of many of the words. When queried about taking materials from the jury room, juror #4 opined that juror #10 might have taken her note pad out of her backpack (and thus out of the jury room) , but he was not sure. (45 R.T. 5398.) Juror #4 also recalled that juror #10 stated that her lawyer could poke holes in the interrogation/admission of Williams. Juror #4 denied hearing anything about prolonging the deliberations (45 R.T. 5398.) On the issue of restroom breaks, juror #4 said juror #10 went to the restroom fairly frequently, but other jurors did as well. (45 R.T. 5398.) Further, it was **not** his impression that she went in order to hinder deliberations. (45 R.T. 5399.)

Juror #4 acknowledged there was a blowup among jurors during the prior week of deliberations.[56] The trial judge quickly indicated, however, that such a disagreement was not a subject the court wanted to discuss. (45 R.T. 5399.)

Moving farther into the subject of deliberations, juror #4 noted that the rest of the jurors gave juror #10 one of the jury instruction

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[56] The juror's exact words were, "....you heard about the blowup that occurred, or did you? Did anybody mention that to you? (45 R.T. 5399.)

booklets. Juror #4 stated that he thought that was a mistake since juror #10 kept flipping through the pages while the rest of the jurors were engaged in deliberation discussions. (45 R.T. 5399.)

After the conclusion of the interview with juror #4, the court clerk informed the parties that she called juror #10 and #10 was still sick. She told the clerk that possibly she would not be in the next day. (45 R.T. 5400.)

The District Attorney responded that when a juror is ill, she can be replaced even without examination. Additionally, if the juror was sleeping that will permit dismissal as well. (45 R.T. 5402.)

Defense counsel objected to any dismissal of the juror noting that while illness may be a consideration, the illness might not last a long time and the juror might be available the following day. (45 RT 5403.) **It was past 3:20 in the afternoon already**. (45 RT 5400.) Further, the issue of whether the juror was sleeping had not been factually established. Moreover, it appeared from the evidence that juror #10 was interacting with other jurors and continued to deliberate. Finally, since this was a capital case, expedience in deliberations was not really the prime consideration. (45 RT 5403-5404.)

The trial judge expressed concern that time really was of the essence because the prosecution had repeatedly claimed that it would lose penalty phase witnesses unless the jury came to a verdict relatively soon. Therefore, the inability to deliberate materially

affected the state's case. (45 R.T. 5403-5404.) Nonetheless, the judge decided to hear more jurors before making a decision. (45 R.T. 5404.)

Juror #5 was then called to court. Juror #5 stated that he was not sure that juror #10 was sleeping, but her body posture suggested that juror #10 was not paying attention. (45 R.T. 5404- 5405.) Additionally, sometimes juror #10 would respond inappropriately to questions on a topic. She would talk about something else entirely. Nevertheless, he was not really keeping track of how #10 was behaving. (45 R.T. 5406.) **He admitted that he was struggling with the legal issues and trying to figure out what they meant** (45 R.T. 5406.) When queried about the possibility that juror #10 brought information to the court from outside, juror #5 stated that he did not know, but juror #10 would often write on these little scraps of paper although she never shared those notes with the rest of the jurors. (45 R.T. 5407.) Sometimes she would take one position in the morning and then shift to another that afternoon, but juror #5 had no way of knowing if that shift resulted from any outside influence. (45 R.T. 5408.)

On the subject of the deliberations themselves, juror #5 said that when the jurors would go around the table stating their views, juror #10 would not share her reasoning. She would simply say that she had nothing to say. (45 R.T. 5407.) That is, she would take a position but not explain how she got there. (45 R.T. 5407.) Juror #5 denied ever hearing anything from juror #10 about prolonging

deliberations. (45 R.T. 5408.) In that regard, juror #5 opined that other jurors tried to act in good faith to get juror #10 to participate in discussions more fully. (45 R.T. 5409.)

The judge inquired of defense counsel if he wanted to hear more jurors since the information seemed to be getting repetitive. (45 R.T. 5410.)

Defense counsel replied that he needed to hear about previous deliberations. He noted that at least one other juror had significant problems during deliberations as well, so difficulty with deliberations might not be an issue confined to juror #10. (45 R.T. 5410-5411.)

Juror #6 was then examined. Juror #6 noted that he saw juror #10 with her eyes closed but could not say whether #10 was sleeping during deliberations. (45 R.T. 5411.) It appeared that juror #10 was sleeping during the judge's instructions though. (45 R.T. 5412.) [57] Juror #6 had no knowledge of juror #10 receiving information from outside sources, but she often wrote on pieces of paper from a date planner type notebook. What those notes were for, juror #6 had no idea. (45 R.T. 5412.) Nevertheless, it appeared to juror #6 that when juror #10 returned from lunch on occasion, she had spoken to someone. Juror #6 also complained that juror #10 returned to subjects that were already voted on and did not seem to remember

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[57] The trial judge told the jurors that they could relax during his instructions because there was no way they could absorb everything he was telling them and a copy of the written instructions would be provided for their use during deliberations. (45 R.T. 5250-5251.)

taking a position on that vote. Moreover, sometimes after lunch she would come back and totally reverse her opinion on a subject they voted on right before lunch. (45 R.T. 5413.) Juror #10 probably did not take notes and did not seem to remember certain testimony in the same way other jurors did, so the jury had to go through readbacks. Juror #6 recalled having heard #10 say that she did not want to go back to work. (45 R.T. 5414.) Defense counsel Wright elicited from juror #6 that juror #10 had at times discussed things with the other jurors and was still discussing the evidence. (45 R.T. 5415.) According to juror #6, the pattern that emerged is that when juror #10 disagrees, she will say so, but she will not state why in any detail. (45 R.T. 5415.) When juror #10 agrees with the other jurors, she opens up more. (45 R.T. 5415.)

Juror #11 was then examined. (45 R.T. 5417.) Juror #11 said there were times when juror #10 had her eyes closed and did not appear to be paying attention. Nevertheless, juror #11could not say if juror #10 had been sleeping. (45 R.T. 5417-5418.) Juror #11 did not know anything about juror #10 trying to slow deliberations or removing material from the jury room. Sometimes after lunch though, juror #10 would complain about a technical point or the wording of a technical point. (45 R.T. 5418.) Additionally, juror #10 said her lawyer could pick apart the police interrogation of defendant Williams. (45 R.T. 5419.) Occasionally, before lunch juror #10 would be engaged in the discussions but after lunch she would have nothing to say. (45 R.T. 5420.)

Juror #11 also complained that the delay and length of trial was hurting him financially. Juror #11 stated that he believed the jurors had been acting in good faith to get #10 involved in deliberations. **Nevertheless, on one occasion, things got very heated and people were irritated.** (45 R.T. 5421-5422.)

After juror #11 was examined, neither side wanted to interview more jurors. 45 R.T. 5422.)

The District Attorney urged the court to dismiss juror #10 for failure to deliberate. (45 R.T. 5423.) Defense counsel Wright asked the court to wait until the morning to see if juror #10 showed up. At that point the court clerk interjected that there was a voice mail from juror #10 saying she was still sick, throwing up and probably would not make it in the morning. (45 R.T. 5423.)

The trial court ruled that it found as a matter of fact that juror #10 was sleeping and noted that it saw juror #10 apparently nodding off during the trial as well. (45 R.T. 5424.) The judge could not find, however, that juror #10 was deliberately prolonging deliberations. (45 R.T. 5425.) Nevertheless, it was clear to the judge that juror #10 failed to deliberate. As the judge explained it, "There are times when she does violate her jury oath by not deliberating. You can't take a position and refuse to discuss the basis for it. ... Apparently this has been a consistent pattern where she, if it's a situation where she is in disagreement with other jurors, simply takes the position and then stonewalls, and using various devices to do that." (45 R.T. 5425-5426.) As a last straw, juror #10's illness and inability to participate

that might last awhile caused him to excuse her. (45 R.T. 5426.) The alternate would be substituted. (45 R.T. 5426-5527.)

Defense counsel Wright vehemently objected. (45 R.T. 5427.) He argued that there was no evidence on whether the disagreements between juror #10 and the rest of the panel were major or minor. (45 R.T. 5427.) Mr. Wright urged that the situation did not present a failure to deliberate. Rather, it showed a clear disagreement among the majority and the minority. No juror said that juror #10 refused to articulate why she disagreed. What they said was that she refused to talk about it **any further**. That distinction leads to an equal inference that she expressed her views earlier and did not want to simply rehash what she already said. (45 R.T. 5427-5428.)

The judge replied that his findings implied that the disagreements were major and that belief was implicit in the jurors' responses. (45 R.T. 5428.) Further, although Juror #10, does deliberate sometimes, the norm is that she does not. Thus, the findings and ruling would remain. (45 R.T. 5428.)

Shortly thereafter, the court clerk related a phone call she had with juror 10 about being dismissed. (45 RT 5431-5433.) **Juror #10 was very upset, thought her dismissal was illegal and wanted a meeting with the judge the following morning**. (45 RT 5431-5433.)

The following morning, juror #10 appeared in court and met with the trial judge. (45 R.T. 5433.) Juror #10 stated that she was still sick with an ear infection but wanted to explain some things to the

court. (45 R.T. 5433.)

Juror #10 stated that she was very upset because when jurors were substituted, the jury as a whole did not start deliberations all over. (45 R.T. 5434-5435.) Instead, the existing jurors would ask the new ones what they thought and then tell the new ones what the existing jurors previously decided. Juror #10 thought that procedure was wrong. She also pointed out that in one day, the jurors voted on 11 verdicts based solely on how the jurors felt **before** the new people were added. [58](45 R.T. 5434-5435.)

Additionally, juror #10 noted that jurors were talking on the bus during the bus tour after being told not to discuss the case. Moreover, she stated that she had been attacked verbally, screamed at and cut off during deliberations. (45 R.T. 5434-5435.) Finally, juror #10 disputed the clerk's account of their telephone call. She said she did not tell the clerk she would not be in the next morning, she said she did not know. (45 R.T. 5436.)[59]

Defense counsel Wright noted that he would make a formal mistrial motion and the judge replied that he would make a ruling on

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[58] In this regard, a jury note dated March 30, 1998 [two days before the jury foreman complained about juror #10 failure to deliberate] inquired of the court whether the verdicts should be given to the court as they were reached or whether they should be retained until a verdict on all counts and enhancements had been reached. (19 CT 5161.)

[59] Neither the clerk nor juror #10 were sworn or took the stand and there is no evidence that the phone message was preserved.

that motion if and when it was filed. The judge then noted that with respect to redeliberation after jurors were added, the new jury does not have to get readbacks of all the testimony that was readback before or repeat every single step in the deliberation process. (45 R.T. 5438.)

Defense counsel Wright argued that this was the second juror who had been dismissed for disagreeing with the majority. It appeared that the majority was simply getting rid of the people that did not agree by telling the judge that there was a failure to deliberate. Further, although the majority might not like the way juror #10 deliberated, it appeared that she was in fact deliberating. She may not have felt it necessary to keep repeating herself after she stated her reasons once. Juror #10 obviously took this responsibility seriously (by coming to court when she was sick instead of just taking the dismissal). (45 R.T. 5438-5439.)

Alternate #4 was then seated in place of juror # 10. The court gave the standard instructions to the jury to begin deliberations anew. (45 R.T. 5441.)

On the first day of renewed deliberations the jury reached verdicts on all but two counts. (18 C.T. 5074-5095.) The next working day the jury reached verdicts on all counts. (18 C.T. 5069; 46 R.T. 5449-5450.) The jury found the defendant guilty of all counts except counts VIII and IX [L.A. Times robbery]. On those two counts, the jury found appellant Williams guilty of the lesser included offense of accessory after the fact. (46 R.T. 4561-4562.) The jury also

found all the sentence enhancements and the special circumstance to be true. (46 R.T. 5451-5465.)

Standard of Review

As with the previous issue, the standard of review is whether the trial court abused its discretion in substituting an alternate for a sitting juror during deliberations. That discretion, however, is not unlimited. (*People v. Roberts*, *supra,* 2 Cal.4th at pp. 324 - 325.) "Moreover, removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." (*United States v. Hernandez* (2 Cir. 1988) 862 F.2d 17, 23.) Therefore, it is especially critical that the court make a full inquiry into the facts before it determines that they constitute good cause for discharge of a juror that appears to favor the defense. (Cf. *People v. McNeal* (1979) 90 Cal.App. 3d 830, 840 [trial court's failure to conduct a more extensive hearing before concluding that the deliberating juror *could* render an impartial and unbiased verdict entitled defendant to reversal].)

The Nature of "Good Cause" to Dismiss a Sitting Juror

As appellant noted in the previous issue, there is no statutory definition of 'good cause' for removal of a deliberating juror. Nevertheless, California reviewing courts have found a number of things to constitute good cause showing a juror is unable to perform his or her duty. Sometimes a finding of good cause is based in part on the juror's admission that the matter in question would effect his or

her ability to perform his or her duty as a juror. For example, in *People v. Marshall* (1996) 13 Cal.4th 799, 845-846, the court learned during trial that the juror had appeared in municipal court on a speeding ticket and was going to have a hearing on the ticket the next week. The juror stated that under his employer's rules this ticket, which was his fifth, would result in the loss of his job, and the juror acknowledged this situation would affect his ability to serve as a juror and focus on the trial in which he was serving as a juror. In *People v. Fudge* (1994) 7 Cal.4th 1075, 1098-1100, the juror initially said that anxiety about a new job she was about to begin would not affect her ability to perform her duties. After speaking to her employer, however, she said it would. The Supreme Court found that this change supported a finding of good cause to discharge the juror. In *People v. Collins, supra*, 17 Cal.3d 687, 690-691, 696, the juror asked to be excused, stating that she was unable to follow the court's instructions, felt she was emotionally involved in the case, was unable to cope with the experience of being a juror, and thought she was not able to make a decision based on the evidence or the law. This Court found that these facts supported a finding of good cause to discharge the juror. (See also *People v. Hacker* (1990) 219 Cal.App.3d 1238, 1242-1245 [defendant joined the juror's church during the trial and the juror was unable to give any assurances she would decide the case without reference to this].)

In other cases, while there was no admission by the juror of inability to perform his or her duties, there was plain evidence of that

inability. The most common example is cases of illness. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 539-541 [juror with severe high blood pressure discharged when she collapsed for the second time during trial, requiring emergency medical treatment from paramedics; on the first occasion she stopped breathing and the court clerk resuscitated her with mouth-to-mouth resuscitation]; *People v. Roberts* (1992) 2 Cal.4th 271, 323-325 [juror ill with a sore throat and high blood pressure stated she might be able to resume her duties as a juror in three days]; *People v. Pervoe* (1984) 161 Cal.App.3d 342, 354-356 [juror had arthritis, was unable to raise her arm, dress herself, or drive a car, and was feeling sick to her stomach and was fainting because of medication she had taken].) Another good cause to discharge a juror is concealment or misrepresentation of information of prior criminal charges or arrests. (*People v. Johnson* (1993) 6 Cal.4th 1, 21-22; *People v. Price* (1991) 1 Cal.4th 324, 399-401; *People v. Farris* (1977) 66 Cal.App.3d 376, 385-387.) Yet another good cause is that the juror has fallen asleep during the trial. (*People v. Johnson, supra*, 6 Cal.4th at pp. 21-22.) Good cause also may be found when the juror requests discharge because of the death of a close relative, since the grief which accompanies such a loss would make it difficult for the juror to perform his or her duties. *(People v. Ashmus* (1991) 54 Cal.3d 932, 986-987; disapproved on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [death of juror's mother]; *In re Mendes* (1979) 23 Cal.3d 847, 852 [death of juror's brother].) In addition, good cause also can consist of a juror

having contact with members of the defendant's family and then falsely denying such contact, thereby showing the loss of impartiality and the inability to perform the duty of a juror. (*People v. Green* (1995) 31 Cal.App.4th 1001, 1010-1012.)

Perhaps, the most sensitive and controversial context for a finding of good cause relates to matters arising during deliberations. Certainly the trial court can discharge a juror for good cause that manifests itself during deliberations. This power flows from the language of section 1089, which authorizes discharge "at any time", including "after final submission of the case to the jury." Nevertheless, the court's power to act "becomes more limited once the jury has begun to deliberate. Once the jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important -- safeguarding the secrecy of jury deliberations." *(United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 618; see also *People v. McIntyre* (1990) 222 Cal.App.3d 229, 232, fn. 1.) The conflict is especially pronounced when the alleged misbehavior is a purposeful disregard of the law -- a particularly difficult allegation to prove and one for which an effort to act in good faith may easily be mistaken. (*Ibid.*) There is great tension between the need to discharge a juror who is unable to perform his or her duties and the need to safeguard the secrecy of jury deliberations.

In *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780-1781, for example, the discharged juror was mentally unable to comprehend

simple concepts, to remember events or to follow the law. In *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1434-1437, the discharged juror was unwilling to participate in the jury discussions, refused to explain her thoughts, stated that she had already made up her mind and was not going to change it even with respect to issues which the jury had not yet discussed, and stated she had prejudged the credibility of police officers. In *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1332-1333, the discharged juror did not answer questions which the other jurors posed, did not sit at the table with the other jurors, acted as if he had made up his mind before hearing the whole case, did not look at the two victims in the courtroom, disobeyed the court's instruction not to take home juror notes during trial and did not cooperate with the other jurors. In *People v. Warren* (1986) 176 Cal.App.3d 324, 325-327, the juror informed the court she felt intimidated by the other jurors and stated she could not comply with an instruction that she did not vote a certain way because a majority of jurors favor such a decision.

Nevertheless, in *People v. Cleveland, supra*, 25 Cal.4th 466 this court concluded that the trial court abused its discretion in excusing a juror because the record did not establish "as a demonstrable reality" that the juror refused to deliberate. In *Cleveland*, the other jurors complained that the excused juror considered irrelevant matters and adopted unreasonable opinions. This court concluded, however, that even if the juror's logic was faulty and his conclusions "incorrect," he participated in the

deliberative process. He was not articulate in explaining that he believed the evidence was insufficient to support the conviction, and he was not sympathetic when listening to the others. While this was frustrating to the others, nevertheless, it did not rise to the level of refusing to deliberate. This court then explained the circumstances which do and which do not constitute a refusal to deliberate:

> "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. **The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views.**" ([Emphasis added] *Id* at p. 485.)

In *U.S. v. Symington* (9th Cir. 1999) 195 F.3d 1080 the court faced a set of circumstances similar to the instant case. After eight

days of deliberations, the court received a jury note stating that " '[o]ne juror has stated their [*sic*] final opinion prior to review of all counts.' " (*Id.* at p. 1083.) The court returned a note reminding the jury "of their duty to participate in deliberations with each other, but emphasizing also that each juror should make up his or her own mind on the charges." Several days later, the court received another jury note stating that one juror "cannot properly participate in the discussion" for the following stated reasons: "Inability to maintain a focus on the subject of discussion. [¶¶] Inability to recall topics under discussion. [¶¶] Refusal to discuss views with other jurors. [¶¶] All information must be repeated two to three times to be understood, discussed, or voted on. Immediately following a vote, the juror cannot tell us what was voted. [¶¶] We question the ability to comprehend and focus on the information discussed."

The court then questioned the jurors individually. Every juror (except the one that was the subject of the complaint) stated that one juror, "appeared confused and unfocused during deliberations" (*ibid.*), gave rambling answers to questions, and refused to explain her views, stating she did not "have to explain herself to anybody." (*Id.* at p. 1084.) The *Symington* court observed: "The statements of some jurors indicated that their frustration with [the juror] may have derived more from their disagreement with her on the merits of the case, or at least from their dissatisfaction with her defense of her views." The juror "stated that she was prepared to continue deliberating. She noted that the other jurors' frustration with her might be because 'I can't agree

with the majority all the time ....' " The court discharged the juror, "because she was 'either unwilling or unable to deliberate with her colleagues.' " (*Ibid.*) The Ninth Circuit reversed the conviction, concluding that "there was a reasonable possibility that [the juror]'s views on the merits of the case provided the impetus for her removal." (*Id.* at p. 1088.)

Another case dealing with a similar circumstance is *People v. Bowers, supra,* 87 Cal.App.4th 722, a case that presaged *Cleveland.* In *Bowers*, while there was some evidence that a juror was inattentive at times during deliberations and did not participate as fully as others, the record showed this conduct was simply a manifestation of the fact that he did not agree with the majority's evaluation of the evidence. There was no demonstrable reality that he was unable to perform his function and he did not engage in willful misconduct. The facts of *Bowers* are particularly close to the facts of the instant case, so appellant will set them out in greater detail.

In *Bowers,* the jury foreman believed that juror # 4 was not deliberating and so informed the judge. The judge then reread the instructions relating to jury deliberation to the entire jury. Subsequently, the jury foreman informed the court that juror #4 was still not deliberating. The court's questioning of the jury foreman revealed that juror #4 stated that he heard everything that the other jurors said, but he was not convinced that the other jurors were right nor could he convince the other jurors that they were wrong. (*Id.*, at p. 726.) Further inquiry revealed that Juror No # 4 participated in

deliberations at times, but sometimes sat alone in a corner. (*Id.*, at p. 726.) Based in this preliminary assessment by the jury foreman, the trial court examined all the other jurors. (*Id.*, at p. 726.) The results of that examination showed that some jurors believed juror #4 participated in deliberations, others said that he made up his mind at the beginning of their deliberations and refused to participate in any meaningful way thereafter. (*Id.*, at p. 726.)

When juror #4 was questioned, he said that after closing arguments he was "kind of 50/50." Nevertheless, he admitted that he had come to a preliminary decision. (*Id.*, at p. 727.) After initially reviewing the evidence with the other jurors he came to the conclusion that he simply did not believe certain prosecution witnesses. (*Id.*, at p. 727.) More importantly, after he told the other jurors he did not agree with their views, **he did not discuss his reasoning or argue with the other jurors** because "[t]hat's their belief. That's what they heard. And I stayed with what I think is right." ([Emphasis added) *Id.*, at p. 727.)

When discussing the trial court's dismissal of juror #4, the Court of Appeal quoted the trial court's reasoning at length. Because the ruling of the trial court in *Bowers* is so similar to the ruling of the trial court in the instant case, appellant will also quote it at length.

> "In short, the consistent statements of all the jurors is that [Juror No. 4] refused to engage in meaningful deliberations. The Court notes [*People v. Johnson* (1993) 6 Cal.4th 1 [23 Cal.Rptr.2d 593, 859 P.2d 673]], which indicated that the Court may remove a juror for good

cause, if that juror is not paying attention. In this case we have ... statements from jurors that he fell asleep, that he walked around and crossed his arms and that he refused to respond when the other jurors attempted to get him to participate. It even appears they came close to begging him. The Court recalls the different jurors indicating that they explained to him that they could not do their deliberations unless he would explain to them the basis for his reasoning for the position that he had taken. And that he actually refused to do so. [¶¶] ... [¶¶]

"The Court believes that based on the record before it, there is substantial evidence and demonstrable reality that this juror, Juror Number 4, ... did not enter into meaningful deliberations. That either he made up his mind here in the courtroom after having heard the first witness, which is what he apparently told his fellow jurors or once he got in the jury room after he initially and almost immediately indicated his position and refused to meaningfully discuss that position with the other jurors or to meaningfully consider the statements and the evidence as they attempted to discuss with him. And that he refused to participate with them even after their numerous efforts to advise him of his duty and to attempt to elicit cooperation.

"The Court notes it was probabl[y] a very uncomfortable circumstance in the jury room due to the level of frustration. However, one of the jurors made an interesting statement when that juror stated to the Court that it appeared ... [Juror No. 4] ... had committed what the Court cautioned the jurors not to do, that is, to state an opinion early and have a sense of pride to prevent them from further considering the evidence. [¶¶] ... That Juror Number 4 had fallen into that particular trap of pride. Whatever the reasons, it appears to the Court that the Court has good cause to excuse [Juror No. 4]." (*Id.*,

at pp. 727-728.)

Noting that a trial court's discretion to dismiss a sitting juror is at best a limited one, the appellate court **reversed**. The appellate court observed that although Juror # 4 may have been inattentive during portions of the deliberations and did not participate as fully as others, his conduct did not manifest an inability to perform his function as a "demonstrable reality," nor did he engage in serious and willful misconduct. (*Id.*, at p. 730.)

Inability to Perform Juror Functions Was Not A Demonstrable Reality Here

In this case, the trial judge gave three reasons for dismissing juror #10: that juror #10 was occasionally sleeping during deliberations and apparently nodding off during the trial as well. (45 R.T. 5423.) Further, sometimes juror #10 deliberated and sometimes she didn't. (45 R.T. 5425.) Finally, juror #10's illness might last awhile. (45 R.T. 5425.) None of these reasons will support dismissal of juror #10 and at least two are not even supported by any substantial evidence.

Juror Inattentiveness

In *People v. Johnson, supra,* 6 Cal.4th 1, this court upheld the trial judge's exercise of discretion in dismissing a juror for sleeping. In that case, however, the juror was excused during trial, not during deliberations. Further, the juror slept during testimony and paid little or no attention to the proceedings. Additionally, he lied in his jury

questionnaire about having been arrested. (*Id.* at pp. 16, 21.) Even in *Johnson*, however, this court was very careful to limit the scope of the trial court's discretion to dismiss a siting juror. This court made it clear that a juror should not be discharged for sleeping unless there is convincing proof the juror actually slept during trial. (See *People v. Johnson, supra,* 6 Cal.4th at p. 21, citing *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.) In this case, no juror even alleged that Juror #10 slept through any part of the presentation of evidence.[60]

In *People v. Bowers, supra*, the court stated: "Even deferring to the trial court's factual finding Juror No. 4 slept, the bare fact of sleeping at an unknown time for an unknown duration and without evidence of what, if anything, was occurring in the jury room at the time is insufficient to support a finding of misconduct or to conclude the juror was unable to perform his duty. (See *People v. Daniels, supra,* 52 Cal.3d at p. 864 [misconduct must be serious and willful].)"

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[60] Here, juror #6 opined that juror #10 probably slept during the trial court's instructions. (45 R.T. 5412.) Even if that was true, however, the trial court stated at the beginning of its reading of the instructions: " ...., you will get a copy of the instructions in the jury room. They are rather dry and stilted by their nature. I don't think anybody expects you to fully comprehend them as I read them to you, so my suggestion to you is to simply relax and get what you can out of them as I read them, because I am required to read them to you, and then rest assured they will be in the jury room with you if you need to study them and refer to them as you deliberate on the case." (45 R.T. 5250-5251.) Moreover, because multiple copies of the jury instructions were given to the jurors and because Juror #10 was extraordinarily careful in her reading of the written instructions, including taking copious notes on what she read (45 R.T. 5394), the possibility that she missed a critical instruction is remote.

(*People v. Bowers, supra,* 87 Cal.App.4th at p. 731.)

Here, there is simply no evidence to support the trial court's conclusion that juror #10 actually slept during deliberations. The juror testimony was that juror #10 appeared to be asleep. One juror described the situation as closing her eyes, curling up in her chair and pulling a cap down over the top of her face. (See, e.g., 45 R.T. 5379.) Nevertheless, when queried directly by the trial judge about whether juror #10 was actually sleeping, NO juror could state unequivocally that he or she saw juror #10 asleep. Further, no juror said that this inattentiveness occurred on more than one occasion, and no juror explained what transpired during this period of inattentiveness. Juror #1 noted that this period lasted for only 10 to-15 minutes (during which time only two jurors spoke) and he only observed it on one day. (45 RT 5376.)

Appellant notes that the jurors had been deliberating - anew after the dismissal of another juror for illness - for approximately a day and a half before the issue was presented to the trial judge. (45 RT 5376.) Moreover, prior to that evolution, the original jurors [including juror #10] had been deliberating the case for approximately seven days. (18 C.T. 5055, 5064.) This evidence does not show that Juror #10 was asleep for any substantial amount of time or that she missed any significant portion of jury deliberations.

For these reasons, the trial court's factual determination that juror #10 slept not only lacks substantial evidentiary support, as a matter of law it is insufficient to show that juror #10 was unable to

perform her duties as a "demonstrable reality."

Probability of Juror Illness.

One of the other bases for the trial court's dismissal of juror #10 was the probability that juror #10 would be ill for some time and the delay might jeopardize the prosecution's ability to procure witnesses for the penalty phase. (45 R.T. 5403-5404.) Rather than the likelihood of extended illness being a demonstrable reality, the trial court's determination was based on pure speculation. Essentially, the trial court relied on unsworn testimony from the court clerk who summarized what she believed to be the substance of telephone messages and a conversation with juror #10. (45 R.T. 5349, 5400.)

Unfortunately, the trial court never conducted its own investigation into the matter. When juror #10 actually showed up the following morning, she refuted most of what the court clerk said and clarified the rest. (45 R.T. 5433-5436.)

Since the inquiry about juror #10's fitness to serve was conducted after 3:20 pm in the afternoon, and since defense counsel Wright urged the court to wait until the following morning to see if juror #10 would be available (45 R.T. 5423), the trial court's failure to conduct a full inquiry is inexcusable. Additionally, since the clerk also told the judge that she called juror #10 that afternoon and juror #10 **said she would be in court the next morning to protest her dismissal**, it is just unfathomable that the trial judge made a final dismissal decision without waiting for the next day to question juror

#10 in person.

These facts show that the trial court's determination that juror #10 was too ill to continue as a juror was not even supported by substantial evidence. Thus, it certainly could not be a "demonstrable reality.' The only demonstrable reality here was that the trial court improperly "presumed the worst" and used it as a basis for dismissal. (*People v. Franklin, supra,* 56 Cal.App.3d at p. 26.)

Refusal to deliberate

The last, and most important ground for the trial court's decision to dismiss juror #10 was her purported refusal to deliberate. (45 R.T. 5425- 5426.) In the court's view, juror #10 was not permitted to simply take a position and refuse to discuss it with other jurors. (45 R.T. 5426)

Like the issues involving sleeping and illness, however, the trial court's finding was both unsupported by the evidence and inadequate as a matter of law to support its dismissal of juror #10. Although the majority of the jurors argued that juror #10, refused to deliberate, close questioning revealed that she deliberated until she reached a decision and then simply refused to change her mind.

More importantly, however, there seems to have been a significant clash of cultures in the jury room during deliberations. Clearly juror #10 did not believe the prosecution's witnesses and did not believe that the state carried its burden of proof. When she initially tried to debate the issues and explain the racial divide, she

was verbally attacked. Recognizing that further debate was useless in the sense that she could not persuade the majority and the majority could not persuade her, she remained silent except in those rare instances when the majority saw the issues the same way she did. Moreover because she refused to debate the majority of white jurors on their terms, they accused her of refusing to deliberate. This is indeed, the classic case of the holdout juror refusing to cave in under pressure from the majority. Moreover, the critical facts here mimic the facts of the *Cleveland* case to such a high degree that reversal is required.

The evidence shows that even before the jury foreman complained about juror #10's behavior, juror #10 **specifically asked** the court what it meant to deliberate. Juror #10 wanted to know what happened if she did not have any further comments - would that situation constitute a failure to deliberate? (45 RT 5311.) The court responded that there should be some give and take. (45 RT 5311.) Juror #10 then asked what happened if there was an impasse (or as she phrased it a "lockdown") between her and the other jurors ands she simply had nothing more to say. (45 RT 5311.) The judge responded that if she told the jurors that "I've made up my mind and I'm not going to change it," that situation still constituted deliberation. (45 R.T. 5311-5312.) Even though the judge later told juror #10 that he might have misled her, he never took any action to answer her question or further explain what it meant to deliberate.

The initial complaint by the jury foreman epitomized the clash

in the jury room . When the jury foreman actually reported juror #10's behavior to the court, he complained that juror #10 would announce that she had nothing to say. (45 RT 5364.) The foreman admitted, however, that after certain votes were taken, juror #10 would engage the rest of the jurors by changing her mind and asking technical questions. (45 RT 5365.) On those occasions when she disagreed with the majority, the foreman would ask her to write out what she thought so that they could discuss the reasoning behind her stand on an issue. She refused to do that. (45 RT 5365.) She "just clam[ed] up". (45 RT 5366.) "She just says my opinion is this and that's it." (45 RT 5369.)

Under examination by the prosecutor, the foreman reiterated that juror #10 made statements but would not discuss the reasoning behind them. She just said "that is what she believes." (45 R.T. 5370.) **In his opinion, juror #10 refused to accept the views of other jurors and was therefore failing to deliberate**. His exact words were "she does not accept our views at all." (45 R.T. 5371.)

Perhaps most significantly, the foreman admitted that there was "a little blowup " in the jury room during deliberations. Although the foreman apologized and thought most people accepted his apology, he did not know for sure. (45 RT 5373.) Additionally, the issue of race came up during deliberations. As foreman, he tried to put a stop to the talk but he was not sure he was entirely successful. (45 RT 5373.) In any event, he thought juror #10 might have taken it personally. (45 RT 5373.)

The other jurors corroborated the essential facts of the

foreman's complaint. Most significantly, jurors #4 and #11confirmed that there was a heated exchange among the majority and juror #10 during the prior week of deliberations and people were very irritated. (45 R.T. 5399, 5421-5422.)

Specifically on the issue of whether juror #10 participated in deliberations, juror #1 admitted that Juror #10 expressed her opinions. She simply refused to discuss the basis for them. (45 R.T. 5377-5378.) Juror #2 also admitted that juror #10 was arguing with other jurors at the beginning of deliberations. It was not until later after the other jurors strongly challenged her to prove her arguments that she would say "When I have something to say, I'll say it, and I don't want to say anything right now so I'm not saying it. You guys talk about what you want, but I'm not gonna say anything," (45 R.T. 5382; see also juror #11's similar comments at p. 5419.)

Juror #2 also observed that on occasion, other jurors had to explain the meaning of words because juror #10 did not seem to understand. (45 R.T. 5385.) Juror #4 corroborated juror #2 noting that on one occasion juror #10 apparently misunderstood what was going on and voted exactly the opposite of what she clearly intended. (45 R.T. 5394) Then, after she realized what happened, she changed her vote. (45 R.T. 5395) Additionally, sometimes juror #10 wanted to reopen votes that were already settled. (45 R.T. 5395.)

Juror #5 also agreed that sometimes juror #10 would respond inappropriately to questions on a topic. (45 R.T. 5406) He, too, admitted that he was struggling with the legal issues. (45 R.T. 5406.)

Additionally, jurors #5, # 6 and #11 complained that sometimes juror #10 would take one position in the morning and then argue or shift to another in the afternoon. (45 R.T. 5408, 5413, 5418-5419.) Juror #5 also agreed that juror #10 often would not share her reasoning. (45 R.T. 5407) That is, sometimes she would take a position but refuse to explain how she got there. (45 R.T. 5407.)

Juror #6, explained that the pattern that emerged during deliberations was that when juror #10 disagreed with the majority, she would say so. Nevertheless, she would not explain why in any great detail (45 R.T. 5415.) When juror #10 agreed with the majority, however, she opened up and discussed her reasoning more. (45 R.T. 5415.) In this regard, juror #4 told the court that juror #10 would argue that the other jurors did not have evidence to support their views. When the other jurors come up with specifics, juror #10 would say "I don't believe it." (45 R.T. 5396.)

Finally, juror #4 and juror #2 admitted that juror #10 spent a lot of time flipping through the booklet of jury instructions and writing notes. (45 R.T. 5394, 5399, 5389.) Juror #2 explained that juror #10 realized she was the only African American in the room, so she wanted to double check everything. Further, she felt "picked on" because of her race and her insistence on getting things right. Indeed, the rest of the jurors told her not to bring race into it. (45 R.T. 5386, 5389.)

Hearkening back to *Cleveland, supra,* there, the jurors complained that the holdout juror, "'appeared confused and

unfocused during deliberations', gave rambling answers to questions, and refused to explain her views.'" (*Id.* at p. 1084.) In *Cleveland*, however, this court explained that a juror who does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge." (*Id* at p. 485.) Indeed, "Not all comments by all jurors at all times will be logical, or even rational, or, strictly speaking, correct." (*People v. Riel* (2000) 22 Cal.4th 1153, 1219.) Moreover, where a juror disagrees with the majority concerning what the evidence shows, or how deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. Additionally, a juror who participates in deliberations for a reasonable period of time may not be discharged for refusing to deliberate further simply because the juror believes that additional discussion will not change his or her conclusions. (*People v. Cleveland, supra*, at p. 485.)

Here, the jurors admitted that juror #10 fully participated in deliberations for at least a day. Moreover, even though the majority complained that she did not deliberate towards the end, they also complained that towards the end of deliberations she flipped through the jury instruction booklet, she tried to engage in technical discussions and changed her vote. Contrary to the view of several jurors, closely analyzing jury instructions, engaging in technical discussions and changing votes certainly shows continuing participation in the deliberative process.

Additionally, as the foreman explained, once juror #10 made up

her mind, "She just says my opinion is this and that's it." (45 RT 5368.) This is precisely the problem the majority jurors had with the holdout in *Symington* (cited with approval *in Cleveland*). The holdout juror simply refused to debate her views stating that she did not "'have to explain herself to anybody.'" *(Symington, supra* at p. 1084, quoted in *Cleveland, supra* at p. 484.) In *Cleveland* this court found that similar conduct was perfectly appropriate and necessary to maintain the integrity of the jury trial process. (*Id.*, at pp. 485-486.)

Finally, it is abundantly clear that juror #10 was simply unpersuaded by the state's case. As juror #6 explained, when other jurors would try to contradict juror #10's views by pointing to specific testimony or evidence, juror #10 often said "I don't believe it." (45 R.T. 5395.) There could hardly be a more clear statement of juror #10's rejection of the state's evidence. It is this failure to be persuaded by the prosecution evidence that is fundamentally fatal to the trial judge's dismissal of juror #10. (*Cleveland* at pp. 483-484.) Indeed, if there was any doubt about the matter, the jury foreman erased it when he told the trial judge that juror #10 was failing to deliberate **because she refused to accept the views of other jurors**. (45 R.T. 5371.)

On a deeper level, however, there was a much more pernicious dynamic at work during deliberations. That dynamic was race. In this case, race was the elephant in the jury room. It was a a huge, brooding presence that ultimately divided the jurors, a division resolved only by the removal of both African American jurors. Not

only was a young black male of modest accomplishment and relatively loose moral character accused of killing a young white woman of firm moral character and high accomplishment, but when a black juror attempted to explain the culture the defendant came from, she was silenced for bringing the issue of race into the debate. Race and its culture was an integral part of the case and the juror tried to discuss it. It is clear that any effort to address the roles of race and culture in the process was immediately stamped out by the jury foreman. In order to preserve the freedom and sanctity of jury deliberations, this court needs to carefully examine the racial dynamic in the jury room in the context of this case.

It is no secret that in Riverside county, African Americans constitute only a small minority of the population but receive the overwhelming majority of death sentences. (See *In Re Seaton* (2004) 34 Cal.4th 193, 202-203 [despite some statistical support, racial disparity claim barred on procedural grounds] .) Juror #10 and juror #12 were the only two African American jurors on appellant's panel. Juror #12 was outspoken in her denunciation of official conduct by the state in shackling only black witnesses. Indeed, the state's conduct was so improper in these circumstances that not only did the trial judge concede the error, he took remedial action to correct it by instructing the jury. (30 R.T. 4097-4100.)

Moreover, as appellant pointed out in the previous issue, the trial judge simply didn't recognize the racially disparate treatment of witnesses when it occurred. (30 R.T. 4073, 4075.) It had to be pointed

out to him by a black juror. (30 R.T. 4075.) Additionally, although the problem was caused by employees of the state - sheriff's deputies - there was no official rebuke, or at least none that the jury heard. Instead, the trial court's official inquiry into misconduct focused on juror # 12. She was the one singled out for examination (30 RT 4072) and admonished not to let the incident affect her ability to be impartial. (30 R.T. 4074-4075). The message from the court was that it was the complaint from a black juror that caused official concern, not the conduct of state employees.

As appellant also explained in the previous issue, after Mr. Brodbeck testified about the Taco Bell incident, juror #12 was again examined and ultimately dismissed for her purported comment that "the only truth lied in the parking lot and that everyone else was just lying." (31 R.T. 4574.)

Juror #12's outspokenness and its effect on the trial court certainly did not escape the notice of juror #10. As appellant pointed out in the previous issue, the dismissal of juror #12 was a clear sign that outspoken criticism from a black juror was not favored.

During deliberations, juror #10 discussed growing up in Moreno Valley [where these events occurred] as a young girl. (45 R.T. 5282.) Although she was speaking to juror #2, those discussions were held in the jury room at the jury table where presumably others could hear. (45 R.T. 5289.) This conversation took place right near the beginning of jury deliberations. (45 R.T. 1589.) Subsequently, there was an angry exchange among jurors. (45 R.T. 5399, 5421-

5422.) Apparently, however, it was a little more than a mere isolated exchange of strong views. As juror #10 herself explained to the trial judge, she was attacked verbally, screamed at and cut off during deliberations. (45 R.T. 5434-5435.) Further, Juror #2 explained that juror #10 realized she was the only African American in the room and felt "picked on because of her race." Indeed, the rest of the jurors specifically told her not to bring race into it. (45 R.T. 5386, 5389.) According to juror #2, juror #10 acquiesced in the majority's demand. (45 R.T. 5389.)

It is unfortunate that the trial court failed to conduct an adequate inquiry into the abuse suffered by juror #10 at the hands of the other jurors, a matter discussed at length in issue III *infra*. From the record available, however, it appears that the rest of the jurors attempted to preclude any discussion of the racial aspects of the case because juror #10 was trying to convey the context of what life was like for a young black person in Moreno Valley. Moreover, that was obviously a view antithetical to the prosecution's presentation and certainly out of favor with the rest of the white jurors. Nevertheless, this kind of discussion of personal experience is not only permissible, it often dominates jury discussion. (*See, e.g., Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 741-742.)[61] Yet here, the mostly white jury intimidated the only

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[61] In *Moore* the court stated: "Jurors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself. Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them." (*Moore v. Preventive Medicine Medical Group,*

remaining black juror and kept her from discussing the context of what occurred.[62]

Inadequate Inquiry

Finally, because the trial judge failed to conduct a sufficient inquiry into the facts underlying the bases for his dismissal of juror #10, reversal is required. (*People v. Castorena* (1996) 47 Cal.App.4th 1051.) In *Castorena*, the trial court initially interviewed seven of the 12 jurors. Based on their testimony that a holdout juror was failing to deliberate, the trial court determined to dismiss the

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Inc., *supra*, 178 Cal.App.3d at pp. 741-742.) "Jurors' views of the evidence ... are necessarily informed by their life experiences...." (*In re Malone* (1996) 12 Cal.4th 935, 963.) "A juror does not commit misconduct merely by describing a personal experience in the course of deliberations." (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 819.) Indeed, "it would be an impossibly high standard to permit these jurors to express an opinion on [the] evidence without relying on, or mentioning, their personal experience and background." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.)

[62] In the context of this case, juror #10 might well have been trying to explain to the other jurors that the " organizational meeting" at Natalie Dannov's house was little more than a group of teenagers boasting to one another and talking big. It was certainly not the well orchestrated beginning of a smoothly functioning criminal enterprise. Indeed, most of the subsequent carjackings were complete failures. Even then, there was no evidence of recrimination by appellant or review or retraining to make things go more smoothly the next time. As a criminal enterprise, the Pimp Style Hustlers was mostly a bust. More importantly, juror #10 could have explained that it was self evident that in context, the Pimp Style Hustlers was never intended to be a viable criminal enterprise. Instead, it was an engine for achieving social status [or as Natalie Dannov phrased it, becoming " legitimate businessmen" (see e.g. 24 RT 4329)] in a low status environment.

holdout juror. Significantly, however, the trial court did **not** interrogate the holdout juror. Subsequently, the judge received a 15 page note from the holdout juror which contradicted the allegations made against her by the other jurors and raised new allegations of misconduct against one of her accusers. (*Id.* at p. 1066.) Additionally, there was evidence from at least one other juror that in fact the holdout juror was deliberating in good faith. (*Id.* at p. 1066.) Despite those matters, the trial court dismissed the holdout juror. (*Ibid.*)

Upon review, the appellate court concluded that reversal was required. The appellate court concluded that the trial court erred significantly in failing to conduct a proper inquiry. (*Ibid.*) Based on the 15 page note, the court possessed information which, if true, would preclude 'good cause' for removing the holdout juror, and constitute 'good cause' to justify removal of one or more of the other jurors from the case. (*See, e.g., People v. Ray* (1996) 13 Cal.4th 313, 343.) Absent an inquiry into the facts raised in the juror's 15 page note, however, "the court did not have the requisite facts upon which to decide whether [the holdout juror herself] in fact failed to carry out her duty as a juror..." (*Id.*, at p. 1066.) Although a sufficient inquiry might have refuted the holdout juror's claims in the note, nevertheless, "we cannot speculate about what facts might have been adduced if the [proper] inquiry had been conducted."(*People v. Castorena, supra*, 47 Cal.App.4th at p. 1066.)

The facts of this case closely mirror those of *Castorena*. Here, the trial judge heard from the majority jurors about juror #10's

purported failure to deliberate, but refused to examine juror #10 herself. Then, juror #10 came into court to refute the allegations against her. She also raised claims of misconduct against other jurors. The trial court failed to investigate any of these matters. Under these circumstances, this court can have no confidence that the trial court found facts sufficient to justify removal of the holdout juror. Thus, reversal is required. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485, *People v. Castorena, supra*, 47 Cal.App.4th at p. 1067.)

Prejudice

The prejudice here is similar to the prejudice in the pervious issue. Jury service is a protected right for every citizen to participate in the democratic process and it cannot be abridged except under the most compelling circumstances. (Cf. *Powers v. Ohio, supra,* 499 U.S. 400, 406-407 [11 S.Ct. 1364, 113 L.Ed.2d 411].) Excusing an empaneled juror from deliberations without good cause deprives a criminal defendant of his right to a fair trial under the Fifth and Fourteenth Amendment Due Process clauses as well as the Sixth Amendment right to trial by jury. (Cf. *Crist v. Bretz* (1978) 437 U.S. 28, 35-36 [98 S.Ct. 2156, 2160-2161, 57 L.Ed.2d 24]; *Downum* v. *United States* (1963) 372 U.S. 734, 736 [83 S.Ct. 1033, 1034, 10 L.Ed.2d 100].) Indeed, the right to a trial by jury in criminal cases is such a fundamental feature of the justice system that it is protected against state action by the Due Process clause of the Fourteenth Amendment. (*Duncan v. Louisiana, supra,* 391 U.S. 145, 147-158 [88 S.Ct. 1444, 1451, 20 L.Ed.2d 491].) It also violates the Eighth and

Fourteenth Amendment requirements for reliability in the guilt and sentencing phases of a capital trial. (Cf. *Beck v. Alabama, supra,* 447 U.S. 625, 638, 643 [65 L.Ed.2d 392, 403, 406, 100 S.Ct. 2382]

Moreover, fundamental due process, and the right to a fair and impartial jury entitles a criminal defendant to be tried by the jury originally selected to determine his guilt or innocence. (Cf. *Downum v. United States, supra,* 372 U.S. at p. 736 [83 S.Ct. at p. 1034, 10 L.Ed. 2d 100].) Because this "valued right" is so fundamental (*Ibid.*), reversal may be required where the trial court excuses a juror without good cause. (Cf. *People v. Hamilton, supra,* 60 Cal.2d at pp. 122-126 [disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 649], see also *People v. Armendariz, supra,* 37 Cal.3d 573, 584; *People v. Wheeler, supra,* 22 Cal.3d 258, 283; both quoting *People v. Riggins, supra,* 159 Cal. 113, 120.)[63] More importantly, where the record demonstrates that a particular juror is inclined toward one side, any erroneous removal of that juror is prejudicial to that side. (*Hamilton.*, at p. 126-127; see also *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856 [improper removal of holdout juror compels reversal].)

Indeed, "[T]he essential feature of a jury ... lies in the

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63 In *People v. Riggins, supra,* 159 Cal. 113, the court stated:

> "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (Id., at p. 120.)

interposition between the accused and his accuser of the commonsense judgment of a group of laymen ...." (*Williams v. Florida* (1970) 399 U.S. 78, 100 [26 L.Ed.2d 446, 460, 90 S.Ct. 1893].) "[T]he interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him" lies at the heart of the right to trial by jury. (See *Apodaca v. Oregon, supra,* 406 U.S. 404 [32 L.Ed.2d 184, 92 S.Ct. 1628.)

Based on the foregoing, the court's dismissal of juror #10, whose purported refusal to deliberate appears to be nothing more than a proper refusal to change her opinion in the face of overwhelming majority pressure, significantly departed from the statute's requirement of good cause for discharge. Because the record fails to unmistakably show juror #10's inability to fulfill her duties as a juror, her discharge violated appellant's right to a full and fair trial by an impartial and unanimous jury as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments.

Arbitrary deprivation of the right to a unanimous verdict guaranteed by California law similarly deprived appellant of his right to due process of law as guaranteed by the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343 [arbitrary deprivation of state guaranties constitutes a federal due process violation].)

For these reasons, appellant's conviction must be reversed and his sentence set aside.

III.

SUBSTITUTION OF AN ALTERNATE JUROR FOR ORIGINAL JUROR #10 COERCED A VERDICT

Introduction

When a new juror is substituted, the jury is required to start deliberations anew in order to prevent existing jurors from imposing their views on the new juror, thus coercing a verdict. Here, although the judge instructed jurors to begin deliberation anew on the substitution of a juror, he did nothing to ensure that past misconduct in this area - revealed by juror #10 - did not continue. Further, the dates on the verdict forms and the speed at which the jurors arrived at verdicts despite the vast quality of evidence demonstrates that there was no meaningful deliberation. Instead, as with past juror misconduct substitutions, the existing jurors simply coerced the new juror into accepting their view of the evidence.

Factual Background

When juror #10 was replaced and appeared before the trial court to protest her dismissal, she informed the court that when the other two alternate jurors were previously substituted in, the jury as a whole did not start deliberations all over. (45 R.T. 5433-5434.) Instead, despite the fact that the jury was repeatedly instructed to start deliberations anew, the existing jurors would simply ask the new ones what they thought and then tell the new ones what the existing jurors previously decided. She also pointed out that in one day, the jurors

voted on 11 verdicts based solely on how the jurors felt **before** the two new alternate jurors were added. (45 R.T. 5433-5434.)[64] A jury note dated March 30, 1998, **two days** before the controversy over juror #10 erupted, asked whether the jury should give the court the

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[64] The exact quote from juror #10 was :

> But when the alternates came, your instruction was that we were supposed to start our deliberations from -- like we never deliberated before and forget what we talked about before and start anew, because we had two new alternates and the defendant was entitled to verdicts from everybody from -- fresh, and during the deliberations, if I would have been here yesterday I would have told it, but it wasn't redeliberated.
>
> It was like, "You tell us what you think and we'll tell you what we decided," and it wasn't right to me, because to me, you supposed to act like you never talked about what you talked about before, and it was kind of like, okay, well, if that's the way you guys did it, okay, then we're ready to vote.
>
> And we spent a week and a half in there before we could even vote on issues, and then you come in and you just say how you felt about certain charges, and then we listened and we said that's how we felt, and then we voted, and I don't think it was fair and unbiased, because to me it seemed it was a preconceived thing already in their mind how they was gonna do it, because they had no discussion about anything, and I thought that your instructions meant we are supposed to start again, like we started when we first started, without giving what -- the things we talked about, the questions that came up.
>
> We had to ask for certain testimony again, and none of that was done, and in one day mostly 11 verdicts, 11 charges was voted on in one day by basis of, to me, how we felt before the two other people came in there, and it bothered me because that didn't -- to me didn't seem like your instructions to us, and I really don't feel that that's fair." (45 R.T. 5433-5434.)

verdicts it already reached or wait until it reached verdicts on all the counts and enhancements. (19 C.T. 5161.) The judge responded that the jury was to keep the verdicts until the jury was finished deliberating. (19 C.T. 5161.)[65]

Significantly, in a jury note dated that same day, the jury inquired whether during the new deliberations it could rely on the same questions and answers from prior deliberations in order to "fill [] in" new jurors. The court responded that such a procedure was permissible assuming that the jury's concerns were the same. (19 C.T. 5163.)[66]

The trial court conducted **no further inquiry** with juror #10 (or

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[65] The jury note reads:

[Jury question] "Do we give you the verdict papers as we vote or do we keep them till we have them all"

[signed] 3/30/98 Juror #3 [foreman]

[Court response] "Same procedure as before, retain until done deliberating." (19 C.T. 5161.)

[66] The jury note reads:

[Jury question] "When deliberating anew, can we use our same questions and answers during the new deliberations or do we resubmitt (sic) some questions if we want to fill the new jurors in on certain questions that came up before along with their answers."

[signed] march 30, 1998 Juror #3 [foreman]

[Judge response] "You may not have the same questions as before, but to the extent that you do, you may use the same answers" (19 C.T. 5163.)

any other juror) on these allegations of possible misconduct. Further, the court then specifically refused juror #10's direct request to tell her why she had been dismissed. (45 R.T. 45 R.T. 5435-5436.) Additionally, when the third alternate juror was substituted in for juror #10, the trial court again gave the standard instruction for starting deliberations anew but did not caution the existing jurors to discontinue their practice of simply "filling [] in" the new jurors on matters that had been discussed or decided. [67] (45 R.T. 5440-5441.)

Defense counsel Wright strenuously objected to the dismissal of juror #10, noting that this was the second juror who had been dismissed for disagreeing with the majority. It appeared that the majority jurors were using the tactic of telling the judge that there was a failure to deliberate simply as a method of getting rid of minority jurors who did not share the majority's view. (45 R.T. 5437.)

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[67] The judge instructed the jury:

"Members of the jury, a juror has been replaced by an alternate juror. You must not consider this fact for any purpose.

The People and the defendant have a right to a verdict reached only after full participation of the twelve jurors who return the verdict.

This right may be assured only if you begin your deliberations again from the beginning.

You must therefore set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place.

You shall now retire to begin anew your deliberations in accordance with all the instructions previously given." (45 R.T. 5440-5441.)

Significantly, the record reveals that juror #10 was dismissed on Wed., April 1, 1998. (18 C.T. 5067.) The reconstituted jury began deliberations the next day, Thursday, April 2, 1998. (18 CT 5068.) The verdicts on nine of the eleven counts are dated April 2, 1998 (18 C.T. 5074- 5095), the very first day of renewed deliberations. The remaining two verdicts and some of the enhancements are dated Monday April 6, 1998, the next working day. (18 CT 5070-5073.) The record indicates that the reconstituted jury deliberated on the second day for only four or five hours [depending on whether the jury recessed for lunch] before reaching verdicts on all counts and enhancements. (18 C.T. 5069.)

Standard of Review

As with the previous issue, the standard of review is whether the trial court abused its discretion in substituting an alternate for a sitting juror during deliberations. That discretion, however, is not unlimited. (*People v. Roberts*, *supra,* 2 Cal.4th at pp. 324 - 325.) "Moreover, removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." (*United States v. Hernandez* , *supra* (2 Cir. 1988) 862 F.2d at p. 23.)

Substitution of Alternates Coerced a Verdict

The Sixth Amendment to the Constitution of the United States and article I, section 16 and article VI of the California Constitution guarantee an accused in a criminal prosecution the right to a trial by an impartial jury. (*People v. Price, supra* , 1 Cal.4th 324, 467.) Thus, a trial court must use "great care to avoid the impression that jurors

should abandon their independent judgment 'in favor of considerations of compromise and expediency.'" (*People v. Price*, *supra*, 1 Cal.4th 324, 467, citing *People v. Carter* (1968) 68 Cal.2d 810, 817.)

The basic test of whether a verdict was coerced is whether the conduct of the court, viewed in the totality of the circumstances, operated to displace the independent judgment of the jury in favor of compromise and expediency. (*People v. Peters* (1982) 128 Cal.App.3d 75, 91; *People v. Ozene* (1972) 27 Cal.App.3d 905,913, citing *People v. Carter*, *supra,* 68 Cal.2d 810, 817; see also *Jenkins v. United States* (1965) 380 U.S. 445 [85 S.Ct. 1059, 13 L.Ed.2d 957] [where the judge told the jury it was required to reach a verdict, the Supreme Court "conclude[d] that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it"].)

The court's discharge of both jurors #12 and #10 following outspokenness and reported disagreements with the majority of the jurors could not help but act as an endorsement of the position of the remaining majority jurors who favored guilt. Indeed this is precisely the point that defense counsel made in response to the trial court's determination to dismiss juror #10. (45 R.T. 5437.) Accordingly, the trial judge's actions operated to displace the jury's independent judgment and to coerce the verdict.

While it might be argued that the trial court's instructions to begin deliberations anew could dispel any taint, such an argument

would not be persuasive on the facts of this case. As juror #10 explained, the same instruction had been given before and the majority jurors simply short-circuited the instruction's mandate by telling new jurors what they thought/decided before the new deliberations began. (45 R.T. 5440-5441.) Clearly there is a limit to how much an instruction or admonition can overcome. Many courts have held that juries are particularly unable to set aside indications of how the judge views the case despite curative instructions: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction." *(Krulewitch v. United States* (1949) 336 U.S. 440 [Jackson, J. concurring.])

Additionally, the trial court's failure to inquire further in this and possibly other areas of juror misconduct eliminates any basis for this court's deferential reliance on the trial court's factual findings because the trial court did not have an adequate basis upon which to make any factual findings. (Cf. *People v. Nessler, supra*, 16 Cal.4th at p. 581.) Indeed, no juror contradicted juror #10's account of the process by which the majority circumvented the mandate of the trial court's instructions to deliberate anew. (*People v. Castorena, supra*, 47 Cal.App.4th at p. 1066.) In fact, the jury notes of March 30, 1998 **bolster** juror #10 claims. (19 C.T. 5161,5163.)

Moreover, even though a jury has been instructed to start its deliberations anew, there are some circumstances where following

such an instruction is simply unrealistic because it is impossible to incorporate into those deliberations the perception, memory and viewpoints of the new juror. This is especially true where (as here) the jury has already reached agreement for verdicts on related counts. (See, e.g., *People v. Aikens* (1988) 207 Cal.App.3d 209, 219 (conc. & dis. opn. of Johnson, J.) [where jury reached a verdict on a related count prior to the substitution of a new juror, a verdict by a reconstituted jury cannot meet the requirement of unanimity]; *State v. Corsaro* (1987) 107 N.J. 339 [526 A.2d 1046][68] [once jurors have reached any verdicts, the panel cannot be reconstituted to deliberate and reach the remaining verdicts].) As *Corsaro* explained:

> [W]here the deliberative process has progressed for such a length of time or to such a degree that it is strongly inferable that the jury has made actual fact-findings or reached determinations of guilt or innocence, the new juror is likely to be confronted with closed or closing minds. In such a situation, it is unlikely that the new juror will have a fair opportunity to express his or her views and to persuade others. Similarly, the new juror may not have a realistic opportunity to understand and share completely in the deliberations that brought the other jurors to particular determinations, and may be forced to accept findings of fact upon which he or she has not fully deliberated. (*State v. Corsaro*, *supra*, 526 A.2d at p. 1054.)

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[68] As Justice Johnson explained in *Aikens*, the New Jersey statute governing substitution of jurors is similar to and interpreted in a manner similar to California's Penal Code section 1089. (*People v. Aikens, supra,* 207 Cal.App.3d at p. 218.)

Accordingly, the *Corsaro* court concluded:

> "The requirement that juries begin deliberations anew after a juror has been substituted would be rendered nugatory if the reconstituted jury is likely to accept, as conclusively established, facts that could underlie, if not necessarily establish, its verdict on the open charges .... While the jury was not technically required to accept the facts underlying the partial verdict, the likelihood that deliberations would truly 'begin anew' was so remote, in our opinion, as to foreclose juror substitution." (*Id.* at p. 1055.)

Similar circumstances attended appellant's case at the time of substitution. Deliberations had progressed to the point where only the views of juror #10 may have stood between the fixed positions of the rest of the jurors and the return of guilty verdicts. In fact, Juror #10 told the court that the jury actually reached verdicts on 11 counts prior to the substitution of the previous juror. (45 R.T. 5433-5434, see also jury note dated March 30 1998, 19 CT 5161.) Moreover, the court implicitly endorsed the majority's position when it discharged juror #10. Indeed, juror #10 told the court that on the previous occasion when a juror was substituted there were no substantive new deliberations, instead, the majority simply told the new jurors what had already been decided. (45 R.T. 5433-5434; see also jury note dated march 30, 1998 19 C.T. 5163.) Given the circumstances of juror #10's discharge, and the failure of the trial court to admonish the jurors to discontinue its previous improper practices, it was totally unrealistic to expect the reconstituted jury to be able to deliberate de

novo and fully involve the new juror in such deliberations.

There is a substantial "inherent coercive effect upon an alternate juror who joins a jury that has ... already agreed that the accused is guilty...." (*United States v. Lamb* (9th Cir. 1973) 529 F.2d 1153, 1156.) The coercive effect is particularly strong where the sole dissenter is removed by the court, which can only telegraph to the majority that its guilty position was approved by the court. (Cf. *Lowenfield v. Phelps* (1988) 484 U.S. 231,239-241 [108 S.Ct. 546, 98 L.Ed.2d 568] [recognizing that court's conduct more likely to be interpreted as coercive where jury is aware that the court knows the numerical breakdown of the division between the jury].) The new juror was under inordinate psychological pressure to go along with the group, whose one recalcitrant member the court had removed from its body after relatively lengthy deliberations. (See, e.g., *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976, 981 [trial court coerced a verdict by its actions that "sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity"].)

This Court has emphasized that the propriety of substitution of a juror during deliberations rests on the presumption that the new juror will participate fully in the jury's deliberation:

> "It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally

> important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdicts." (*People v. Collins*, *supra*, 17 Cal.3d at p. 693.)

The deliberations of appellant's jury were irretrievably skewed, however, when the court effectively gave its imprimatur to the majority by discharging the one juror who took issue with the majority's view during those deliberations. Here, the verdicts on counts 3-12 are dated April 2, 1998 (18 C.T. 5074- 5095), **the first day of deliberations after the last alternate was substituted in**. (18 CT 5068.) All verdicts were reached on April 6, 1998, **after approximately four more hours of discussion on only the second day of deliberations** by the reconstituted jury. (18 C.T. 5069.) Unquestionably, under these circumstances, "[a] replacement juror, no matter how novel or persuasive her argument for [] acquittal may have been, would have been hard pressed to overcome the trial court's implied admonition to the original jurors to hold their ground and convict." (*Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1429 (dis. opn. of Nelson, J.).)

For these reasons, requiring redeliberation after the court removed juror #10 as it did – even if such removal was proper and even with the explicit instruction to begin deliberations anew –

invoked coerced verdicts. Accordingly, the trial court deprived appellant of his state and federal constitutional rights to a fair trial by an impartial jury, requiring reversal of the convictions. Because the coercion of the guilt verdicts rendered them unreliable, it also deprived appellant of his right to a reliable death judgment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. For all these reasons, the judgment should be reversed.

IV.

THE TRIAL COURT ERRED IN INSTRUCTING ONLY ON FIRST DEGREE FELONY MURDER WITHOUT ANY LESSER INCLUDED OFFENSE INSTRUCTION, AND IN GIVING SPECIAL CIRCUMSTANCE INSTRUCTIONS WHICH ALLOWED THE SPECIAL CIRCUMSTANCE TO BE IMPUTED TO APPELLANT.

Introduction

The trial court has a sua sponte duty to instruct on all lesser included offenses supported by the evidence. These instructions ensure that the jury is not left with an "all or nothing" situation in which it either has to convict a defendant of a more serious offense about which the jury has its doubts, or acquit the defendant despite evidence showing clear criminal culpability. Here, despite the jury's evident difficulty with the reach of the theories of vicarious liability, no instructions on lesser included offenses related to the Los homicide were given. Nevertheless, there was evidence supporting an instruction on the lesser included offense of second degree felony based on the target offense of discharging a firearm at the vehicle in a grossly negligent manner. Absent an instruction on the lesser offense, the homicide conviction must be reversed.

Factual Background

At trial, the prosecutor told the court that it was proceeding on a felony murder theory **only** with respect to appellant Williams. (8

R.T. 813.)[69] Appellant's jury was later instructed on felony murder as the sole ground for conviction on the Los homicide. (42 R.T. 5143) The only instruction given on any lesser offenses was the instruction on accessory after the fact, which defense counsel requested. (38 R.T. 4668-4670, 41 R.T. 4966-4967.)

During the discussions over jury instructions, defense counsel objected to all the aiding and abetting instructions as well as the special circumstance instruction. (42 R.T. 5117.) Those objections were overruled and a whole series of aiding an abetting instructions were given including CALJIC 3.00, 3.01, 3.02, 3.03, 3.04, 3.10, 3.11, 3.12, 3.13, 3.14, 3.18, 3.19, 3.31 as well as the special circumstance instruction, CALJIC 8.81.17. (19 CT 5180 et seq., 42 R.T. 5118, 43 R.T. 5133 et seq.)

During deliberations, appellant's jury sent the court a note that read, "I want to know if a person is a principal if the non principal commits a crime is the principal just as guilty of the crime also." (19 CT 5149.) The prosecution prepared a response using the language from CALJIC 3.00 that an aider an abetter is equally guilty with the perpetrator. (44 R.T. 5229.) Defense counsel objected. (44 R.T. 5229.) After argument, the judge determined that the appropriate

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[69] It is noteworthy that although conspiracy was not charged in this case, the prosecution used conspiracy as a theory of guilt. According to the prosecution, the object of the conspiracy was to commit theft crimes to obtain money to put in a general fund that would later be used to invest in legitimate businesses. (See e.g. 24 RT 4329; prosecution exhibit 68 at p. 45-46, 50.) The Los homicide, however was not part of that purpose. When Ms. Los was shot, Lyons and Dearaujo were simply trying to obtain transportation to a party.

response was "You are referred to instruction 3.00." [Principal is equally guilty][70] (44 R.T. 5231) and provided that answer in writing to the jury. (19 CT 5149.) The note and response are both dated March 25, 1998. (19 CT 5149.)

Standard of Review

The standard of review based on the failure to instruct on a lesser included offense is the de novo standard. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.)

Failure to Instruct on Lesser Included Offenses

Trial courts have a *sua sponte* duty to instruct on all lesser included offenses unless no rational jury could find the offense to be less than that charged. In *People v. Barton* (1995) 12 Cal.4th 186, this court emphasized that where there is evidence to support a lesser included offense, the trial court is required to instruct on it *sua sponte* even over a specific defense objection. There are several reasons why this is so. One reason is to keep the jury from facing an all-or-nothing choice between conviction and acquittal; a dichotomy that subverts the fact finding process and undermines the reliability of the verdict.

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[70] CALJIC 3.00 as it was read to the jury provides:

"Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty.

Principals include, one, those who directly and actively commit or attempt to commit the act constituting the crime, or, two, those who aid and abet the commission or attempted commission of the crime." (43 R.T. 5131

(*People v. Geiger* (1984) 35 Cal.3d 510 at p. 519, citing *Beck v. Alabama* (1980) 447 U.S. 625, 638, 643 [65 L.Ed.2d 392, 403, 406, 100 S.Ct. 2382]; see also *People v. Barton, supra*, 12 Cal.4th at p. 196.) But this is not the only or even the primary reason for the rule. "The necessity for instructions on lesser included offenses is based on the defendant's constitutional right to have the jury determine every material issue presented by the evidence." (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.)

The rule requiring instructions on lesser included offenses also is based on a consideration which is applicable to both parties: "Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716.) Put another way, the instructions on lesser included offenses have an important purpose unrelated to the interests of either party -- the discovery of truth. (*People v. St. Martin* (1970) 1 Cal.3d 524, 533; see also *People v. Barton, supra*, 12 Cal.4th at p. 196.) Accordingly, case law recognizes that for the truth to be discovered, the trial court cannot simply instruct on one lesser included offense, but rather on all lesser included offenses that may be supported by the evidence. (E.g., *People v. Ray* (1975) 14 Cal.3d 20, 27-31 (overruled on a different ground in *People v. Lasko*, (2000) 23 Cal.4th 101) [holding that the trial court erred in failing to instruct on involuntary manslaughter based on diminished capacity even though the court

instructed on the lesser included offenses of second degree murder and voluntary manslaughter]; *People v. Sedeno, supra*, 10 Cal.3d at pp. 714-715, 720 [same]; *People v. Webber* (1991) 228 Cal.App.3d 1146, 1160-1165 [holding that the trial court erred when it failed to instruct on involuntary manslaughter even though the court instructed on second degree murder and voluntary manslaughter].)

Logically, the right to have the jury consider every material issue presented by the evidence and the need to discover the truth also requires that the jury be instructed on all applicable theories of a lesser included offense. (See *People v. Doolittle* (1972) 23 Cal.App.3d 14, 19, fn. 3: "A charge of murder includes all subdivisions of murder, the lesser degrees thereof, and manslaughter.")

Additionally, any doubts about the sufficiency of the evidence to warrant a defense or lesser included offense instruction should be resolved in favor of the defendant. (*People v. Ratliff* (1986) 41 Cal.3d 675, 964; *People v. Flannel* (1979) 25 Cal.3d 668, 685.) Moreover, when making the determination whether to instruct on a lesser included offense the "trial court should not . . . measure the substantiality of the evidence by undertaking to weigh the credibility of witnesses, a task exclusively relegated to the jury." *(People v. Flannel, supra*, 25 Cal.3d at p. 684.) Even if the evidence is not of a character to inspire belief, that determination does not authorize the refusal of an instruction. (*Ibid.*, citing *People v. Carmen* (1951) 36 Cal.2d 768, 773.) Further, failing to instruct on noncapital lesser

included offenses that are supported by the evidence violates due process under the Fourteenth Amendment as well as violating the Eighth Amendment. (*Cordova* v. *Lynaugh* (5th Cir. 1988) 838 F.2d 764, 767; *Vickers* v. *Ricketts* (9th Cir. 1986) 798 F.2d 369, 371-373 [per Justice Kennedy, verdict overturned despite "abundant, clear, persuasive" evidence of guilt of first degree murder].) Verdicts following a failure to give lesser included offense instructions are more suspect in capital than non-capital cases. (*Beck* v. *Alabama, supra,* 447 U.S. at pp. 642-643.)

Significantly, under California law, the fact that the perpetrator of the crime is guilty of one crime does not mean that the person who aids and abets the perpetrator or conspires with the perpetrator is necessarily guilty of that same degree of the crime. (*People* v. *Woods* (1992) 8 Cal.App.4th 1570, 1590-1591; *People* v. *Horn* (1974) 12 Cal.3d 290, at 295; *People v. Prettyman* (1996) 14 Cal.4th 248, 275-276 [assuming but not deciding that Woods was correctly decided]. Thus the failure to instruct the jury that the aider and abetter could be guilty of a lesser offense than the actual perpetrator is an error of Constitutional magnitude.

Here, appellant was convicted of first degree felony murder (robbery). The only evidence linking appellant to the killing, however, was furnishing a weapon to Mr. Dearaujo and the knowledge that Mr. Dearaujo might (or might not) try to obtain a vehicle. The record is equivocal concerning whether Mr. Dearaujo actually intended to obtain a car and , if so, whether he intended to

obtain a car by force or simply through theft; or whether the weapon would be used to scare someone into giving up an automobile, or as a defensive measure should someone attack him as he was procuring a vehicle.

The evidence is uncontradicted that the attempt to obtain the Los vehicle was simply a method of obtaining transportation to ferry Dearaujo and Lyons to a party because they could not all fit in Ms. Coble's vehicle. (See, e.g., 26 R.T. 3699-3702.)[71] Thus, if Dearaujo and Lyons decided they did not want to go to the party, it is not at all clear that they would have even tried to obtain a vehicle. Certainly, there was no one watching the two teenagers as they wandered through the parking lot looking for a vehicle; thus there was no immediate peer pressure to commit a robbery. Even in those circumstances where appellant and other members of the group were watching, not every outing to obtain a vehicle even resulted in an actual attempt to do so. (See, e.g., 25 R.T. 3568-3571.) Thus, appellant could not know for certain that Dearaujo and Lyons would even make an actual attempt to steal a vehicle.

Even if that was not so, the jury could certainly infer that since the object of the trip to the Family Fitness Center parking lot was simply to obtain a car, there was no necessity to use force or fear to procure it. That is, if the two found a car with the keys in it, they

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[71] Since appellant already had a spot in Ms. Coble's vehicle for the ride to the party, the requirement for an additional vehicle was obviously to transport Dearaujo and Lyons to the party.

could have merely appropriated it. In a similar vein, Steve McNair testified that when he, Holland, Weatherspoon and appellant went out specifically to "carjack" a vehicle, he thought they were simply going to hotwire the car and take it. (31 RT 4275.) Obviously, simple theft of a vehicle would satisfy any requirement to obtain transportation to the party. Indeed, nothing in the evidence shows that appellant required Lyons and Dearaujo to use force or fear to obtain the vehicle. In fact, Kimberly Coble testified that she told the prosecutor and the police that appellant said to her that no one was supposed to shoot that woman. (26 R.T. 3727.)

While the record shows that appellant provided a weapon, that weapon could just as easily be used for self defense as it could for offensive purposes. Nothing in the evidence necessarily compelled the jury to find that appellant intended the gun be used to shoot someone. What the evidence shows is that appellant told the police that when he furnished the weapon, he assumed that Dearaujo and Lyons were going to commit a crime of some sort ("gonna do dirt," Prosecution exhibit 68 at p. 32), although he did not know that they were going to commit a robbery. (Prosecution exhibit 68 at p. 42.) Further, he would have loaned them the weapon virtually anytime they asked for it and for virtually any purpose they wanted. (Prosecution exhibit 68 at p. 32.)

Thus, it is certainly not a mandatory inference from the evidence that appellant either knew the two teenagers were going to use the weapon to commit a robbery or that he shared that purpose

when he loaned them the weapon. Lyons admitted that he did not know what his intent was at the time they went looking for a vehicle. He just knew he wanted to get a car to drive to a party in Anaheim. (21 R.T. 2904.) If Lyons did not know exactly what his intent was, logically, appellant could not knowingly share it.

Most significantly in this regard, however, during the discussion on jury instructions, the trial court specifically found that the evidence was insufficient to show that appellant commanded or ordered the two to commit the carjacking. (38 RT 4658-4660.) Even if that was not enough, during the prosecution's penalty phase closing argument to Mr. Dearaujo's jury, she specifically argued that the car jacking was Dearaujo's idea. (Volume 9 of the supplemental reporter's transcript at p. 7089.)[72]

Viewed as a whole, the actual shooting in this case reflects nothing more than "a rash impulse hastily executed." (Cf. *People v. Munoz* (1984) 157 Cal.App.3d 999, 1010.)[73] Far from being a

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[72] Ms. Nelson told the Dearaujo jury; "They went to commit the carjacking of Yvonne because they wanted to go with Jack. **It was his [Dearaujo's] idea**. They wanted to do it, he and Chris." ([Emphasis added] 9 Supp. R.T. at p. 7089.) A few moments later, Ms. Nelson reiterated to the jury "He's [Dearaujo] doing this all on his own. {para} There's no one there giving him step by step instructions on how to commit a carjacking.." (9 Supp. R.T. at p. 7094.)

[73] *People v. Munoz, supra*, was an attempted robbery case. The facts reveal that the defendant drove up to a person whom he did not know, Klima, and asked Klima for directions. Almost immediately the defendant demanded Klima's wallet. When Klima refused, Munoz shot him. The defendant was convicted of first degree murder. Commenting on that result, the court in *Munoz* stated:

"Under the circumstances of this case, the brief time, seconds,

calculated plan to kill, the shooting here was a reflexive act and the bullet accidentally hit a vital spot. The homicide was committed by a slow-witted and panicky teenager who did not know how to handle a volatile situation and who could not make good decisions quickly. [74] (Cf. *Jackson v. State* (1991) 575 So. 2d 181, 192-193; see also *People v. Dillon* (1983) 34 Cal.3d 441.) [75]

Although the evidence here was consistent with first degree felony murder (robbery), it was also consistent with second degree felony murder based on the target offense of discharging a firearm in a grossly negligent manner under Penal Code, section 246.3. (*People v. Robertson* (2004) 34 Cal.4th 156, 165-167) As a matter of law, second degree felony murder is a lesser included offense of first degree felony murder. (See, e.g., *People v. Cole, supra,* 33 Cal.4th

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from Munoz' first confrontation with Klima until the shooting do not establish the killing was the result of preexisting reflection, careful thought and weighing of considerations." (*Id.*, at p. 1010.)

[74] In fact, in the penalty phase trial for Mr. Dearaujo,, Dr, Moral, a psychologist testified that Mr. Dearaujo told him that he [Dearaujo] shot Ms Los because he panicked, NOT because she could identify him . (Supplemental R.T. Vol. 9 at p. 6998.)

[75] In *Dillon*, the defendant fired nine shotgun blasts into the victim who was attempting to protect his property from a team of youths who armed themselves and invaded the victim's farm as part of a well-planned criminal conspiracy to rob him. Dillon, was convicted of first-degree robbery felony murder and there was little dispute that the crime of which he was convicted was reprehensible. (*Id.* at p. 483.) Nevertheless, the Court reduced Dillon's conviction to second degree murder, primarily because of his individual background. The comparison between the facts of this case and thos e of *Dillon* is discussed more fully in Issue XIX.

1158, 1218.)

Additionally, although grand theft auto is not an inherently dangerous felony that will support a second degree felony murder instruction (*People v. Williams* (1965) 63 Cal.2d 452, 458, fn. 5), under the circumstances of this case a jury could consider this to be an intentional but unpremeditated shooting and thus second degree murder. (See *People v. Satchell* (1971) 6 Cal. 3d 28, 34 fn 11[76]: disapproved on a different point in *People v. Flood* (1998) 18 Cal. 4th 470.)

The language from the *Woods* case is instructive on this point: "the evidence established beyond question that the necessarily included offense of second degree murder (i.e., an intentional but unpremeditated killing or a killing resulting from conduct inherently dangerous to human life) was a reasonably foreseeable consequence. Thus, the trial court had a duty to inform the jurors they could convict Windham of second degree murder as an aider and abettor even though they found Woods was guilty of first degree murder..." *(People v. Woods, supra,* 8 Cal.App.4th at p. 1578.)

Finally, the mere furnishing of a weapon to a codefendant with the knowledge that it might be used in a criminal act, or even a homicide, amounts to nothing more than criminal negligence

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[76] In footnote 11 of *Satchell*, this court observed: "If the defendant commits the felony in a highly reckless manner, he can be convicted of second degree murder independently of the shortcut of the felony-murder rule. Under California's interpretation of the implied malice provision of the Penal Code [§§ 188], proof of conduct evidencing extreme or wanton recklessness establishes the element of malice aforethought required for a second degree murder conviction."

supporting a voluntary manslaughter conviction. (See *People v. Howk* (1961) 56 Cal.2d 687, 703-704.) Thus, the jury could have found appellant guilty as an aider and abetter of the lesser included offense of voluntary manslaughter as well.

The furnishing of the weapon is the critical fact implicating appellant. Thus, in the defense view, the jury must find unanimously and unambiguously that it was given specifically for the purpose of robbery. (*Cf. Apprendi v. New Jersey* (2000) 530 U.S. 466, 476.) Here, the evidence and general verdict are too ambiguous to conclude that the jury necessarily made that finding. Certainly no verdict on any other offense or the special circumstance shows that the jury made that factual finding. Even if that was not so, since the jury note confirms that the jury was unsure of the extent of appellant's legal and moral culpability, any such jury finding certainly could not stand reliably in the absence of an opportunity to consider lesser findings. (*Beck v. Alabama, supra*, 447 U.S. at 637-638.)

The aider and abetter instructions given to the jury after it questioned whether it could find appellant guilty of a lesser offense simply aggravated the problem. By telling the jury that an aider and abetter was equally guilty with the principal (19 CT 5149), it denied the jury the opportunity to find appellant guilty of any lesser offense than Dearaujo.

Since this jury did NOT deliberate Mr. Dearaujo's fate, it did not have the range of options available to it that Dearaujo's jury did. Appellant's jury had to speculate about what offense Mr. Dearaujo

might be guilty of and then, based on that guess, make a decision about what offense appellant might be guilty of aiding and abetting. Moreover, since the only offense on which appellant's jury was instructed was felony murder, it necessarily assumed that Mr. Dearaujo must be guilty of that offense as well. After all, he was the triggerman. As explained above, however, since there were multiple lesser included offenses of which appellant could be found guilty, and aider and abetter liability is derivative (*People v. Prettyman, supra, 14* Cal.4th at p. 290) if appellant's jury knew of the possibility of lesser offenses, it might have convicted him of a lesser offense.

Prejudice

Under California law in a non capital context, the failure to instruct *sua sponte* on lesser included offenses is measured under the Watson[77] standard of prejudice. (*People v. Breverman* (1998) 19 Cal.4th 142.) In the capital context, however, the failure to instruct on a lesser included offense is a violation of the Fifth and Fourteenth Amendment Due Process clause, the Sixth Amendment right to a jury trial as well as the Eighth Amendment. (Cf. *Vickers* v. *Ricketts, supra,* 798 F.2d at pp. 371-373; *United States v. Gaudin* (9th Cir. 1995) 28 F.3d 943, 951 [cert. grd. o.g. and aff'd, 515 U.S. 506 [115 S.Ct. 2310, 132 L.Ed.2d 444].) Thus the error is judged under the *Chapman* standard. (*Beck* v. *Alabama, supra* 447 U.S. at pp. 642-643.)

Under the *Chapman* harmless error standard, the case will be

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77 *People v. Watson* (1956) 46 Cal.2d 818, 836

reversed unless there is no reasonable possibility the error materially affected the verdict. (*United States* v. *Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 297 n. 3. See also, *Hopper* v. *Evans* (1982) 456 U.S. 605; *Schad* v. *Arizona* (1991) 501 U.S. 624, 645-648 [no error in failing to instruct on robbery and theft lesser included offenses where jury was instructed upon, and rejected, second degree murder lesser included offense]; *Wade* v. *Calderon* (9th Cir. 1994) 29 F.3d 1312, 1320-1322, overruled on other grounds in *Rohan ex rel Gates v. Woodford* (2003) 334 F.3d 803, 815 [where jury instruction omits necessary element of special circumstance, i.e., that defendant intended to torture the victim, constitutional error has occurred which was not cured by other instructions or the fact that the jury sentenced the defendant to death]. Moreover, as to the actual harmless error analysis, it should be kept in mind that to obtain a more favorable verdict it is only necessary for one juror to have voted differently. (See *People v. Flood* (1998) 18 Cal. 4th 470 [question is whether any "rational juror, properly instructed, could have found [in favor of the defendant as to the omitted element]"; see also *Duest v. Singletary* (11th Cir. 1993) 997 F2d 1336, 1339.)

The error compels reversal of appellant's convictions under either standard. Here, the jury specifically asked if appellant's criminal liability as an aider and abetter was the same as that of Mr. Dearaujo. The judge replied that it was. (19 C.T. 5163.) The jury. or at least some its members were likely seeking a legal way to find appellant less guilty than Dearaujo. Moreover, since appellant wasn't

at the scene, did not know for sure that Dearaujo and Lyons would even attempt a robbery, much less a shooting, and did not find out about the incident until later, it would certainly be reasonable of a juror to seek a lesser penalty than death for appellant. (Cf. *People v. Fauber* (1992) 2 Cal.4th 792, 834. [No accomplice liability as a matter of law after codefendant said "either do it" or "blow it off." That is, no suggestion that codefendant had any prior knowledge the offense would actually take place and expressed surprise after he learned of it. Moreover, the evidence is not clear that codefendant knew when, how or even if the offense would take place.]) The problem for the jury here, however, is that under the judge's instructions, either it had to acquit appellant or convict him of capital murder. This is exactly the dilemma posed by *Beck.* Indeed, relying on *Beck*, this court noted in *People v. Dennis* (1998) 17 Cal.4th 468, 502 that a "jury's guilt determination would be unreliable if the jury is forced to make an all or nothing choice between a capital verdict and an acquittal." However, when the jury is presented with options short of acquittal, this central concern of *Beck* does not apply. (*Id.*, at p. 503.) Since the only option offered to the jury in this case, however, was first degree felony murder or acquittal, the failure to instruct on the lesser included offenses to a jury that was plainly searching for a lesser offense resulted in a Constitutionally defective verdict. Therefore, under the circumstances presented by this case, reversal is required.

INTRODUCTION TO VICARIOUS LIABILITY ISSUES

Since appellant was not present when many of these offenses took place, particularly the Los homicide, the core of the prosecution's case was vicarious liability. In the guilt phase, the prosecution sought to demonstrate appellant's criminal culpability as either an aider and abetter or a coconspirator [although conspiracy was not alleged as a separate offense]. In the penalty phase, the prosecution tried to demonstrate that appellant was a sufficiently violent person that even though he was physically removed from most of the actual crimes, his moral culpability was such that he deserved the death penalty.

The jury notes and the instructional issues discussed in this section demonstrate that the jury was having a very difficult time with the whole notion of vicarious liability. Not only is the law of vicarious liability notoriously difficult for lay persons to fully grasp, but the several notes demonstrate that the jury was not entirely convinced that the evidence supported the prosecution's theories.

The essence of the prosecution's position was that when appellant and the others met at Natalie Dannov's house on the evening of May 14, 1993, appellant set himself up to be the leader of a group that agreed to commit crimes, primarily carjackings and robberies but perhaps murder as well, in order to obtain money to invest in stocks, buy a house and gain wealth. Essentially, the group would use criminal activity to obtain sufficient capital to become

legitimate businessmen. While prosecution witnesses certainly provided some evidence of that, the nature and extent of appellant's purported leadership and the actual agreement was far from clear.

There were apparently two factions in this group, one headed by appellant and one headed by Mondre Weatherspoon. The members of the faction purportedly headed by appellant looked to appellant for leadership. Their testimony about the purpose of the group differed significantly. Some saw it (as the prosecution urged) as a real organization dedicated to the goal of making money to become legitimate businessmen. Others saw it as simply a loose group of teenagers who would commit crimes if the opportunity presented itself, but whose primary purpose was to party and have fun.

Members of the Weatherspoon faction did not acknowledge appellant as a leader or that there was even a defined group let alone a group that specifically agreed to a plan to commit crimes.

There were three jury notes. Taken together they show that the jury simply did not understand the law of vicarious liability. Unfortunately, the trial court's response to all of these inquiries essentially was to refer the jurors to the instructions previously given. Under the circumstances of this case, that direction was distinctly unhelpful. Moreover, to the extent that the trial court tried to expand on its responses, the directions were misleading at best and simply wrong at worst.

Finally, the notes indicate that the jury was largely unconvinced that there was any actual overall agreement to commit

crimes apart from a general teenage thrill seeking/braggadocio by engaging in risky behavior. Instead, the jury tried to focus on appellant's liability for each specific incident rather than a general vicarious liability. On each occasion when the jury asked for guidance on such issues, the trial court refocused the jury on general vicarious liability as an aider and abetter or a coconspirator, thus precluding individual consideration of criminal liability for each separate crime.

For ease of understanding, appellant discusses each jury note and each theory of liability separately. The problems, however, are inextricably linked together in misdirecting the jury in its deliberative tasks. Therefore, both individually and cumulatively, the errors set forth below require reversal.

V.

THE TRIAL COURT'S ANSWER TO THE JURY'S QUESTION REGARDING AIDER AND ABETTER LIABILITY WAS NEITHER RESPONSIVE NOR IMPARTIAL. THE RESPONSE THUS VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS; HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL AND HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE GUILT DETERMINATION IN A CAPITAL CASE.

Introduction

A jury note expressing confusion on the law informs the judge that the instructions given are not adequate to permit the jury to deliberate fully and fairly. Here, a jury note expressed confusion concerning the matters that constitute aider and abetter liability for felony murder. The court's simple reference to CALJIC 3.00 [all principals equally guilty] did not explain the requisite causal and temporal relationship between the underlying felony and the act resulting in death. Moreover, by omitting any reference to that relationship, the court's response not only failed to clarify the legal issue, but impliedly endorsed the prosecution's theory of guilt.

Summary of Argument

In a note submitted during deliberations, the jury requested clarification of aider and abetter liability for felony murder. Over defense objection, the trial court simply directed the jury to reread CALJIC 3.00 [all principals are equally guilty]. The trial court failed

to alert the jury to CALJIC 8.27, the instruction which explains the causal and temporal requirements for aider and abetter liability in felony murder. Therefore, the court's reply failed to properly explain the legal issue confronting the jury. That error alone would cause reversal. Nevertheless, by referring the jury to CALJIC 3.00 and not CALJIC 8.27, the judge implicitly endorsed the prosecution's theory of the case and failed to give the jury an impartial view of the evidence.

Appellant was severely prejudiced by this combination of errors. Vicarious liability was the fundamental issue for the jury in the case. The jury's note clearly indicated that it was not fully convinced that the prosecution proved its claim that appellant was an aider and abetter to felony murder. That is, had the aider and abetter instructions been clear, and had the jury been convinced by the evidence, the note would have been unnecessary. Under the circumstances presented here, a reviewing court cannot say beyond a reasonable doubt that the errors did not contribute to the verdict. Reversal is compelled.

Factual Background

At the close of the evidence, the jurors were given all the standard aider and abetter instructions, as well as CALJIC 8.27 [Aider and Abetter Liability for Felony Murder].[78] After several days of

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[78] CALJIC 8.27, as it was read to the jury provides:

"If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery, all persons

deliberation, the jury sent the court a note expressing concern over the extent of appellant's liability as an aider and abetter for felony murder. The jury note read, "I want to know if a person is a principal if the non principal commits a crime is the principal just as guilty of the crime also" (19 CT 5149.) Over defense objection, the judge determined that the appropriate response was "You are referred to instruction 3.00." [Principal is equally guilty][79] (44 R.T. 5231; 19 CT 5149.) However, the judge did not reread CALJIC 8.27 to the jurors or otherwise refer them to that instruction.

Aider and Abetter Liability for Felony Murder

A defendant's criminal culpability for felony murder based on a killing perpetrated by another requires "both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death." (*People v. Cavitt* (2004) 33 Cal.4th 187, 193.)

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who either directly and actively commit the act constituting that crime or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging or facilitating the commission of the offense aid, promote, encourage, instigate by act or advice its commission are guilty of murder in first degree, whether the killing is intentional, unintentional or accidental." (44 R.T. 5275.)

[79] CALJIC 3.00, as it was read to the jury provides:

"Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty.

Principals include, one, those who directly and actively commit or attempt to commit the act constituting the crime, or, two, those who aid and abet the commission or attempted commission of the crime." (43 R.T. 5131.)

That is, in order for the nonkiller to be complicit in the homicide, there must be some causal and temporal nexus. "The causal relationship is established by proof of a *logical nexus, beyond mere coincidence of time and place,* between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of *one continuous transaction.*" (*Id.* at p. 193, italics added.)

CALJIC 8.27 explains this causal and temporal relationship and the trial court has a clear duty to provide the jury with guidance on this " 'complicity aspect' " of felony murder. (*People v. Pulido* (1997) 15 Cal.4th 713, 720.)

Requirement for Adequate Instructions

The jury note presented the trial court with a question fundamental to the basic fairness of the judicial process. The jury wanted more information regarding a legal principle contained in a jury instruction they had already received.

When the jury requested clarification on the nonkiller's liability for the homicide, the judge responded by referring to CALJIC 3.00 (principals are equally guilty). Unaccountably, the court did not refer the jurors to CALJIC 8.27 which actually explains the causal and temporal requirements for a finding of aider and abetter liability in a felony murder case. The error in failing to adequately respond to the jury's request is absolutely clear.

"The responsibility for adequate instruction becomes

particularly acute when the jury asks for specific guidance." (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 498 ; see also *McDowell v. Calderon* (9th Cir. 1997) 130 F3d 833; accord, *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 387;.) "Where ... the need for more [instruction] appears, it is the duty of the judge ... to provide the jury with light and guidance in the performance of its task." (*Wright v. United States* (D.C. Cir. 1957) 250 F2d 4, 11.) "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States* (1946) 326 US 607, 612-613 [90 LEd 350]; accord, *Powell v. United States* (9th Cir. 1965) 347 F2d 156, 157-58; *United States v. Harris* (7th Cir. 1967) 388 F2d 373, 377.) "To perform their job properly and fairly, jurors must understand the legal principle they are charged with applying ... A jury's request for ... clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) Additionally, Penal Code section 1138 "imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 96-97.)

Certainly the precise nature of any amplification, clarification or rereading of instructions is a matter of judicial discretion. (*United States v. Bolden* (D.C. Cir. 1975) 514 F2d 1301, 1308; see also *People v. Beardslee, supra,* 53 Cal.3d at p. 97) Nevertheless, "there are necessarily limits on that discretion." (*United States v. Bolden, supra.*

514 F.2d at p. 1308.) "When the jury makes a specific difficulty known ... [a]nd when the difficulty involved is an issue ... central to the case ... helpful response is mandatory." (*Price v. Glosson Motor Lines* (4th Cir. 1975) 509 F2d 1033, 1037.)

At a minimum, the court must inquire into the jurors' confusion and seek to identify the source of the question. (See *McDowell v. Calderon, supra,* 130 F3d 833, 839; *People v. Thompkins, supra* 195 Cal App.3d at 250; *Powell v. United States, supra,* 347 F2d 156, 157.) Thereafter, the reinstruction or amplification should be fully sufficient to eliminate the confusion. (See, *United States v. Bolden, supra,* 514 F2d at 1308-09; see also *United States v. Gordon* (9th Cir. 1988) 844 F2d 1397, 1401-02 [error to rely on original instruction where jury expressed confusion regarding conspiracy counts]; *United States v. Walker* (9th Cir. 1978) 575 F2d 209, 213 [trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion].)

A cursory response which does not clarify the confusion is insufficient. *(People v. Thompkins, supra,* 195 CA3d at 250; see also *United States v. Petersen* (9th Cir. 1975) 513 F2d 1133, 1136 [giving cursory supplemental instruction in face of jury confusion was insufficient].) Also insufficient is a perfunctory rereading of the general instructions which were previously given. (*United States v. Bolden, supra,* 514 F2d at 1308-09.)

Here, the court's supplemental instructions were inadequate to clear up the jury confusion. The instructions given were inadequate

because they told the jurors that appellant was equally guilty with the actual perpetrator when it was clear that the jury was not convinced that appellant's culpability was equal to that of Dearaujo.

The prosecution's only theory of criminal culpability was felony murder. (8 R.T. 813.) CALJIC 8.27 guides the jury in its determination of whether the requisite causal and temporal relationship actually exists in a felony murder prosecution. Thus, the failure to even refer the jury to this critical instruction when the jury note clearly showed that the jury was struggling with this central issue in the case amounts to a deprivation of federal and state due process under the Fifth and Fourteenth Amendments. Moreover because it failed to clarify or fully explain the matters at issue for the jury, the error also violated the defendant's Sixth Amendment right to a jury trial and his Eighth Amendment right to a reliable guilt phase verdict in a capital case.

In this regard, the jury may well have been convinced that appellant had no criminal culpability for the homicide at all. As appellant pointed out extensively in issue IV (and that explanation is incorporated herein by reference), appellant wasn't at the crime scene, did not know for sure that Dearaujo and Lyons would even attempt a robbery, much less a shooting, and did not find out about the incident until after Ms. Los was already dead. On these facts, a jury could reasonably conclude that the prosecution did not establish the temporal and causal nexus between the felony and the killing.

Requirement for Impartial Instructions

Aside from the problem that the court's response did not fully explain the requisite causal and temporal nexus, the supplemental instruction was fatally unbalanced. It favored the prosecution's theory of the case and essentially directed a verdict for first degree felony murder.

Both state and federal decisions have long recognized that instructions "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence are impermissible," because such an instruction is argumentative. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1276, citing *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1138.) A judge is prohibited from giving the jury argumentative instructions or comments favoring a certain party. (Cf. *Quercia v. United States*, (1933) 289 U. S. 466, 469-470.) Federal and state due process notions under the Fifth and Fourteenth Amendments as well as Cal. Const., art. I, §§ 7 and 15 demand that when the jury has expressed difficulty in resolving an issue at trial, the court's response must be balanced and not unequally favoring either side.

In a comment that applies with great force to this case, the Fifth Circuit quoted from *Bollenbach, supra,* noting:

> "It is well-established that in giving additional instructions to a jury, particularly in response to inquiries from the jury, a court must be especially careful not to give an unbalanced charge. Although the failure to give any presumption of innocence

> instruction does not mandate reversal in all criminal appeals, [citation omitted] the particular significance of a supplemental charge when a jury has been unable to reach a decision on the basis of all it has heard up until that time demands an exacting sensitivity on the part of the trial court to give an accurate and balanced instruction." [*Bollenbach v. United States* (1946) 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350 [additional citation omitted] (*United States v. Meadows* (5th Cir.1979) 598 F.2d 984, 990)

The *Meadows* case arose in the context of a jury requesting additional instruction on the law of fraud. The instruction was given but the instructions impermissibly lacked a "balancing" instruction on the requisite burden of proof in that trial. (*Id.*, at p. 989.)

Additionally, when addressing this problem of partisan instructions, the Fifth Circuit explained:

> "When the jury requests further instructions on points which are favorable to the Government, the trial judge should repeat instructions favorable to the defense where the requested instructions taken alone might make an erroneous impression in the minds of the jury. [citation omitted] In the present case the instructions requested by the jury were not inherently favorable to either side; but the trial court went beyond the request to provide additional instructions strongly emphasizing the theory of the prosecution. [citation omitted] (*United States v. Carter* (5th Cir. 1974) 491 F.2d 625, 634.)

The *Carter* decision further observed:

> "It must be recognized that the jury has been unable to reach a decision on the basis of all it has heard up until that time. Under those circumstances a trial judge must be acutely sensitive to the probability that the jurors will listen to his additional instructions with particular interest and will rely more heavily on such instructions than on any signal portion of the original charge. Thus, the court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial." (*Id.,* at p. 633.)

In *People v. Rodriguez* (1986) 42 Cal.3d 730, this court also has established similar guidelines in the area of constitutionally authorized judicial comment, distinct from the area of jury instruction. There, this court wrote, "the decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact finding power. [Citations.]" (Id., at p. 766, cited with approval in *People v. Proctor* (1992) 4 Cal.4th 499; See also, *People v. Gates* (1987) 43 Cal.3d 1168, 1207.)

The *Rodriguez* opinion also noted that a trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but may focus

critically on particular evidence, expressing views about its persuasiveness. [Citations.]" (*People v. Rodriguez, supra*, 42 Cal.3d at 768 .) Further;

> " . . .Appellate courts still must evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury. (*E.g., People v. Scott* (1960) 53 Cal.2d 558, 564) [additional citation]
>
> . . .
>
> As we have suggested, "a trial court that chooses to comment to the jury must be extremely careful to exercise its power 'with wisdom and restraint and with a view to protecting the rights of the defendant.' [Citations.] court's comments must be scrupulously fair and may not invade the province of the jury as the exclusive trier of fact. [Citation.]" (*Id* at pp. 766-767.)

The supplemental instruction given to the jury in this case impliedly directed a verdict for the prosecution on a first degree felony murder theory. The jury specifically asked if appellant's criminal liability as an aider and abetter was the same as that of Mr. Dearaujo. By referring the jury solely to CALJIC 3.00 and NOT to CALJIC 8.27, the judge clearly implied that it was. (19 C.T. 5163.) Moreover, absent a thorough explanation of the principles of causation and temporal relationships, such as those contained in CALJIC 8.27, the jury obviously believed it had no legal theory by which it could acquit appellant of the homicide.

The instructional errors here implicate not only state and federal due process, but appellant's rights to trial by jury, and to fair and

reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

Prejudice

Given this basic denial of fundamental federal Constitutional rights, the errors are reviewed under the *Chapman*[80] standard of prejudice. That is, could this court declare beyond a reasonable doubt that a properly instructed jury would have found appellant guilty as an aider and abetter of first degree felony murder? (See *People v. Sakarias* (2000) 22 Cal.4th 596, 625.) Clearly not. The jury's own question indicated it was unsure whether the prosecution proved the central factual issue of the case, the causal and temporal relationship between the underlying felony and the act resulting in death. Certainly the jury was induced to ask this question because one or more of its members was unconvinced that prosecution proved that defendant had anything to do with the death of Ms. Los. Here, since appellant wasn't present at the Family Fitness Center, did not know for sure that Dearaujo and Lyons would even attempt to obtain a vehicle and did not find out about the incident until after the shooting was over, it would certainly be reasonable of the jury to determine that appellant was not an accomplice to the homicide. (Cf. *People v. Fauber*, *supra* 2 Cal.4th at p. 834.) Significantly, the trial court specifically ruled

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80 *Chapman v. California* (1967) 386 U.S. 18 at p. 24

that the evidence was **NOT** sufficient to show that appellant commanded or ordered the two perpetrators to commit the carjacking. (38 RT 4658-4660.) Moreover, even furnishing a weapon would not necessarily result in culpability for first degree felony murder. (*People v. Howk, supra,* 56 Cal.2d at pp. 703-704.) Thus, where the circumstances surrounding the felony and the killing are not entirely clear, it remains entirely the province of for the jury to say that it is unable to determine with any degree of certainty that the requisite causal connection has been shown.

If the jury fully understood the instructions that it had been given concerning aider and abetter liability for felony murder, it would never have had to propound a question to the court in the first place. Simply by asking the question, however, the jurors explicitly told the court that they found the instructions confusing and did not understand how to apply them. There is simply no way to assume that when the court denied them assistance the court, they nevertheless returned to their deliberations and correctly found the answer that had previously eluded them.[81] Given the importance of the instructions

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[81] The United States Supreme Court has frequently accepted jury questions as evidence that the trial judge's original instructions were not sufficiently clear. (See, e.g., *Shafer v. South Carolina* (2001) 532 US 36 [149 LEd2d 178; 121 SCt 1263, 1273] ["*Shafer's* jury left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means"]; *Simmons v. South Carolina* (94) 512 US 154, 178 [129 LEd2d 133; 114 SCt 2187] ["That the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison"]; *Bollenbach v. United States* (46) 326 US 607, 612 [90 LEd2d 350; 66 SCt 402] ["The jury's questions . . . clearly indicated that the jurors were confused"].) The Ninth Circuit has done so as well. (*Morris v. Woodford* (9th Cir. 2001) 273 F3d 826, 840 [citing fact that jury asked mid-deliberation question as evidence that it was

which are provided to a deliberating jury, it has been said that "there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations." (*People v. Thompkins, supra*, 195 Cal.App.3d 244, 252-253.)

For these reasons, this court cannot conclude that the error was harmless beyond a reasonable doubt. Therefore, appellant's conviction must be reversed.

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confused by the original instruction]; *United States v. Frega* (9th Cir. 1999) 179 F3d 793, 809 [stating that a reviewing court may infer from the jury's questions that it was confused about a controlling legal principle].)

VI.

CALJIC 3.02 WAS MISLEADING AND APPLIED AN IMPROPER STANDARD FOR A NONKILLER WHO AIDED AND ABETTED IN A FELONY MURDER CASE.

Introduction

As appellant explained in the prior issue, aider and abetter liability for a nonkiller in a felony murder case requires both a causal and temporal relationship between the underlying felony and the homicide. CALJIC 3.02, however substitutes a negligence standard for those requirements. That is, CALJIC 3.02 requires that the nonkiller merely commit an act the natural and probable consequences of which are a homicide. This standard is entirely different, and lowered the prosecution's burden of proof in a felony murder case in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments

Factual Background

CALJIC 3.02 as it was read to the jury in the guilt phase provides:

> One who aids and abets another in the commission of a crime is not only guilty of those crimes, but is also guilty of any other crimes committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.
>
> In order to find the defendant guilty of the crimes charged in Counts I through XI, you must be satisfied beyond a reasonable doubt that, one, the crime or crimes of robbery, attempted robbery, attempted kidnapping for robbery and murder were

committed; two, that the defendant aided and abetted those crimes; three, that a co-principal in that crime committed the crimes of robbery, attempted robbery, attempted kidnapping for robbery and murder, and, four, the crimes of kidnapping for robbery and murder were a natural and probable consequence of the commission of the crimes of robbery. (43 R.T. 5132-5133.)

This instruction made an aider and abettor liable for felony murder, and a death sentence, even if he did not share the intent needed for the underlying felony, for felony murder, or for capital murder. This error violated appellant's fundamental rights to due process and a fair jury trial as well as the heightened reliability requirements of the Fifth, Sixth, Eighth and Fourteenth Amendments.

The Natural and Probable Consequences Instruction is Unconstitutional

The problem with the natural and probable consequence portion of the instruction quoted above is that it implied that an aider and abettor who intentionally aids the first crime (such as the unlawful attempted taking of a vehicle) is, by operation of law, automatically guilty of any other unintended crime just so long as such crime is the natural and probable consequence of the first crime. Therefore, the probability that the jury in this case may have understood this instruction to permit it to convict appellant of felony murder and special circumstance murder without a need to decide if he had the otherwise requisite intent renders his convictions for those crimes invalid under *Stromberg v. California* (1931) 283 U. S. 359, 368.

The natural and probable consequence theory is unconstitutional in a capital case because it permits criminal liability to be imposed

upon an aider and abettor based on the finding that the crime committed by the perpetrator was a "natural and probable consequence of that target crime which was aided and abetted." (*People v. Croy* (1985) 41 Cal.3d 1, 12.) Such a result is not consistent with fundamental principles of our criminal law because it allows liability to be imposed based upon negligence even when the crime involved requires a different state of mind. (LaFave and Scott, *Substantive Criminal Law*, (1986) § 6.8, p. 158.)

Professors LaFave and Scott have also noted that the natural and probable consequence doctrine is based on what a reasonable person would foresee as probable and natural consequences and then uses that standard to impute conclusively a higher degree of criminal culpability to a person who may not, in fact, have foreseen, let alone intended or deliberated, such consequences. (*LaFave* and *Scott, supra.*) In a prosecution for murder, the doctrine operates as an irrebuttable presumption that a non-killer (i.e., an aider and abettor to some contemplated offense) has malice and/or some alternative mens rea sufficient to establish guilt of murder, even though such a state of mind could not be presumed and would have to be proven in order to convict the actual killer. (*Ibid.*)

As the concurring opinion in *People v. Luparello* (1986) 187 Cal.App.3d 410, 452 observed; a natural and probable consequence doctrine can produce anomalous results by basing an accomplice's culpability, not on his own intent, but rather on the intent of the perpetrator or on other circumstances of the crime. Thus, the liability

of the aider and abettor is not based on his individual mental state but instead turns on the jury's finding as to the perpetrator's mental state. (Kadish, "*Complicity, Cause and Blame: A Study In the Interpretation of Doctrine*," 73 Cal.L.Rev. at p. 346 (1985).) Moreover, since appellant's jury was not required to deliberate or consider Dearaujo's intent, **it could base a murder conviction on mere speculation** about the perpetrator's intent.

Such a result blatantly offends due process and the right to a jury trial. In *Clark v. Jago* (6th Cir. 1982) 676 F.2d 1099, the jury was instructed that "the essential element of purpose to kill could be found in the mind of the defendant and/or his accomplice." (*Id.* at p. 1104.) The Sixth Circuit Court of Appeals found that the instruction violated due process because it could have been interpreted to mean that it was not necessary for the accomplice personally to have had the purpose to kill because the purpose of the actual killer was sufficient to convict the accomplice. (*Id.* at p. 1105.)

To the extent instructions on the natural and probable consequence doctrine permit the jury to find essential elements of the crime by reference to the perpetrator's mental state rather than to the actual mental state of the aider and abettor, such instructions violate due process. Moreover, in a case where the death penalty could result from convictions based on such instructions, they violate the Eighth Amendment. The United States Supreme Court pointed out in *Furman v. Georgia* (1972) 408 U. S. 238, 313, a death penalty statute must provide a meaningful basis for distinguishing the few cases in which

the death penalty is imposed from the many cases in which it is not. This instruction on the natural and probable consequence doctrine would allow for a death sentence based on a vicarious negligence theory of liability and thus offends the requirement that the death penalty is reserved for those killings which society views as the most grievous affronts to humanity. (*Zant v. Stephens* (1983) 462 U.S. 862, 877, fn 15 [103 S.C..2733, 77 L.Ed.2d 235].)

Accordingly, for all of the foregoing reasons the erroneous instruction on the natural and probable consequences doctrine requires reversal of appellants convictions, the specific circumstances findings, and appellant's sentence of death.

VII.

ALTERNATIVELY, IF THE JURY WAS PROPERLY INSTRUCTED ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE, THE TRIAL COURT ERRED IN FAILING TO MODIFY THE INSTRUCTION SUA SPONTE TO TELL THE JURY THAT THE TEST WAS AN OBJECTIVE RATHER THAN A SUBJECTIVE ONE.

Error in Giving the Standard Instruction.

The trial court erred by not modifying CALJIC No. 3.02 to inform the jury that the determination of whether a particular crime was a natural and probable consequence of a criminal act requires the application of an objective rather than subjective test. (*People v. Woods, supra*, 8 Cal.App.4th at p. 1587; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) The question of whether the ultimate crime was the natural and probable consequence of the target offense is not an issue of law. **It is an issue of fact** for the jury that must be resolved in light of all the circumstances. . (*People v. Croy, supra*, 41 Cal.3d at p. 12, fn.5.) "The issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*People v. Woods, supra*, at p. 1587; *People v. Nguyen, supra*, at p. 531.)

Whether the shooting of Ms. Los was a natural and probable consequence of the underlying felony was a critical factual question for the jury to decide. The jury note clearly shows that the jury was having difficulty deciding where appellant's culpability (if any) lay. As appellant previously explained, the evidence shows that appellant told the police that when he furnished the weapon, he assumed that Dearaujo and Lyons were going to commit a crime of some sort ("gonna do dirt," Prosecution exhibit 68 at p. 32), although he did not know that they were going to commit a robbery. (Prosecution exhibit 68 at p. 42.) Further, he would have loaned the weapon to the two teenagers virtually anytime they asked for it and for virtually any purpose. (Prosecution exhibit 68 at p. 32.) In this regard, on cross examination, Mr. Lyons admitted that he told police that he and Mr. Dearaujo **volunteered** to get a car. (20 R.T. 2832.) Lyons also admitted that he did not know what his intent was at the time he and Dearaujo went looking for a vehicle. He just knew he wanted to get a car to drive to a party in Anaheim. (21 R.T. 2904.) Most significantly, however, during the discussion on jury instructions, the trial court found **as a matter of law** that the evidence was insufficient to show that appellant commanded or ordered the two to commit the carjacking (38 RT 4658-4660.)

The reality of the homicide in this case is that it reflects nothing more than "a rash impulse hastily executed." (Cf. *People v. Munoz*, *supra,* 157 Cal.App.3d at p. 1010.) It was committed by a slow-witted and panicky teenager who did not know how to handle a rapidly

evolving and volatile situation. The shooting here was nothing more than a reflexive act and the bullet accidentally hit a vital spot. (Cf. *Jackson v. State, supra,* 575 So. 2d 181 at pp. 192-193; see also *People v. Dillon, supra,* 34 Cal.3d 441, 487-489.)

Under these circumstances, there is no mandatory inference that appellant either knew Lyons and Dearaujo were going to use the weapon to commit a robbery or that he shared that purpose when he loaned them the weapon. Indeed, the jury could have found that the robbery itself was an independent act conjured up by Dearaujo and Lyons, or that the shooting of Ms. Los was an independent act done by a panicky teenager after the robbery attempt had been abandoned. Therefore, whether the killing of Ms. Los was in fact a natural and probable consequence of appellant's activities was a key factual question which only could have been resolved by the jury if they were properly instructed to apply an objective test. (Cf. *People v. Fauber, supra*, 2 Cal.4th at p. 834.)

Sua Sponte Duty to Give Correct Instructions

Since the prosecution relied on the natural and probable consequences doctrine, the trial court clearly assumed that it had a *sua sponte* duty to give CALJIC 3.02 and did so. (See, e.g., *People v. Prettyman, supra,* 14 Cal.4th at p. 269.) Unfortunately, although the court informed the jury about the natural and probable consequences doctrine, it did not inform the jury that it should apply an objective test to determine whether a reasonable person in appellant's position would have or should have known that the charged offense was a reasonably

foreseeable consequence of the act he allegedly aided and abetted. The defense notes that in the wake of the 1996 decision in *People v. Prettyman, supra,* 14 Cal.4th 248, the form version of CALJIC 3.02 has been modified to specifically include an objective test.[82] (See also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) Certainly once a trial court is alerted to the need for an instruction, the court has an obligation "to give a correctly phrased instruction." (*People v. Forte* (1988) 204 Cal.App.3d 1317, 1323; disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027.) That is, "[A] court may give only such instructions as are correct statements of the law. [Citation]." (*People v. Gordon, supra,* 50 Cal.3d 1223, 1275.) This duty requires the trial court to correct or tailor an instruction to the particular facts of the case even though the instruction submitted by the parties was incorrect. (*People v. Fudge, supra,* 7 Cal.4th 1075, 1110 [judge must tailor instruction to conform with law]; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [; *People v. Malone* (1988) 47 Cal.3d 1, 49.) The court must insure that instructions

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82 The instruction now includes the following language:

> "In determining whether a consequence is natural and probable, you must apply an objective test based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A natural consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened.'Probable' means likely to happen."

adequately state the law and adequately assist the jury in resolving the issues the instructions address. (*People v. Key* (1984) 153 Cal.App.3d 888, 898.) Moreover, a defendant does not have to request that an instruction be modified in order to have the issue reviewed on appeal where the error (as here) consists of a breach of the court's fundamental duty to properly instruct. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207 fn 20.)

Prejudice

The confusion caused by the incomplete instruction in this case was similar to that caused by the disputed instructions in *Smith v. Horn* (3rd Cir. 1997) 120 F.3d 400,[83] a Pennsylvania death penalty case which was the subject of a federal petition for writ of habeas corpus. In *Smith*, the federal court of appeals granted the writ because portions of the jury instructions were unclear about the requisite mental state. Under Pennsylvania law, an accomplice or coconspirator in a crime during which a killing occurs may not be convicted of first degree murder unless the Commonwealth proves that he harbored the specific intent to kill.

The facts of the *Smith* case were as follows: two men entered a pharmacy with the intention of robbing it, and during the course of the robbery one of the three people in the store was shot to death. While the evidence showed that both defendants carried handguns into the store, the evidence also tended to show that defendant Smith was the

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[83] Certiorari denied sub.nom. *District Attorney of Bucks County v. Smith* (1998) 118 S.Ct. 1037.

actual killer. Nonetheless, as in the instant case, the prosecutor in *Smith* argued to the jury that it did not make any difference who shot the victim because the jurors could find that the defendants were liable for each other's misdeeds under the doctrine of accomplice liability.[84]

The *Smith* court found the jury instructions to be fatally ambiguous and confusing because they failed to clarify that one could find a defendant guilty of first degree murder under accomplice liability only if the Commonwealth had proved beyond a reasonable doubt that the accomplice intended that the victim be killed. Specifically, the court found that the instructions were not clear about whether an accomplice in the robbery was necessarily an accomplice in the murder.

Further, the confusing nature of the instructions violated defendant Smith's Fifth and Fourteenth Amendment due process rights because they permitted his conviction without assuring that the prosecution proved every fact necessary to constitute the crime beyond a reasonable doubt. (*Id.* at p. 415, citing *In re Winship* (1970) 397 U.S. 358, 364.) The *Smith* court noted:

> A jury instruction that omits or materially misdescribes an essential element of an offense as defined by state law relieves the state of its obligation to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant's federal due process rights.

(*Id.*, citing *Carella v. California* (1989) 491 U.S. 263, 265.)

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[84]Under Pennsylvania law, a felony murder is a second degree murder unless the Commonwealth proves beyond a reasonable doubt that there was an intent to kill.

Because the Commonwealth of Pennsylvania proceeded on a theory that defendant Smith was guilty of first degree murder whether or not he intended the victim to be killed and because the evidence did not show overwhelmingly that Smith was, in fact, the actual killer, the failure to instruct the jury in a complete and clear way regarding the intent to kill required a reversal of the first degree murder conviction against defendant Smith. (*Id.* at p. 419).

As evidenced by the jury note expressing concern over appellant's culpability as an aider and abetter in this case, there is a reasonable likelihood the jury applied the incomplete aiding and abetting instructions in an unconstitutional fashion. (*Boyde v. California* (1990) 494 U.S. 370, 380.) Therefore, by failing to modify CALJIC No. 3.02, the trial court deprived appellant of his state and federal constitutional rights to a fair trial, due process and a jury trial under the Fifth, Sixth and Fourteenth Amendments as well as undermining the reliability of the guilt phase findings in violation of the Eighth Amendment. For these reasons, appellant's conviction for first degree murder must be reversed.

VIII.

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURORS TO DETERMINE WHETHER THERE WAS A SINGLE OR MULTIPLE CONSPIRACIES VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY IMPROPERLY LOWERING THE PROSECUTION'S BURDEN OF PROOF ON A MATERIAL ISSUE OF FACT.

Introduction

The prosecutor's alternative theory of vicarious liability was conspiracy. After a jury note asking whether there was one or perhaps multiple conspiracies, the trial court simply responded that the jury had to decide whether there was a conspiracy. The question of whether there are multiple conspiracies, however, is a critical factual issue for the jury that requires specific instructions that were not given here.

Summary of Argument

In the federal courts and in the California courts until 1989, the question of whether there was a single or multiple conspiracies was deemed to be a jury question. This is so because the essence of the crime conspiracy is the nature of the agreement. The question for the jury to decide is what did the conspirators agree to do? Was there one agreement encompassing multiple acts, or multiple agreements encompassing separate acts? A trial judge who made that determination would invade the province of the jury.

With the decision in *People v. Davis* (1989) 211 Cal.App.3d 317, however, the Court of Appeal for the First Appellate District

determined that the question was one of law and therefore no instructions were required. Relying on the holding of *People v. Ramos* (1982) 30 Cal.3d 553, 589, [rev'd. on another ground in *California v. Ramos* (1983) 463 U.S. 992 [77 L.Ed.2d 1171, 103 S.Ct. 3446], the *Davis* court ruled that if there were multiple victims, there were multiple crimes (in that case, multiple solicitations). Therefore, since reasonable people would not normally disagree on the number of victims, the jury need not be instructed to determine whether there was a single or multiple crimes.

Other state appellate courts have simply applied the *Davis* holding to conspiracy cases with no further analysis. The *Davis* holding, however, will not withstand analysis. *Ramos* was concerned with the statutory construction to be applied to robbery offenses. It did not even purport to examine conspiracy cases. Moreover, even in later conspiracy cases which have rejected the "number of victims" test, the state appellate courts have refused to address the Constitutional double jeopardy, Due Process right to a fair trial and Sixth Amendment right to a jury trial issues involved in whether the judge or the jury is required to make the final determination on the nature of the agreement. Nonetheless, because factual determinations are the province of the jury, there is a *sua sponte* duty to properly instruct the fact finder to determine whether the evidence shows one, or more than one conspiracy. The failure to so instruct improperly lowered the prosecution's burden of proof by removing a material factual issue from the jury's consideration. Therefore, the error is reversible per se.

Moreover, even if not reversible per se, the error undermined the reliability of the guilt and penalty phase verdicts in violation of the Eighth and Fourteenth Amendments so reversal is required.

Factual Background

Over defense objection, the jury was instructed on conspiracy as a theory of guilt. (37 R.T. 4589-4590.) The conspiracy instructions included CALJIC 6.10.5, 6.11, 6.12, 6.13, 6.14, 6.16, 6.18, 6.20, 6.24. (19 C.T. 5192- 5193, 5194-5195; 43 R.T. 5136-5140.)

During guilt phase deliberations, the jury sent the court the following note: "When you deal with conspiracies, is every individual crime the start of a new conspiracy or does the conspiracy start at the first crime and every crime after that is just a continuance of the original conspiracy? Dated March 31, 1998." (19 C.T. 5165.)

When the court and the parties convened to discuss the matter, the prosecutor suggested that the jury be told the jurors must decide if there was a conspiracy, and if so, when it commenced and when it concluded. The jury should then be referred to the conspiracy instructions. (45 R.T. 5342-5343.)

Noting that he objected to conspiracy instructions in the first place, trial defense counsel objected that the language of the instructions was too broad. (45 R.T. 5343.) The defense also noted that conspiracy is an issue of fact for the jury to decide. (45 R.T. 5343.)

The trial court then proposed telling the jury to determine whether a conspiracy was formed, and if so, then any crimes

committed in the furtherance of that conspiracy come within the original conspiracy. (45 R.T. 5344.)

The prosecution agreed and the defense acquiesced without waiving its prior objection. (45 R.T. 5344.)

The trial court's written response was: "You are to determine from the evidence whether a conspiracy was formed. If you find that a conspiracy was formed, then any crimes committed which you find to be in furtherance of that conspiracy comes within the original conspiracy.

All of these legal concepts are included in the instructions previously given, starting with 6.10.5." (19 C.T. 5166)

Duty to Clarify Jury Misunderstanding

Before turning to the specific instructional problems in this case, it is important to keep in mind the admonition of Justice Jackson in his concurring opinion in *Krulewitch v. United States*, *supra*, 336 U.S. 440, 445, [69 S.Ct. 716, 719; 93 L.Ed. 790, et seq.] Commenting on the inherently vague nature of conspiracy, Justice Jackson noted:

> "'The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.
> 'The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleonlike, takes on a special coloration from each of the many independent offenses on which it may be overlaid.
>
> ****

> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

As Justice Jackson pointed out, conspiracy is a very complex concept and difficult to define accurately. The great danger in using a conspiracy theory but failing to define it accurately for a jury is that a defendant cannot adequately defend himself. The ostensible sweep of the conspiracy concept is so broad that the jury simply tars the defendant with the same conspiratorial brush as the actual perpetrator regardless of the defendant's individual culpability. Moreover, when Justice Jackson wrote he was referring to the formal charge of conspiracy. The vagueness problem becomes even more pronounced when conspiracy is not charged but simply used as a theory of culpability. Indeed, when used as a theory of culpability the jury is not even required to agree unanimously on what constitutes an overt act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 ; *People v. Vargas* (2001) 91 Cal.App.4th 506, 561.)

Therefore, when a jury has a question about a subject as complex as conspiracy, the trial court has a duty to be especially careful in crafting an adequate response. As appellant explained in a

previous issue, "The responsibility for adequate instruction becomes particularly acute when the jury asks for specific guidance." (*Trejo v. Maciel, supra,* 239 Cal.App.2d at p. 498 ; see also *McDowell v. Calderon, supra,* 130 F3d 833; accord, *Bartosh v. Banning, supra,* 251 Cal.App.2d at p. 387.)

Further, "[w]here ... the need for more [instruction] appears, it is the duty of the judge ... to provide the jury with light and guidance in the performance of its task." (*Wright v. United States, supra,* 250 F2d at p. 11.) "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States, supra,* 326 US at pp. 612-613 [90 LEd 350]; accord, *Powell v. United States, supra,* 347 F2d at pp. 157-58; *United States v. Harris, supra,* 388 F2d at p. 377.)

The reason for the requirement of clarity is simple: "To perform their job properly and fairly, jurors must understand the legal principle they are charged with applying ... A jury's request for ... clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration." (*People v. Thompkins, supra,* 195 Cal.App.3d at p. 250.) Additionally, Penal Code section 1138 "imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury." (*People v. Beardslee, supra,* 53 Cal.3d at pp. 96-97.)

The precise nature of any amplification, clarification or rereading of instructions is a matter of judicial discretion. (*United States v. Bolden, supra,* 514 F2d at p. 1308; see also *People v. Beardslee, supra,* 53

Cal.3d at p. 97) Nevertheless, "there are necessarily limits on that discretion." (*United States v. Bolden, supra.* 514 F.2d at p. 1308) "When the jury makes a specific difficulty known ... [a]nd when the difficulty involved is an issue ... central to the case ... helpful response is mandatory." (*Price v. Glosson Motor Lines, supra*, 509 F2d 1033, 1037.)

The jury note here specifically told the court that the jury was confused over the nature and extent of any conspiracy. Instead of clarifying the jury's understanding of the consequences of its decision, however, the court essentially referred the jury to the instructions previously given. Any reinstruction or amplification, however, should be fully sufficient to eliminate the confusion. (See, *United States v. Bolden, supra,* 514 F2d at 1308-1309.) It was certainly of no help to the jurors to be referred to instructions which their note clearly told the court they did not understand. (*United States v. Gordon, supra*, 844 F2d 1397, 1401-1402 [error to rely on original instruction where jury note expressed confusion regarding conspiracy counts]; *United States v. Walker, supra*, 575 F2d at p. 213 [trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion].) Moreover, a "perfunctory rereading" of the general instructions which were previously given is insufficient as well. (*United States v. Bolden, supra*, 514 F2d at 1308-09.)

Jury Misunderstanding- Multiple Conspiracies

The jury note makes plain that the jury simply did not

understand the law of conspiracy as explained in the instructions given by the trial judge. If the jury understood that there was only one conspiracy, there was certainly no need to ask if each offense constituted a new conspiracy.

Despite the inquiry about multiple conspiracies, the trial court responded that if the jury found a conspiracy, there was only one. ["You are to determine from the evidence whether **a** conspiracy was formed." [Emphasis added].] As the defense counsel correctly noted, however, the existence of one or more conspiracies is a fact question for the jury, not a legal question for the trial judge. (45 R.T. 5343.)

In resolving this issue, it is important to keep in mind the evolution of the law in this area. Prior to 1987, the California case law postulated that the issue of whether there was but a single or multiple conspiracies was a factual issue for the jury rather than a legal issue for the courts. In dicta in *People v. Morocco* (1987) 191 Cal.App.3d 1449, the Court of Appeal for the First Appellate District cited *United States v. Orozco-Prada* (2d Cir. 1984) 732 F.2d 1076, 1086 for the proposition that "the question whether one or multiple conspiracies are present is a question of fact, to be resolved by a properly instructed jury." The *Morocco* court analogized to the similar crime of solicitation where the issue of single v. multiple solicitations was a fact question for the jury under California law. (See *People v. Cook* (1984) 151 Cal.App.3d 1142, 1145-1147.)[85] Under the circumstances

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[85] In this regard, because the concepts of conspiracy and solicitation are closely related, the California case law concerning single v. multiple conspiracies has

of the *Morocco* case, the court further observed: "The jury here received no instructions on the issue of single versus multiple solicitation(s). Arguably, that fact in itself would mandate reversal for a retrial." (*People v. Morocco, supra,* 191 Cal.App.3d at p. 1454.)

Two years later, in *People v. Davis, supra*, 211 Cal.App.3d 317, another division of the Court of Appeal for the First Appellate District rejected the argument that the issue of single v. multiple solicitations was a factual one for the jury. In *Davis*, the court first noted that the language in *Morocco* was dicta. The court looked to this court's [then recent] decision in *People v. Ramos, supra,* 30 Cal.3d at p. 589. In *Ramos*, this court reviewed the language of the robbery statute and rejected the notion "that a single taking from two victims constitutes but one robbery." Instead, it held that "if force or fear is applied to two victims in joint possession of property, two convictions of robbery are proper." (Fn. omitted.) (cited in *People v. Davis, supra*, 211 Cal.App.3d at p. 322.) Therefore, since the solicitations involved robbing at least two people, the *Davis* court concluded that the number of victims was controlling. As a matter of law, then, the question of single v. multiple solicitations was an issue for the trial court based solely on the number of victims. (*People v. Davis, supra*, 211 Cal.App.3d at pp. 322-323.)

A year later, in *People v. McLead* (1990) 225 Cal.App.3d 906, the Court of Appeal for the Fourth Appellate District, Division Two,

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often been discussed in cases where the issue was multiple solicitations rather than conspiracies.

applied the *Davis* court reasoning to a conspiracy case. While acknowledging that the determination of whether there was a single or multiple conspiracies was more complicated that simply counting up the number of victims (*Id* at p. 920), nonetheless, without further analysis the court adhered to the *Davis* holding that the number of conspiracies need not be submitted to the jury. (*Id.*, at p. 921.) Similarly, without analysis, other courts have continued to hold that the issue of single v. multiple conspiracies is an issue of law for the trial judge and need not be submitted to the jury. (See, e.g., *People v. Liu* (1996) 46 Cal.App.4th 1119, 1133.)

Davis Holding is Erroneous

The federal courts consider the issue of single v. multiple conspiracies to be an issue of fact for the jury to decide. (See, e.g., *United States v. DiCesare* (9th Cir 1985) 765 F.2d 890, 900; *United States v. Williams* (2nd Cir. 2000) 205 F.3d 23, 32; *United States v. LiCausi* (1st Cir. 1999) 167 F.3d 36, 45; *United States v. Kennedy* (4th Cir. 1994) 32 F.3d 876, 884; *United States v. Hanzlicek* (10th Cir 1999) 187 F.3d 1228, 1232. *United States v. Pullman* (8th Cir 1999) 187 F.3d 816, 821; *United States v. Gallardo-Trapero* (5th Cir 1999) 185 F.3d 307, 315; *United States v. Alred* (11th Cir 1998) 144 F.3d 1405, 1414.) Indeed, it could hardly be otherwise since the nature of the inquiry is, what did the conspirators actually agree to do?

As explained above, California followed the federal rule until the *Davis* case. The court in *Davis*, however, erroneously departed from the federal rule because the Davis court simply misinterpreted

the holding in the *Ramos* case. *Ramos* was a robbery case. The issue in *Ramos* was whether the taking of property from different persons during the same transaction constituted a single robbery or multiple robberies. Looking at the statutory definition of robbery, this court concluded that because of the way the robbery statute was written, multiple victims equated with multiple robberies. Seizing on this multiple victims/multiple robberies theory, the court in *Davis* concluded that if there were multiple victims in a solicitation case, there must be multiple solicitations. (*People v. Davis*, *supra*, 211 Cal. App.3d at p. 322.) Presumably, therefore, since reasonable minds could not disagree on the number of victims, there was no need to submit the issue to the jury. *McLead* and its progeny simply adopted the *Davis* formulation with no further analysis.

It has long been the law, however, that a case cannot stand for a proposition which it did not consider. (*People v. Ceballos* (1974) 12 Cal.3d 470, 481.) *Ramos* had nothing to do with multiple conspiracies or even multiple solicitations. It was concerned solely with the proper application of the robbery statute. Therefore, the *Davis* court's reliance on *Ramos* for the proposition that multiple victims equates to multiple solicitations is misplaced as a matter of law.

Moreover, as the United States Supreme Court has made clear, the inquiry in a single v. multiple conspiracy case has less to do with the number of victims than it does with the nature of the agreement. (*Braverman v. United States, supra*, 317 U.S. at p. 53 [87 L. Ed. 23, 63 S. Ct. 99].) Likewise, as the court recognized, the nature of that

agreement is a fact question for the jury. (*People v. Morocco, supra*, 191 Cal.App.3d at p. 1554.)

Jury Misunderstanding - Single Conspiracy

Even if it could be persuasively argued [which it cannot] that the trial court did not err in determining as a matter of law that there was only one conspiracy, the jury asked whether any single conspiracy began with the "first" offense. Significantly, the first offense was the robbery of the Circle K convenience store. That robbery could NOT be part of a single conspiracy since it occurred the night BEFORE the purported organizational meeting at Natalie Dannov's home.[86] The law is clear that a defendant cannot be held liable vicariously for acts committed by others before the conspiracy even began. (See, e.g., *People v. Marks* (1988) 45 Cal.3d 1335, 1345; *People v. Weiss* (1958) 50 Cal.2d 535, 566; *People v. Brown* (1991) 226 Cal.App.3d 1361, 1372.) Moreover, CALJIC 6.19 [Joining a Conspiracy After its Formation] was NOT given, in this case, so the jury had no guidance whatsoever on the applicability of any conspiracy theory to the Circle K robbery.

A trial court has a *sua sponte* duty to instruct on the general principles relevant to the issues raised by the evidence. (*People* v. *Wilson* (1967) 66 Cal.2d 749, 759.) Therefore, even though the jury note made plain the jury's confusion about the applicability to

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[86] The robbery of the Circle K occurred in the early morning hours of May , 14, 1993. (27 R.T. 3729-3731, 3737.) The meeting at Dannov's did not take place until the following evening around 8 pm. (22 R.T. 3033.)

conspiracy to the counts alleged, since the trial court never instructed the jury that a conviction for the Circle K robbery could not be based on a conspiracy theory, appellant's conviction for this count certainly must be reversed. (See *People v. Marks, supra,* 45 Cal.3d at p. 1345.)[87]

Unfortunately, the Circle K robbery was not the only problem related to the uncertainty over the reach of the conspiracy theory. The prosecutor elicited from Natalie Dannov that the purpose of the conspiracy was to get money to invest in stocks, buy a house and become legitimate businessmen. (See, e.g., 24 RT 4329; prosecution exhibit 68 at p. 45-46, 50.) When Ms. Los was shot, however, Lyons and Dearaujo were simply trying to obtain transportation to a party. Party transportation was obviously not within the ambit of the conspiracy as framed by the prosecution.

Moreover the fact that appellant provided the weapon and suspected that Dearaujo and Lyons were "gonna do dirt" does not necessarily bring appellant within the ambit of any conspiracy. (See, e.g., *Piaskowski v.Bett* (7th Cir. 2001) 256 F.3d 687, 693-694 [petitioner's presence at the scene of the crime and his reference to "shit going down" was constitutionally insufficient to sustain a murder

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[87] It might be argued that the conviction for this offense could be upheld on an the alternate aider and abetter theory. Even if the aider and abetter theory was appropriate under the facts of this case (which it is not), if the reviewing court cannot determine whether the jury used a correct or an incorrect theory, the conviction must be reversed. *(People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) Nothing in the jury findings indicate which theory the jury used to arrive at its decision. Moreover, here, since the jury note specifically mentioned the "first" crime in connection with its conspiracy inquiry, it is more likely than not that the jury used the invalid conspiracy theory rather than an aider and abetter theory as the reason for the guilty finding on the Circle K robbery count.

conviction based on a conspiracy theory].) Thus, if there was only one conspiracy, certainly the Los homicide and the Circle K robbery fell outside the ambit of that conspiracy. Nothing in the judge's instruction required the jury to make that determination. In fact the opposite is true. The judge specifically instructed the jury that if it found a conspiracy, the conspiracy would apply to ALL the offenses charged. (43 R.T. 5137.)[88]

This is precisely the danger that Justice Jackson cautioned against in *Krulewitch*. A single conspiracy can be made to cover a multitude of offenses which may or may not have been within the ambit of the original agreement. Moreover, since the very existence of an agreement can simply be inferred (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999) its exact parameters , including its extent and duration are often more matters of jury speculation than requirements of proof. This is particularly true where conspiracy is only a theory of conviction rather than a charged offense. Thus the trial court's failure to explain that even if there was only one conspiracy, it certainly did not apply to the Circle K robbery or the Los homicide, left the jury without adequate guidance in determining to which of the counts the

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[88] The judge instructed the jury:

"You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and if so, whether the crime alleged in **Counts I through XI** was perpetrated by a co-conspirator in furtherance of that conspiracy and was a natural and probable consequence of the agreed upon criminal objective of that conspiracy." (43 R.T.5137 [Emphasis added].)

purported conspiracy theory applied. The jury should have been instructed to agree unanimously whether there was a single or multiple conspiracies. (*See United States v. Echeverry* (9th Cir.1983) 698 F.2d 375 (9th Cir.1983), *modified,* 719 F.2d 974, 975.

Prejudice

In the absence of adequate guidance on this matter, appellant's convictions cannot stand for any of these offenses. Because the jury was deprived of the opportunity to determine whether there were different agreements for different counts, or whether there were no conspiratorial agreements at all on some counts where the defendant was not even present, a critical factual determination on each count was removed from the jury's consideration. As the *Morocco* court observed, the failure to allow the jury to deliberate on the factual issue posed by the evidence compels reversal. This is so for the simple reason that, "in the absence of such instructions, a court cannot 'presume in support of the judgment the existence of every fact the trier could reasonably have deduced from the evidence.' [citation" (*People v. Morocco, supra*, 191 Cal.App.3d at p. 1353, fn 4.)

In addition, in evaluating a claim of instructional error, the reviewing court must assume the jury could have believed the evidence of the party claiming error. (See, e.g., *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673-674.) Moreover, the failure to instruct on a material factual issue is reversible unless "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*People v. Harris* (1994) 9

Cal.4th 407, 424.) As noted above, a defendant has a constitutional right to have the jury determine every material issue presented by the evidence. Therefore, the error cannot be cured by an appellate court weighing the evidence and determining that it was more probable than not that a correctly instructed jury would still have found the defendant guilty. If the reviewing court were permitted to conduct such an analysis under the guise of harmless error, "the wrong entity [would have] judged the defendant guilty." *Rose v. Clark* (1986) 478 U.S. 570, 578 [92 L.Ed.2d 460, 471, 106 S.Ct. 3101, 3106].), Under the *Chapman* standard, such an error is **not** harmless beyond a reasonable doubt. (Cf. *Sullivan v. Louisiana* (1993) 508 U.S. 275 [124 L.Ed.2d 182, 113 S.Ct. 2078], *Yates v. Evatt* (1991) 500 U.S. 391 [114 L.Ed.2d 432, 111 S.Ct. 1884][89].)

Therefore, under the circumstances of this case, where the issue of single v. multiple conspiracies was clearly an issue for the jury, the instruction that there was only one conspiracy removed a factual determination from the jury's purview and constitutes reversible error. Additionally, even if there was but one conspiracy, the failure to properly instruct the jury to determine if all the charged offenses fit within it impermissibly lightened the prosecution's burden of proof and undermined appellant's right to due process and a trial by jury as well as reliable capital guilt and sentencing determinations, all in

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[89] *Yates* was disapproved on a slightly different point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 [116 L.Ed.2d 385, 112 S.Ct. 475, 482, fn. 4]. However, the substance of *Yates* was subsequently reapproved by the United States Supreme Court in *Sullivan.*

violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

IX.

THE TRIAL COURT ERRED IN FAILING TO REQUIRE THAT THE JURY AGREE UNANIMOUSLY THAT THERE WAS ONE OR MORE CONSPIRACIES AND THAT THE DEFENDANT WAS PART OF EACH SUCH CONSPIRACY.

Introduction

Aside from, but related to the previous issue, there was a more pernicious problem with the conspiracy instructions in this case. Nowhere in the instructions was the jury required to agree unanimously on the nature of the conspiracy (or conspiracies) nor were jurors required to agree unanimously that appellant was a member of any such conspiracy (or conspiracies).

Even though conspiracy was merely a theory of conviction rather than a charged offense in this case, the requirement for unanimity is not thereby suspended. Moreover, since the jury was instructed that the conspiracy theory applied to all of the offenses in this case, the error in failing to ensure unanimity requires reversal of all of appellant's convictions.

Factual Background

The facts pertinent to this issue are similar to the ones in the previous issue. During guilt phase deliberations, the jury sent the court the following note: "When you deal with conspiracies, is every individual crime the start of a new conspiracy or does the conspiracy

start at the first crime and every crime after that is just a continuance of the original conspiracy?" dated March 31, 1998. (19 C.T. 5165.)

Noting that he objected to conspiracy instructions in the first place, trial defense counsel objected to instructing the jurors in the language of the CALJIC instructions. (45 R.T. 5343.) The defense also noted that conspiracy is an issue of fact for the jury to decide. (45 R.T. 5343.)

Ultimately, the trial court's response was: "You are to determine from the evidence whether a conspiracy was formed. If you find that a conspiracy was formed, then any crimes committed which you find to be in furtherance of that conspiracy comes within the original conspiracy.

All of these legal concepts are included in the instructions previously given, starting with 6.10.5." (19 C.T. 5166.)

Three days later, the jury sent the court a second note [question #9] . The note read: "If A-B-C -D were involved in planning and talking about a robbery in one place - and B & C started out to do the crime. They did not do the planned crime but did another crime in the same area. What would A's status be under the law? Dated March 24, 1998." (19 C.T. 5146.)

The judge responded the next day in writing but confined his remarks to the aiding and abetting theory and did not even mention the conspiracy theory.[90] (19 C.T. 5147.)

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[90] The judge told the jury:

Error to Fail to Separately Instruct on Unanimity or the Reasonable Doubt Standard Under Conspiracy Theory

Each of the eleven charged offenses in this case was predicated on both an aiding and abetting theory as well as a conspiracy theory. The problems with the aiding and abetting instructions have already been discussed extensively in the prior issues.

Nothing in any of the conspiracy instructions given in this case, however, requires a jury to find unanimously or beyond a reasonable doubt whether there were any conspiracies, a single conspiracy or multiple conspiracies; nor does any instruction require that the jury find unanimously or beyond a reasonable doubt that appellant was in fact a member of any or all of the possible conspiracies in this case.

Under the Fifth and Sixth Amendments to the United States Constitution made applicable to the states via the Fourteenth Amendment, a defendant in a state prosecution may not be convicted of a crime unless the jury finds "beyond a reasonable doubt ... every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]; see also *Sullivan v. Louisiana, supra,* 508 U.S. 275, 277-278 [113

"In response to your question #9, the legal answer is provided in the instructions already provided. The court would refer you to the series on Aiding and Abetting starting with 3.00. [Para] Note that in your question, whether "A" would be legally responsible for the actual crime ultimately committed would require that the jury unanimously find that the committed crime was "reasonably foreseeable." That is, an aider and abettor ('A" in your hypothetical) is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable committed by the person(s) ("B-C-D" in your hypothetical) he aids and abets. (19 C.T. 5147.)

S.Ct. 2078, 124 L.Ed.2d 182].) Moreover, under article I, section 16 of the California Constitution, a criminal defendant's right to a jury trial further includes the right to a *unanimous* verdict. (*People v. Nesler, supra,* 16 Cal.4th 561, 578, *People v. Wheeler, supra,* 22 Cal.3d 258, 265, 148 Cal.Rptr. 890, 583 P.2d 748; *People v. Superior Court* (1967) 67 Cal.2d 929, 932, 64 Cal.Rptr. 327, 434 P.2d 623.) Together, these constitutional guarantees ensure, among other things, that when the prosecutor presents evidence of more than one unlawful act for a given charge, *the jury* will not only determine whether all elements of the offense have been proved beyond a reasonable doubt but also unanimously agree on the particular unlawful act that forms the basis of each conviction.

While it is certainly true that the jurors need not agree unanimously on which **theory** of guilt they employ to reach a conviction for the target offense (*Schad v. Arizona, supra*, 501 U.S. 624, 630-646), nevertheless, they should agree at least on what the actual conspiratorial agreement was. Nothing in the conspiracy instructions given here tells them that. The danger is that some jurors might think appellant was involved in one conspiracy, others might think he was involved in a different one and some might think he was not involved in any conspiracy at all. (Cf. *People v. Russo*, *supra,* 25 Cal.4th at p. 1132.)

If there was only one conspiracy as a matter of law, a separate unanimity instruction might not be required because all of the criminal acts charged in the information would be in furtherance of a single

criminal objective. (See, e.g., *People v. Daniels* (1983) 145 Cal.App.3d 168, 175 (no separate unanimity instruction required where embezzlement took place over a five year period.].) Here, however, as appellant explained in the previous issue, there could not be only one criminal conspiracy covering all of the charged offenses since the Circle K robbery took place before the conspiracy alleged by the prosecution even came into being. (*People v. Marks, supra*, 45 Cal.3d at p. 1345.)

Additionally, the evidence regarding the Los homicide is insufficient to sustain a conviction based on a conspiracy theory. (See e.g. *Piaskowski v.Bett, supra*, 256 F.3d at pp. 693-694.) There is also a serious question concerning whether the Los homicide had anything to do with a single conspiracy to commit robberies to benefit the group or its investment objectives. There was certainly no evidence of any plan to rob Ms. Los of her valuables or to take and strip her vehicle for parts that could be converted to cash and put in an account to benefit the group members. The Los homicide was simply the result of an attempt by codefendant Dearaujo and Christopher Lyons to obtain transportation to a party because appellant had already provided for his own transportation. Thus, not even appellant (let alone the other members of the purported group) would have benefitted from stealing Ms. Los' vehicle.

Regardless of the benefit, however, the record is very clear that the jury was having great difficulty in determining whether there was a single or multiple conspiracies, or whether appellant was involved in

some conspiracies at all. As appellant explained in the prior issue, the jury *specifically asked* the court if there was a single or multiple conspiracies. (19 C.T. 5165.) The trial court responded that there was only one conspiracy. (19 C.T. 5166)

More significantly, however, three days later, the jury sent the court a second note that obviously referred to the robbery at the LA Times office. Although phrased as a hypothetical involving characters A-B-C, the note clearly asked the court if appellant, Dearaujo and Lyons discussed a robbery of the Classy B liquor store, but ultimately Dearaujo and Lyons took it upon themselves to rob the LA Times office, what was appellant's liability? (19 C.T. 5146.) The court responded with instructions concerning aider and abetter liability but said nothing about conspirator liability. (19 C.T. 5147.) Obviously, however the jury's question encompassed conspirator liability.

These two notes demonstrate that despite the trial court's admonition that there was only one conspiracy, the jury was still struggling with the nature of that conspiracy, whether it encompassed all of the charged offenses, and whether appellant was even a member of the conspiracy for some of these discrete criminal events such as the LA Times robbery and the Los homicide.

Significantly, in multi defendant cases with a single jury, CALJIC 6.22 *mandates* that the jury be told that it must agree unanimously and beyond a reasonable doubt that there was a conspiracy to commit a particular crime, that an overt act was committed by one of the conspirators and that the defendant willfully

intentionally and knowingly joined the conspiracy. (*People v. Crain* (1951) 102 Cal.App.2d 566, 581-582; *People v. Fulton* (1984) 155 Cal.App.3d 91, 101).[91] Although there is case law to the effect that an instruction similar to CALJIC 6.22 need not be given in a trial with multiple juries, (see *People v. Von Villas* (1992) 11 Cal.App.4th 175, 245-246.) the reasoning does not apply to situations such as the one in this case. In *Von Villas* this court reasoned that CALJIC 6.22 would not be necessary in multiple jury cases because there is less risk that conspiracy evidence against one defendant will "spillover" and unduly prejudice a less culpable defendant. (*Ibid.)* "Spillover" prejudice among defendants is not the problem here though. Here, the prejudice results from multiple counts to which the conspiracy theory does not apply.

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[91] CALJIC 6.22 as it is presently constituted provides:

"Each defendant in this case is individually entitled to and must receive, your determination whether [he] [she] was a member of the alleged conspiracy. As to each defendant you must determine whether [he] [she] was a conspirator by deciding whether [he] [she] willfully, intentionally, and knowingly joined with any other or others in the alleged conspiracy.

Before you may return a verdict as to any defendant, of the crime of conspiracy, you must unanimously agree and find beyond a reasonable doubt, that (1) there was a conspiracy to commit the crime(s) of _____, and (2) a defendant willfully, intentionally and knowingly joined with any other or others in the alleged conspiracy. You must also unanimously agree and find beyond a reasonable doubt, that an overt act was committed by one of the conspirators. You are not required to unanimously agree as to who committed an overt act, or which overt act was committed, so long as each of you finds beyond a reasonable doubt, that one of the conspirators committed one of the acts alleged in the [information] [indictment] to be overt acts.

Under normal circumstances where there is only one count, a separate specific unanimity instruction need not be given when the standard unanimity instruction under CALJIC 17.01 is given. (See, e.g., *United States v. Anguiano* (9th Cir. 1989) 873 F.2d 1314, 1319, *cert. denied,* 493 U.S. 969.) Nevertheless, in complex conspiracy cases, a separate unanimity instruction **is** required to prevent different jurors from using different factual bases to arrive at similar conclusions. (*United States v. Payseno* (9th Cir.1986) 782 F.2d 832, 836; see also *United States v. Echeverry, supra,* 698 F.2d 375 (9th Cir.1983), *modified,* 719 F.2d 974, 975 and *United States v. Gilley* (9th Cir 1988) 836 F.2d 1206, 1211- 1212.)

In *Payseno,* for example, the evidence showed that the defendant might have committed three acts of extortion, each of which involved different victims, different methods, and different actors, and each occurring in different places at different times. Thus, the evidence was sufficiently complex that the jury might be confused absent specific unanimity instructions. (*United States v. Payseno, supra*, 782 F.2d at p. 837.)

Here, the situation was even more complex than in *Payseno.* Appellant was charged with ***eleven*** separate crimes in this case. The judge told the jury that the conspiracy theory could underlie all of these offenses. As the statement of facts explains in detail, however, virtually all of these offenses occurred in a different place, at different times with different participants. Moreover, not only were the factual underpinnings of a conspiracy theory complex, the jury notes told the

court the jury was having difficulty understanding how the conspiracy theory applied to these various counts.

Under these circumstances, the trial court clearly had a *sua sponte* duty to specifically instruct on both unanimity and the "beyond a reasonable doubt" standard. Not only did this *sua sponte* duty arise from the Penal Code section 1138 requirement to "clear up any instructional confusion expressed by the jury," but from the Fifth and Sixth and Fourteenth Amendment requirements to ensure that the jury does not convict a defendant of a crime unless it finds "beyond a reasonable doubt ... every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra,* 397 U.S. at p. 364, [90 S.Ct. 1068, 25 L.Ed.2d 368].)

Additionally, the instructional error here presents an Eighth Amendment problem regarding the overall reliability of the fact finding process in a capital case. Indeed, the United States Supreme Court has made it abundantly clear that its concern for heightened reliability extends not only to sentencing, but to the guilt phase of trial as well. Long before the modern era of capital jurisprudence announced in *Furman v. Georgia* (1972) 408 U.S. 238 (overruled in part by *Gregg v. Georgia* (1976) 428 U.S. 153), the Supreme Court recognized that capital proceedings required special procedural rules and protections not extended to noncapital defendants. For example, in *Powell v. Alabama* (1932) 287 U.S. 45, the Court held that at least some capital defendants had a right to effective appointed counsel thirty years before extending that right to others accused of noncapital

felonies. (Compare *Gideon v. Wainwright* (1963) 372 U.S. 335; see also *Bute v. Illinois* (1948) 333 U.S. 640, 674 (no obligation on part of state court to inquire whether noncapital defendant wished to be represented by counsel; contrasting due process right of capital defendant to appointed counsel); *Reid v. Covert* (1957) 354 U.S. 1, 45-46 (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.")

More recently, recognizing that "[t]he quintessential miscarriage of justice is the execution of a person who is actually innocent," *Schlup v. Delo* (1995) 115 S.Ct. 851, 866, the current Court also has imposed special procedural requirements on determinations of guilt and innocence in capital cases that it has not imposed in noncapital cases. As Justice Stevens explained in *Beck v. Alabama, supra,* 447 U.S. 625, "we have invalidated procedural rules that tend to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Id.* at 638 (note omitted).)

As the Court subsequently explained, the *Beck* rationale was not limited to the specific issue of an all-or-nothing jury instruction [the precise issue in that case], but represented a more general principle requiring enhanced reliability in guilt phase determinations: "The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction

introduced into the jury's deliberations." (*Spaziano v. Florida* (1984) 468 U.S. 447, 455.) Later cases have reiterated the Supreme Court's belief that the potential danger of executing the "actually innocent," *Schlup*, 115 S.Ct. at 866, requires special guarantees of reliability where the conviction of a capital defendant is at issue. (See, e.g., *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 (in capital guilt phase "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case"); *Herrera v. Collins* (1993) 506 U.S. 390, 399 ("[i]n capital cases, we have required additional protections because of the nature of the penalty at stake"); *Gray v. Mississippi* (1987) 481 U.S. 648, 669 (Powell, J., concurring) (declining to find harmless error because "[g]iven our requirement of enhanced reliability in capital cases, I would hesitate to conclude that the composition of the venire 'definitely' would have been the same").

Even aside from the United States Supreme Court case law, the notion that the Eighth Amendment due process values of individualized consideration and extra-reliable verdicts apply at the guilt phase is logically sound. Only defendants who are convicted of capital crimes are eligible in the first instance for the death penalty, and the Eighth and Fourteenth Amendment requirement for heightened protections in capital cases would be virtually meaningless if they only affected the death selection process, but not the death eligibility process. The jury is well aware of the sentencing implications of its decision on guilt or innocence. To a large extent, voir dire dealt with exactly that issue. Thus having committed itself to making the

defendant eligible for death, that decision necessarily influenced the penalty phase decision whether to actually impose the penalty. Indeed, empirical research bears out this common sense hypothesis. (See Bowers, "*The Capital Jury Project: Rationale, Design, and Preview of Early Findings*," 70 Ind. L. J. 1043 (1995); see also, Bowers, Sandys, & Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L.Rev. 1476, 1486-1496 (1998).) Thus the Eighth and Fourteenth Amendment standards must control at the guilt phase just as they do in the penalty phase. For that reason, procedures and practices that may be acceptable in a non capital context must give way to the requirement for heightened reliability in the guilt phase of a capital trial.

Prejudice

The failure to give a separate unanimity/beyond a reasonable doubt instruction fatally prejudiced appellant. The jury might determine that at least some of the robbery type offenses where appellant was not present might not fit within the original agreement. Indeed, the note the jury sent to the trial court asking about the two robberies at the LA Times offices presents this exact problem. Obviously, the jury was struggling with the problem of whether there was even an agreement to commit this particular crime.

More importantly, the note shows that the jury was NOT convinced that there was an all encompassing agreement as the prosecution urged. Had the jury found an all encompassing agreement

which arose from the meeting at the Dannov house, then there would have been no need to ask whether there was a single or multiple conspiracies or whether appellant was responsible for the LA Times robbery. In the latter instance, the jury was only concerned with whether any conspiratorial agreement to commit a robbery at the Classy B liquor also carried over to the apparent independent decision by Lyons and Dearaujo to commit the robberies at the LA Times offices.

The error here is reversible unless "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*People v. Harris*, *supra,* 9 Cal.4th at p. 424.) Under the circumstances of this case, the failure to instruct on the requirement for unanimity and the "beyond a reasonable doubt" standard for each of the separate counts to which the conspiracy theory purportedly applied impermissibly lightened the prosecution's burden of proof and undermined appellant's right to due process, a trial by jury and reliable capital guilt and sentencing determinations in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. For these reasons, appellant's convictions must be reversed.

X.

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

Introduction

The consciousness of guilt instructions given at appellant's trial were constitutionally infirm for two reasons. First, they created permissive inferences that were overbroad. That is, they allowed the inference of guilty mental state from conduct unrelated to the mental state; they permitted an inference of guilt of many offenses from a single untoward act or statement, and the jury could draw adverse inferences about a defendant's guilt based solely on untoward conduct or statements by the codefendant.

Second the instructions are impermissibly argumentative. They highlight particular evidence for the specific purpose of inferring consciousness of guilt. Effectively, they focused the attention of the jury on evidence favorable to the prosecution, thus lightening the prosecution's burden of proof. Compounding the problem, they placed the trial judge's imprimatur on the prosecution's evidence. Given the jury's difficulties in resolving the whole question of appellant's vicarious liability, the instructions given here were highly prejudicial.

Instructions Improper

At the request of the prosecutor, and over the objection of the

defense (37 R.T. 4585), the trial judge instructed the jury on so-called consciousness of guilt. The first instruction was CALJIC No. 2.03, which reads as follows:

> If you find that before this trial a defendant made a willfully false, or deliberately misleading statement concerning the crime for which he is now being tried, you may consider such statement as a circumstance tending to prove the consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(43 R.T. 5124.)

Again over the objection of the defense (37 R.T. 4596) , the trial judge instructed the jury, pursuant to CALJIC No. 2.06, which states:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying the evidence, or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove that a killing was deliberated and premeditated, and its weight and significance, if any, are matters for your consideration.

(43 R.T. 5124.)

For the reasons which follow, the trial court erred in giving each of these instructions.

The Instructions Create Improper Permissive Inferences

CALJIC Nos. 2.03 and 2.06 authorize permissive inferences;[92] that is, they each permit the jury to infer one fact (an elemental fact) -- appellant's consciousness of guilt[93] -- from other facts (basic facts) -- false statements and attempts to suppress evidence. When the prosecution proves the basic fact contained in the permissive inference, the jury is permitted, but not required, to infer the elemental fact. (*County Court of Ulster County, New York* v. *Allen* (1979) 442 U.S. 140, 157.) The United States Supreme Court has held that a permissive inference instruction is constitutional only if the connection between the facts found by the jury from the evidence and the facts inferred pursuant to the instruction is rational. (*Id.*; see also *United States* v. *Gainey* (1965) 380 U.S. 63, 66-67.) Further, the connection must more likely than not follow from the proved fact to the inferred fact. (*Leary* v. *United States* (1969) 395 U.S. 6, 36.) Also, this court has recognized that the Due Process Clause of the Fourteenth Amendment requires that inferences "be based on a

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[92]As the United States Supreme Court noted in *Francis v. Franklin* (1986) 471 U.S. 307, 314: "A permissive inference suggests to the jury a possible conclusion to be drawn if the state proves predicate facts, but does not require the jury to draw that inference." This definition concerns the *proper* form of permissive inferences. In this case, however, the conscious-of-guilt instructions created *improper* permissive inferences.

[93] "Consciousness of guilt" is not literally an element, but a lay jury is likely to understand the phrase as referring to "consciousness of guilt of the charged offense" and hence as the equivalent of an element – and, indeed, all the elements of the charge offense.

rational connection between the fact proved and the fact to be inferred." (*People* v. *Castro* (1985) 38 Cal.3d 301, 313.)

The record shows that the prosecution requested CALJIC 2.03 because at the beginning of his interview the defendant denied any involvement in the offenses. (37 RT 4585.)

The problem with these allegedly false statements by appellant is that virtually none of them were false. He told the detectives that he knew who did the shooting and told the detectives their names. (Prosecution Exhibit 68, p. 3.) Although the authorities accused him of being at the scene, he explained that he was not there but waiting for a ride to go to a party when the shooting took place . (Prosecution Exhibit 68, p. 7.) That was also true.

The only thing that might conceivably have been construed as a lie was that appellant noted Dearaujo and Lyons might or might not have been involved in other carjacking incidents (Prosecution Exhibit 68, p. 7), and that he did not know where the gun was after the Los homicide. (Prosecution Exhibit 68, p. 12.) Even assuming arguendo that such statements were lies, those statements were about matters that were wholly collateral to the murder of Yvonne Los.

With respect to the attempt to suppress evidence, the prosecutor told the court that her request for CALJIC 2.06 was based on the fact that the murder weapon was ultimately given to Anthony Post and disassembled in an attempt to hide it. (37 R.T. 4596.) The evidence, however, shows that Lyons gave Post the gun and some shell casings.

He told Post to hold onto them because appellant would come by later to pick them up. Before the police came by to pick up the gun, however, Post disassembled it, cleaned his fingerprints off of it and hid it. (25 RT 3455-3457.) Post also testified that early on the day the police arrested everyone involved, he offered to give the gun to appellant. (25 R.T. 3456.) Appellant told him to hang onto it, he would get it later. (25 R.T. 3456.) Thus, nothing in Tony Post's testimony suggests that appellant ordered (or even knew) that the gun was to be disassembled to keep it from the police.

Accordingly, these "facts" did not provide the basis for a logical and rational inference that appellant intended to rob Ms. Los. Thus, because the alleged false statements did not relate to the charged crimes or provide any basis for inferring the requisite mens rea, the instruction was inappropriate. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 435-436 [in Rankin, the defendant's false statement about where he got a stolen credit card was irrelevant to the charged crime of using a stolen card. Indeed, the defendant never denied knowing that the card was stolen].)

Another reason why the consciousness of guilt instructions are improper is that they do not limit the jury's use of evidence to a single permissible inference but instead advise the jurors that they can attach whatever weight and significance to the evidence that they choose. The evidence noted above, refers to statements or conduct by appellant after the murder. Such evidence is not, however, relevant to a defendant's state of mind prior to or during the killing. In *People* v.

Anderson (1968) 70 Cal.2d 15, this court pointedly observed that while statements made by the defendant to cover up the crime "may possibly bear on defendant's state of mind *after* the killing, it is irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing." (*Id.* at p. 32.)

Similarly, these instructions do not either specifically mention the defendant's mental state nor specifically exclude it from the inferences which supposedly can be drawn from any misleading statements or suppression of evidence by the defendants. Indeed, the instructions suggest that the scope of permissible inferences is very broad because the jurors are told that they can determine what weight and significance they wish to give the evidence.

The disputed instructions are also constitutionally infirm because they permit the jury to infer from any misstatements allegedly made by appellant that he is guilty of *all* the offenses with which he has been charged.[94] Because these instructions permitted the jury to draw irrational and sweeping inferences of guilt against appellant, their use violated the standards for acceptable permissive inference instructions set forth by the U.S. Supreme Court in *County Court of Ulster County v. Allen, supra.* Accordingly, the use of the instructions undermined the reasonable doubt requirement and denied appellant a

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[94] Indeed, the decision in *People* v. *Rodrigues* (1994) 8 Cal.4th 1060, approved such sweeping inferences. The court held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140; emphasis in the original.) Appellant requests the court to reconsider its endorsement of such a far reaching use of consciousness of guilt evidence.

fair trial and due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15.) The instructions also deprived him of his right to a properly instructed jury and to reliable capital guilt and sentencing determinations in violation of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and article I, section 1,7, 15,16, and 17 of the California Constitution.

These Instructions Were Impermissibly Argumentative

This court has held that argumentative instructions are impermissible. (*People* v. *Sanders, supra,* 11 Cal.4th 475, 560.) The reason for this prohibition is that such instructions present the jury with a partisan argument disguised as a neutral statement of the law. (*People* v. *Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Argumentative instructions also tend to unfairly single out facts favorable to one party while also suggesting to the jury that special consideration should be given to those facts. (*Estate of Martin* (1950) 170 Cal. 657, 672.)

This court has defined argumentative instructions as those which "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 437.) Instructions which ask the jury to consider the impact of specific evidence or imply a conclusion to be drawn from the evidence are argumentative and should be refused. (*People* v. *Daniels, supra,* 52 Cal.3d 815, 870-871; *People* v. *Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9.)

Under these standards, CALJIC Nos. 2.03 and 2.06 are

argumentative. It is useful to compare the syntax of 2.03 and 2.06 with the argumentative instruction analyzed in *People* v. *Mincey*, *supra*. In *Mincey*, the disputed instruction read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense willful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.) All three instructions state that "[i]f you find" certain facts, then "you may" infer another more ultimate fact. Since the instruction in *Mincey* was found to be argumentative, so should CALJIC Nos. 2.03 and 2.06.

Appellant is mindful that this court has previously rejected the claim that these instructions (CALJIC Nos. 2.03 and 2.06) are impermissibly argumentative; however, he respectfully requests the court to reconsider the issue. In *People v. Bacigalupo* (1991) 1Cal.4th 103 at p. 128, this court found that CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence." This conclusion, however, is puzzling since it does not differ significantly from the Court's description of an impermissible argumentative instruction as one which "improperly implies certain conclusions from specified evidence." (*People* v. *Wright*, *supra*, 45 Cal.3d at p. 1137.)

In *People* v. *Kelly* (1992) 1 Cal.4th 495, 532, the court gave the following reason why consciousness of guilt instructions are permissible:

> "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence."

This reasoning does not appear to take into consideration the fact that the jury is told, via other instructions, to consider all the evidence. (CALJIC Nos. 1.00 and 2.90.) It is not necessary, therefore, to expressly invite the jury to consider certain evidence for the specific purpose of inferring consciousness of guilt.

Moreover, the analysis in the *Kelly* opinion, *supra,* fails to explain why a trial judge should be permitted to single out evidence favorable to the prosecution and invite the jury to consider that evidence as showing consciousness of guilt. The fact that these instructions also advised the jurors that the weight and significance of the so-called consciousness of guilt evidence are matters for their determination does not mitigate the fact that the trial court is singling out evidence which is favorable only to the prosecution. Moreover, if the language concerning the "weight and significance of the evidence" somehow confers a benefit on the defense as the *Kelly* opinion suggests, then the defense ought to be able to waive that benefit and preclude the instruction from being given at all. (Cf. *Cowan v. Superior* Court (1996) 14 Cal.4th 367, 371 ["Permitting waiver.... is consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights. [Citation]"].) Obviously, however, that is not the case with these two instructions. They were given over specific defense objection.

Not only did the consciousness of guilt instructions focus the attention of the jury on evidence favorable to the prosecution and lighten the prosecution's burden of proof, they placed the trial judge's imprimatur on the prosecution's evidence. In so doing, these instructions violated the defendant's right to a fair trial as guaranteed by due process of law (U.S. Const., Amends. 5 & 14; Cal. Const., art. I, §§ 7 and 15); his right to have his guilt found beyond a reasonable doubt by an impartial and properly instructed jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 16); and his right to a fair and reliable capital guilt and penalty determinations. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17).

Prejudice

Because these instructions violated federal constitutional guarantees, the appellant's convictions and judgment of death must be reversed unless the prosecution can show, beyond a reasonable doubt, that the error was harmless. That is, the State must show that the erroneous instructions did not contribute in any way to appellant's convictions for murder and other crimes. (*People v. Guzman* (2000) 80 Cal.App.4th 1282, 1290, citing *Chapman* v. *California, supra*, 386 U.S. at p. 24.) Given the paucity of evidence supporting appellant's convictions and the lack of any reliable evidence which shed light on appellant's state of mind, the prosecution cannot meet this burden. Accordingly, the error was not harmless, and appellant's convictions and death sentence must be reversed.

XI.

THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE JURY'S ROBBERY-MURDER SPECIAL CIRCUMSTANCE FINDING AS TO APPELLANT, WHO WAS CONVICTED AS AN AIDER AND ABETTOR OR CO-CONSPIRATOR

Introduction

In order to prove appellant's aider and abettor or coconspirator liability under the felony murder special circumstance in this case, the evidence must show that he was a major participant in the offense and that he exhibited a reckless indifference to human life. Reckless indifference requires a subjective appreciation that particular conduct creates a grave risk of death. Here, although there was evidence that appellant was one of the instigators of a series of carjackings, there is no evidence that he had any significant participation in the carjacking that led to Ms. Los' death. In fact he was not even present and did not know for sure that a carjacking would even take place. Further, because his participation was largely limited to making the weapon available to the perpetrators if they decided to actually commit a crime, he had no subjective awareness that his acts would likely result in death. Finally because the judge and the prosecutor confused mere

liability for the underlying felony with the additional major participant and reckless indifference requirements for the special circumstances, the jury was affirmatively misled on the evidence necessary to sustain those findings.

Standard of Review

As established in *In Re Winship, supra*, 397 U.S. 358, proof beyond a reasonable doubt is an essential facet of Fourteenth Amendment due process and required for a constitutionally valid conviction as well as a true finding on a special circumstance. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) On appeal, the test of whether the evidence is sufficient to support a conviction is "whether a rational trier of fact could find defendant guilty beyond a reasonable doubt." (*People* v. *Holt* (1997) 15 Cal.4th 619, 667. Or, as the United States Supreme Court put it in *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319, when explaining the *Winship* due process standard on appeal "The relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

To satisfy this due process standard and to avoid an affirmance based primarily on speculation, conjecture, guesswork, or supposition (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543), the record must contain **substantial** evidence of each of the essential elements. In order for the evidence to be "substantial," it must be "of ponderable

legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577, 578.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, interior quotation marks deleted.) In *People v. Morris, supra*, this court stated:

> We may *speculate* about any number of scenarios that may have occurred on the morning in question [when the victim was murdered with no eyewitnesses present]. A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [Para.] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'

[Citations.] (*Id.* at p. 21; emphasis and ellipses in original.)

Further, when the sufficiency of the evidence is challenged at the close of the prosecution's case-in-chief on the motion of the defendant, as occurred in this case,[95] a later conviction must be reversed if, judging the record as it was at that point in the case, the evidence was insufficient to establish each element of the offense. (*People v. Allen* (2001) 86 Cal.App.4th 909, 913, citing *People v. Cuevas* (1995) 12 Cal.4th 252, 261.)

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[95]Appellant filed a motion for judgment of acquittal on the special circumstance at the close of the prosecution's case-in-chief. (18 CT 5032 - 5037; 36 R.T. 4532-4533)

Moreover, because this is a capital case, there are additional considerations that come into play. Even if the evidence were sufficient, in a noncapital context, to support a robbery murder special circumstance (which it is not), the evidence showing major participation and reckless indifference to human life is too weak and uncertain to serve as a constitutionally valid basis for establishing death-eligibility and turning a noncapital homicide into capital murder. The evidence cannot satisfy the heightened reliability requirement mandated in capital cases by the Eighth and Fourteenth Amendments and California state constitutional analogues. Thus, permitting appellant's robbery murder special circumstance finding to stand would violate not only *Winship*'s due process standard for a criminal convictions, but would also violate the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. at 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

Factual Background

The issue of liability for the special circumstance was actually raised twice in this case. The first time the issue came up was in a Penal Code section 995 motion made by trial defense counsel at the close of the preliminary hearing. The second was after the close of the prosecution's case when the defense raised the issue in a Penal Code section 1118.1 motion. For ease of understanding, appellant will

recount the arguments made on both occasions.

Penal Code Section 995 Motion.

After the close of the preliminary hearing, appellant filed a Penal Code section 995 motion. The written motion argued *inter alia* that under the *Tison*[96] decision, the defendant was not a "major participant" in the killing because the "acts" were not contemporaneous with the homicide and supplying the weapon was not a "substantial" contribution to the homicide. Further, Mr. Williams did not act with "reckless indifference" to human life by supplying the weapon to the perpetrators since being armed is an inherent part of a violent felony. Moreover, the purported direction to shoot resisters was attenuated by time and was in response to a hypothetical which might or might not have taken place. For these reasons, the defendant's responsibility was not proportionate to the responsibility of the actual perpetrators. (2 CT 374-388.)

In its written response, the prosecution urged that a member of a conspiracy may be held liable for all the independent acts of the coconspirators. Further, he is continually liable until he withdraws from the conspiracy and Mr. Williams never withdrew from the conspiracy in this case. Thus, Ms. Los' death was the natural and probable consequence of the acts the defendant set in motion. (2 CT 396-406.) More importantly, Mr. Williams' general declaration that resisters should be shot is evidence of his specific intent to kill in this

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96 *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed. 2d 127, 107 S.C. 1676]

instance. (2 C.T. 407.) Additionally, the defendant told police that he and Lyons planned the robbery the night of May 19, 1993. He gave the gun to Lyons and wanted Lyons to get the vehicle so they could all go to Orange County that night. (2 CT 407-408.) Finally, the prosecution argued that the mandate of *Tison* was inapplicable to this case. (2 CT 408.) In *Tison*, the court said there would be no death penalty liability for a person who served only as the getaway driver. Here, by contrast, the defendant was an integral member of the gang that assaulted Ms. Los. (2 CT 409.)

Penal Code section 1118.1 Motion

At the close of the prosecution's evidence, the defense made a Penal Code section 1118.1 motion challenging the special circumstance. In the motion, appellant argued that the evidence showed that he was not a major participant in the homicide or the attempted robbery of Ms. Los. He was not present during the offense and any "counseling" or "encouragement" took place several days before the incident. Codefendant Dearaujo and Christopher Lyons proceeded to the parking lot of the family fitness center and committed the crime on their own. Appellant provided no planning, direction or control of their activities. At most, appellant provided a weapon that was subsequently used to commit the homicide. Furnishing a weapon does not meet the requisite element of major participation. (18 CT 5034-5035.)

Additionally, appellant did not act with reckless indifference to human life. Being armed or providing arms are endemic to any violent

felony. Arming alone will not qualify as reckless indifference. Further, since it was codefendant Dearaujo who was actually armed when the felony was committed, appellant's criminal culpability is further attenuated. (18 CT 5036.)

When the motion came before the trial court for argument, trial defense counsel cited *Tison* and *Enmund*[97] for the proposition that mere felony murder liability is insufficient to support the special circumstance. Further, merely furnishing the firearm is insufficient as well. (36 R.T. 4532.) The use of firearms and the possibility of bloodshed are generally foreseeable in any violent felony, but foreseeability is not reckless indifference. (36 R.T. 4532.) Further, major participation requires more than was shown by the facts of this case. Appellant was not present at the homicide. Although he admits giving a gun to either Dearaujo or Lyons, that transfer took place well before the homicide. If there was a plan, it was not something that Mr. Williams carried out. (36 R.T. 4533.)

The prosecutor responded that there was plenty of evidence of both major participation and reckless indifference. First, the prosecutor urged that the carjacking that resulted in Ms. Los' death was probably appellant's idea. In the prosecutor's view, appellant recruited Dearaujo and Lyons to do the carjacking and provided the weapon and his jacket. More importantly, armed robbery is a crime that in and of itself shows reckless indifference to human life. Even

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97 *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140]

though appellant wasn't present during the actual shooting, he discussed shooting robbery victims on at least one prior occasion. (36 R.T. 4534.) "But for" appellant's conduct and wanting Lyons and Dearaujo to commit the crime, Ms. Los would be alive today. Given those circumstances, the evidence supports both the major participant and reckless indifference elements necessary for the jury to find the special circumstance to be true. (36 R.T. 4534)

The court ruled that there was sufficient evidence of both elements to send the special circumstance to the jury. The court pointed to evidence showing that appellant was a major planner in the overall conspiracy and a "major instructor of his minions." (36 R.T. 4535) He used "G stripes" as incentives and manipulated peer pressure and the need to belong as additional incentives. Appellant was at least a co-leader of the conspiracy to rob, acquire wealth, share and invest it. That thread was interwoven throughout the charged offenses. (36 R.T. 4535.)

Additionally, the judge noted that appellant's exhortation to shoot resisters was some evidence of his intent and certainly of reckless indifference to human life. Providing a weapon on this occasion amply demonstrated his reckless indifference. (36 R.T. 4535-4536.) In the context of the prior discussion involving shooting resisters, appellant's involvement in this incident went far beyond simply furnishing a weapon. (36 R.T. 4536.)

For those reasons, the evidence was sufficient to survive a Penal Code section 1118.1motion to dismiss the special circumstance.

(36 R.T. 4536.)

Jury Instructions

During discussions on the felony murder (robbery) special circumstance, the prosecution admitted that the section of the CALJIC 8.80.1 pattern instruction dealing with specific intent to kill should be eliminated since appellant was not at the crime scene and thus did not have the specific intent to kill Ms. Los. (38 R.T. 4656-4662.) Later, at the close of the guilt phase evidence, the court instructed the jurors on the slightly modified special circumstance instruction as follows:

> "If you find the defendant in this case guilty of murder in the first degree, you must then determine if the following special circumstance is true or not true: That the murder of Yvonne Los was committed while the defendant was engaged in the commission or attempted commission of and immediate flight after committing or attempting to commit the crime of attempted robbery.
>
> The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> If you find that a defendant was not the actual killer of a human being, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that such defendant, with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of robbery which resulted in the death of a human being, namely Yvonne Los.

A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being. In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously. You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied." (43 R.T. 5144-5145.)

Jury Note

During guilt phase deliberations, the jury sent the court the following note:

[Juror Question requesting the following information:]

"1. Testimony of James Handy, (after lunch) LA Times, Classy B

2. 2 more jury instructions [packet of jury instructions]

3. Clarification on Section 8.80.1 p. 19 of the jury instructions (in simple English) Thanks. :)

[signature] 3/26/98 Juror #3 [foreperson]

[Court response] "In jury instruction 8.80.1 the definition of 'reckless indifference' is contained within the instruction.

The definition of 'major participant' is the ordinary meaning of the words." (19 CT 5154.)

Proportionality

Although the Eighth Amendment does not specifically prohibit disproportionate sentences nor does it contain an express mandate for individualized punishment, the Supreme Court has held that the cruel and unusual punishment clause of that Amendment bans sentences that are grossly disproportionate to the crime for which the defendant is convicted. (*See, e.g., Solem v. Helm* (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637].) Additionally, in *Woodson v. North Carolina* (1976) 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944] (followed in *Lockett v. Ohio* (1978) 438 U.S. 586, 603- 04, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973), the Court set forth the requirements of individualized sentencing:

> "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

(*Woodson,* 428 U.S. at 304, 96 S.Ct. at 2991.)

In *Enmund v. Florida* (1982), 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140] the defendant drove a getaway car. His confederates intentionally killed two persons during a robbery. Based solely on

accomplice liability for felony murder, the Florida court sentenced the defendant to death. (*Enmund,* 458 U.S. at 786, 102 S.Ct. at 3370-71.) Finding that death was a disproportionate penalty "for one who neither took life, attempted to take life, nor intended to take life." the United States Supreme Court reversed. (*Enmund,* 458 U.S. at 787, 801 [102 S.Ct. at 3371, 3378.] Focusing on Enmund's personal culpability and applying the federal proportionality principles set forth in *Lockett,* and Woodson, the Court concluded, "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims]. This was impermissible under the Eighth Amendment." (*Enmund,* 458 U.S. at 798 [102 S.Ct. at 3377].)

In her dissenting opinion in *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140], Justice O'Connor explained the proportionality concept this way: "In sum, in considering the petitioner's challenge, the Court should decide not only whether the petitioner's sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner's involvement in the crime, as well as whether the procedures under which the petitioner was sentenced satisfied the constitutional requirement of individualized consideration set forth in Lockett. [*v. Ohio* (1978) 438 U.S. 586, 605 [98 S.Ct. 2954, 2965, 57 L.Ed.2d 973]]" *Enmund*, 458 U.S. at 815-16, 102 S.Ct. at 3386-87

(O'Connor, J., dissenting)

It is **not** enough simply to find that the case fit within statutory parameters or to defer to the jury's determination that death was the appropriate penalty. The critical inquiry is whether the defendant's conduct under the circumstances of this case was *individually blameworthy* enough that death is the appropriate punishment. (See *Coker v. Georgia* (1977) 433 U.S. 584 [97 S.Ct. 2861, 53 L.Ed.2d 982].)

Building on the *Edmund* reasoning, the court subsequently and specifically held that mere liability for felony-murder is **not** sufficient to warrant either the imposition of the death penalty or a true finding on a special circumstance. (*Tison v. Arizona* (1987) 481 U.S. 137, [95 L.Ed. 2d 127, 107 S.C. 1676].) In *Tison*, the defendants were brothers who helped arrange the prison escape of their father and his cell mate. Both prisoners were convicted murderers. The getaway vehicle broke down on a desert highway so the group decided to steal another car from a passing motorist. When a family stopped to help, the group forced them off the highway and down a dirt road. The defendants' father told his sons to return to the car for some water. When the Tison brothers returned they witnessed their father and his cell mate shotgun the family to death. The brothers were tried, convicted, and sentenced to death under Arizona's felony-murder and accomplice liability statutes. *(Tison,* 481 U.S. at 139-42.)

On appeal, the defendants argued that their death sentences were disproportionate as the Eighth Amendment was construed in

Enmund. The Supreme Court disagreed. It concluded that *Enmund* left open "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." *(Tison,* 481 U.S. at 152.) Thus, in order to sustain the felony murder special circumstance against a defendant who was not the actual killer, the prosecution must prove that the defendant (1) acted with reckless indifference to human life and (2) was a major participant in a felony which resulted in death. (*Id.*, 481 U.S. at p. 158.) California Penal Code Section 190.2, subdivision (d) attempts to embody the *Tison* requirement.[98]

The "reckless indifference" standard of *Tison v. Arizona* is meant to describe a mental state short of intent to kill, yet beyond foreseeability. Its purpose is to "genuinely narrow the class of persons eligible for the death penalty" *(Zant v. Stephens* (1983) 462 U.S. 862, 877, [103 S.C..2733, 77 L.Ed.2d 235]) so that felony-murder liability alone does not permit execution.

Imposition of the death penalty on non-killer accomplices or conspirators such as appellant has always been problematic. "The nontriggerman convicted of felony murder is three times removed from the locus of blame: the killing is murder by reason of the felony-murder rule, the defendant is responsible for the killing under

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[98] Penal Code section 190.2, subdivision (d), enacted in 1990 pursuant to Proposition 115, tried to bring "state law into conformity with *Tison v. Arizona* (1987) 481 U.S. 137, 158 . . . " (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298. fn. 16.)

accomplice liability principles, and he faces the executioner because of the manner in which another person killed. Such a person may be at the outer reaches of personal culpability, yet still face death." Garnett, R., *Depravity Thrice Removed: Using the 'Heinous, Cruel or Depraved' Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases* (1994) 103 Yale L.J. 2471, 2473.

Significantly, however, the *Tison* court noted, "the possibility of bloodshed is inherent in the commission of **any** violent felony and this possibility is generally foreseeable and foreseen." ([Emphasis added] *Id.*, 481 U.S. at 151.) Foreseeability, therefore, is simply too low a standard for imposition of the death penalty. (*Ibid.*) The "reckless indifference" standard cannot equal forseeability because then "every felony murder accomplice [would be] arguably recklessly indifferent." (Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death* (1990) 31 B.C. L. Rev. 1103, 1163-1167.) That is, the amorphous nature of "reckless indifference" would allow courts to impose the death penalty on any felony-murderer simply by fitting the facts of the case into a risk-oriented analysis. (See Note: *Constitutionalizing the Death Penalty for Accomplices to Felony Murder*, 26 Am. Crim. L. Rev. 463, 489-490.)

People v. Estrada (1995) 11 Cal.4th 568 approved the "requirement of a defendant's subjective awareness of the grave risk to human life created by his or her participation in the underlying felony. This is the meaning intended by the phrase 'reckless indifference to human life' as it is used in section 190.2(d), and as defined in *Tison*."

(*Id.* at 578.) But what facts manifest subjective awareness?

Enmund v Florida, supra, 458 US 782, represents one end of the spectrum. The defendant in that case had been convicted of murder and robbery and sentenced to death even though the record supported no more than the inference that the defendant had been in a car by the side of the road, several hundred feet away, waiting to help his alleged confederates escape from the scene of an armed robbery, while the confederates murdered their victims in the victims' house.

The Supreme Court recognized that robbery is a serious crime deserving serious punishment, but is not so grievous an affront to humanity that the only adequate response would be the death penalty, since life for the victim of a robbery is not over and normally is not beyond repair, and the court concluded that death is an excessive penalty for the robber who, as such, does not take human life. It would be very different, the Supreme Court noted, if the likelihood of killing in the course of a particular robbery were so substantial that one should share in the blame for the killing if he or she somehow participated in the felony, but the court found no factual basis for such a conclusion in Enmund's case, despite his knowledge that his confederates were armed. *Enmund* thus points to the defendant's appreciation of risk from his subjective standpoint.

The California Courts, however, seem to have chosen a different path. In *Bustos, Mora and Proby, infra*, the courts of appeal looked at the *Tison* decision in a way that represents the other end of the spectrum. These courts counted particular factors in the *Tison* case

noting that the Tison brothers (1) smuggled guns to their father and his cellmate, both of whom were convicted murderers; (2) helped the two prisoners overpower their guards and escape from prison; (3) flagged down passing motorists when the original getaway car broke down; (4) participated in kidnaping the motorists at gunpoint and robbing them of their vehicle and other valuables; (5) were physically present when their father and his cellmate fatally shot the motorists; (6) made no effort to aid the victims although they were allegedly surprised by the shootings; and (7) continued to assist in the escape attempt thereafter.

Significantly, however, the Supreme Court reversed the Tison brother's sentences of death because the Arizona courts employed an overbroad "foreseeability" standard in imposing sentences of death. Participants in armed robberies can frequently anticipate that lethal force may be used, the Supreme Court noted, and Enmund himself may have done so; but to reformulate the intent element in this manner, the court concluded, would amount to a mere restatement of the felony-murder rule. (*Tison* at p. 151.)

In California and some other jurisdictions, *Tison* has been misunderstood and misapplied as an example of when a non-slaying accomplice is liable. When evalauting the *Tison* case, three points are crucial. First, the Supreme Court in *Tison* did not overrule *Enmund.* If an accomplice has no basis to anticipate a high degree of risk of death, beyond that which inheres in an armed robbery, he does not act with reckless indifference. Second, *Tison* did **not** hold the facts of that case

necessarily sufficient to meet the reckless indifference standard, but merely remanded to the state courts to make that determination. It is improper, therefore, solely to compare the facts of a given case with the facts of *Tison* in assessing sufficiency. Third, on remand, the Arizona state courts did not impose a second death penalty on the Tison brothers. See *State v. Rodriguez* (Del. Sup. Ct. 1993) 656 A.2d 262, at 266, chronicling the subsequent remand in the *Tison* case. Instead, *Tison* should offer guidance only as to potential factors in the analysis. So, too, should decisions from other jurisdictions. The factors are generally outlined as follows:

Direct Action or High Degree of Participation of Nontriggerman Accomplice Causing or Contributing to Death

Tison suggests scenarios meeting its standard: "the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property." (*Id.* at 157.) These descriptions could equally fall under the *Enmund* classification of "actual killer" where there are no other participants. Applied to an accomplice, however, they contemplate a very high degree of causal involvement in the homicide that is absent in this case.

Cases following this factor are *Bush v. Singletary* (11th Cir. 1993) 988 F.2d 1082, in which a kidnaping accomplice stabbed the

victim but another participant ultimately killed her with a gunshot; *Duboise v. State* (S.C.. Fla. 1999) 520 So. 2d 260, 266, where the defendant was one of a group of persons who struck a rape victim with boards, and death resulted from the cumulative effects of the beating; *State v. Ryan* (S.C.. Neb. 1995) 534 N.W.2d 766, 787, where the defendant was the first to begin a campaign of torture against the victim, although not the ultimate cause of death.

This "causation" focus requires the Court to look at the defendant's contribution to the deaths rather than his contribution to the underlying felonies. *Resnover v. Pearson* (7th Cir. 1992) 965 F.2d 1453, for example, involved the gunning down of police officers who were attempting to serve arrest warrants on people believed to reside at the home. (*Id.* at p. 1455.) The Seventh Circuit found it unclear which of two suspects (Smith or Resnover) fired the fatal shot. The court nevertheless upheld the judgment under the "reckless-indifference" standard as to Resnover, finding that he fired his gun at the victim and at other officers who were present. (*Id.* at p. 1464.)

Here appellant was absolutely excluded from the realm of perpetrators. The shooting was committed by codefendant Dearaujo. Appellant may have provided the weapon, but he did not even know if the carjacking actually would take place. There was no specific plan to conduct a carjacking of any specific person. Instead, the evidence shows that appellant had a ride to a party in Anaheim but that there wasn't enough room for Dearaujo and Lyons in the car. Thus, if they wanted to go to the party, they would have to obtain their own vehicle.

For all appellant knew, Dearaujo and Lyons would abandon the enterprise and decide that the risk of getting caught outweighed the desire to go to the party. Certainly on the two prior occasions when appellant's associates attempted to carjack vehicles [De George and (Nolin) Meza], they abandoned the enterprise and ran away when the victims refused to cooperate. (25 R.T. 3503; 27 R.T. 3795.)

Appellant's involvement amounted to nothing more than furnishing a weapon in the event that his associates decided to commit a criminal act on their own. Simply contributing to the commission of a possible felony fails the requisite test set forth in *Tison* of direct involvement in actually causing a death. The evidence here shows nothing more than vicarious liability for felony murder, an insufficient basis for a true finding on the special circumstance.

Physical Presence at the Location of and Failure to Intervene

The Court in *Tison* found it significant that the brothers were present at the time of the killings and in a position to intervene and prevent the victims' deaths. Even if a defendant is present at the scene, however, the opportunity to intervene must be meaningful. As explained in *State v. Rodriguez, supra* , 656 A.2d 262:

> "Major participation and reckless indifference to human life are more likely to be found where an accomplice defendant is present at and before a killing which involved considerable deliberation and the killing is preceded by physical or psychological abuse of the victim, including assault, torture or other acts of cruelty. Such a finding is less likely where the killing is sudden or impulsive and it cannot be established either through the

testimony of an eyewitness or through other evidence that the defendant actually caused the victim's death."

Id., 656 A. 2d at 272.)

Consistent with this approach, in *Jackson v. State* (S.Ct.Fla. 1991) 575 So. 2d 181, the Florida Supreme Court held that the presence of the defendant at the site of the homicide is only meaningful in relation to the length of the transaction, since the opportunity to intervene is limited where one of several participants acts quickly and impulsively. The codefendant in *Jackson* was armed with a gun, but the defendant was not. There was no evidence that the defendant intended to harm anybody or that he expected violence to erupt. There was no opportunity for the defendant to prevent murder since the murder resulted from a sudden single gunshot, which was a reflexive reaction to the victim's resistance. (*Id* at 192-193.)

As the evidence makes clear in this case, however, appellant was *not* present and did not know for sure that a carjacking would even take place. The events that led to the death of Ms. Los occurred suddenly and without any preexisting plan. Dearaujo and Lyons simply walked around the parking lot to see if a relatively easy victim would randomly appear. When Ms. Los suddenly appeared in her vehicle, the carjacking attempt began. Not only did Dearaujo deliver the fatal shot, but appellant had no meaningful opportunity to counsel his companions against rash action or to intervene on behalf of Ms. Los.

State v. Branam (Tenn. 1993) 855 S.W. 2d 563, 570 is

particularly close to the facts of this case. There, a robbery went sour when the victim began honking the horn of her car and the triggerman shot her. (Id., 855 S.W. 2d at 570.) Although the defendant was physically present, he was held **not** to have manifested reckless indifference. Like appellant herein, he was never in possession of a weapon and never personally confined the victim. There was no evidence of a preconceived plan to kill by the triggerman. The probable awareness that the triggerman was armed was not enough, in itself, to manifest reckless indifference. (*Id.*, 855 S.W. 2d at 571.) The facts of this case are even weaker because not only was appellant not present at the scene, there is no evidence that appellant was aware that a carjacking would even take place.

Prior Plans or Expectations of Violence

Tison suggests other evidence from which an inference of reckless indifference may be drawn: placing the victim in jeopardy of persons known to have homicidal tendencies, or supplying the means by which the killing is accomplished. (Id. at pp. 151-153.) Or, there may be other facts, which alert the particular defendant that deadly violence is likely to occur. It is not sufficient simply that there be a **risk** of violence, there must be a **probability of death** based on facts known to the defendant. (*See, e.g., Abram v. State* (S.C.. Miss. 1992) 606 So. 2d 1015, at 1042.)

Awareness of a coparticipant's violent propensities may be the key to death eligibility. (*See, e.g., Guy v. State* (S.C.. Nev. 1992) 839 P.2d 578, 587, *Doleman v. State* (S.C.. Nev. 1990) 812 P.2d 1287,

1293.) Specific facts which implied a high likelihood of violence and death were important to the outcomes in *Haney v. State* (S.C.. Ala. 1991) 603 So. 2d 368, 386 and *White v. State* (Miss. 1988) 532 So. 2d 1207. However, since foreseeability was specifically rejected in *Tison*, it is not sufficient that a defendant should have anticipated violence. The "subjective awareness" standard requires that a defendant *expected homicidal* violence.

Appellant in this case had no basis to believe that his companions were homicidal. Even though appellant supplied the weapon for a possible carjacking, the jury could not have inferred a subjective awareness of a grave risk of death from that fact alone. There was no evidence in this case that Dearaujo had displayed violent propensities in the past, or that appellant was aware of his propensities. While Dearaujo had been involved in the prior Circle K robbery, he did not hurt anyone. Moreover, in this case, it appears that the shooting was largely reflexive reaction to the victim's resistance. Indeed, since Mr. Dearaujo had organic brain damage and was borderline mentally retarded (Supplemental R.T. Vol. 7 at p. 6681), it is doubtful that he even had the capability to meaningfully reflect on a decision to pull the trigger.

The trial judge concluded that the evidence showing that appellant urged group member's to "cap em" if victims offered resistance was sufficient evidence that appellant acted with reckless indifference. (36 R.T. 4535-4536) Not so. Appellant's comment was offered in response to a hypothetical question and provided what was

essentially a hypothetical answer to a hypothetical situation. (2 C.T. 374-388.)

This is not a situation where the defendant directed a specific attack on a specific individual and told the assailants to kill. Instead, this was mere braggadocio by inexperienced (and likely intoxicated) teenagers fantasizing about lurid possibilities. Indeed, Steve McNair testified that he did not even consider himself to be a member of the group (31 R.T. 4265) and Weatherspoon testified that he did not take directions from appellant. (31 R.T. 4213) If there was any doubt about the matter, despite this tough rhetoric, on the two occasions when victims actually offered resistance prior to this incident (DeGeorge and (Nolin) Meza), the perpetrators ran away. (25 R.T. 3503; 27 R.T. 3795.) There is no evidence that appellant exacted any sort of reprisal on his associates for their display of cowardice. He did not berate them or take any other measures to ensure that in the future, resisters actually would be shot.

Additionally, even the most inexperienced "wannabe" robber would recognize that shooting a gun in a parking lot where there are people around, is not a particularly good way to steal a car. Indeed, if the plan is to steal a car but the weapon has to be fired, the noise draws so much attention that the vehicle theft is fatally compromised. The weapon is actually useful only if the threat to use it overcomes the victim's will to resist. Here for example, the defense notes that after codefendant Dearaujo shot Ms. Los, he did NOT subsequently steal the vehicle. He ran away. Thus the actual use of the weapon

completely compromised the plan to steal the car rather than being an integral part of it.

The evidence also shows that virtually all of the robberies or attempted robberies occurred in or around the parking lot where other people were present. Most likely, that is why no one ever actually used the gun prior to the Los incident. Moreover, since all but the Circle K robbery were preceded by the same purported admonition to kill resisters yet none of those robberies even resulted in injury, let alone death, appellant's theatrical rhetoric to "cap 'em" adds nothing to his subjective awareness that death was likely to ensue from an attempted carjacking.

In short, none of the sorts of evidence that supply the *Tison* "subjective awareness" requirement are present in this case. That being so, the evidence is insufficient to establish the element of reckless indifference necessary to sustain the special circumstance finding.

Even Assuming Arguendo that the California cases of Bustos, Mora and Proby Are Good Law, They Are Easily Distinguishable.

In *People v. Proby* the defendant and a friend were employees at a McDonald''s Restaurant. (*People v. Proby* (1998) 60 Cal.App.4th 922, 925.) They planned to rob the restaurant while off duty. The defendant applied shoe polish to his friend's face and drove him to the restaurant. Armed with a sawed-off shotgun, the friend locked the staff inside a walk-in freezer and looted the safe. The defendant and his friend shared in the proceeds of the robbery. (*Id.*, at 925-926.)

Eleven days later, the defendant and his friend robbed another McDonald's restaurant. In this robbery, both entered the McDonald's; the defendant armed with a sawed-off shotgun and the friend armed with a semi-automatic handgun that the defendant had obtained for him. The friend fatally shot an employee in the back of the head because the employee recognized him. The defendant and his cohort then took money and gift certificates from the safe and left. (*Id.*, at 926.)

The Court of Appeal found that there was sufficient evidence that the defendant acted as a "major participant" with "reckless indifference to human life," as required to support the special circumstance that the murder was committed in furtherance of a robbery. (*Id.*, at 930.) In reaching this conclusion, the court emphasized the following facts: the defendant was armed and "actively" participated in the execution of the robbery; he provided his friend with the murder weapon; after witnessing his friend shoot the victim, he made no attempt to provide assistance, but instead took the money and left. In addition, the defendant had previously participated in a robbery with his friend where the robbery victims had been placed in a freezer vault and was thus aware of his friend's willingness to do violence. (*Id.*, at 929.)

A similarly high level of participation by an aider and abettor to a killing was found sufficient to uphold a special circumstance finding in both *People v. Bustos* (1994) 23 Cal.App.4th 1747 and *People v.*

Mora (1995) 39 Cal.App.4th 607. In *Bustos*, the defendant and codefendant jointly planned to rob a woman in a rest room at a Malibu beach. The two men had previously participated in a robbery together in another state. The defendant initially entered the rest room alone and unarmed to rob the victim, although he knew that his codefendant was waiting outside with a knife. The defendant struck the victim about the head and face, knocking her down. When she continued to resist, the codefendant ran in and stabbed the woman twice in the defendant's presence. The two men then fled together with the robbery proceeds, leaving the victim to die. (*Id.*, at 1754-1755.)

In *People v. Mora* (1995) 39 Cal.App.4th 607, the defendant helped plan the robbery of a drug dealer from whom he had previously bought drugs. The defendant knocked on the dealer's door and was allowed into the apartment. As the defendant was sharing a marijuana joint with the dealer and another visitor, the coparticipant knocked on the door. The defendant explained that his friend needed to use the bathroom. When the door was opened, the coparticipant pushed his way in while pointing a high-powered rifle. The defendant and his friend instructed the dealer and the visitor to get down on the floor, which they did. The dealer was then told to get up to get his drugs. As the dealer rose from his knees, the defendant grabbed him and a struggle ensued. The defendant's friend then fired a shot into the dealer's chest, causing the dealer to fall to his knees. The defendant then pushed the dealer to the ground and his friend shot him in the back. The defendant and his friend broke into the dealer's bedroom

where they obtained drugs and money. The victim was then left to die and the defendant threatened the remaining victim as he left. (*Id.*, at 611.)

Here, the evidence pertaining to the defendant's level of participation in the killing was far short of what was found to be sufficient to support the felony murder special circumstance finding in *Tison*, *Proby*, *Mora*, and *Bustos*. Contrary to the District Attorney's argument, appellant was not involved in any planning for the Los carjacking and did not participate in it. He wasn't even certain that the carjacking would actually take place. The idea for the carjacking apparently came from Lyons and Dearaujo themselves. They volunteered to obtain a vehicle to get themselves to the party. (20 R.T. 2832.) As explained above, appellant's involvement was limited to furnishing the weapon in case the perpetrators actually decided to commit a carjacking. There was no evidence that on this occasion appellant was subjectively aware that his actions would likely to lead to Ms. Los' death. Even if there was evidence of vicarious liability for the underlying felony of robbery, nothing demonstrates appellant's subjective awareness of the likelihood of death. Comparison to the circumstances of *Proby, Mora* and *Bustos* only confirm appellant's lack of culpability for the special circumstance in this case.

Accordingly, the true finding on the felony murder special circumstances under Penal Code section 190.2, subdivision (a)(17) must be set aside and the death penalty stricken.

XII.

THE TRIAL COURT ERRED IN REQUIRING APPELLANT WILLIAMS TO WEAR LEG RESTRAINTS DURING THE TRIAL

Introduction

A defendant may not be shackled in the courtroom except on a showing of manifest need and as a last resort in an extraordinary case. Here, despite proper behavior in the courtroom, the trial judge allowed the bailiffs to impose rigid leg restraints **based solely on the deputy's assessment** that a few instances of misconduct over a five year period in jail awaiting trial warranted shackling in the courtroom. The improper imposition of these restraints violated federal and state due process under the Fifth and Fourteenth Amendments, his Sixth Amendment rights to counsel and to present a defense, and to reliable guilt and penalty phase determinations under the Eighth Amendment.

Factual Background

During the five years that this case took to get to trial, appellant appeared in court for various proceedings.[99] There were no incidents of improper behavior during these court appearances.

Nevertheless, right after the preliminary instructions by the trial judge, the jury was dismissed for the evening and the following

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[99] These included appearances on 5/25/93 (1 C.T. 4), 6/7/93 (1 C.T. 14), 6/28/93 (1 C.T. 28), 8/06/93 (1 C.T. 48),

colloquy took place:

THE COURT: The record should show the jury has left the courtroom. I was approached by the security people that their intention is to request at some point Mr. Williams wear, at least initially, the leg restraint locking-type of device to prevent his escape or any type of other security issue. As I understand it, although, I have never seen it, it is an unobtrusive device which is not visible to any member of the jury. As long as there's no attempt to rapidly run, it remains flexible. So he can, if he tries to run, it's supposed to lock — supposed to lock, and then there was some talk about other restraints, but that should be put on the table so it can be addressed. I've been told that there or there are a number of incidents that apparently Mr. Williams has been in custody that have occurred in the jail that apparently support the sheriff's concern that some, at least minimal, restraints ought to be employed in this case.

Mr. Wright you're not prepared to deal with that, probably.

MR. WRIGHT: No we can deal with. I told Mr. Williams to expect this. So I don't think at this point I'm in a position to comment further but other than to say Mr. Williams has never been a problem for transportation, to my knowledge. I think the incidents that may have occurred in the jail are pretty old at this point. Other than that, I told Mr. Williams already to expect to have the leg restraint. He's seen it already and knows what it is. In light of what happened last week [in another case in another courtroom] it's something we expected to happen with anybody. I won't give the name.

THE COURT: All right and of course, because of what happened last week the device will be inspected

carefully each time it's applied then if there are any concerns above that regular restraint I assume that you will or someone from your office will make the presentation or ask us to revisit the issue.

THE BAILIFF: Yes, Your Honor.

THE COURT: Okay. (16 R.T. 2182-2183.)

Subsequently, during a court recess, defense counsel Wright told the court that Mr. Williams reported that the leg brace was "very, very uncomfortable." (16 R.T. 2211.) The court and the defendant then engaged in the following exchange:

THE COURT: I don't know if — admittedly, I've never seen it, don't know, in a very general sense, whether its adjustable or not.

THE DEFENDANT: Good for somebody tall, It's cutting me. It's built for somebody tall. (16 R.T. 2211.)

The prosecution suggested leg shackles as an alternative. (16 R.T. 2211.)

Defense counsel noted that if the defendant sat, the leg brace might not be so oppressive and the jury might not see it. If leg shackles would be an appropriate alternative, the defense would let the court know. (16 R.T. 2211.) Nothing further was said about the

matter and appellant spent the rest of the trial wearing the leg brace.[100]

Standard of Review

The standard of review is whether the trial court abused its discretion in ordering the defendant to be shackled. (*People v. Sheldon* (1989) 48 Cal.3d 935, 945)

The Unjustified Restraint Violated Appellant's State and Federal Constitutional Right s

Unjustified shackling of a defendant, which impairs his mental faculties and communication with his counsel, causes unwarranted pain and discomfort, creates an unwarranted aura of dangerousness and untrustworthiness and impairs the presumption of innocence, as well as the dignity and decorum of the courtroom, undermines a defendant's right to due process, to a fair trial, to present a defense, to the effective assistance of counsel, to a trial by jury, and to fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution. (See *Deck v. Missouri* (2005) 544 U.S. 622 [125 S.Ct. 2007, 2011]; 61 L.Ed.2d 953, also *Estelle v. Williams* (1976) 425 U.S. 501, 504-505 [forcing a defendant to stand trial in physical restraints may violate the Due Process clause and the Sixth Amendment right to trial by jury by undermining the presumption of

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[100] There is no indication anywhere in the record that codefendant Dearaujo, the actual murderer in this case ever wore leg restraints in the courtroom.

innocence]; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712 (Trial court's failure to consider or employ less drastic alternatives to shackling violated due process]; *Rhoden v. Rowland* (9th Cir. 1998) 172 F.3d 633 [unjustified shackling of defendant throughout trial violated due process]; *Riggins v. Nevada* (1992) 504 U.S. 127 [forced medication which may have interfered with defendant's ability to follow the proceedings or communicate with counsel violated due process and Sixth Amendment trial rights]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [heightened reliability required by the Eighth and Fourteenth Amendments for conviction of a capital offense]; and *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [reliable, individualized capital sentencing determination is required by the Eighth and Fourteenth Amendments]; *Zant v. Stephens* (1983) 462 U.S. 862, 869 [same]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [same].)

California courts also have long recognized the disadvantage a defendant faces when he appears in court shackled like a convict. As far back as *People v. Harrington* (1871) 42 Cal. 165, this court observed:

> "Should the Court refuse to allow a prisoner on trial for felony to manage and control, in person, his own defense, or refuse him the aid of counsel in the conduct of such defense, he would manifestly be deprived of a constitutional right, and a judgment against him on such trial should be reversed. In my opinion any order or action of the Court which, without evident necessity, imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and

> thereby materially to abridge and prejudicially affect his constitutional rights of defense and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf."

(*Id.*, at p. 168.)

In *Illinois v. Allen* (1970) 397 U.S. 337, the shackling issue was addressed by the United States Supreme Court. The court explained that restraining a defendant is a measure that may be employed only "as a last resort" in an extraordinary case. (*Id.*, at p. 344.) Explaining its decision, the court said:

> "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total restraint." (*Ibid.*)

Shortly afterwards in *Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 105-106, cert. denied, 416 U.S. 959 (1974), the court discussed five factors supporting the rule against shackling the defendant in th courtroom: (1) physical restraints may prejudice the defendant in the minds of the jury, thus reversing his presumption of innocence; (2) the defendant's mental faculties may be impaired by the shackles; (3) communication between the defendant and his lawyer may be impaired by any physical restraints; (4) the dignity and

decorum of the judicial proceedings may suffer; and (5) the restraints may be painful to the defendant. The court further held that a defendant may not be subjected to physical restraints of any kind in the courtroom, while in the jury's presence, unless a manifest need for the restraints has been demonstrated. (*Id.*, at p. 102.)

In *People v. Duran* (1976) 16 Cal.3d 282, 290-291, this court affirmed California's reliance on the federal authorities. The court stated the general rule applicable to physical restraints and "reaffirm[ed] the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." Further:

> "The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion. (*Id.*, at pp. 291-292.)

Moreover, under the standard set forth in *Duran*, the trial court's discretion is relatively narrow. (*Id.*, at pp. 292-293; *People v. Cox, supra,* 53 Cal.3d 618, 651.) Thus, the "manifest need" required for the imposition of physical restraints "arises only upon a showing of unruliness, an announced attention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which

disrupts or would disrupt the judicial process if unrestrained . . . .' (*People v. Duran*, *supra*, 16 Cal.3d. at p. 292, fn. 11.) Moreover, '[t]he showing of nonconforming behavior . . . must appear as a matter of record . . . . The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.' (*Id.*, at p. 291.)" (*People v. Cox*, *supra*, 53 Cal.3d at p. 651.) The federal standard is even higher -- shackling a defendant is only justified "as a last resort, in cases of extreme need, or in cases urgently demanding that action." (*Wilson v. McCarthy* (9th Cir. 1985) 770 F.2d 1482, 1485.)

Thus, shackling is proper only if there is a serious threat of escape, danger to those in or around the courtroom, or where disruption in the courtroom is likely. (*Ibid.*) Significantly, however, "[T]he determination to impose restraints and the nature of the restraints to be imposed are judicial functions to be discharged by the court, not delegated to a bailiff." (*People v. Jacla* (1978) 77 Cal.App.3d 878, 885; see also *People v. Jackson* (1993) 14 Cal.App.4th 1818.)

No Justification for Shackling

The trial judge's rulings demonstrate at best a studious indifference to the Constitutional imperative that a defendant not be shackled unless he poses a serious risk of flight or danger in the courtroom. Not only did the trial court simply take the bailiff's word for it that shackling might be necessary, but he failed to develop a

record supporting the shackling determination. Most importantly, however, trial judge failed to grasp his essential Constitutional responsibilities in making the shackling decision.

The trial judge held only a perfunctory hearing prior to deciding to maintain the restraints on appellant. At the time, the apparent rationale for the restraints was the sheriff's request based on defendant's purported jail incidents. (16 R.T. 2182.)[101] Moreover, in context it appears that the decision to shackle the defendant already had been made based entirely on the request of the sheriff's department. Indeed, defense counsel told the court that he had previously advised appellant that shackling would be imposed. (16 R.T. 2182.)

Significantly, prior to the introduction of the leg brace, the defendant had been present for a number of hearings. Nothing in the conduct of the defendant in court suggested a need for these restraints. Indeed, nothing in the record suggested that the defendant had been in any way disruptive in court during almost five years of various court proceedings.

Additionally, the trial court's ruling was not based on factual

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[101] Later in trial when the court and the parties were discussing the separate problem of shackling witnesses, the court noted that the courtroom itself was quite small and a witness on the stand close to the jury box could prove to be a danger. (30 R.T. 4093) Inadequate courtroom facilities, however, have been repeatedly rejected as a sufficient reason by itself to impose physical restraints. (See, e.g., *People* v. *Ceniceros* (1994) 26 Cal.App.4th 266, 278; *Solomon* v. *Superior Court* (1981) 122 Cal.App.3d 532, 536; *People* v. *Prado* (1977) 67 Cal.App.3d 267, 276.)

matters clearly set forth on the record. (*People v. Mar* (2002) 28 Cal.4th 1201, 1222.) Instead, the sheriff's department apparently informed the court that appellant had been involved in jail incidents. Nowhere in the record does the trial court indicate what these incidents were or what the defendant's role was ijn any of these incidents. **Apparently, the judge simply accepted the bailiff's recommendation with no further inquiry into the facts and circumstances.** Blanket acceptance of the bailiff's recommendation, however, is not the standard. In order for the court to impose physical restraints, there must be a showing of need based "on facts, not rumor and innuendo...". (*People* v. *Cox*, *supra,* at p. 652) Nothing in the record shows that the evidence presented to the trial court even remotely approached that standard.

Even assuming arguendo that in some "off the record" briefing, the sheriff's department somehow described the jail incidents in similar factual detail as the prosecution's penalty phase presentation, those facts still would not justify leg restraints. As described in the Statement of Facts, all of the incidents took place in various jail tanks where the defendant and his purported accomplice Deloney were attempting to establish dominance or positions of influence within the prisoner community. There was no showing that any of these incidents were related to any attempt to escape or that they posed any real challenge to the authority of correctional staff. Additionally, the most severe violence involving appellant in jail revolved around fisticuffs, certainly no match for the modern weaponry of correctional

staff or even the courtroom bailiff.

Moreover, nothing in the record demonstrates that the sheriff's department told the trial court about the chronological relationship between the observation of these incidents and the imposition of leg restraints. That is, there is no showing that the incidents were observed shortly before the restraints were imposed. What the later trial record shows is that the last jail incident involving appellant fighting with another inmate took place on December 29, 1995. (48 R.T. 5583.) It wasn't until January 27, 1998, more than **three years later**, that the trial court ruled that appellant was required to wear a leg brace. (18 CT 4995.) As trial defense counsel pointed out, by the time the court ordered restraints, the jail incidents were already quite old and not indicative of appellant's behavior in court. (16 R.T. 2182.)

In any event, the inescapable conclusion from the available evidence is that the trial judge simply acceded to the desire of the Sheriff's Department for absolute security based on little more than a precaution. The trial judge clearly failed to make an independent factual determination of the necessity for the restraints. *(People v. Duran, supra* 16 Cal.3d 282, 291 [trial court, not security personnel, must make the determination that there is evident necessity for the restraints used to preserve courtroom security]. (See also *People v. Jacla, supra,* 77 Cal.App.3d 878, 885: "[T]he determination to impose restraints and the nature of the restraints to be imposed are judicial functions to be discharged by the court, not delegated to a bailiff"; and *People v. Jackson, supra,* 14 Cal.App.4th 1818, 1825: "The trial court

here abused its discretion in abdicating its responsibility for courtroom security to the bailiff and/or sheriff's personnel.")

Finally, nothing in the trial court's comments indicates it was aware of the procedural and substantive requirements established in *Duran* that should have governed its determination of defendants' objection to the leg restraints. (*People v. Mar, supra*, 28 Cal. 4th at p. 1222.) Under these circumstances the reasons cited by the court fail to demonstrate the "manifest need" for shackles, and thus the trial judge abused his discretion as a matter of law. (Cf. *Deck v. Missouri, supra,* 544 U.S. ____ [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953] [death penalty reversed because trial judge failed to make clear why shackles were neccessary at this time with this defendant, thus abusing his discretion]; *People v. Cox, supra*, 53 Cal.3d at pp 650-651.)[102]

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[102] In *People v. Cox, supra*, 53 Cal.3d 618, defense counsel alerted the trial court to the possibility that the defendant might try to escape. The trial court then ordered that defendant be handcuffed to his chair. The next day, counsel requested that the handcuff be removed because it was uncomfortable. The trial court refused. "A day or so later", defendant arrived in court wearing leg shackles. When defense counsel asked why the shackles were necessary, the court said " 'At least for today, I am going to order that, based on information that has previously been placed on the record in this case, and also based on some information that was imparted to the court today and it is merely by way of rumor. ...' ... '[T]he bailiff informed me there were certain rumors floating through the jail today that he was receiving information through other jail personnel that there was going to be an escape, an attempt today; and that's why there is the use of the shackles today. [¶¶] I don't know that it's anything more than a rumor, but in light of all the information, I felt it was better to be safe than sorry.' " (53 Cal.3d at pp. 650-651.)

On appeal, this court found that the record simply failed to demonstrate "manifest need" within the meaning of the *Duran* standard. (*Id.* at p. 651.) The court observed that: "While the instant record may be rife with an undercurrent of tension and charged emotion on all sides, it does not contain a single substantiation of violence or the threat of

Prejudice

If the defendant was improperly shackled in the courtroom, the error is of constitutional magnitude. (See *Deck v. Missouri, supra,* 544 U.S. ____ [125 S.Ct. 2007, 2009; 61 L.Ed.2d 953] *Estelle v. Williams* (1976) 425 U.S. 501, 504-505; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712 .) Thus, there is no burden on the defense to prove the error was harmless, prejudice is presumed. (*Deck v. Missouri, supra,* 544 U.S. ____ [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953]. The burden is on the respondent to prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24; see generally *Yates v. Evatt, supra,* 500 U.S. 391, 402-405 [114 L.Ed.2d 432, 111 S.Ct. 1184][overruled on a different ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 72].)

To show lack of prejudice from the error in shackling appellant, the factors set forth in *Kennedy v. Cardwell, supra,* 487 F.2d at pp 105-106, must be considered. (*Spain v. Rushen, supra,* 883 F.2d 712, 721.)

First, the physical restraints may prejudice the defendant in the minds of the jury, thus reversing his presumption of innocence. When an accused is required to appear before jurors in restraints, this presumption is seriously jeopardized. (*Holbrook v. Flynn* (1986) 475

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violence on the part of the accused. Although the shackling decision was not based on a 'general policy' to restrain all persons charged with capital offenses, neither did it follow 'a showing of necessity' for such measures.[Citation] Accordingly, the trial court abused its discretion in ordering defendant physically restrained in any manner." (*Id.,* at p. 652.)

U.S. 560, 569.) In this instance, there is nothing on the record showing one way or the other whether the jury could see appellant's leg restraints. Nevertheless, in view of the controversy that erupted after a sharp-eyed juror perceived that black witnesses were handcuffed while white witnesses were not (see Issue I *infra.*), the trial judge should have taken it upon himself to determine if any jurors were similarly aware of whether the defendant was restrained. Indeed, as the bailiff noted, in another courtroom, the trial judge almost always had the defendants shackled with leg restraints, but placed a wooden screen at counsel table so the jurors would not see. (30 R.T. 4092.)

There is nothing in this record indicating that there was a skirt or other device at counsel table to prevent the jurors from seeing the defendant's leg restraint. More importantly, this court has **no factual basis** upon which to make a determination that the jurors could NOT see the leg restraints. (See (*Deck v. Missouri, supra,* 544 U.S. ____ [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953] [Death sentence reversed even though record ambiguous about whether the jury saw the restraints or the effect the restraints had on the jury.]

The second danger from restraining a defendant is that the defendant may feel confused, frustrated, or embarrassed, thus impairing his mental faculties. Here, the trial court was aware that the brace was "very, very uncomfortable" and was "cutting" the defendant. (16 R.T. 2211.)

Third, communication between the defendant and his lawyer may be impaired by any physical restraints. While this does not appear

directly from the record, given the defendant's obvious discomfort and distaste for the physical restraints, there is little question that he was distracted by the leg braces. Indeed, imagine immobilizing a leg for even 20 minutes while sitting at a desk trying to work. The inability to properly flex the leg and stretch tired muscles and the inability to adjust leg position to increase blood flow causes capillaries and veins to constrict thus making the restraints extremely uncomfortable and unduly distracting.

Fourth, the dignity and decorum of the judicial proceedings may suffer. The United States Supreme Court has stated that trial courts must consider this factor before ordering restraints. (*Illinois v. Allen, supra*, 397 U.S. at p. 344.) In this situation, the dignity and decorum of judicial proceedings was destroyed by the totally uncalled for and unnecessary shackling. Indeed, to permit shackling of any defendant without proper due process constraints insults the system as a whole.

Finally, the restraints may be painful to the defendant. Not only did appellant complain about how uncomfortable the restraints were, but modern shackles inflict enough pain to call into question the propriety of their use. (*United States v. Whitehorn* (D.D.C. 1989) 710 F.Supp. 803, 840, rev'd on unrelated grounds sub nom. *United States v. Rosenberg* (D.C.Cir. 1989) 888 F.2d 1406.)

This court grappled with all of these considerations in *People v. Mar, supra,* 28 Cal.4th 1201. In *Mar*, the issue was whether the trial court's unjustified use of a "stun belt" restraint was prejudicial. The belt was never activated and the facts demonstrate that the jury

probably could not see it. More importantly, there was nothing in the record to show what effect the belt had on the defendant while testifying or on his demeanor. (*Id.*, at p. 1213.)

Nonetheless, finding that the use of such a physical restraint was prejudicial, this court hearkened back to *Harrington*. This court concluded that even when the restraint is not visible to the jury, it may nonetheless "preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury..." (*Id.*, at p. 1219.)

That was the situation here. The defense urged that the restraints were unnecessary and informed the court that the leg braces were "very, very uncomfortable." It is difficult to imagine that despite the defendant's perception that he had done nothing to warrant these special restraints and the obvious discomfort they inflicted, the restraints nonetheless left the defendant's ability to concentrate on the proceedings or participate in his defense unimpaired. As this court noted in *Mar*: "Even when the jury is not aware that the defendant has been compelled to wear a [restraint], the presence of the [restraint] may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury...." (*People v. Mar, supra,* 28 Cal.4th at p. 1219.)

Under the circumstances of this case, therefore, appellant was prejudiced by the trial judge's error in requiring him to be shackled

and that error was not harmless beyond a reasonable doubt. (*People v. Jacla, supra*, 77 Cal.App.3d at p. 891.) Accordingly, appellant's judgment of conviction must be reversed.