SUPREME COURT COPY

SUPKEIVIL VVVIII IN THE SUPREME COURT OF THE STATE OF CALIFORNIA EB 1 3 2008

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JACK EMMIT WILLIAMS,

Defendant and Appellant.

Riverside County Superior Court No. CR49662 Honorable Timothy Heaslett, Judge

RESPONDENT'S BRIEF

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CAPITAL CASE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JACK EMMIT WILLIAMS,

Defendant and Appellant.

S073205

CAPITAL CASE

STATEMENT OF THE CASE

In an information filed on August 19, 1994, the Riverside County District Attorney charged Alonso Dearaujo and appellant Jack Emmitt Williams in count one with the first degree murder of Yvonne Los on May 19, 1993 (Pen. Code, § 187, subd. (a)).^{1/} The special circumstance alleged was that the murder was committed by Williams and Dearaujo while they were engaged in the commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime of attempted robbery (§§ 644/211), within the meaning of § 190.2, subdivision (a)(17)(i). It was further alleged that Dearaujo personally used a .380 caliber Beretta handgun (§§ 12022.5, subd. (a) and 1192.7, subd. (c)(8)), and that a principal was armed with that firearm (§ 12022, subd. (a)(1)). (2 CT 352-353; 3 RT 135.)

In count two, Williams and Dearaujo were charged with the attempted robbery of Los (§§ 644/211). It was further alleged that Dearaujo personally used a .380 caliber Beretta handgun (§§ 12022.5, subd. (a) and 1192.7, subd.

^{1.} Unless otherwise indicated, all statutory references are to the Penal Code.

(c)(8)), and that a principal was armed with that firearm (§ 12022, subd. (a)(1)). (2 CT 353.)

In count three, Williams and Dearaujo were charged with the robbery of James Garcia on May 14, 1993 (§ 211). It was further alleged that Dearaujo personally used a .380 caliber Beretta handgun (§§ 12022.5, subd. (a) and 1192.7, subd. (c)(8)), and that a principal was armed with that firearm (§ 12022, subd. (a)(1)). (2 CT 353-354.)

In count four, Williams and Dearaujo were charged with the attempted kidnapping of Debby Phillips to commit a robbery on May 14, 1993 (§§ 664/209, subd. (b)). It was further alleged that a principal was armed with the .380 caliber Beretta handgun (§ 12022, subd. (a)(1)). (2 CT 354.)

In count five, Williams and Dearaujo were charged with the attempted kidnapping of Deena Nolan to commit a robbery on May 14, 1993 (§§ 664/209, subd. (b)). It was further alleged that a principal was armed with the .380 caliber Beretta handgun (§ 12022, subd. (a)(1)). (2 CT 355.)

In count six, Williams and Dearaujo were charged with the robbery of Dale Nonies on May 15, 1993 (§ 211). It was further alleged that Williams personally used a .380 caliber Beretta handgun (§§ 12022.5, subd. (a) & 1192.7, subd. (c)(8)), and that a principal was armed with that firearm (§ 12022, subd. (a)(1)). (2 CT 355-356.)

In count seven, Williams and Dearaujo were charged with the attempted robbery of Barbara DeGeorge on May 15, 1993 (§§ 664/211). It was further alleged that a principal was armed with the .380 caliber Beretta handgun (§ 12022, subd. (a)(1)). (2 CT 356.)

In count eight, Williams and Dearaujo were charged with the robbery of Patricia Smith on May 17, 1993 (§ 211). It was further alleged that Dearaujo used a knife (§§ 12022., subd. (b) & 1192.7, subd. (c)(23)), and that a principal

was armed with the .380 caliber Beretta handgun (§ 12022, subd. (a)(1)). (2 CT 356-357.)

In count nine, Williams and Dearaujo were charged with the robbery of Charles Estey on May 17, 1993 (§ 211). It was further alleged that Dearaujo used a knife (§§ 12022., subd. (b) & 1192.7, subd. (c)(23)), and that a principal was armed with the .380 caliber Beretta handgun (§ 12022, subd. (a)(1)). (2 CT 357.)

In count ten, Williams and Dearaujo were charged with the robbery of Glynn Brodbeck on May 20, 1993 (§ 211). It was further alleged that Williams personally used a .380 caliber Beretta handgun (§§ 12022.5, subd. (a) & 1192.7, subd. (c)(8)), and that a principal was armed with that firearm (§ 12022, subd. (a)(1)). (2 CT 358.)

In count eleven, Williams and Dearaujo were charged with the attempted kidnapping of Brodbeck to commit a robbery (§§ 664/209, subd. (b)). It was further alleged that Williams personally used a .380 caliber Beretta handgun (§§ 12022.5, subd. (a) & 1192.7, subd. (c)(8)), and that a principal was armed with that firearm (§ 12022, subd. (a)(1)). (2 CT 358-359.)

On December 2, 1994, the prosecutor asked that Williams and Dearaujo be arraigned because the Riverside County District Attorney's Office decided to seek the death penalty. (3 RT 149.) Williams and Dearaujo were arraigned, plead not guilty and denied all the allegations. (2 CT 370-371; 3 RT 149-150.)

On November 13, 1997, the trial court granted Dearaujo's motion to impanel separate juries as an alternative to severance, and denied Williams's motion for separate juries. (3 CT 757; 5 RT 553-555.) Selection of Williams's jury began on December 3, 1997. (4 CT 802; 6 RT 587.) Selection of Dearaujo's jury began on December 11, 1997. (1 Supp. RT 678.) Williams's jury was empaneled on January 13, 1998. (18 CT 4984; 12 RT 1482.) Dearaujo's jury was empaneled on January 27, 1998. (6 Supp. RT 2129.) On April 8, 1998, Williams's jury returned its verdict. Other than counts eight and nine, where the jury convicted Williams of the lesser offense of being an accessory to the robberies of Patricia Smith and Charles Estey, the jury found Williams guilty of count one, the first degree murder of Yvonne Los, also found true the special circumstance that the murder was committed during a robbery, found him guilty of all other counts and found true the special circumstances alleged as to those counts. (18 CT 5070-5095; 19 CT 5239-5241; 46 RT 5451-5464.) On April 9, 1998, Dearaujo's jury found him guilty of all charged crimes, including the first degree murder of Los, found true the special circumstance that the murder was committed during a robbery, and found true the special circumstances alleged as to the other crimes. (7 Supp. RT 5470-5477.)

On April 13, 1998, Williams's penalty phase began. (19 CT 5243; 47 RT 5488.) On May 11, 1998, the jury fixed the penalty as death for the murder of Yvonne Los. (19 CT 5334, 5353; 56 RT 6665.) On August 24, 1998, the trial court denied the automatic motion for modification of the penalty verdict under section 190.4, subdivision (e), and sentenced Williams to an indeterminate term of 21 years and 8 months in prison plus death. (19 CT 5373-5375; 64 RT 7194-7199, 7202-7212.) On September 2, 1998, the trial court scheduled a hearing because it noted several computation errors in the determinate term in the probation officer's worksheet. (64 RT 7214.) Williams was sentenced to an indeterminate term of 24 years and 6 months in prison plus death. (19 CT 5406-5409; 64 RT 7214-7216.) Appeal to this Court is automatic pursuant to section 1239, subdivision (b).

On May 12, 1998, Dearaujo's penalty phase began. (7 Supp. RT 6681.) On June 4, 1998, the jury was deadlocked and the trial court declared a mistrial. (7 Supp. RT 7177-7178.) On September 25, 1998, Dearaujo was sentenced to a determinate term of 34 years and 8 months in prison, plus life without the possibility of parole. (10 Supp. RT 7195-7196.)

STATEMENT OF FACTS

Guilt Phase

The Prosecution's Case

In May of 1993, 18-year-old Williams was the nucleus of a group of teenagers in Moreno Valley. (20 RT 2797; 25 RT 3523; 26 RT 3595.) Most of the teenagers in the group were not attending school or working, but were frequently hanging out with each other, drinking and smoking marijuana. (19 RT 2613-2614, 2700; 20 RT 2768, 2775, 2778; 21 RT 2885-2886, 2889, 2919, 2966; 2980-2981; 23 RT 3265; 24 RT 3306, 3408; 25 RT 3539; 28 RT 3875, 3918, 3922; 29 RT 3813, 3901-3902, 3916-3917, 3933, 3939, 3941, 4028; 31 RT 4177, 4189, 4238-4239; 39 RT 4788-4789; 40 RT 4872, 4877.) Williams had a black .380 caliber semi-automatic Beretta pistol that he carried around all the time. It was usually tucked in the waistband of his pants. (19 RT 2623-2624, 2705, 2775; 20 RT 2775; 21 RT 2892, 2985-2986; 22 RT 3042; 23 RT 3902; 24 RT 3431; 29 RT 3903, 4036; 40 RT 4825.) Williams was believed to be a member of a criminal street gang. (21 RT 2889; 31 RT 4179, 4243.) Williams planned to transform these "lost" teenagers into a gang that would commit crimes to make money. (21 RT 2991-2992; 24 RT 3317.)

Williams lived on Ramsdell Street. Across the street were the residences of 18-year-old George Holland and 14 or 15-year-old Rodney M. (18 RT 2595; 21 RT 2939, 2965-2967, 3000; 24 RT 3407; 25 RT 3533; 26 RT 3595; 33 RT 4382.) John H.^{2/} and his 17-year-old girlfriend Kiesha L. lived next door to Rodney. (18 RT 2612; 19 RT 2655; 21 RT 2965; 24 RT 3214; 25 RT 3543;

^{2.} John H. is not related to George Holland.

26 RT 3595; 39 RT 4735.) 13-year-old Andrew C. lived in Big Bear, but visited his best friend Rodney in Moreno Valley just about every other weekend. (28 RT 3808-3809, 3812, 3910, 3939.) Their parents were friends. (28 RT 3808.) Rodney's residence was at the end of the street near Gordy's Market. (21 RT 2965.) Sixteen-year-old Tony P. resided across the street from Holland. (24 RT 3408, 3411; 26 RT 3593.) Williams, Holland, Rodney and Tony were close friends. (21 RT 2968; 23 RT 3270-3271.) Eighteen-year-old Alonso Dearaujo, also known as "Junior," lived about two streets away in the same neighborhood. (18 RT 2502; 21 RT 2896, 2970; 24 RT 3367; 28 RT 3819-3820; 40 RT 4831-4832.) Junior and Williams hung out together. (21 RT 2972-2973.) Dearaujo's best friend was 13-year-old Chris L. They hung out together almost daily. (20 RT 2272.) (19 RT 2610-2611; 20 RT 2864-2865; 21 RT 2896; 24 RT 3367.) Dearaujo introduced Chris to Williams in March of 1993. (19 RT 2611, 2700; 20 RT 2762, 2863, 2867; 21 RT 2885, 2919.)

Natalie D. and Cathy R. were best friends. (22 RT 3030.) They were both 17 years old. Natalie was not attending school. (22 RT 3027; 23 RT 3175; 25 RT 3564.) In May of 1993, Cathy lived with her parents in Yucaipa. (22 RT 3112.) Natalie lived with her mother in Moreno Valley. (22 RT 3027, 3098.) Natalie did not have any adult supervision during the work week because her mother worked out of town and stayed home on Saturdays and Sundays. (19 RT 2702; 21 RT 2974; 22 RT 3028; 23 RT 3175.) Cathy called Natalie so she could begin staying with Natalie in Moreno Valley. (22 RT 3114; 23 RT 3265.) Holland was Cathy's boyfriend. (23 RT 3257, 3264; 24 RT 3323.) Holland drove to Yucaipa to pick up Cathy. (23 RT 3265.)

On May 10, 1993, Cathy introduced Williams to Natalie. (22 RT 3029, 3114-3115, 3132; 23 RT 3169.) Shortly thereafter, Natalie and Williams established a romantic relationship. (21 RT 2974-2975; 22 RT 3031; 23 RT 3170; 24 RT 3323.) When Williams was at her house, he kept his pistol tucked

under the waistband of his pants, in a drawer, or under a couch or mattress. (22 RT 3041-3043.) Williams, Holland, Dearaujo, Chris and Mondre Weatherspoon began coming over to Natalie's house. (22 RT 3124.)

Weatherspoon was 18 years old and considered Williams to be a close friend. Although Weatherspoon lived in a different neighborhood, it was close to Williams's residence. (25 RT 3533; 26 RT 3595; 29 RT 4020; 31 RT 4181, 4229-4230.) Weatherspoon trusted Williams. (31 RT 4201.) Weatherspoon's neighborhood friends and criminal associates were his cousin, 17-year-old Steve M., 17-year-old James H., and Alfredo G., known as "Chuey." (25 RT 3539; 29 RT 3989, 3993, 3995, 4015, 4021; 31 RT 4182, 4200-4201, 4232, 4236, 4255; 32 RT 4299.)

Williams, Weatherspoon, James and Steve are African-Americans. (6 Supp. RT; 16 RT 2196; 20 RT 2788; 32 RT 4300.) Holland, John, Rodney, Kiesha and Natalie are Caucasian or of mixed race. (6 Supp. RT; 16 RT 2196, 2205; 18 RT 2540, 2560, 2573; 26 RT 3673; 27 RT 3781, 3795.) Chris and Cathy are Caucasian. (18 RT 2542, 2560; 19 RT 2736; 20 RT 2789; 28 RT 3912.) Tony is Caucasian or Hispanic. (20 RT 2847; 28 RT 3905.) Alfredo is Hispanic. (29 RT 4021; 31 RT 4182, 4239, 4260; 40 RT 4898.) Dearaujo is described as Hispanic and was born in Brazil. (17 RT 2334; 22 RT 3110; 8 Supp. RT 6887; 9 Supp. RT 6950.)

In mid-May of 1993, Williams, Holland, Rodney, Andrew and Tony were drinking in a remote area outside of Moreno Valley that they called the "Badlands." They discussed forming a gang known as "Total Domination." (28 RT 3837-3838, 3939, 3951-3952.) These individuals had discussed forming a gang on more than one occasion. (28 RT 3919-3920.) Williams and Holland also previously talked about forming a small gang. (21 RT 2991.)

In May of 1993, Williams and Weatherspoon talked about forming the "Pimp-Style Hustlers" gang. (29 RT 4033; 31 RT 4159.) They had

occasionally talked about committing crimes together. (29 RT 4031-4032.) Williams and Weatherspoon were going to take a leadership position in the gang. (29 RT 4033.) The focus of the gang was to make money, both legally and illegally, and seek adventure. (29 RT 4034.) On one occasion at Natalie's house, Williams, Weatherspoon, Holland, Natalie and Cathy gathered and talked about committing crimes. (31 RT 4186.)

Circle K Store (Count Three)

In the early morning of May 14, 1993, Weatherspoon was driving his father's Ford LTD. Williams was in the front passenger seat and Dearaujo in the back seat. (30 RT 4125, 4127; 31 RT 4212.) They talked about robbing a store with Williams's .380 caliber pistol. (30 RT 4126.) They drove around and looked at a couple of stores until Williams directed Weatherspoon's attention to a secluded Circle K convenience store. (30 RT 4127, 4128.) They decided that Dearaujo would commit the robbery. (30 RT 4127-4128, 4131.) Williams and Weatherspoon advised Dearaujo how to commit the robbery. They told him to go in, pull out the gun, demand the money and have the victim put the money in a bag. (30 RT 4129-4130; 31 RT 4223.) Once Dearaujo obtained the money, he was to run to the car and they would drive away. (30 RT 4132.) Williams handed his pistol to Dearaujo. (30 RT 4131.) Dearaujo exited the car and walked up to the Circle K store. (30 RT 4132, 4137.)

James Garcia was working the graveyard shift as the sole clerk of a Circle K convenience store on Maude Street in Riverside. (27 RT 3730-3731.) The store procedure was to keep no more than \$20 in a register, and any additional money was placed in a safe not accessible to the clerk. (27 RT 3736.) Garcia did not see any cars in the parking lot. (27 RT 3744.) After 1:00 a.m., Garcia was removing the old magazines to return them for credit when he heard the door chime. (27 RT 3731, 3736-3737.) Garcia looked up and saw

Dearaujo, who was wearing a black sweatshirt with the hood over his head. Dearaujo approached the counter, raised his hands up and pointed Williams's pistol at Garcia's head. (27 RT 3737-3739, 3745-3747.) Dearaujo stood three to four feet from Garcia. (27 RT 3747.) Dearaujo told Garcia to give him all the money in the register or he would "blow his fucking head off." (27 RT 3737.)

Garcia was afraid, and believed that if he did not comply he would be shot. (27 RT 3739.) Garcia opened the drawer, grabbed the \$15 to \$20 in the register, and tried to hand it to Dearaujo. (27 RT 3740, 3744.) Dearaujo told him to put the money in a bag and place the bag on the counter. Garcia complied with his demand. (27 RT 3741-3742, 3747.) While pointing the gun at Garcia, Dearaujo ordered him to turn around. Garcia complied but was fearful that he might be shot. (27 RT 3742-3743.) Dearaujo told Garcia to count out loud to one hundred. Garcia started counting, but Dearaujo demanded that he count louder and he complied. (27 RT 3743.) Once Garcia heard the door chime, he turned around to see if Dearaujo was gone. (27 RT 3743.) Dearaujo ran back to the LTD and entered the back seat. (30 RT 4133.) Garcia did not see Dearaujo, and he locked the door and called police. (27 RT 3744.) At 1:14 a.m., Riverside Police Officer Charles Holm received a call regarding the robbery at the Circle K store. (32 RT 4282.) Officer Holm arrived within a few minutes, contacted and interviewed Garcia. (27 RT 3745; 32 RT 4283.)

Weatherspoon, Williams and Dearaujo drove off intending to return to Moreno Valley. (30 RT 4134.) Dearaujo returned the pistol to Williams. (30 RT 4134-4135.) They stopped in a parking lot or gas station in Riverside, where Williams counted the money and split it with Weatherspoon and Dearaujo. (30 RT 4135.) Across the street was a convenience store or minimart that they intended to rob. They got tired of waiting for the customers to leave, so they drove off and returned to Moreno Valley. Weatherspoon dropped off Williams and Dearaujo and drove home. (30 RT 4137-4138.)

"Pimp-Style Hustlers" Meeting

On May 14, 1993, Chris, Dearaujo and Williams had a conversation about the armed robbery that Dearaujo committed. (19 RT 2707, 2708, 2714-2715; 20 RT 2792; 21 RT 2953.) Williams said that Dearaujo had earned a "stripe" for that robbery. (19 RT 2713, 2714; 20 RT 2796.) Dearaujo said he wanted to earn more "stripes" and encouraged Chris to join him by saying, "We're in this together. Let's go." Chris also said he wanted to earn "stripes." (19 RT 2713-2714.) Natalie heard this conversation about the robbery. (22 RT 3039-3040, 3172.) They told Natalie that Williams instructed Dearaujo to point Williams's .380 caliber pistol at the store clerk and demand that the clerk give him all the money. The clerk complied by emptying the drawer of cash and food stamps and giving it to Dearaujo. They then drove away. (22 RT 3040, 3041, 3042.) Dearaujo bragged about the robbery. (23 RT 3178.) Williams took \$5 from the proceeds and gave it to Natalie and Cathy so they could purchase groceries. (22 RT 3040-3041, 3148, 3158.) Williams previously told Natalie about his interest in committing robberies and carjackings. (22 RT 3172.)

That day, Williams called persons on the telephone, and through word of mouth, to organize a meeting at Natalie's house. (22 RT 3039.) Later that evening, a large group of persons gathered at Natalie's house. (19 RT 2703; 22 RT 3124-3125.) The plan was for the persons who attended the meeting to be part of the gang. (29 RT 4039-4040, 4043, 4044; 31 RT 4192.) The group included Williams, Weatherspoon, Dearaujo, Chris, Holland, Steve, Rodney, Tony, Andrew, Cathy and Natalie. John and Kiesha arrived some time after the others. (19 RT 2703; 20 RT 2772-2774, 2781-2783; 21 RT 2978-2979,

2984, 3012; 22 RT 3054, 3126-3129, 3138-3139; 24 RT 3325-3326, 3416-3417, 3428; 25 RT 3548-3549; 28 RT 3821-3822, 3928; 29 RT 4030; 31 RT 4259; 32 RT 4302-4303, 4306.) Williams arrived with his .380 caliber pistol tucked in the waistband of his pants. (22 RT 3129-3130.) He asked Natalie to put the pistol in a drawer of a desk located in the living room. (22 RT 3133.) Persons talked, drank alcohol, watched television and listened to music. (19 RT 2704; 20 RT 2783-2784; 21 RT 2888; 22 RT 3126-3127; 24 RT 3326-3327, 3425-3426; 25 RT 3443.) Williams turned down the volume of the stereo and television, told the group to "be quiet," and announced he was starting the meeting. (19 RT 2705; 20 RT 2788-2789; 21 RT 2983-2984, 3139; 29 RT 4034.) Williams retrieved his pistol from the drawer. (22 RT 3146.) The group complied, gathered around him, and Williams addressed them. (19 RT 2705; 20 RT 2789; 2987-2988; 22 RT 3043-3044, 3047, 3130; 24 RT 3431-3432; 31 RT 4261-4262.) Williams's .380 caliber pistol was nearby on a table. (21 RT 2986, 2994, 3010; 24 RT 3308; 28 RT 3828-3829, 3928.)

Williams discussed his desire that they become a gang called the "Pimp-Style Hustlers," and commit crimes such as armed robberies and carjackings to have fun and make money. (19 RT 2706, 2712; 20 RT 2795; 21 RT 2888-2889, 2988-2992, 2994; 22 RT 3045, 3048-3049; 24 RT 3429, 3432; 25 RT 3464, 3560; 28 RT 3825-3827, 3839-3840, 3942-3943; 31 RT 4262-4264; 32 RT 4302-4303.) Weatherspoon also discussed selling drugs and committing robberies to make money. (29 RT 4035.) Occasionally, others would interject in the discussion about committing crimes. (20 RT 2791; 31 RT 4200.) They discussed the way the gang would gain its reputation would be to terrorize the neighborhood by committing the violent crimes they had discussed, including murder. (29 RT 4041; 31 RT 4159-4160.) They also talked about murder being the most impressive thing a gang member could do, and the best way to

elevate your status in the gang. (29 RT 4040.) Williams said that if anybody "ratted," there "would be a bullet" for that person. (28 RT 3949.)

Williams discussed how to commit a carjacking. Williams said the victim should be put in the trunk and then the perpetrator would take over the car. (19 RT 2710; 20 RT 2794; 21 RT 3002-3003, 3050; 24 RT 3330-3331; 29 RT 4036, 4054.) Williams also said his pistol would be used to commit the carjackings. (25 RT 3469.) Williams demonstrated how to commit a carjacking by having Dearaujo act as the driver, Williams opening the imaginary car door, and then put his .380 caliber pistol up against Dearaujo's body. (22 RT 3046-3047, 3137; 23 RT 3180.) Williams said that if the carjacking victim resisted, the gang member should "shoot them." (19 RT 2710; 22 RT 3046-3047, 3137; 29 RT 4055.) Williams said that carjacking victims would be kidnaped and taken to a remote area of Moreno Valley known as the "Badlands." (21 RT 2996-2998.) Williams advocated homicide when the gang member faced resistance from a crime victim. He said when it "needed to be done," the gang member should "cap'em," "shoot 'em," or "pop them." (21 RT 2992-2994; 22 RT 3049; 23 RT 3180; 31 RT 4272-4273.) They discussed good places for carjackings, such as parking lots and hotels. (29 RT 4058.) Weatherspoon also gave advice as to how to accomplish a carjacking and thought the present gang members could commit that crime. (29 RT 4053.)

Williams discussed that anybody who committed such crimes would earn a "G stripe" which would increase their respect and elevate their status in the gang. (19 RT 2713, 2715; 20 RT 2796; 21 RT 2894, 3005, 3051; 22 RT 3164-3165; 24 RT 3312; 28 RT 3841, 3953; 29 RT 4040.) He said Dearaujo earned a "G stripe" by committing the Circle K robbery. (22 RT 3051, 3131; 23 RT 3180.) Most of the males present expressed an interest in getting "G stripes." (22 RT 3051-3052, 3140-3141; 28 RT 3841.) A witness would have to verify that a member committed a crime such as a carjacking. (24 RT 3429; 25 RT 3584.) The gang members were to report to Williams for direction. (20 RT 2795; 2900.)

Williams was also to be the repository for the proceeds from the crimes which would be taken to gang headquarters, which was Natalie's house. (21 RT 2917, 3011-3012, 3054, 3061; 24 RT 3393.) The proceeds were to be used to purchase a house, weapons and other items they would need such as food and gasoline. Any money that was left over would be used to invest in stocks and open bank accounts for gang members once they turned 18 years old. (22 RT 3047; 3052-3053; 25 RT 3561, 3587; 26 RT 3619.) There was also a discussion about recruiting gang members. (25 RT 3588-3589; 31 RT 4200.) The role of the women, who were called "bitches," was to clean, cook, keep track of the whereabouts of the gang members, give the men access to the house for protection, and safekeep Williams's pistol. (22 RT 3052; 23 RT 3180-3181; 29 RT 4043.) The persons present at the meeting did not express any objection, instead they voiced their support and reacted as if it was also their desire to be gang members. They were also ready and willing to commit crimes and go along with Williams's and Weatherspoon's vision of a criminal gang. (19 RT 2708, 2716; 21 RT 3007-3008; 22 RT 3048, 3050, 3051; 23 RT 3188-3189, 3259-3260; 24 RT 3313, 3316, 3392-3393; 29 RT 4043, 4050; 31 RT 4160.) All the gathered gang members said, "Let's go out and do some dirt." (41 RT 4197-4198.) When the meeting ended, Williams retrieved his pistol. (22 RT 3055.) The gang went out to commit a carjacking that night. (29 RT 4055; 31 RT 4202.)

Dilly's Parking Lot (Counts Four And Five)

Other than Natalie and Cathy, everybody entered John's van. (19 RT 2716; 20 RT 2798; 22 RT 3055; 24 RT 3331-3332, 3432; 25 RT 3468; 28 RT 3832.) John was driving, Chris was in the middle, Kiesha was in the front

passenger seat, Williams was just behind the passenger seat by Kiesha, and everybody else was seated on the floor in the back of the van. (19 RT 2718; 20 RT 2801; 21 RT 3013; 25 RT 3570-3573; 28 RT 3846; 29 RT 4056-4057; 30 RT 4101; 31 RT 4203-4204, 4267; 32 RT 4307.) Williams had his .380 caliber pistol. (21 RT 3015.) Williams directed John where to drive the van. (23 RT 3198.) Williams told John to drove into a K-Mart parking lot where the Dilly's night club is located and some persons looked out the windows. (19 RT 2719, 2721-2722; 21 RT 3014; 23 RT 3198, 3200; 24 RT 3335; 31 RT 4268; 32 RT 4307.) There was a discussion about how the carjacking would be committed and that Williams's pistol would be used to accomplish it. Once the carjackers obtained the car, the van was to follow it. (19 RT 2717, 2718, 2720; 20 RT 2798-2799; 24 RT 3334; 28 RT 3854-3855, 3854-3855, 3857; 29 RT 4059; 31 RT 4268.) Williams and Weatherspoon said that since Holland was the oldest gang member, he should commit the carjacking. (23 RT 3203; 24 RT 3334; 29 RT 4059.) Williams gave the pistol to Holland. (21 RT 3203, 3015; 24 RT 3335, 3382; 28 RT 3855.) Williams and Holland volunteered Andrew to go with Holland. (28 RT 3852-3853, 3944-3946.) Andrew had a knife. (24 RT 3339; 28 RT 3858.) Holland and Andrew got out of the van and walked around the parking lot looking for a car to steal. (19 RT 2719-2720, 2722; 20 RT 2803; 23 RT 3208, 3210; 24 RT 3335-3336; 25 RT 3474; 28 RT 3857, 3860.) Williams, Kiesha and others in the van pointed out two women. (19 RT 2722; 23 RT 3210-3212; 24 RT 3336-3337; 25 RT 3474; 28 RT 3862-3864, 3932.)

At about 10:00 p.m., Deena Meza and her friend Debbie Phillips left the Dilly's night club to meet friends at another location. (27 RT 3786-3789, 3799.) They quickly walked to Debbie's white Daihatsu and did not notice anything unusual. (27 RT 3787, 3789, 3801.) Holland and Andrew approached the women. (19 RT 2722-2724; 23 RT 3212-3213.) Deena entered the driver's

side, started the engine and turned on the radio. (23 RT 3213; 27 RT 3789-3790.) Debbie entered the front passenger seat and Deena lit a cigarette. (37 RT 3790, 3791.) Holland approached the car, he lifted up his shirt, pulled the pistol out of the waistband of his pants and moved it down by his thigh. (23 RT 3218; 28 RT 3864.) Holland went to the driver's side and Andrew to the passenger side door. (23 RT 3216, 3220-3221; 27 RT 3791.) Holland intended to put the women in the back seat and drive them to the "Badlands" before dropping them off. (23 RT 3217.)

Holland approached the driver's side and knocked on the window. (23) RT 3218.) Deena rolled down the window. (23 RT 3218.) Holland pointed Williams's pistol at Deena's face and with an aggressive tone of voice told them to get in the back seat of the car. (23 RT 3219-3221, 3222; 27 RT 3790-3791, 3797, 3804; 28 RT 3867, 3933.) Deena and Debbie were shaking and scared. (23 RT 3220; 27 RT 3791.) Deena and Debbie exited the car. Debbie started to enter the back seat, but Deena told her not to get in the car. (27 RT 3791, 3793.) Andrew was standing next to Debbie, who was scared and crying. (27 RT 3792-3793.) Deena told Holland that she was not going in the backseat of the car. (23 RT 3221; 27 RT 3791-3792.) Holland raised his voice and said more than once, "Get in the fucking car now." To each demand Deena would respond, "No." (27 RT 3794.) The keys were in the ignition and the car was running. (27 RT 3792.) Deena said they could have the car, their purses or anything else, but they were not getting into the car. (23 RT 3222; 27 RT 3792.) Both women screamed and ran away from the car and into Dilly's. (19) RT 2724-2725; 23 RT 3222; 24 RT 3338; 27 RT 3795, 3797; 28 RT 3865, 3868-3869.) They told friends inside the night club what occurred and somebody called the police. (27 RT 3797.) While waiting for police to arrive, a friend moved their car closer to the entrance of Dilly's. (27 RT 3798.)

Andrew ran away and Holland followed him. (23 RT 3222-3223; 28 RT 3868.) They ran towards the van, but Williams, Weatherspoon and others told them to keep running past the van. (19 RT 2725-2726; 20 RT 2803; 23 RT 3223-3224; 24 RT 3338-3339; 25 RT 3475, 3476; 28 RT 3869, 3934; 30 RT 4103; 31 RT 4271.) They ran through an adjacent parking lot and through a housing tract where they hid in a drainage ditch. (23 RT 3222-3225; 24 RT 3340; 28 RT 3869, 3873.) They waited for 10 to 15 minutes in the ditch before they walked to Natalie's house. (23 RT 3226-3227.) At Natalie's house, Holland shaved off his goatee. (24 RT 3341.) John drove the van to a nearby residential neighborhood to look for Holland and Andrew. (19 RT 2726.) During the drive, the gang members discussed how the carjacking was botched because Holland and Andrew should have waited until both women had entered the car before approaching them. (19 RT 2726-2727.) They were not successful in finding Holland and Andrew, so they drove to a Comfort Inn hotel where Holland's sister had a room to party. (19 RT 2727, 2728; 20 RT 2804; 21 RT 2983; 30 RT 4104-4105; 31 RT 4218, 4273.)

At about 11:00 p.m., Riverside County Sheriff's Deputy Lori Ann Marquette was on patrol in a canine unit when she received a call regarding this attempted carjacking. She was instructed to drive to Dilly's night club. (27 RT 3752, 3758-3759, 3762.) Deputy Marquette arrived five minutes later and saw many cars parked in front of the night club. (27 RT 3760.) Deputy Marquette contacted two female victims who were standing at the front entrance of Dilly's. (27 RT 3759.) The women were very nervous and scared. (27 RT 3759.) They pointed to their car, which was parked near the entrance of Dilly's. (27 RT 3760, 3762-3763.) One of the women gave a description of one of the robbers. (27 RT 3760-3761.)

Deputy Marquette contacted Forensic Technician William Davies, who inspected the victims's white Daihatsu for evidence and dusted the driver's side for fingerprints, but the only two prints lifted were non-comparable. (27 RT 3761, 3776-3778.) Davies spoke with both female victims, who were crying and very emotional. (27 RT 3778-3779.) The women described the suspect on the driver's side as a Caucasian male with a mustache and goatee, who held a black pistol in his hand and wore dark knee-length shorts and a baseball cap turned backwards. (27 RT 3780-3781, 3784.) Davies showed his composite drawing to the victims, and they said it resembled the suspect. (27 RT 3779, 3781.) The suspect on the passenger side was described as a Hispanic male wearing dark clothing. (27 RT 3783, 3802.)

Terra Bella Street (Count Six)

Later that night, Holland and Andrew were picked up by Williams, who was driving Holland's sister's yellow Ford Festiva. Weatherspoon and Steve were in the car. (21 RT 2977; 23 RT 3227-3228; 28 RT 3873-3874, 3935; 31 RT 4219.) They returned to the Comfort Inn, went to the room and dropped off Andrew, who returned to Big Bear the next day. (23 RT 3231; 28 RT 3874, 3875.) At the parking lot, they had a conversation about committing another robbery that night. (24 RT 3343-3344.) Holland, Williams, Steve and Weatherspoon returned to the car. Holland drove as they looked for another vehicle to steal. (23 RT 3232; 30 RT 4105-4106; 31 RT 4272-4273; 32 RT 4310-4311.) Williams was in the front passenger seat, and Weatherspoon and Steve were in the back. (24 RT 3345; 30 RT 4111.) They stopped at a parking lot of a Food 4 Less store. Williams and Weatherspoon exited and walked around for about 10 minutes before returning to the Festiva. They said they did not find a car to rob, so they started driving to continue their quest. (23 RT 3234-3236; 24 RT 3346-3347; 30 RT 4107-4109.) They followed a mini-van driven by a woman into a residential neighborhood. But the van pulled into a

garage where the door shut so they continued driving in that neighborhood. (23 RT 3238-3239; 24 RT 3347; 30 RT 4111-4114.)

On Terra Bella Street, they passed a white Ford Escort. Standing in front of the parked Escort were Dale Nonies and his girlfriend, Genalyn Doronio, who were hugging by a driveway. (23 RT 3239; 24 RT 3348; 31 RT 4114, 4116; 32 RT 4285, 4287; 34 RT 4453.) Nonies and Doronio were both 18 or 19 years old. (32 RT 4284.) Williams or Weatherspoon said, "We're going to get that one." (23 RT 3241.) Holland drove the Festiva around the corner and parked. (23 RT 3241; 24 RT 3348; 31 RT 4113.) Williams and Weatherspoon got out of the car and walked around the corner. (23 RT 3241; 31 RT 4275.) Steve moved up front to the passenger seat. (23 RT 3241; 32 RT 4312.)

When they reached Terra Bella, Williams and Weatherspoon walked across the street from where the Nonies and Doronio were standing in front of her parent's home just before 1:00 a.m. (31 RT 4115; 32 RT 4288; 34 RT 4452-4454, 4456.) There were no other persons out in the street. (30 RT 4117.) They walked up behind the car and then approached the couple. (30 RT 4117; 32 RT 4288.) Doronio kept looking at Williams and Weatherspoon because she had not previously seen them and wondered what they were doing walking around the street that early in the morning. This made her nervous, but Nonies told her to ignore them and they continued their conversation. (34 RT 4457.) Williams and Weatherspoon tried to get Nonies's attention by complementing his car and asking for cigarettes. After responding, Nonies would turn his attention back to Doronio. (32 RT 4288.) A little while later, Williams said, "Hey, nice car." Nonies turned around and said, "Thanks." (32 RT 4288, 4289; 34 RT 4457.) Williams pointed the gun at Nonies's head and said, "Give me the keys." (30 RT 4117-4118; 32 RT 4288, 4290.) Nonies was shocked and said, "What?" Williams replied, "Give me your keys. The gun is cocked

and loaded." (32 RT 4288.) Doronio was scared, so she put her head down and held on to Nonies. (31 RT 4119; 32 RT 4290; 34 RT 4459.) Nonies handed his keys to Weatherspoon. (32 RT 4288; 34 RT 4461.) Nonies asked him to only take the car keys, and Weatherspoon returned the other keys to him. (32 RT 4290.) Williams then said, "Now give me your wallet." (32 RT 4289.) Nonies threw his wallet at Weatherspoon and said, "Just take the money, let me have my wallet back." Weatherspoon pulled out the cash, about \$10, put it in his pocket, and threw the wallet on the ground. (30 RT 4118; 32 RT 4289-4290, 4295.) Williams continued to point his pistol at Nonies's head. (30 RT 4118; 32 RT 4290.) Williams and Weatherspoon entered the white Escort and drove away. (30 RT 4119; 31 RT 4221; 32 RT 4290-4291; 34 RT 4460.) Nonies and Doronio entered her parent's house and called the police. (34 RT 4460.)

Williams drove the Escort and Weatherspoon sat in the front passenger seat. The Escort came around the corner and drove by the Festiva. (23 RT 3242; 30 RT 4119; 31 RT 4276.) The Festiva followed the Escort about 10 miles to the "Badlands." (23 RT 3243; 30 RT 4120; 31 RT 4277.) Williams and Weatherspoon took the car stereo, other items of value and a plastic toy gun out of the Escort. Holland drove the Festiva up against the Escort to push it into a ditch. (23 RT 3243-3244, 3246; 24 RT 3349; 30 RT 4120; 31 RT 4221, 4223-4224; 31 RT 4277-4278.) Williams fired a couple of shots at the Escort. (31 RT 4120.) Weatherspoon kept the cash from the robbery. (30 RT 4121.) Williams and Weatherspoon returned to the Festiva to continue to look for potential carjacking victims. (30 RT 4120, 4122.)

Some time thereafter, they visited James, told him about the carjacking of the Escort, and that Williams was starting a gang called the "Pimp-Style Hustlers" (29 RT 3918-3919, 3968-3969, 4008; 31 RT 4122-4123.) After visiting James, they drove back to the Comfort Inn and returned to the room to

drink with Holland's sister, Andrew and others. (23 RT 3245; 24 RT 3349-3351; 31 RT 4121, 4123-4124, 4223, 4278.)

On May 15, 1993, at 10:50 a.m., Riverside County Sheriff's Deputy Brian Melerech received a call regarding the discovery of a stolen vehicle. Deputy Melerech drove to the county area of Hemet, off Gilman Springs Road, south of Alessandro Boulevard. (34 RT 4463.) It is about 10 miles from the center of Moreno Valley. (34 RT 4464.) Deputy Melerech found Nonies's white Ford Escort, called a tow truck, and recovered the vehicle. It had damage to the left front corner, but no bullet holes. (34 RT 4465.) Nonies was called to inform him that his car was recovered. (32 RT 4291.) Nonies retrieved his car, which was worth \$2,200. (32 RT 4291, 4295.) The radio and his sunglasses were stolen, and the bar on the hood was ripped. (32 RT 4292-4293.)

Movie Theater Parking Lot (Count Seven)

On May 15, Tony went to Holland's house. (25 RT 3478.) Holland told him about what occurred during the attempted carjacking at the K-Mart/Dilly's night club parking lot. (25 RT 3478.) Tony and Holland were in front of Holland's house when Williams walked up. Williams said he wanted Tony to commit a carjacking so he could get a car for the prom. (25 RT 3478-3479, 3480-3481; 25 RT 3564-3565, 3567; 26 RT 3601.) They called John, who picked up Williams and Tony. (35 RT 3479, 3482.) John drove, Williams sat in the front passenger seat, and Tony sat behind Williams. (35 RT 3485.) Williams said he would distract a female victim while Tony would come up and take the car from her. (25 RT 3479, 3482.) Williams gave his pistol to Tony and John bumped his van into the back of a truck with a female driver. (35 RT 3485-3486, 3569.) Williams got out and spoke to the woman, but Tony did not get out of the van. (35 RT 3486-3487, 3560-3570.) John got out, announced there was no damage, and the woman drove away. (25 RT 3487, 3569-3570.) Williams chastised Tony and called him a "punk" for not committing the carjacking. (25 RT 3480, 3487.)

John dropped off Tony and Williams and they walked through residential neighborhoods looking for a car. (25 RT 3487-3489, 3570.) They encountered a woman near a van who was recycling cans. (25 RT 3489-3490, 3570.) Williams pulled out his pistol, showed it to the woman and said, "Give me your van." (25 RT 3490-3491, 3570.) The woman said that she did not have the keys; but they were with her mother who was in a store. Williams told the woman she better not be lying to him, and Williams and Tony left. (25 RT 3491, 3571.) They continued walking until they reached the parking lot where an Edwards Movie Theaters and Yoshinoya restaurant were located and looked for a car. (25 RT 3488, 3491, 3492, 3572.) A woman drove up in a car and parked. (25 RT 3493.) Williams told Tony the carjacking would be easy because the woman had not put away her keys. But Tony said he did not want to do it. Williams replied, "Go do it, I didn't know you would be such a punk." (25 RT 3491, 3497.) After being "pumped up" by Williams, Tony decided to commit the carjacking. (25 RT 3497, 3498.) Williams gave his unloaded pistol to Tony, who put it in his shorts. (25 RT 3497; 26 RT 3606-3607.)

Barbara DeGeorge drove her 10-year-old daughter Lisa to a movie theater in Moreno Valley. (28 RT 3880, 3895-3896.) They were going to meet her father and sister-in-law at the theater. (28 RT 3880-3881.) As they pulled into the lot, Lisa saw Tony. (28 RT 3900, 3902.) Lisa told her mother that she saw a man walking back and forth and maybe her mother should not park there. (28 RT 3883, 3891, 3897-3898.) DeGeorge told Lisa not to worry and that they would be fine. (28 RT 3883, 3898.) It was getting dark when she parked her Trans-Am in the back of the lot by the Yoshinoya restaurant where many cars were parked. (28 RT 3881-3883, 3906.) DeGeorge did not see any pedestrians

by her car. (28 RT 3883, 3889, 3891.) DeGeorge and Lisa got out of the car. (25 RT 3494, 3499; 28 RT 3883.) Lisa came around the car and walked up to her mother. (28 RT 3900.) DeGeorge locked the door and had the keys in her hand when she heard Tony say, "Ma'am, come here." Williams was standing on a curb by a tree. (25 RT 2499, 2500, 3572-3573; 28 RT 3884, 3899-3900.) DeGeorge approached Tony, who was nervous. (28 RT 3884, 3887.) Tony lifted up his shirt to display the pistol on the waistband of his shorts and told her, "Give me your car keys now." (25 RT 3500-3501; 28 RT 3884-3885, 3887-3889.) DeGeorge screamed "No," told Lisa to run, and they both ran towards the movie theater. (25 RT 3500-3501-3502, 3574; 28 RT 3885, 3889, 3898-3899, 3901-3902.) DeGeorge told a security guard what occurred. (28 RT 3889.) She entered the movie theater and spoke with her father. She was very nervous and upset. DeGeorge remained in the theater about 10 minutes before she and Lisa returned to the car. DeGeorge drove home and called the police. An officer arrived and they reported the incident. (28 RT 3890, 3892, 3903.)

Tony ran towards Williams, who said, "Don't come near me." (25 RT 3502, 3574.) Tony ran into a field, hid the pistol under a rock and sat down. (25 RT 3505, 3574; 26 RT 3611-3612.) Williams walked over to him, and they switched hats and shirts. (25 RT 3505, 3577.) Tony took Williams's tuxedo, which was on a hanger, and they walked around acting as if they were going to the dry cleaners. (25 RT 3505, 3576.) They waited 20 to 30 minutes until it was dark, then returned to the field to retrieve the pistol. (25 RT 3503-3504.) Tony and Williams were walking to Tony's house when a girl that Williams knew picked them up and dropped them off at Tony's house. (25 RT 3504.) Williams returned to Natalie's house and told her that they held up two ladies at the K-Mart but they ran away. (22 RT 2057.)

L.A. Times Office (Counts Eight And Nine)

Later that same day, May 15, 1993, Williams planned an armed robbery with Dearaujo and Chris at Natalie's house. (19 RT 2729, 2730; 20 RT 2811-2812; 21 RT 2893.) Weatherspoon and James may have been present. (22 RT 3062, 3066.) Natalie and Cathy were present at times during the planning of the robbery. (19 RT 2735, 2736; 22 RT 3062, 3064.) Williams suggested that they rob the Classy B's liquor store near the Taco Bell on Alessandro Boulevard. (19 RT 2730-2732, 2734; 20 RT 2813, 2814, 2816; 21 RT 2922; 22 RT 3063.) Williams advised them how to commit the robbery, including using his pistol to accomplish it. (19 RT 2735; 20 RT 2815.) After the robbery was accomplished, Dearaujo and Chris were to return to Natalie's house where Williams would be waiting for them. (19 RT 2734-2735, 2737.) Natalie and Cathy gave them stockings which they made into masks. (19 RT 2735, 2736; 22 RT 3064, 3155.) Williams gave his pistol to Dearaujo, and Chris had two knives. (19 RT 2738; 22 RT 3066, 3155.) When they left Natalie's house, it was dark outside. (19 RT 2737.)

Dearaujo and Chris walked through the apartment complex where James lived and jumped over the wall to the business complex where the Classy B's liquor store was located. (19 RT 2738, 2739; 20 RT 2817; 21 RT 2954.) Chris and Dearaujo tried to motivate each other by saying they should put on their stocking masks and "let's do it now." (19 RT 2739.) On two occasions they walked in front of the entrance of the liquor store, looked inside, but lacked the bravado. (19 RT 2741-2742; 20 RT 2816.) James walked by the Taco Bell and said to them, "Don't worry, I know what you are doing." (19 RT 2472, 2473; 21 RT 2897, 2898, 2954-2955.) They pumped each other up again because they had committed to Williams that they would do the robbery. They went around the corner, put on their stocking masks, but the clerk was closing the Classy B's liquor store. (19 RT 2742, 2742, 2744; 21 RT 2897-2898.)

As Dearaujo and Chris walked back towards the wall, they looked through the window of the Los Angeles Times newspaper office and saw two persons inside. (19 RT 2744.) Chris was "worked up" and told Dearaujo they should rob the persons in the office. Dearaujo did not want to do it. Chris said, "If you don't want to do it, give me the gun." (19 RT 2744.) Dearaujo gave Chris the gun. Chris handed his two knives to Dearaujo. (19 RT 2745, 2748; 20 RT 2815.) They both put on their stocking masks and ran into the office. (19 RT 2744, 2745; 20 RT 2818-2819.)

At 11:00 p.m., Charles Estey, the distribution officer, and his mother Patricia Lee Smith Estey, were seated behind a desk reviewing documents.^{3/} (19 RT 2477; 33 RT 4326-4327, 4352-4353.) Estey heard persons running and looked up. (33 RT 4328.) Chris and Dearaujo went around the desk. (33 RT 4335.) Chris pointed the pistol at Estey's face, said it was a "holdup" or "stickup" and to put their hands up. (19 RT 2746; 33 RT 4328, 4329, 4342.) Estey thought they were friends who were playing a joke on him and he smiled. (19 RT 2746; 33 RT 4328, 4331.) Dearaujo pulled out a knife and put it to Smith's back. (19 RT 2746, 2747, 2749; 33 RT 4331-4332, 4333, 4354.) Estey's expression changed to shock and fright. Smith was scared and started to panic. (19 RT 2747; 33 RT 4332.) Estey tried to calm his mother. (33 RT 4332.)

Dearaujo told them not to look at him and exclaimed, "Do what we say." (19 RT 2747; 33 RT 4333.) Dearaujo demanded Estey's wallet and Smith's purse. (19 RT 2746; 33 RT 4336, 4354.) Estey handed his wallet to Chris. The wallet contained cash, credit cards and telephone numbers. (33 RT 4336.) Estey reached over to the desk, picked up Smith's purse, and said they could

^{3.} Because they share the same surnames, to avoid confusion Charles Estey will be referred to as "Estey" and his mother Patricia Lee Smith Estey will be referred to as "Smith."

have the purse. (33 RT 4336.) The purse contained Estey's checkbook, identification and credit cards. (33 RT 4356.) Dearaujo told Chris, "Let's cap them and let's go." (33 RT 4336-4337.) Estey was nervous, pulled out his car keys, and said they could take his car. (33 RT 4337.) Estey's Corvette was in front of the office parked next to another car. (33 RT 4338.) Chris and Dearaujo debated whether they should take the keys. (33 RT 4337.) Estey said, "Okay, you guys have all our money. You have what you need. We never saw you once, just go." (33 RT 4337, 4350, 4358.) Chris handed the pistol to Dearaujo, and Dearaujo gave him the purse. Chris ran out of the office and Dearaujo followed him. (19 RT 2744, 2746; 20 RT 2750, 2751, 2818; 33 RT 4337.) Estey called the police. (33 RT 4340.)

At 10:25 p.m., Riverside County Sheriff's Deputy Carlton Allen received a call regarding the robbery. He arrived two minutes later and contacted Estey and Smith at the office. Estey and Smith were scared and appeared quite shaken from the incident. (33 RT 4361, 4372-4373, 4379-4380.) The suspects were described as young Hispanic males wearing blue jeans and stocking masks. Estey also said that one had a gun and the other one had a knife. (33 RT 4368, 4376.) Deputy Allen drove Smith around the area, but they were not able to locate the suspects. (33 RT 4362, 4378.)

Dearaujo and Chris went over the wall and walked to James's apartment to hide from the police. They met up with James, Chuey, Williams and Weatherspoon. (20 RT 2752, 2753, 2820; 21 RT 2893; 29 RT 3908-3909, 3919, 3978-3979.) Dearaujo told Chris he made a mistake because he did not take the safety off the pistol when he used it during the robbery. (21 RT 2923-2924.) They gave the purse and wallet to Williams. (20 RT 2754; 21 RT 2893, 2917.) Williams emptied the contents of the purse and put them on a table in the living room. (20 RT 2755; 29 RT 3926.) The purse and wallet contained close to \$100 in cash. The purse also contained a driver's licence, identification, credit cards and a checkbook. (20 RT 2754; 23 RT 3156-3158.) Williams kept all the cash. Chris retrieved some identification and a credit card. (20 RT 2755.) Williams told them "good job." Chris and Dearaujo felt proud about the robbery. (20 RT 2757.)

Chris and Dearaujo went to Natalie's house and spent the night there. (20 RT 2821.) Williams gave Chris the nickname "Roach," which is the end of a marijuana cigarette, because Williams gave him the "roaches" when they smoked marijuana. (20 RT 2766, 2868-2869.) Williams said Dearaujo just robbed somebody and joked to Natalie and Cathy they would get pizza with the checks and identification because that was all they got from the robbery. (22 RT 3067, 3068.) Williams gave them a checkbook and small wallet containing credit cards and identification from the robbery. (22 RT 3061, 3067.) Natalie kept Smith's pocketbook and checkbook in a desk drawer, that also had an identification card with a picture of a woman who resembled Cathy and a hat. (22 RT 3069-3070, 3156-3158; 33 RT 4356-4357.)

The next day, May 16, 1993, Williams, Rodney, Dearaujo and Chris took a bus to a mall in Riverside. (20 RT 2757, 2758, 2822.) Williams used money from the L.A. Times office robbery to pay for pizza. (20 RT 2758.) After a couple of hours at the mall, they returned to Moreno Valley. (20 RT 2758, 2823.)

There were occasions at Natalie's house where Williams demonstrated violent and abusive behavior, especially towards Dearaujo. Once, Natalie, Williams, Weatherspoon, Steve, Dearaujo and Chris were sitting at the kitchen table and smoking marijuana. Williams ordered Dearaujo to pull down his pants and underwear. Dearaujo nodded his head to indicate "no." Williams gestured with his pistol that he would shoot if Dearaujo did not comply. Dearaujo pulled down his pants and underwear. Everyone at the table laughed.

(20 RT 2874-2876, 2881-2882; 21 RT 2946-2947.) Williams ordered Chris to do the same thing. Chris said, "Shoot me, and I'll see you in hell." Williams backed off his demand. (20 RT 2877.)

On a separate occasion, Williams hit Dearaujo in front of the others after telling Dearaujo to do something. Dearaujo and Steve walked to the store to get cigarettes. During the walk, Dearaujo cried and said he was afraid of Williams. (32 RT 4316.) On a third occasion, Williams beat up Dearaujo because Dearaujo asked Williams to return bullets to him. (26 RT 3604.) Dearaujo took his father's bullets so they could be used in Williams's pistol. (25 RT 3457; 26 RT 3604.) On a fourth occasion, Williams pointed a BB gun at various persons in the living room and shot it very close to Natalie. Williams told the group, "We're all in this together and there is a bullet for each of you." This indicated that anyone who ran away from the gang or disobeyed Williams could be shot. (23 RT 3185-3186.)

Murder Of Yvonne Los (Counts One And Two)

Paul Petrosky was engaged to be married to Yvonne Los. (17 RT 2289.) Petrosky and Los lived in separate residences of a duplex on military housing at March Air Force Base. (17 RT 2289.) Los had two children, Patrick and Michelle. (17 RT 2290.) On the evening of May 19, 1993, Los left her children with Petrosky and his two sons so she could go run errands and then go to the gym to work out. (17 RT 2290.) Los was wearing work out clothing when she left her residence. (17 RT 2292; 18 RT 2454-2455.)

In the late afternoon, Grades J. and his friend Randy met up with Williams, who was cleaning the yard of his parent's house. (18 RT 2498-2499, 2500, 2521, 2556-2557, 2558, 2583.) They went to Rodney's house to play basketball. (18 RT 2501-2503, 2521, 2559, 2560, 2581; 33 RT 4382.) Williams, Grades, Randy, Dearaujo and Chris played basketball until it got

dark. (18 RT 2504; 20 RT 2827.) Grades and Randy were walking to Gordy's Market to use the telephone and purchase beer. (18 RT 2506, 2458.) At the corner of Delgado and Ramsdell, they saw Kimberly Coble driving a black car which had stopped. (18 RT 2506, 2560-2561; 20 RT 2828; 26 RT 3651.)

Coble, Mike and Terrill were seated in the black Duster. (18 RT 2507, 2561.) Grades chatted with Mike and learned they were going to a party. (18 RT 2562.) Grades invited Williams to come along as he and Randy entered and then sat in the back seat. (18 RT 2508, 2511, 2563, 2585.) Williams approached the car, and called Dearaujo over to him. Chris followed Dearaujo. (18 RT 2511, 2512, 2619.) Johnson or one of the other men inside the car spoke with Williams about going to a party. (20 RT 2830.) Williams asked if Dearaujo could ride with them, but Coble said there was no room in the car. Grades told Williams that Dearaujo could not go. (18 RT 2511, 2515, 2564; 26 RT 3676, 3700.) The car engine was running, the stereo was playing. Coble and Grades could not hear a conversation between Williams, Dearaujo and Chris that took place outside the car. (18 RT 2514, 2515, 2586-2587; 26 RT 3659-3662, 3683.)

Williams had a discussion with Dearaujo and Chris, at that time or earlier that day, about going to a party in Anaheim. (19 RT 2614, 2618; 20 RT 2825; 21 RT 2901.) Williams said there was not enough room in the black car. Williams told Dearaujo to go to the Family Fitness Center parking lot to get a car because there were usually a lot of cars there. (19 RT 2619, 2620, 2621, 2625; 20 RT 2831 2836; 26 RT 3676.) At the invitation of Grades, Williams entered the Duster. (18 RT 2515, 2516; 20 RT 2833.) Dearaujo and Chris, who had a knife, walked towards the fitness center. (19 RT 2621; 21 RT 2902.) The fitness center was near the area of Classy B's liquor where Dearaujo and Chris committed the L.A. Times office robbery. (19 RT 2732.) They reached the sidewalk by Gordy's Market and the black Duster stopped at the intersection. (19 RT 2621.) Dearaujo approached the passenger side window where he had a conversation with Williams. (19 RT 2622, 2625.) Lyons was standing on the sidewalk, about two steps away from Dearaujo and Williams. (19 RT 2622, 2623.) Williams handed his .380 Beretta pistol, a jacket and a blue bandana to Dearaujo. (19 RT 2624, 2628-2629; 21 RT 2904-2905, 2955, 2956.) Dearaujo put the gun in the waistband of his pants. (19 RT 2631; 21 RT 2907.)

Williams directed Dearaujo and Chris to carjack a four door light colored car, put the victim in the trunk and be prepared to "dispose" of the victim later. (19 RT 2622, 2625; 20 RT 2836; 21 RT 2928, 2956.) Williams told them that once they had the car, they were to meet him by a trash can in the parking lot of Gordy's Market so they could drive to Anaheim. (19 RT 2625; 21 RT 2905-2906.) When Williams re-entered Cobble's car, he told the occupants that he would meet his friends back at the location near Rodney's house in 15 minutes. (26 RT 3663.)

Dearaujo and Chris walked down the street and the black Duster drove off. (18 RT 2516; 19 RT 2627.) As they walked through the lot there were only a few persons going out to their cars. (19 RT 2629-2630.) They walked up to a car in front of the fitness center, but a man exited and they decided he could cause them problems and make a carjacking difficult. (19 RT 2631-2632; 20 RT 2839.) They looked for a car that met the description given by Williams, as well as an easy victim. (19 RT 2631.) They waited at the entrance of the fitness center and looked around the lot for a few minutes trying to find a suitable victim. (19 RT 2630-2361, 2632.)

Shannon Walsh got off work at the Family Fitness Center and went to a tanning salon next door. (17 RT 2297-2298.) Gregg Plamondon, a Los Angeles County Sheriff's Deputy, accompanied his wife as she drove to the tanning salon next to the Family Fitness Center located off Alessandro Boulevard. (17 RT 2362.) Plamondon joined his wife because he was concerned for her safety. His wife drove a nice car and here were recent crimes in that area. (17 RT 2365.) Plamondon saw two young men wearing baggy clothing standing in a shadowy area by a liquor store or mini-mart. He did not see any other pedestrians when they pulled into the parking lot. (17 RT 2364, 2365-2366.)

Dearaujo and Chris saw a female driving a car down Alessandro Boulevard to the entryway of the parking lot. (19 RT 2632-2633.) They started following the car as it turned and then parked. (19 RT 2633-2634.) Dearaujo said, "That's it, let's do it." Chris responded, "Okay, let's do it." (19 RT 2634.) Dearaujo pulled the gun out from his pant's waistband and held it in his right hand in front of him. (19 RT 2635.) Chris was one step behind Dearaujo as they approached the driver's side of the car. (19 RT 2635, 2636.) Los was in the driver's seat and writing on papers on her lap. (19 RT 2635.) Dearaujo tapped on the window with the barrel of the pistol, and said "Shh" to indicate that she be quiet. (19 RT 2636, 2637; 21 RT 2907.)

After 30 minutes at the tanning salon, Walsh walked out towards her car in the parking lot. (17 RT 2298, 2343.) Walsh saw the back of Los's car and two young men standing on each side of the car. Both young men wore baggy blue jeans, oversized flannel shirts and dark baseball caps. (17 RT 2303, 2304-2305, 2332-2333, 2334-2335.) Walsh saw the young man on the driver's side with his right arm over the roof of the car, his left hand was pointing at the window as if he had a gun, and talking to Los. (17 RT 2305, 2306, 2337, 2345-2346.) The one on the passenger side was trying to open the door, and said, "Get out of the car, get out of the fucking car." (17 RT 2305.) Walsh made eye contact with the young man on the passenger side of Los's car. (17 RT 2305, 2306, 2322-2323.) Los was frightened as she looked at Dearaujo. (19 RT 2638, 2640.) Los locked the car doors. (19 RT 2638.) Dearaujo tried to pull down the window and open the driver's side door to force his way into the car. (19 RT 2641; 21 RT 2908.) He directed Chris to go to the passenger side to try to open the door. (19 RT 2638.) Dearaujo pointed the gun at the window and said, "Open the door, bitch." (19 RT 2641.) Chris tried to open the passenger side door handle or push the window down. Chris said about four times, "Open the door bitch, open up, open up." (19 RT 2641, 2642.) At that point, it was still their intent to put Los in the trunk. (19 RT 2642; 21 RT 2908-2909.)

Walsh entered her car, locked the doors, and looked at them through the rear view mirror for a while. (17 RT 2307, 2308, 2346-2347.) Los moved one of the papers from her lap, retrieved a key and put it in the ignition. (19 RT 2643; 21 RT 2909.) Walsh decided to leave and turned on the ignition of her car. She then heard the ignition of Los's car turn on. (17 RT 2309, 2337, 2352; 19 RT 2643.) Walsh saw Los's car begin to roll and the young man on the driver's side slightly jump back. (17 RT 2309.) Dearaujo shot Los. (19 RT 2643, 2644; 21 RT 2909.) Walsh then heard a gunshot. (17 RT 2309, 2312, 2315, 2353.) Walsh put her car in reverse and slowly backed out of the parking lot. (17 RT 2309, 2321, 2338; 19 RT 2643-2644.) Los tapped the car horn several times to call for help and then slumped forward over the steering wheel. (17 RT 2309, 2316, 2319.)

Dearaujo ran away and Chris ran after him into a field next to the Family Fitness Center. (19 RT 2644, 2646; 21 RT 2910.) Walsh saw them running into the field. (17 RT 2309, 2310, 2315, 2338.) Walsh told a woman who approached that Los had "just been shot" and indicated she had not called the police. (17 RT 2319.) Walsh was fearful because she did not know the whereabouts of the young men. Walsh and the woman entered their own cars, drove to a different location, and the woman called the police. (17 RT 2319, 2331, 2340.)

Plamondon was sitting in the lobby of the tanning salon when he heard a "pop," which he thought was a firecracker. (17 RT 2367, 2385, 2387.) He heard repeated sounds from a car horn coming from the parking lot in front of the Family Fitness Center. (17 RT 2367, 2368.) Plamondon looked out the door of the salon but did not see anything. He then heard a car crash and horn stopped honking. (17 RT 2367, 2368-2369, 2372.) Plamondon exited the salon and saw a Ford Mustang up on a median. (17 RT 2369, 2372.) Plamondon approached the Mustang and saw a gray Mercury Sable backed up against the Mustang. (17 RT 2369-2370, 2371, 2399, 2413, 2415.) The Sable's headlights were turned on. (17 RT 2414.)

The Sable's driver's side window had a small hole and was "spidered," meaning it was shattered but held up by the plastic lining in the safety glass. (17 RT 2320, 2371-2372.) Plamondon looked through the window and saw Los slumped forward in the driver's seat slightly towards the passenger side and with her hands down. (17 RT 2372, 2373.) There was a bullet wound to the left side of her neck in the area of the carotid artery. (17 RT 2373.) Plamondon opened the unlocked passenger side car door to see if Los was awake or breathing. (17 RT 2373, 2388.) He touched Los, checked for a pulse or respiration, asked if she could hear him or talk to him, but there was no response or any obvious signs of life. (17 RT 2373, 2387.) Plamondon left Los and ran to the Family Fitness Center. He entered and asked a person to call 911 and tell them a lady had been shot and they needed paramedics and to send a sergeant. (17 RT 2375.) Although Plamondon believed that Los was dead, he returned to the car, put his hands on her neck to apply pressure and asked her to hold on because persons were coming to help in case there was a possibility

that she was alive. He did not get a response from Los. (17 RT 2375, 2376; 27 RT 3755.)

At about 10:00 p.m., Deputy Marquette, who previously responded to the attempted carjacking at Dilly's, was called to go to the Family Fitness Center. (27 RT 3752-3753.) Deputy Carlton Allen, who previously responded to the L.A. Times office robbery, was the first officer to arrive at 10:04 p.m. (33 RT 4363.) Deputy Marquette arrived shortly thereafter. (17 RT 2395; 27 RT 3753, 3754, 3757; 33 RT 4369.) Deputy Allen approached the driver's side of the Sable and saw Los leaning over the steering wheel with her eyes partially open. (33 RT 4364.) Deputy Allen saw a gunshot wound to the left side of Los's neck towards the base of her skull. (33 RT 4367.) She was not responsive to any of his requests. (33 RT 4364,4367.) Deputy Allen checked Los's vital signs, but he did not see any signs of life. (33 RT 4364.)

Deputy Marquette saw persons standing on the sidewalk in front of the fitness center. (27 RT 3754.) Deputy Marquette saw Plamondon at the car attending to Los, who was bleeding profusely and appeared to be dead. (27 RT 3754, 3755.) It was readily apparent to Plamondon and Marquette that a homicide investigation was necessary, and the area had to be secured. (17 RT 2376; 27 RT 3757-3758.) Other police officers, homicide detectives and paramedics arrived. (17 RT 2377; 27 RT 3766, 3772; 33 RT 4364.) Paramedics removed Los from her car and they attempted CPR. (17 RT 2377-2378, 2400-2401, 2402, 2411; 33 RT 4364.)

After the telephone call to the police, Walsh returned to the Family Fitness Center parking lot. (17 RT 2359.) She walked up to the area that had been marked off with the yellow crime scene tape and spoke with Deputy Allen. (17 RT 2359; 33 RT 4371.) Walsh told him that when she walked by that area the suspects were standing by Los's car so she entered her car and sat there terrified. (33 RT 4372.) The crime scene was taped off, persons coming out of the Family Fitness Center could not get to their parked cars, and over 20 persons gathered in the area of the crime scene, mostly in the sidewalk in front of the fitness center. (17 RT 2378-2379, 2381, 2401-2402, 2534; 27 RT 3773; 33 RT 4364-4366.) Plamondon did not see the two young men with the baggy clothing in the crime scene area. (17 RT 2392.)

Paul Petrosky had not heard from Los, and it was past the time that he expected her to come home. (17 RT 2290.) Petrosky left the children in the care of his oldest boy and he drove to the Family Fitness Center in Moreno Valley. (17 RT 2291, 2293.) Upon arriving, Petrosky saw yellow crime scene tape marking off an area and was told where to park. (17 RT 2291, 2294.) He saw Los's gray car with the door open and persons standing around her car. (17 RT 2291, 2292, 2295.) Petrosky walked up to the yellow tape, told the officers who he was, and an officer told him that Los had been shot. (17 RT 2291, 2295.)

As they drove around in the black Duster, Grades and Randy drank alcohol and smoked marijuana, while Williams drank alcohol. (18 RT 2518, 2520.) During the drive, they stopped at a liquor store to purchase more alcohol and stopped at a couple of homes. They drove back to the corner by Gordy's Market where they had picked up Williams in order to drop him off to meet up with Dearaujo and Chris. (18 RT 2506, 2518, 2522, 2523, 2565-2566, 2588, 2590, 2591-2592.) They heard and saw emergency vehicles driving down Alessandro Boulevard, and they discussed going to see what was going on. (18 RT 2530, 2531, 2568.) Coble wanted something to eat and Williams said he wanted to go to a Taco Bell. (18 RT 2522; 26 RT 3663.)

The black Duster drove to the Taco Bell at about 10:00 p.m., ordered food at the drive-thru, and left. (18 RT 2424; 26 RT 3664, 3683.) Police cars and ambulances were driving down Alessandro Boulevard towards the Family Fitness Center. (18 RT 2525-2526; 26 RT 3687-3688, 3710.) When they

arrived at the Taco Bell parking lot, Williams and the other occupants of the black Duster exited and walked over to the area of the fitness center. (18 RT 2526-2527, 2603.) Police were present and the yellow crime scene tape was in place. (26 RT 3688, 3713.) Grades saw the shattered driver's side window of the gray Mercury Sable and the covered body of a dead person. (18 RT 2529, 2535, 2538.) Coble went with Terrill, who asked someone what happened and they were told a lady was shot. (26 RT 3667, 3669-3670.) Police officers told them to leave the area of the fitness center. (18 RT 2532, 2605; 27 RT 3771.) All the occupants returned to the Duster and discussed the blood on the car window and body laying on the asphalt as they drove away. (18 RT 2537, 2538, 2570; 26 RT 3671.)

Meanwhile, Dearaujo and Chris had run across the field, through the parking lot of an adjacent building, and climbed over the wall of the nearby apartment complex where James lived, but James was not home. (19 RT 2645-2646; 20 RT 2840-2841; 21 RT 2910.) The wall separated the apartment complex from the business complex where the Classy B's and the L.A. Times office where located. (19 RT 2739.) Dearaujo still had the .380 caliber pistol and was wearing the jacket that Williams gave him. (19 RT 2648, 2650.) They walked the short distance from the apartment complex to Natalie's house. (19 RT 2648-2649; 20 RT 2841.) The house lights were not turned on. (20 RT 2841.) They knocked on the door and asked Natalie to wake up and open the door. (22 RT 3072.) Natalie could hear police helicopters, but she did not go to the door. (19 RT 2649; 22 RT 3072.) Dearaujo and Chris hid the pistol and the jacket in the bushes to the side of Natalie's house. (19 RT 2649; 20 RT 2843.)

They left Natalie's house and, as they crossed the street, they heard sirens which they believed were in response to the shooting of Los. (19 RT 2652.) They were nervous and trying to get away so they walked to Rodney's house to look for Williams and ask for his advice. (19 RT 2650-2652, 2653.) They knocked on the door and Rodney's parents said that Rodney was sleeping. (19 RT 2654, 2655; 20 RT 2842.) Dearaujo and Chris went next door to the Holland residence. (19 RT 2655.) They jumped over the fence, entered the back yard and knocked on the window to John's and Kiesha's bedroom. (19 RT 2655, 2656-2657; 20 RT 2843.) After Chris and Dearaujo identified themselves, John and Kiesha came outside to the backyard. (19 RT 2657-2658; 20 RT 2843.) A nervous Dearaujo said he shot someone and asked where he could find Williams. (19 RT 2658; 21 RT 2911.) Kiesha, who was initially hysterical, and John spoke with them, told them to be quiet, and eventually advised them to find a place where they could stay. (19 RT 2658-2659.) Rodney had opened his bedroom window, Rodney offered them a sleeping bag, which was later placed in front of the garage. (20 RT 2844.)

Holland had dinner at his parent's home and then drove up in his sister's Festiva to pick up his drawing at John's house. (19 RT 2659-2660; 20 RT 2843; 21 RT 2977; 23 RT 3248.) Dearaujo and Chris went up to the car and spoke with Holland. (19 RT 2660; 23 RT 3250.) Dearaujo looked excited and scared, was talking very fast and said that he shot somebody, or that someone had been shot, at the Family Fitness Center. (23 RT 3249-3250, 3252-3253, 3255.) Holland did not believe him and told him to quit lying. Dearaujo replied that he was serious. (23 RT 3250.) Holland thought that Dearaujo had been involved in a crime. (23 RT 3255.) Holland entered his sister's car and drove to the Family Fitness Center. (19 RT 2660; 23 RT 3250.) Holland saw police officers and yellow tape in the parking lot. (23 RT 3250, 3251.) Holland turned the car around and drove back to John's house. (23 RT 3250, 3254.)

The black Duster with all its occupants returned to the corner near Gordy's Market where they had picked up Williams. (18 RT 2537, 2571, 2599; 20 RT 2844; 26 RT 3671.) Dearaujo, Chris, and possibly John and Kiesha, came out to the street. Grades tried to get Williams to return to the car, but Williams said he wanted to speak with them because he had to "handle his business." (18 RT 2539-2540, 2541-2542, 2546-2548, 2550-2551; 19 RT 2661.) Kiesha was crying and hysterical, but Dearaujo and Chris were laughing. (18 RT 2543, 2573-2574, 2596; 26 RT 3673, 3692.) John and Kiesha left the area, and Williams spoke with Dearaujo and Chris. (18 RT 2548-2549; 26 RT 3725.) Dearaujo told Williams that he shot a lady at the fitness center parking lot and asked what they should do. (19 RT 2665; 21 RT 2914-2915.) Coble asked who was shot, and she heard that they shot the lady. Terrill asked, "Why?" Coble heard the response, "Because she saw my face." (26 RT 3672.) Williams asked where the pistol was, and Dearaujo responded that he and Chris hid it. (19 RT 2665.) Kiesha said they needed to come up with an alibi for Dearaujo and Chris. (26 RT 3673.) Williams said something about coming up with an alibi and told them to find somewhere to stay that night. Williams told them that they would meet the next day at Natalie's house. (19 RT 2668; 20 RT 2845-2846; 21 RT 2915.) The black Duster with Williams and all its occupants drove away to find a place to party and hang out. (18 RT 2550, 2574; 19 RT 2666; 20 RT 2846; 26 RT 3675-3676, 3683-3684, 3717.)

Holland agreed to give Dearaujo and Chris a ride. (19 RT 2667.) Holland dropped them off at Tony's home. (19 RT 2668; 20 RT 2846-2847.) They knocked on his window and asked if they could stay there, but Tony said they could not. (19 RT 2668; 20 RT 2848; 25 RT 3510, 3511, 3512.) Dearaujo and Chris split up and walked to their own homes. (19 RT 2668-2669; 20 RT 2848.) Gary Thompson, a Riverside County Sheriff's Homicide Detective, arrived at about 10:55 p.m., and there were several officers and sergeants. (17 RT 2395, 2404.) Detective Thompson found a .380 caliber shell casing to the rear of the Mercury Sable, which was collected by a forensic technician. (17 RT 2400, 2401, 2407, 2408, 2413, 2420-2421; 34 RT 4507-4508.) The Sable was dusted for fingerprints. (17 RT 2418.) Latent prints were collected, including two prints near the handle of the driver's side door. (17 RT 2418, 2430, 2431.) In the early morning of May 20, 1993, Walsh spoke with a forensic technician to put together an Identi-Kit composite. (17 RT 2329, 2432-2437.) Later that day, Walsh met with a police sketch artist who prepared a sketch of the young man she saw on the passenger side of Los's car. (17 RT 2329-2330, 2446-2449.)

Post-Murder Celebration

On May 20, 1993, Chris and Dearaujo went to Natalie's house in the morning. (19 RT 2670; 20 RT 2846; 22 RT 3072, 3163.) The .380 caliber pistol was still in the bushes and Dearaujo told Chris to retrieve the pistol. (19 RT 2676; 20 RT 2851.) They knocked on the door and Natalie let them in. (22 RT 3072.) They told Natalie that they tried to steal a lady's car, the lady reached for her keys to get out of there, but Dearaujo shot her in the head. (22 RT 3074.) Dearaujo said, "I shot the bitch and she's dead." Dearaujo then laughed. (22 RT 3074.) They told Natalie they retrieved the pistol from the bushes on the side of her house. (22 RT 3074.) They also told Natalie that they ran after the murder and they heard the police and the helicopters. (22 RT 3075-3076.) Chris took the cap and clothes he was wearing during the murder to Natalie's house. (20 RT 2759-2760.)

That afternoon, Williams, Natalie, Cathy, Dearaujo, Chris, Weatherspoon, James, Tony and Chuey were at Natalie's house. (19 RT 2671,

2676-2677; 22 RT 3071, 3101, 3164; 25 RT 3506; 29 RT 3901-3902, 3929; 31 RT 4156.) The occasion was a party where they drank alcoholic beverages and smoked marijuana and celebrated the murder of Los that was committed the prior night. (19 RT 2672-2673, 2674, 2684; 20 RT 2858; 21 RT 2960; 22 RT 3079, 3081, 3082.) Williams's .380 caliber pistol was on a table in the living room and persons were playing around with the pistol. (29 RT 3903, 3932-3933, 3979.) Williams and the others present read a newspaper article about the murder. (22 RT 3079-3080.) Weatherspoon was sitting next to Dearaujo and Williams said, "You're sitting next to Charles Manson." (31 RT 4157.) On top of the composite drawing of Chris, Chuey wrote "Wanted," and the newspaper article was posted by Weatherspoon at the house. (22 RT 3080-3081; 25 RT 3506, 3509, 3511, 3515-3517, 3579.) Williams was happy for Dearaujo and Chris and told them "good job." Williams awarded Dearaujo two "G stripes" for the murder, and he awarded Chris with one "stripe." (19 RT 2673-2674, 2676; 21 RT 2912, 2883-2884; 22 RT 3165.) "G stripes" were analogous to military "stripes" awarded for service, but as pertained to this group they were awarded for accomplishing crimes. (19 RT 2673.)

All the persons present at Natalie's house watched a television newscast about the murder, which showed Los's car, Los, her fiancee Paul Petrosky, the location of the murder, including a composite sketch of Chris. (19 RT 2676-2677, 2682-2683; 22 RT 3076-3077; 25 RT 3509, 3518.) Williams kept reassuring Dearaujo that they would not get caught and that Williams would take car of the situation. (22 RT 3077.) When the newscast showed a photograph of Los, Dearaujo said, "I smoked that bitch." (19 RT 2674-2675; 22 RT 3078.) At that time, Dearaujo was laughing and bragging. (22 RT 3078.) When Petrosky came on the news and talked about how he and Los were going to get married, Chris said, "Not no more." (19 RT 2675.) After that comment, Williams nicknamed Chris "Charles Manson." (20 RT 2766, 2868, 2869.)

Taco Bell Parking Lot (Counts Ten And Eleven)

That night, Williams, Weatherspoon, James, Chris and Chuey left Natalie's house to commit another carjacking they planned at the house. (19) RT 2677, 2683; 20 RT 2852; 21 RT 2933; 22 RT 3082, 3083; 29 RT 3934-3935, 3937-3938.) They discussed getting a car at the Taco Bell so that Williams, Dearaujo and Chris could leave the Moreno Valley area because of the murder the prior night. (19 RT 2686-2687; 20 RT 2760; 21 RT 2934-2935.) Dearaujo and Natalie were drunk, so they remained at her house. (20 RT 2854; 21 RT 2934, 2960; 22 RT 3082, 3101.) The loaded .380 caliber pistol had been cleaned with a cloth to remove fingerprints and someone in the group carried it when they went out to commit the carjacking. (19 RT 2679.) They were going to put the victims in the trunk, all enter the vehicle and drive away. (19) RT 2690.) They walked from Natalie's house to the apartment complex and jumped over the wall. It was the reverse of the route that Dearaujo and Chris took on the night of the murder. (19 RT 2684-2685.) By the apartment complex, Weatherspoon was holding the pistol while wrestling or playing with Chuey and the pistol accidentally fired. (31 RT 4164-4165, 4226, 4240-4241.) Weatherspoon gave the pistol to Williams. (31 RT 4166, 4242.) They walked by the Family Fitness Center, where security guards were not present. (21 RT 2932-2933; 29 RT 3938, 3942.) They walked to the same Taco Bell on Alessandro Boulevard where Williams had been in the black Duster the previous night. (19 RT 2689.) Directly across from the Taco Bell one could see the Family Fitness Center where Los was killed. (19 RT 2686.)

Glynn Brodbeck drove his white four door 1989 Ford Tiempo to pick up his fiancee who was working at the Taco Bell. (34 RT 4466-4467, 4468.) Brodbeck went to pick her up because she did not want her driving alone at night after the nearby murder of Los the previous night. (34 RT 4467.) Brodbeck arrived at the parking lot at around 11:30 p.m. (34 RT 4467.) The parking lot was not very busy and it was fairly well lit. (34 RT 4467.) Brodbeck turned off the car, but had the stereo on and the windows up as he waited for his fiancee. (34 RT 4468.)

Williams, Weatherspoon and the others spotted Brodbeck sitting alone in his parked car. (31 RT 4168; 33 RT 4445.) Williams and Weatherspoon had a conversation and agreed to take the car. (31 RT 4169.) Williams had the gun and was accompanied by Weatherspoon and James as they approached the white car to accomplish a carjacking. (19 RT 2689, 2693; 29 RT 3945-3946, 3986-3987.) Chris and Chuey remained by some bushes and were talking. (19 RT 2692; 20 RT 2855; 29 RT 3946.) Brodbeck had been waiting for about 15 minutes when he looked at his side view mirror and saw somebody approaching his car. (34 RT 4469.) The three men walked up as if they were going to the front entrance of the Taco Bell. (33 RT 4445; 34 RT 4469, 4470, 4476.) Brodbeck started the car, but did not pull out because his fiancee had not left work. (34 RT 4469.)

Williams walked up to the driver's side and tapped on the window. (34 RT 4469-4470.) Williams said, "Roll down the window and turn the car off." (34 RT 4470.) Brodbeck rolled down the window three to four inches, looked out and saw Williams pointing a pistol at his face. (29 RT 3945-3946, 3953-3955; 31 RT 4170; 34 RT 4470; 34 RT 4470, 4476-4477, 4480, 4486.) Williams told Brodbeck to give his wallet to Williams. Brodbeck tried to find his wallet, realized he left it at home, and said he did not have it with him. (34 RT 4471, 4477-4478.) Williams ordered Brodbeck to turn off the car and get out of the car. (29 RT 3945-3946, 3953-3955; 31 RT 4170; 34 RT 4471, 4478-4479.) Williams continued to

point his pistol at Brodbeck. (34 RT 4480-4481.) Williams ordered Brodbeck to keep his hands up and not look at him. Brodbeck put his hands up. (29 RT 3945, 3947, 4481-4482.) Brodbeck looked scared. (29 RT 3948.) Williams also ordered Brodbeck to walk backwards towards James, who was standing toward the rear of the car. Weatherspoon was standing nearby. (29 RT 3945-3946, 3948, 3955; 31 RT 4170.) James then patted down Brodbeck and retrieved cigarettes from the back pocket of his pants. (29 RT 3947-3948, 3956-3957, 4002; 34 RT 4472, 4481.) James said that Brodbeck did not have a wallet on him. (34 RT 4472.)

Weatherspoon had the car keys and opened the trunk because he wanted to put Brodbeck in there. (31 RT 4171, 4172, 4228, 4482-4483.) Weatherspoon said, "Come over here and look at this." (34 RT 4472.) Brodbeck knew the only thing in the trunk was a blanket, so he started to worry that they might kill him. (34 RT 4472-4473, 4485.) Williams walked around to the back of the car, looked in the trunk, and Brodbeck ran away. (31 RT 4171; 34 RT 4473, 4497-4498.) Williams fired a shot at Brodbeck. (31 RT 4172-4173, 4253, 4483.) As Brodbeck ran away he heard a gunshot. Brodbeck slipped as he ran up a sidewalk and heard the bullet whistle by him. (33 RT 4445; 34 RT 4473, 4484, 4498.) James was walking away when he heard a shot coming from the direction where Williams was standing. (29 RT 3945, 3950, 3958-3959.) Brodbeck turned the corner and ran to the side of the building where the drive-thru was located. Brodbeck banged on the window and asked to be let in because he had been robbed and shot at. (34 RT 4484-4485.) Brodbeck was allowed into the restaurant where he called the police. (34 RT 4485.)

At 11:37 p.m., Riverside County Sheriff's Deputy Anthony Aguirre was on patrol and he received a call to respond to the Taco Bell on Alessandro Boulevard. (33 RT 4435-4436.) He arrived shortly thereafter and contacted Brodbeck inside the Taco Bell. (33 RT 4436.) Brodbeck was very scared and upset. (33 RT 4436.) Deputy Aguirre and Brodbeck searched the parking lot for a bullet casing. (33 RT 4447; 34 RT 4488.) Deputy Aguirre found a .380 caliber shell casing about 20 to 30 feet from the restaurant. (33 RT 4447; 34 RT 4488-4489.) The car keys were laying on the ground of the parking lot. (34 RT 4497.) Deputy Aguirre also dusted Brodbeck's 1989 Ford Tempo for fingerprints, but did not find any. (33 RT 4438.) Four days later, Brodbeck identified Williams at a lineup. (34 RT 4492, 4496.)

Chris saw Williams, Weatherspoon and James running, so he and Chuey joined them. (19 RT 2692; 20 RT 2855; 29 RT 3950-3951, 4005.) They ran back towards the wall, jumped over it, and they walked to Natalie's house. (19 RT 2693; 20 RT 2856; 22 RT 3083; 29 RT 3951, 3960; 31 RT 4173-4174.) While they were away, Dearaujo cried and wanted Williams to return because he was scared of being caught by police. Ultimately, he passed out. (22 RT 3105-3106.) When they returned to Natalie's house, they continued partying and smoked marijuana. (19 RT 2696; 20 RT 2856; 29 RT 3960; 31 RT 4174.) Chris and Dearaujo were handling the .380 caliber pistol in the backyard. (19 RT 2697.) Weatherspoon took the pistol and fired some shots in the air. (19 RT 2694, 2695, 2696, 2698; 20 RT 2776; 29 RT 3962-3963; 31 RT 4174-4175.) Chris put the gun in the attic under insulation after Weatherspoon fired the pistol. (19 RT 2697; 20 RT 2776, 2856.)

Deputy Aguirre worked the graveyard shift and was still on patrol in the early morning of May 22, 1993. (33 RT 4439.) At 2:55 a.m., he received a call regarding the shooting of a weapon. He checked the area but there was no responding party for him to contact. (33 RT 4439.) At 5:55 a.m., Deputy Aguirre received a call regarding the same incident, and contacted the reporting party, who was the next-door neighbor of Natalie's residence. (33 RT 4439-4440, 4442.) Deputy Aguirre went next door and contacted Natalie, who came

to the door. (19 RT 2697; 20 RT 2856; 22 RT 3102; 31 RT 4175; 33 RT 4440, 4443.) Deputy Aguirre asked if she knew anything about somebody shooting off a gun, and she said that she did not. (33 RT 4440.) Natalie also had been told that the pistol was fired in the backyard but that they hid the casings. (22 RT 3102.) Natalie allowed him to enter the house to look for a gun or any evidence. (33 RT 4440.) There were five or six males in the house with Natalie. (33 RT 4442-4443.) Deputy Aguirre did not find a weapon or any ammunition in the house. (22 RT 3103; 29 RT 3964; 33 RT 4443-4444.) He did not look in the attic. (33 RT 4445.) During the search, Natalie was nervous because she knew the pistol was in the attic. (22 RT 3104.) Deputy Aguirre entered the backyard and saw some shell casings. Because the persons claimed they did not witness anything, he could not make a misdemeanor arrest or write a citation for unlawful discharge of a weapon. Deputy Aguirre did not collect the casings because at that time he did not have any information connecting the casings to the shooting at the Family Fitness Center or the Taco Bell. (33 RT 4440-4442.)

Williams And Others Arrested

In the early morning of May 22, Chris went with his friends, and cousins Jason D. and Jeremy D., to Tony 's house. Chris told Tony that he was looking for Williams. Tony directed Chris to a nearby home where he found Williams. Williams directed Chris to take the 380 caliber pistol to Tony 's house. Chris demonstrated the pistol to Jason and Jeremy before he gave it to Tony. (20 RT 2761, 2857, 2858-2859; 21 RT 2913; 24 RT 3430; 25 RT 3446-3447.) Chris gave Tony the pistol and a plastic bag containing eight or nine casings. (25 RT 3454-3456; 3532.) Chris told Tony that Williams would pick up the pistol later that morning. (25 RT 3455, 3456, 3520, 3577.) Tony put the pistol and bag

with the shell casings under his pillow and went to sleep. (25 RT 3520.) Tony kept the pistol in his closet. (25 RT 3456.)

Later that morning, Tony took the pistol to Williams, but Williams told Tony to hold on to it. (25 RT 3456, 3519-3520, 3521.) Rodney's mother took a group fishing to Lake Perris. (25 RT 3514; 33 RT 4382-4383.) The group included Rodney, his brother Arthur, Williams, Tony, Dearaujo and Chris. (25 RT 3514.) The Riverside County Sheriff's Department did not have any further information about the Los murder until that day. (34 RT 4502-4503.) They began to interview persons and determine who was involved and how the homicide occurred. (33 RT 4398-4399, 4402.) Between 10:00 and 10:30 a.m., Detectives Thompson and Wilson contacted Holland and interviewed him at 11:00 a.m. (34 RT 4503, 4306.) Holland initially claimed that the only thing he knew about the Los homicide was what he had read in the newspaper. Subsequently, Holland gave the detectives several details about the murder and the names of several suspects, including Williams, Dearaujo and Chris. (34 RT 4504.) Detective Collins dropped off Holland, before picking up Kiesha and John at 4:00 p.m. He took Kiesha and John to the station for an interview. (33 RT 4405.) Subsequently, the group that went fishing returned to Rodney's residence. (25 RT 3521-3522.)

At 8:00 p.m., Detective Collins received a telephone call from Kiesha, informing him that Williams, Dearaujo and the others had returned from fishing and were at the Metoyer residence. (33 RT 4395, 4396.) Detective Collins, a sergeant, and four to six other deputies drove to Rodney's residence. (33 RT 4397.) Tony had been playing video games inside the residence. Tony went outside to see why the others had not entered and saw a police officer with a shotgun. (25 RT 3522; 33 RT 4368.) Detective Collins saw Williamsor on the curb outside the residence and took him into custody. (33 RT 4396.) The other officers entered the residence to secure it and determine if there were any other

suspects in the area. (33 RT 4397.) Rodney, Tony and Williams were detained outside the residence without incident, and subsequently taken to the station for questioning. (25 RT 3546; 33 RT 4383-4384, 4388.) Detective Collins spoke with Rodney's father who came outside and saw his son was handcuffed. He told Rodney's father that Rodney was not being arrested, but was being questioned regarding the murder of Los at the fitness center parking lot. (33 RT 4384, 4398.) Williams was arrested and taken to the Moreno Valley station for questioning. (35 RT 4521-4522.) At the station, Detective Collins spoke with Rodney and Tony. (33 RT 4399.) Tony was released that night, returned home, and cleaned and took the pistol apart because his fingerprints were on it. (24 RT 3430; 25 RT 3521.)

That evening, Dearaujo rode his bicycle to Rodney's residence. (33 RT 4384, 4399.) Dearaujo knocked on the door and Rodney's parents answered it. (33 RT 4388.) Dearaujo brought an athletic bag which he said belonged to Williams. Dearaujo asked Rodney's parents to give it to Williams when they saw him. (33 RT 4384, 4387, 4388.) Rodney's father opened the bag. In addition to clothing he found two checkbooks that did not contain the name of Williams or his father. Rodney's father called the sheriff's office to inform them about the bag and its contents. (33 RT 4385-4386.) At 9:30 p.m., Detective Collins returned to Rodney's residence to pick up the bag. (33 RT 4407.) The bag contained a blue baseball cap with a gun insignia and the saying, "I got gun for my wife, good trade." It also contained other items of clothing, a pair of shoes, a local newspaper, the plastic toy pistol and two checkbooks, one bearing the name Steven Ruiz, and the other with the name of Patricia Lee Estey, from the L.A. Times Office robbery. (33 RT 4400-4402, 4408.) Rodney was picked up at the police station by his father between 11:00 p.m. and midnight. (33 RT 4387.)

At 10:00 p.m., Detective Collins contacted Deputy Catherine Lumpkin to get assistance from her special enforcement gang team to apprehend possible suspects. (33 RT 4409-4410, 4412.) They were asked to respond to the residence of Chris. (33 RT 4410.) Deputy Lumpkin subsequently contacted Chris, who was handcuffed and detained in the back of a patrol car. (33 RT 4311-4312.) Deputy Lumpkin and Sergeant Hoover asked Chris for permission to search his room without a warrant and Chris agreed. (33 RT 4412.) In a closet, they found a black Los Angeles Lakers baseball cap with a purple bill. (33 RT 4413.)

On May 23, Detectives Thompson and Wilson asked Moreno Valley Police Officer Cindy Rambo to transport Williams and Dearaujo to the Riverside County Jail. (35 RT 4515.) She was informed of their charges. (35 RT 4520.) During the drive, Williams initiated a conversation where he asked how much time he could get for carjacking. (35 RT 4516.) Pursuant to policy, Officer Rambo did not respond to Williams's inquiry. (35 RT 4516-4517.) She looked in the rear view mirror when Williams was talking. (35 RT 4516-4517.) She looked in the rear view mirror when Williams was talking. (35 RT 4519.) Williams said one of the detectives had called him "David Koresh," which he thought was quite funny. Williams said he did not think he was Koresh, but guessed he was a leader. (35 RT 4517.) Officer Rambo observed Williams laughing, acting confident, and feeling like a leader. (35 RT 4517-4518.) Dearaujo did not say anything. (35 RT 4519.) Officer Rambo was present when Williams and Dearaujo were received at intake and booked at the county jail. (35 RT 4520.)

On Monday, May 24, a police officer came to Tony's parent's home. Tony opened the door and the officer said, "Take me to the gun." (25 RT 3525.) The officer found the pistol in his room. Tony found the casings and gave them to the officer. (25 RT 3526.) Post again was taken to the station and questioned by police. (25 RT 3526.) Post pretended that he did not know the pistol was used in the murder, or that he did not take it apart. (25 RT 3527.) Post also claimed he did not know much about the crimes, and he was released that day. (25 RT 3527.) Post again spoke with police on Wednesday, May 26, 1993. (25 RT 3527.) During that time, Post was told that the "Pimp-Style Hustlers" was supposed to be a rap group, rather than one that was formed to commit crimes. (25 RT 3528-3529, 3560.) Rodney or Andrew had spoken with Williams, who was in custody. They encouraged Tony to blame Weatherspoon. (25 RT 3590.)

Williams's Statements

Williams agreed to speak to Detective Gary Thompson and Detective Williams at the Moreno Valley station on May 20, and at the Riverside County Jail on May 24, 1993.^{4/} (Exh. 68 at pp. 2, 55.) Williams was aware that the detectives were investigating the murder of Los at the Family Fitness Center. (*Ibid.*) Williams spoke with the detectives about the murder, as well as the other crimes.

Williams said that prior to the murder he saw Dearaujo and Chris when he was playing basketball at Rodney's house. (Exh. 68 at p. 4.) George and John were hanging out at Rodney's house. (*Id.* at p. 5.) Williams, his friend "G," Dearaujo, and one or two of "G's" friends were playing basketball. (*Ibid.*) Chris and Rodney were standing nearby. (*Ibid.*) Williams, Dearaujo and Chris had a discussion about going to Anaheim. (*Id.* at pp. 8, 9, 22.) A girl drove up in a black Duster. (*Id.* at pp. 7-8.) Williams claimed he could not recall her name because he was not good with names and he smoked a joint that night. (*Id.* at p. 8.) Dearaujo and Chris wanted to go with Williams to Orange County.

^{4.} The transcript of the interview was marked as Exhibit 68. The tape of the interview (Exh. 69A) was played for the jury but not reported by stipulation of the parties. (35 RT 4522-4523.)

But Williams told them that they could not go because there was no room in the Duster. (Exh. 68 at pp. 4, 39.) They talked about robbing somebody for a car so they could go to Orange County. But Williams claimed he did not want to do that. (*Id.* at pp. 5, 9.) Williams claimed the .380 caliber pistol belonged to "G," but admitted that he possessed it. (*Id.* at pp. 11, 79.) Dearaujo supplied most of the ammunition for the pistol. (*Id.* at p. 79.)

Williams admitted that he handed them the .380 caliber pistol at the end of Ramsdell Street by Gordy's Market. (Exh. 68 at pp. 22, 23, 29, 40.) Williams admitted he gave his pistol to either Dearaujo or Chris so that it could be used for the carjacking. (*Id.* at pp. 11, 29, 32.) Williams was sitting in the back of the black Duster and reached out to give them the pistol. (*Id.* at p. 32.) Dearaujo and Chris were leaning up against the car and one of them took the pistol. (*Ibid.*) He also admitted he knew that Dearaujo and Chris were going to use the pistol commit a carjacking as they walked to the area of the Family Fitness Center. (*Id.* at pp. 28-29, 32.) Dearaujo and Chris had knives, but Chris was going to use a knife. (*Id.* at p. 40.) They were supposed to meet in the parking lot by Gordy's Market after the carjacking. (*Id.* at p. 39.) From there, Williams would go in the car with Dearaujo and Chris, since they did not know how to get to Anaheim. (*Id.* at pp. 39-40.)

As the Duster drove off they saw police cars driving to the area of the Family Fitness Center. (Exh. 68 at pp. 39-40.) They drove to that area to see what was going on. (*Id.* at pp. 3, 8.) At the parking lot, Williams saw police officers put up yellow crime scene tape. (*Id.* at pp. 26, 39.) They saw a body on the ground and asked what happened. One lady told them a lady had a heart attack. Another lady told them that it was an attempted carjacking. (*Id.* at pp. 3, 8.) Williams knew that Dearaujo and Chris went "jackin," but he did not know what went wrong with it. (*Id.* at pp. 2, 3-4.) They left the fitness center and drove back to Rodney's house. (*Id.* at p. 8.)

Williams was by John's house when he spoke with Dearaujo and Chris. (Exh. 68 at pp. 3-4.) Chris did not say anything and Dearaujo looked scared. (*Id.* at p. 4.) Williams asked if they did what occurred at the fitness center. (*Id.* at p. 4.) Dearaujo asked, "What?" Williams said it was about "this lady that got smoked over there." (*Ibid.*) Dearaujo had a grin on his face and said, "My man I shot a woman." (*Ibid.*) Williams went in the Duster with the girl and "G" to Anaheim. (*Id.* at pp. 3, 7.) Williams stayed in Orange County until about 5:00 a.m. (*Id.* at p. 3.) Williams drove the Duster from Orange County to Moreno Valley. (*Id.* at p. 7.) Williams returned to Moreno Valley and went to sleep at his aunt's home. (*Id.* at p. 3.)

Williams admitted that he and Dearaujo robbed a Circle K in Riverside. (Exh. 68 at pp. 26, 32.) Williams, Weatherspoon and Dearaujo were in a car and discussed committing a robbery. (Id. at p. 33.) Weatherspoon was driving a gray Ford LTD. Williams was in the front passenger seat and Dearaujo was in the back seat. (Id. at p. 35.) They considered robbing a Yum Yum Donuts shop and an AM/PM convenience store before deciding to rob the Circle K. (*Id.* at pp. 33-34.) Williams decided to rob the Circle K because there were no officers by that store. (Id. at p. 34.) Dearaujo wanted to commit the robbery because he wanted "G stripes." (Id. at p. 35.) Williams handed the .380 caliber pistol to Dearaujo. (Id. at pp. 34-35.) Williams and Weatherspoon were in a car when Dearaujo went into the Circle K. (Id. at pp. 33, 36.) Dearaujo ran out of the store and Weatherspoon opened the trunk of the car. (Ibid.) Dearaujo threw the pistol in the trunk and they drove off. (*Ibid.*) Dearaujo discussed and acted out the robbery. (*Ibid.*) Dearaujo said he pointed the pistol at the clerk's head. Dearaujo told the clerk to put his hands up and give him all the money from the register. (Id. at p. 36.) The clerk put the money in a paper bag. (Ibid.) After telling the story, Dearaujo smiled and felt good about the robbery. (*Ibid.*) He gave the \$36 in cash and food stamps to Williams, who counted it. (*Ibid.*) Williams gave Weatherspoon \$5 for gas, and the rest they put in a basket. (Exh. 68 at p. 36.) Natalie got the money to use for a dinner at her house. (*Id.* at p. 37.)

Williams told the detectives that Natalie's house was used as the "kick it" spot where everyone drank and smoked marijuana. (Exh. 68 at p. 5.) Natalie's mother was gone during the week and came home on weekends. (Id. at p. 6.) Natalie liked him and he was "messing" with her so he could stay at her house because he left his parent's house two months prior. (Id. at pp. 2, 17, 47.) Williams admitted that he called the meeting at Natalie's house. (*Id.* at p. 46.) Williams claimed the purpose of the meeting was to discuss different illegal ways to make money. (Ibid.) Williams denied it was a gang, but claimed it was a group of friends. (Id. at p. 85.) Williams also claimed the group had no name. (Id. at p. 84.) Williams said the name "Pimp-Style Hustlers" was a rap name he devised because he wrote lyrics. (*Id.* at p. 85.) Williams claimed that Weatherspoon was the "number one guy" of the group and he was the "second-hand man." (Id. at pp. 83-84.) Williams said that he spoke with Weatherspoon privately in another room. Weatherspoon instructed him what to say in front of the group. (Id. at p. 84.) The meeting was supposed to be between Williams, Weatherspoon, Dearaujo and Chris. (Ibid.) Dearaujo had previously expressed to Williams that he was "down" (i.e., keen about) about being in a gang. (Id. at p. 54.) Dearaujo introduced Chris to Williams. (Ibid.) Weatherspoon brought over his cousin Steve, and others started showing up. (Id. at pp. 46, 63, 67.) Everyone present at the meeting sat in a circle. (*Id.* at p. 44.)

Williams, Weatherspoon and the others present spoke about different criminal ways to make money, including carjackings and selling marijuana. (Exh. 68 at pp. 44, 46, 85.) Williams's plan was to put the proceeds from the crimes in a pot that would grow. (*Id.* at p. 45.) Once the pot reached \$10,000,

Williams was going to invest the money so they could become businessmen. (Exh. 68 at p. 45.) Williams discussed committing "jackings," meaning any type of robbery. (*Id.* at pp. 44-45, 53.) Williams and Weatherspoon had discussed committing "jackings" long before they discussed it with the others at the meeting. (*Id.* at p. 44.) The other persons present suggested different types of robberies they could commit to make money. (*Ibid.*) Weatherspoon and Rodney also discussed selling marijuana. (*Ibid.*) All the persons present at the meeting expressed how they were "down" (i.e., keen for) the gang and that they had to "smoke" (i.e., kill) somebody. (*Id.* at p. 53.) All the persons present wanted to earn their "G stripe," to give them respect in the gang. Holland or somebody else discussed that there had to be a witness to the robbery or crime to verify that the perpetrator had earned a "G stripe." (*Id.* at p. 52, 53.) After the meeting, Holland stated that he wanted to be the first person to "jack" somebody. (*Id.* at p. 63.)

Williams said that Holland and Andrew committed the carjacking at the K-Mart parking lot. (Exh. 68 at pp. 24, 60.) John drove them there in a van. (*Id.* at p. 60.) They ended up at that parking lot because Kiesha pointed out two girls that were there. (*Id.* at p. 64.) The persons in the van had been passing around the pistol and Holland ended up with it. (*Id.* at pp. 64, 65.) Holland said, "Okay, Drew come with me." (*Id.* at p. 64.) Williams was sitting in the van with John and Kiesha. (*Id.* at p. 62.) They were viewing the carjacking. (*Ibid.*) Holland had the pistol tucked in the front of his pants. Andrew had a knife. (*Id.* at pp. 24, 60, 65.) Two Caucasian females walked out of a country western bar. (*Id.* at p. 65.)

Williams said that Holland went up to the car door and tapped on the window. (Exh. 68 at pp. 24, 60.) Andrew went to the passenger side of the car. (*Id.* at p. 60.) Two girls exited the car. (*Id.* at p. 25.) One entered the back seat and the other one stood outside the car. (*Id.* at pp. 25, 60.) Andrew began to

walk away from the car and the girl who entered the back seat started running. (Exh. 68 at pp. 25, 60.) Andrew and then Holland ran away. (*Id.* at pp. 25, 60, 66-67.) The other girl stood by the car. (*Id.* at pp. 25, 60.) Holland and Andrew ran to a gutter. (*Id.* at p. 25.) Williams said they drove away to look for them. Eventually, Williams got out of the van. (*Ibid.*) Williams and a friend named Gabriel walked through a neighborhood looking for them. (*Id.* at pp. 25, 67.) They walked to the Comfort Inn where Holland's sister had a room. (*Ibid.*) Holland and Andrew were not there. (*Id.* at p. 67.) Williams took Holland's sister's car and went looking for them. (*Ibid.*) Williams saw them walking by some apartments. (*Ibid.*) Williams picked them up and drove them to Natalie's house. (*Ibid.*) Holland shaved off his goatee and mustache that night. (*Id.* at pp. 26, 67.) They returned to the hotel and dropped off Andrew. (*Id.* at p. 67.)

Williams admitted that he and Weatherspoon committed the carjacking of the white Ford Escort on Terra Bella Street. (Exh. 68 at p. 25.) Williams said Holland was driving his sister's car. Weatherspoon and Steve were with them. (*Id.* at pp. 25, 67, 68.) Holland parked the car around the corner from where the empty Escort was parked. (*Ibid.*) Williams said that he and Weatherspoon got out of the car and crept up to where a man was standing with his girlfriend. (*Id.* at pp. 25, 69.) Williams used the same .380 caliber pistol that was used during the murder of Los. (*Id.* at p. 29.) Williams told the man it was a "nice car," and the man responded "Thanks." (*Id.* at pp. 25, 69.) Williams pulled his pistol out of the waistband of his pants, exhibited it to indicate he meant business, put it back down and asked the man for his keys. (*Id.* at pp. 25, 69, 70.) The man responded, "You're not serious." (*Id.* at p. 25.) Williams said he was serious as a "heart attack." (*Ibid.*)

The man asked if he could keep his house keys. Williams said that he could. (Exh. 68 at pp. 25, 69.) The man threw his keys at Weatherspoon. (*Id.*

at p. 25) Weatherspoon asked the man for his wallet. The man asked if he could just give him the money and keep the wallet. Weatherspoon agreed. (*Id.* at pp. 25, 69.) The man gave him \$11 or \$12. (*Id.* at pp. 27, 71.) Weatherspoon kept the money. (*Id.* at pp. 26, 71.) Williams said he entered the passenger side and Weatherspoon the driver's side of the Escort. (*Id.* at pp. 25, 70.) Holland and Steve followed them in Holland's sister's car. (*Id.* at p. 70.) They drove off to Gilman Springs Road. (*Id.* at pp. 26, 71.) The car had a plastic pistol with red bullets, which Steve kept. (*Id.* at p. 70.) Holland used the bumper of his sister's car to push the Escort into a ditch where they left it. (*Id.* at pp. 26, 71.)

Williams discussed the attempted carjacking by Tony at the movie theater parking lot. (Exh. 68 at pp. 47-48.) Williams said that the carjacking occurred on the night when he was going to the prom. (Id. at p. 48.) Holland was supposed to drive, but John did so. John left Kiesha at Holland's house. (Id. at pp. 48, 52, 59-60.) John and Tony picked up Williams at his house. (Id. at p. 48.) Tony had not committed a crime and said he wanted to get his "stripes." (Id. at pp. 48, 52.) They discussed that Tony was going to commit a carjacking. (Id. at pp. 72-73.) They drove around looking for someone to rob. (Id. at p. 48.) John had to go home, so he dropped off Williams and Tony behind a Stater Bros. grocery store. (Id. at pp. 48, 52, 73.) John was supposed to meet them later at Holland's house. (Id. at p. 73.) Tony had the .380 handgun because Williams was wearing shorts and carrying a bag containing his suit for the prom. (Id. at pp. 49, 59.) They walked on the street behind the Comfort Inn. (*Ibid.*) Eventually, they reached the parking lot of a movie theater near a Yoshinoya restaurant. (Id. at p. 51.) A car with two girls pulled up and a nervous Tony started walking towards them. (Id. at p. 49.) Tony was supposed to get not only the car but also money from the victim. (Id. at p. 74.)

Williams was sitting on a grass area to witness the crime. (Exh. 68 at pp. 51, 52, 59.)

A Caucasian middle aged lady and approximately 12-year-old girl got out of a car and Tony approached them. (Exh. 68 at pp. 49, 50-51.) Williams saw Tony say something to the lady, who walked back and then started running. (*Id.* at p. 50.) The young girl initially stood there, until the lady called out to her and she started running. (*Ibid.*) Tony started running towards Williams. (*Ibid.*) Williams told Tony to run away from him. (*Ibid.*) Tony ran across the street by the Yoshinoya restaurant and into a field. (*Id.* at p. 51.) Tony threw the pistol into the field. It was getting dark and it started raining, so Williams told Tony not to leave the pistol there. (*Ibid.*) Tony went into the field and retrieved the pistol. (*Ibid.*) Williams did not go to the prom that night. (*Id.* at p. 52.) He went to Tony's house, and then to his girlfriends' house. (*Ibid.*)

Williams also talked about the robbery at the L.A. Times office. (Exh. 68 at p. 23.) Williams knew that Dearaujo and Chris were going to do a robbery. (*Id.* at p. 27.) The target was the Classy B's liquor store. (*Id.* at p. 28.) Chuey had driven by the business and said there was only one clerk working. Williams claimed he was not going to do the robbery, but Dearaujo and Chris volunteered to do it. (*Ibid.*) The plan was for Dearaujo and Chris to return to Natalie's house where they would split the proceeds with Williams. (*Ibid.*) Williams claimed that he kept the pistol in a drawer at Natalie's house. (*Id.* at p. 23.) Either Dearaujo or Chris retrieved the pistol. (*Ibid.*) Williams was having sex with Natalie when Dearaujo and Chris went out to commit the robbery at the Classy B's. (*Ibid.*)

Williams took a shower and went to James's residence, where Dearaujo and Chris met him. (Exh. 68 at p. 23.) Dearaujo and Chris went into a business behind Classy B's to commit a robbery. (*Id.* at pp. 16, 77.) Dearaujo and Chris said the victims were a man and a woman. (*Id.* at p. 27.) They returned with \$90, identifications and credit cards. (Exh. 68 at pp. 16, 78.) Dearaujo and Chris took the \$90 to Williams, which they split up. (*Ibid.*) They reviewed the identification and credit cards. (*Id.* at p. 23.) Williams said he saw the victim's identification. (*Id.* at p. 78.) Both victims were Caucasian. (*Ibid.*) The female victim was 53 years old. She had black hair on an older card, and blonde hair on a newer card. (*Ibid.*) The man had black hair and a thick mustache. (*Ibid.*) Their last names were Estey. However, the woman's newer identification had the name Smith. (*Ibid.*) Afterward, they went to Natalie's house. (*Id.* at p. 23.) James threw the wallet and purse into a dumpster. (*Ibid.*) The following day, they took a bus to the Riverside Plaza mall. At the mall, they ate pizza, played video games, and purchased a hip-hop music tape. (*Id.* at pp. 16-17.) A couple of days later, Williams gave the credit cards to Chris and told him to dispose of them. (*Id.* at p. 23.)

Williams also discussed the attempted carjacking at the Taco Bell. Williams said that Dearaujo stayed at Natalie's house. (Exh. 68 at p. 11.) Williams saw Dearaujo and Chris at Natalie's house. (*Id.* at p. 5.) Dearaujo and Chris rode their bicycles there. Persons were entering and leaving Natalie's house. (*Ibid.*) Chris retrieved the .380 caliber pistol from the bushes. (*Id.* at p. 12.) They were drinking gin and Weatherspoon said he felt like going out to do "dirt," which meant committing a crime such as a carjacking. (*Id.* at p. 41.) Later, Chuey, Chris, Weatherspoon, James and Williams left Natalie's house and went to the Taco Bell parking lot. (*Id.* at pp. 12, 75.) The carjacking was committed by Williams, Weatherspoon and James. (*Id.* at pp. 12, 56.) Chris and Chuey were in the bushes. (*Ibid.*) Williams got the pistol just before the carjacking. (*Id.* at pp. 15, 42.)

A man pulled his car into the parking lot. (Exh. 68 at pp. 30, 42.) They discussed "jacking" that man. (*Ibid.*) Williams pulled out the pistol and Weatherspoon knocked on the window. (*Ibid.*) Williams told the man to get

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out and step away from the car. (Exh. 68 at pp. 30, 42.) Williams told the man to back away from the car towards the curb. Weatherspoon said something to the man. (*Id.* at pp. 30, 32, 43.) Weatherspoon got the car keys from the man and opened the trunk. (*Id.* at p. 30.) Williams admitted that when the trunk was opened, they were going to put the carjacking victim in there. (*Id.* at pp. 30-31.) That was part of the carjacking procedure they had discussed during the meeting at Natalie's house. (*Id.* at p. 31.) Weatherspoon asked Williams to come over to him. (*Id.* at p. 30.) Williams walked to the back of the car and looked inside the trunk. (*Ibid.*) Chuey yelled something. Williams saw the man running around the corner. (*Ibid.*) Williams said he fired one shot at the man during the attempted carjacking. (*Id.* at pp. 19-20.) But claimed he fired the shot in the air. (*Id.* at pp. 20, 30.) Once that occurred, everybody started running away. (*Id.* at p. 30.) After the attempted carjacking, Weatherspoon took the pistol. (*Id.* at p. 41.)

Williams claimed he had no idea who shot a gun that night because he was sleeping. (Exh. 68 at pp. 5-6, 15.) At 6:00 or 7:00 a.m., Natalie woke him up because somebody was knocking on the door and nobody was answering it. (*Id.* at pp. 6, 21.) Williams put on his shorts and went to open the door. (*Ibid.*) An officer asked if Williams lived there. He responded that Natalie lived there. (*Ibid.*) Williams complied with the officers request that he get Natalie. (*Ibid.*) The officer asked Natalie if he could search the house for a gun. Natalie was nervous, and said there was no gun at her house. (*Ibid.*) Williams let the officer in the house. The officer ordered all the other persons present to leave the house. (*Id.* at pp. 6, 21.) The officer searched the house and left. (*Ibid.*) Subsequently, another officer returned to Natalie's house because the next-door neighbors reported the shooting. (*Ibid.*) Williams said that Chris took +he .380 caliber pistol to Tony's house. (*Id.* at p. 21.) He had not seen the pistol since that time. (*Ibid.*)

Physical And Scientific Evidence

A fingerprint examiner rolled Alonso Dearaujo's fingerprints during the trial and compared them to the three latent prints recovered from the Mercury Sable at the Family Fitness Center parking lot. The examiner concluded Dearaujo made all three impressions. (17 RT 2427-2430.) The prints were comparable to the print of Dearaujo's left thumb. (17 RT 2431.)

Los's autopsy revealed the left side of her neck had a gunshot entry wound and stippling marks, which are superficial scrapes of the skin caused by partially burned gun powder that embedded on the skin by close range shots. (18 RT 2453, 2454, 2456, 2456.) The right side of her neck had bruising underneath where the forensic pathologist recovered a bullet. (18 RT 2453-2454, 2457, 2457, 2459.) Los had pseudo-stippling, caused by glass fragments instead of gunpowder, to the side of her neck and shoulder, and fine stippling on the outside of her left wrist. (18 RT 2454-2455, 2459-2460.) This indicated that Los had her left hand up near her shoulder or neck area when she was shot. (18 RT 2455-2456.) The forensic pathologist's opinion was that the barrel of the gun was within one to three feet away from Los (18 RT 2456-2457, 2462), and she was shot at a 15 degree downward angle from her left side. (18 RT 2456, 2461.) The bullet struck Los's carotid artery and she bled to death. (18 RT 2457.) Los remained conscious until she lost enough blood to go into shock and pass out. (18 RT 2457-2458.)

The disassembled .380 Beretta semi-automatic pistol was sent to a firearms analysis expert, Paul Sham. (18 RT 2464-2465.) Sham assembled the pistol and it functioned properly. (18 RT 2466, 2474.) Sham test-fired the pistol and compared the test-fired casings with the two casings recovered by law enforcement officers. (18 RT 2474-2478.) Sham concluded that the .380 Beretta fired the casing collected from the Family Fitness Center parking lot by Los's car, and fired the casing located at the Taco Bell parking lot regarding

the attempted carjacking of Brodbeck. (18 RT 2476-2477, 2480-2481; 33 RT 4447-4449.)

Other Co-Defendant's Cases

Natalie D. entered a plea agreement where, in exchange for her truthful testimony, she was sentenced to juvenile probation. (22 RT 3108-3109.) Williams's and Dearaujo's other previously named co-defendants entered guilty pleas and were sentenced.

On August 6, 1993, Tony P. plead guilty to attempted kidnapping to commit robbery (counts four & five), and an accessory after the fact (count twelve). (2 RT 26.) Tony P. was sentenced to six years eight months, but transferred to the custody of the California Youth Authority under Welfare and Institutions Code, section 1735.1, subdivision (c). (2 RT 26-32.)

On August 20, 1993, George Holland plead guilty to attempted kidnapping to commit robbery (counts four & five) and robbery (count six), and admitted all special allegations. (2 RT 38, 45-47; 24 RT 3363.) Holland was sentenced to 11 years 8 months in prison. (24 RT 3363.)

Alfredo G. plead guilty to robbery (count ten) and admitted the special allegation that a principal was armed with a firearm. Alfredo G.'s maximum prison term was to be six years. (2 RT 48, 52-53.)

James H. plead guilty to two counts of robbery (counts six & ten), and kidnapping for robbery (count eleven), and admitted a special allegation. James H. was to serve seven years, but transferred to the custody of the California Youth Authority. (2 RT 55-56, 61; 29 RT 3988.)

Steve M. plead guilty to kidnapping for robbery (count four) and robbery (count 6), and admitted special allegations as to both counts. He was to be sentenced to eight years in state prison. (2 RT 63-64, 69-70.)

On August 27, 1993, John H. plead guilty to two counts of attempted kidnapping for robbery (counts four & five) and attempted robbery (count

seven), and admitted all special allegations. Howell was to be sentenced to nine years four months in prison, but referred for housing at the California Youth Authority. (2 RT 74-75, 80-81, 83.)

Prior to trial, Mondre Weatherspoon plead guilty to various counts of robbery and attempted kidnapping for robbery (counts four, ten & eleven) and was sentenced to 13 years in state prison. (31 RT 4245.) Andrew C. plead guilty to attempted kidnapping for robbery (counts four & five). Andrew was sentenced to six to nine months in a youth counseling and rehabilitation center, and was housed one year in Juvenile Hall. (28 RT 3876.) Kiesha L. plead guilty to two counts of accessory to attempted kidnapping for robbery (counts four & five) and was sentenced to one year in Juvenile Hall. After eight months, she was released on probation. (39 RT 4735.)

The Defense Case

Testimony Of Jason D.

On May 21, 1993, Cousins Jason D. and Jeremy D. spent the night with Chris. (36 RT 4550.) Chris asked if the wanted to go "jacking," meaning to commit a robbery, with him. (36 RT 4550-4551, 4558.) Jason and Jeremy thought Chris was joking, but Chris pulled out a knife and held it about five inches from their necks. (36 RT 4551, 4556-4557.) Thirteen-year-old Jason was shocked. (36 RT 4551, 4549.) Jason and Jeremy said they did not want any part in committing crimes. Chris dropped the subject. (36 RT 4556-4557.) Earlier that day they were walking around and Chris showed them a female's driver's license and credit cards. Chris said he would find someone that looked like the female and give her the license and cards. (36 RT 4555.) Around 9:30 p.m., they were watching television with Williams, Dearaujo and Rodney. (36 RT 4551-4552.) Chris's father was home. (36 RT 4552.) Later, Chris, Jason and Jeremy rode their bicycles to Natalie's house. (36 RT 4552-4553.)

Chris entered and spoke with Natalie. (36 RT 4553.) Chris returned outside to get Jason and Jeremy and they all entered the house. (36 RT 4553.) Chris went into the attic and handed a black pistol to Jeremy. Chris threw down a bag containing shells. (36 RT 4553-4554.) Chris, Jason and Jeremy rode their bicycles to Tony's house. (36 RT 4554.) Jeremy and Jason stood at the driveway when Chris handed the pistol through a window to Tony. (36 RT 4554, 4557-4558.) They returned to Chris's house. Williams, Dearaujo and Rodney spent the night there. (36 RT 4555.) The next day, Chris's father took Chris, Chris's younger brothers, Jeremy and Jason fishing to Lake Perris. (36 RT 4555.) Subsequently, Jeremy and Jason spoke with an officer about these events. (36 RT 4556.)

Testimony Of Kiesha L.

Kiesha married John just before she was arrested. (39 RT 4733.) Kiesha pled guilty to two counts of being an accessory to attempted kidnapping and was sentenced to a one-year term. She served eight months at the Riverside County jail before being released on probation. (39 RT 4735.) Kiesha was reluctant to testify because she called the police so they could arrest Williams after he and the others returned from fishing. She received threats while she was in jail and when she was released. She also feared for the safety of her children. (39 RT 4736, 4739-4740, 4767-4768; 40 RT 4883.) Williams made it known that he was a member of the Grape Street Crips gang. (39 RT 4742; 40 RT 4869-4870, 4874.) Williams also made it known that he always carried a gun with him. (40 RT 4825.) Kiesha thought that Dearaujo was slow witted. Dearaujo had to work to do things that other people took for granted. (39 RT 4743; 40 RT 4930.) Dearaujo acted like a little kid that wanted to fit in with the others. (40 RT 4931.) Kiesha knew Williams for about a year and one half to two years when he hung around Kiesha and John. (39 RT 4740-4741; 40 RT 4884.) Kiesha knew Dearaujo for over one year when he came over to John's house or walked around the neighborhood. (39 RT 4742.) Kiesha saw Dearaujo get picked on, punched and manipulated by Williams, Holland, John and others in the neighborhood. They would pick on him, punch him, tell him what to do and discipline him. Dearaujo would give them money or buy them cigarettes. (39 RT 4758-4859.)

In May of 1993, everybody hung out at Natalie's house because there were no adults present during the weekdays. (39 RT 4744-4745.) They would go there to watch television, relax and smoke marijuana. (39 RT 4745.) At the May 14, 1993, meeting, Kiesha arrived for about the last five minutes of the meeting, as things were wrapping up. (39 RT 4763; 40 RT 4828.) But Kiesha observed that Williams was the leader of the meeting and of the group. (40 RT 4825, 4828-4829, 4890.) Most of the neighborhood kids looked up to Williams and took orders from him. (40 RT 4890, 4929-4930.) Weatherspoon was his right-hand man. (40 RT 4890-4891.) She also observed that from the time Williams obtained the pistol the previous week he wanted to commit carjackings and lead the lost neighborhood kids who were not going to school and doing drugs. (40 RT 4829, 4884.) She does not recall any discussions about a gang, or the name "Pimp-Style Hustlers" until she read it in the newspaper. (39 RT 4753.)

Kiesha heard Williams, Holland and most of the persons present talk about carjackings and then stripping down the stolen cars to sell the parts. (39 RT 4746, 4778-4779.) Someone said that John had a van and they had a ride to go out and commit a carjacking. (39 RT 4781.) Williams asked Kiesha and John to go to the master bedroom. (39 RT 4781; 40 RT 4089.) Williams, Holland, John and Kiesha were in the bedroom. (39 RT 4781; 40 RT 4899.) Williams asked John and Kiesha to drive them in the van to commit a carjacking. (39 RT 4746, 4747-4748, 4782, 4790.) They left the bedroom and told all the persons in the living room to get in the van because they were going to look for a car. (39 RT 4792-4793.) Prior to leaving the house, there was a decision as to who was going to commit the carjacking. (39 RT 4795.) Natalie and Cathy remained at the house as everybody else entered John's van. (39 RT 4746, 4783, 4791.)

They drove by the Pinky's parking lot and decided there were too many cars there. Williams, Holland and John then decided to drive to the nearby K-Mart parking lot. (39 RT 4747, 4793-4794, 4798-4799; 40 RT 4908.) Williams was the leader and directed the carjacking. (39 RT 4799.) Holland and Andrew got out to look for a car. (39 RT 4747, 4748, 4799.) They walked around the parking lot, started back towards the van, and persons inside the van started saying "over there" and pointing. Holland and Andrew approached two young women. Holland pulled out a black pistol and pointed it at the woman on the driver's side. (39 RT 4747, 4801, 4804-4805; 40 RT 4909.) The woman said, "You can have the car, but you can't have me." She ran away and the woman on the passenger side also ran way. (39 RT 4805-4806.) The women ran towards the Dilly's night club. (39 RT 4806.) Holland and Andrew ran towards the van, but Kiesha held both door handles and told them to run away from the van. (39 RT 4748, 4807; 40 RT 4819.) When they drove around trying to find Holland and Andrew, Williams instructed everyone in the van that, "If they don't give up the car, shoot them." (39 RT 4749; 40 RT 4819-4821.) Williams said they should "cap" (shoot) anybody who saw their face. (40 RT 4812, 4823.) Subsequently, they dropped everybody off at Williams's house. (39 RT 4749, 4807.) John and Kiesha drove away and went home. (39 RT 4807-4808.) The next day, John returned from work and Williams called him to ask if he could take Williams to pick up his tuxedo for the prom. John took Kiesha to Holland's house, where he and his sister were installing a car stereo. John left from Holland's house to pick up Williams. (39)

RT 4809, 4812.) About an hour and one half later, John returned to pick up Kiesha. (39 RT 4812.) Subsequently, Tony told Kiesha that they tried to bump a truck and Tony was to exit to commit a carjacking, but he did not do it. Williams and John told the victim that they were sorry but there was no damage, and they drove off. (39 RT 4813.)

The following morning, Holland told Kiesha about the carjacking of a white Ford Escort from a young couple. (39 RT 4812.) Holland told her that Williams walked up to a couple who were hugging and kissing, asked the man for a cigarette, but the man responded that he did not smoke. (39 RT 4822; 40 RT 4928.) Williams said he only received \$11 from the man and there was nothing in the car, so he was disappointed. (39 RT 4822.) Instead of driving to work, John drove Kiesha, Williams, Holland and Rodney to the remote area known as the "Badlands." Williams and Holland knew the location of the stolen car. Holland wanted to take the rims and they also wanted to take other items from the car. When they arrived, the Ford Escort was not there. (39 RT 4810-4811, 4814; 40 RT 4926-4927.)

On the night of the Los murder, Kiesha thinks that they were playing football in the street when the black Duster drove by. (39 RT 4750; 40 RT 4832.) Williams was in the car with two women and one thin man who were not from the neighborhood. (39 RT 4750, 4754; 40 RT 4833-4835.) Williams exited the car and called Dearaujo over to him. (39 RT 4751.) Dearaujo and Chris walked over to the passenger door and spoke with Williams. (40 RT 4837.) Williams spoke with them about going to "L.A." or Anaheim to "jack" cars and make money. (40 RT 4838; 4919.) Dearaujo, and probably Chris, left with Williams in the Duster. Kiesha did not pay much attention to Chris, but he was there with Dearaujo. (37 RT 4751; 40 RT 4840, 4919.)

Later, Kiesha and John were on the porch with Holland where they smoked cigarettes and were drawing for some time. (40 RT 4842, 4921-4922.)

At about 10:00 p.m., Kiesha and John were getting ready to go to bed. (37 RT 4751.) They heard rocks hit the bedroom window and looked out. Dearaujo said, "It's Junior," and stood outside the window. (37 RT 4751, 4752; 40 RT 4844, 4846.) John and Kiesha went outside to the porch and saw Dearaujo. Dearaujo was out of breath, looked scared and was in a hurry. (39 RT 4752, 4758; 40 RT 4853, 4932.) Rodney looked out his bedroom window and opened it. (40 RT 4850.) Dearaujo asked for a sleeping bag because he wanted to leave and find somewhere to hide. (39 RT 4753; 40 RT 4844, 4846, 4854, 4857.) John and Kiesha asked why he needed a sleeping bag. (40 RT 4844, 4846.) Dearaujo said that he thought that he shot and killed a lady at the Family Fitness Center. (39 RT 4752, 4758; 40 RT 4844, 4846-4847.) Kiesha did not believe it because she thought he could not hurt anybody. (39 RT 4752; 40 RT 4847.) Dearaujo reiterated that he shot the woman. (40 RT 4847.) Chris came up to them and confirmed that Dearaujo shot the woman at the fitness center. (39 RT 4752; 40 RT 4847.) Chris was calmer than Dearaujo. (39 RT 4753; 40 RT 4933.) Rodney had overheard the conversation, appeared with a sleeping bag and gave it to Dearaujo. (40 RT 4850, 4858.) Kiesha saw a helicopter. (39 RT 4753.)

The black Duster returned and stopped by John's house. (39 RT 4755; 40 RT 4850.) Holland saw the Duster and drove in his sister's car to the Family Fitness Center to see what had occurred. (40 RT 4852-4853, 4923.) John told Kiesha to stay by a gate as he, Dearaujo and Chris walked over to the Duster. (40 RT 4854, 4856.) Williams called Dearaujo over to him. (39 RT 4755.) Dearaujo calmed down, and then acted cool and macho about the murder. (40 RT 4854, 4865, 4866, 4869.) Williams remained in the car as he had a conversation through the passenger side window with Dearaujo, Chris and John. (40 RT 4856-4857, 4923.) Dearaujo, and probably Chris, entered the Duster and they drove off. (39 RT 4755, 4756, 4764; 40 RT 4854, 4859.)

When John approached Kiesha, she asked what they wanted. John said they wanted to know where the gun was, and Dearaujo said he threw it in the field. (40 RT 4854.) Kiesha did not see Williams with a gun that night. (39 RT 4755.) Kiesha never saw Dearaujo with a gun. (39 RT 4755.) Holland returned and informed them that the police were taping off the area of the crime, there were lights, sirens and a helicopter flying above the area. (40 RT 4858, 4923.)

On May 20, 1993, Kiesha was grounded, ditched school and stayed home. (40 RT 4861-4862, 4924.) Kiesha did not see Williams, Dearaujo or Chris that day. (40 RT 4862.) Kiesha saw a television newscast about the Los murder and learned that Los had a couple of children and a fiancee. Kiesha felt bad about the murder. (40 RT 4859-4860.) Kiesha called Williams to discuss what he was going to do about the homicide and blamed him for putting his friends in that situation. (40 RT 4866, 4924, 4936-4937, 4938.) Williams responded, "It's already done. The bitch is dead." (40 RT 4938.) Kiesha commented that it was "nice" that Williams did not care that the lady was dead, and asked if Dearaujo was okay and safe. Williams responded that Dearaujo was fine, he had the situation "under control" and she should not worry. (40 RT 4867, 4933, 4939.)

On May 21, 1993, Kiesha went to Natalie's house. (39 RT 4762; 40 RT 4861.) Kiesha overheard a discussion by Williams about the carjacking at the Taco Bell. (40 RT 4861.) The persons present talked about how the police raided Natalie's house because someone heard gunshots the previous night. (40 RT 4861.) Kiesha overheard a discussion between Williams and Weatherspoon where they laughed about the police not finding any shells because Weatherspoon picked them up and held them in his hand. (40 RT 4863-4064.) They discussed that there were only seven shell casings. Williams said, "Oh, that's right, the eighth one is where I shot at the guy at the Taco Bell." (40 RT

4864-4865.) Williams gave Dearaujo and Chris "G stripes," which was congratulations for a job well done, as a result of their involvement in the murder of Los. (39 RT 4762; 40 RT 4867-4868, 4936.) Kiesha saw Dearaujo sitting calmly on the couch. (40 RT 4933.) Kiesha later saw Dearaujo sleeping on the couch. (39 RT 4762; 40 RT 4862-4863.) Kiesha did not see Dearaujo again after that night. (39 RT 4762.)

Penalty Phase

Prosecution Evidence

Impact Of The Murder On Los's Family

Los's Parents

The victim's family testified about the effects of the murder of Los on them. Richard and Rose Holschlag were Los's parents. (47 RT 5488-5489, 5500.) Los was the oldest of six children. (47 RT 5490.) Los was born on January 29, 1961. (47 RT 5500.) Los and her siblings were raised on a farm in New Hampton, Iowa, where her parents still lived. (47 RT 5490, 5501.) Los's siblings and their families live within 20 miles of the family farm. (47 RT 5492.) The Holschlags had 12 grandchildren. (47 RT 5492, 5506.) As the oldest, Los was the "mother hen" who looked out for her siblings. (47 RT 5501.) Los took over the household when her parents were away from the farm on business, selling and setting up steel grain bins on farms. (47 RT 5501.) Los attended public school and church in New Hampton. (47 RT 5490, 5501.)

At age 14, Los served after school as a volunteer candy striper at a hospital because she liked to help others. (47 RT 5491.) That experience inspired her to follow a career in the medical field as a nurse. (47 RT 5490-5491.) In the middle of her senior year in high school, Los enlisted in the Air

Force to become a registered nurse. (47 RT 5491, 5503.) Los enjoyed her 14 years of service in the Air Force. (47 RT 5492.) Los married Nigel Los in 1979. (47 RT 5502-5503.) Family was very important to her. (47 RT 5502.) Los's military service included being stationed in Turkey and Germany prior to being stationed at March Air Force Base. (47 RT 5503.) Los was on active duty heading a hospital in Germany during Desert Storm. (47 RT 5504-5505.) Los also volunteered when she was not on military duty. (47 RT 5505.)

On May 20, 1993, at about 3:00 a.m., Rose received a telephone call from Los's fiancee informing her that her daughter was killed during a carjacking. (47 RT 5506.) Richard and Rose left their home and personally visited the home of each sibling to tell them about Los's death. (47 RT 5506.) Los was buried in Iowa in a local cemetery where other family members are buried. (47 RT 5506-5507.)

Richard and Rose attended a memorial service at March Air Force Base in California. (47 RT 5496.) Two housing units designed for persons who worked at the hospital on base were dedicated to Los. (47 RT 5496.) During the dedication ceremony, they were informed of Los's commendations and accomplishments. (47 RT 5496-5497.)

Richard and Rose visit their daughter's grave, and realize she will not be coming back to them anymore. It is a loss that cannot be replaced, and they hope the best for Los's children. (47 RT 5499, 5507.) Rose testified that the most difficult thing for her is when she senses the loss that Los's children feel. (47 RT 5507.) In August of 1997, Los's children came to Iowa for a short visit. (47 RT 5507.) Los's daughter Michelle had matured enough to be more accepting that her mother is gone, but Rose could see it still hurts her deeply. (47 RT 5508.) Michelle looks and acts a lot like her mother. (47 RT 5499, 5519, 5530.) It appeared that it was the first time that her son Patrick realized what happened to his mother. At the grave site, Patrick stood like a statute. When he came down from the site, he completely came apart. (47 RT 5508.)

Los's Siblings

David Holschlag was Los's youngest sibling. (47 RT 5510.) He was 29 years old at the time he testified. (47 RT 5509.) David has three children and owns a restaurant. (47 RT 5509.) David learned a lot of his cooking from Los, which was the foundation for him becoming the chef of his restaurant. (47 RT 5511.) David and his family were proud that Los served her country. David thought about also doing so because Los had such a good life, achieved many accomplishments and helped a lot of people through her military service. (47 RT 5513.) Los was a very positive person. (47 RT 5513.) She kept in touch with her siblings. (47 RT 5520.) In Iowa, Los had a military funeral with a 21 gun salute. A guard stood over her grave as everyone drove away. His mother was presented with a flag and the funeral was a very sad event. Los's children were present at the funeral and then left to live in Germany. (47 RT 5519.)

David testified that the surviving siblings and their families are very close to each other and their children play together. (47 RT 5515-5516.) Before his sister died, her children Patrick and Michelle had an opportunity to participate in family gatherings with their cousins. (47 RT 5516.) When it was possible, Los and her children would go to Iowa to spend Christmas with the family. (47 RT 5515.) David misses seeing his sister and her children, but especially during the holidays. (47 RT 5515.) Patrick and Michelle have not been able to spend much time with their family in Iowa since their mother's death. (47 RT 5517.)

David described how he learned about his sister's death. He was sleeping and his parents came over to his house at 4:00 or 5:00 a.m. They knocked on the door and rang the doorbell until his wife answered it. David was very tired and could not wake up. His wife told him that he had to wake up because his sister had been killed. David felt it was a dream and could not be real. He did not have a chance to say goodbye to his sister, which is something he does not forget. (47 RT 5517.) It bothered David that his sister had spent time in Turkey and Germany to help them better their own countries, and when she returned to the United States she met a violent death. (47 RT 5518.) His sister's death was very difficult for his parents, each family member experienced sorrow, and there was a lot of sadness. They were a close family that did things together, prayed together and vacationed together. It was very difficult for them to experience that one family member would not be with them any more, so there was a lot of crying. (47 RT 5492, 5518.) David respected his sister's qualities as a leader and someone who put the cares of others ahead of her own, which was important to his sister. (47 RT 5520.)

Susan Baker is the second youngest sibling. (47 RT 5522.) She and Los had a very close relationship that lasted until Los died. (47 RT 5523.) Baker was Los's maid of honor at her wedding. (47 RT 5524.) Baker was also Michelle's godmother. (47 RT 5525.) Baker recalled how excited she was when she received a telephone call from Germany where Los told her about Patrick's birth. (47 RT 5525.)

Baker was pregnant with twin girls when she learned that her sister was killed. (47 RT 5521-5522, 5528.) Baker heard a knock on the door and nudged her husband up to answer it. Baker went back to sleep. Her husband returned to the bedroom and told her to wake up because her sister had been killed. (47 RT 5528.) Baker was told that two men came up to her sister's car and killed her. (47 RT 5528.) Her sister had planned to visit Iowa that Christmas because she knew Baker was pregnant and due that November. They decided to have a Christmas baptism and her sister was going to be the godmother. (47 RT 5528-5529.)

The day of Los's funeral was cold and windy. There were many family members present. Los looked horrible. (47 RT 5529.) Their mother tried to console them by saying that if they stood in a different place she would look better. Patrick took people over to the family photograph and said, "That doesn't look like mommy, this is." Michelle was quiet during the ceremony. (47 RT 5529.) Baker worried for her sister's children. (47 RT 5529.) Baker daily thinks about her sister. (47 RT 5529.) If she had the chance, she would tell her sister how much she loved, respected and looked up to her sister as a role model. (47 RT 5530.)

Los's Former Husband And Children

Nigel Los is Los's former husband. They met in the Air Force, were married in 1980, and Michelle and Patrick were their children. (47 RT 5531-5532.) Their marriage ended amicably in 1988. (47 RT 5533.) His former wife was very committed to the military, her family and her children. Being a mother was very extremely important to her. (47 RT 5532-5535.) Her children were very high on her priority list. (47 RT 5534.) Los was very active in the church and her children spent a lot of time there. When Nigel visited them, he met the pastor and could tell the pastor had a very close connection to the children. Patrick and Michelle were very close with their mother. (47 RT 5536.) Los had high goals for her children and made sure they were doing well in school. They saved money to put their children through college from the time they were born. (47 RT 5535-5536.)

Los achieved the rank of staff sergeant, which was very difficult in the competitive medical field. (47 RT 5533.) She was stationed in Germany during the Gulf War. (47 RT 5535.) Within one year of being stationed at Weisbaden Air Base, she achieved an extremely rare award that required much community service above her work duties. (47 RT 5533.) She set up a

maternity ward and many programs to help new mothers and children. She also was a C.P.R. instructor and continued her education. (47 RT 5533.) In Germany, she liked to go "volksmarching," which was a town-sponsored walk for eight to twenty kilometers where she would walk and talk with her family. (47 RT 5535.)

Nigel remarried and wanted his son to meet Patrick and Michelle. (47 RT 5536.) Nigel and his new family went to California to pick up Patrick and Michelle for a week and they went to Las Vegas. (47 RT 5536.) Nigel dropped them off with their mother about four to five days before she was killed. (47 RT 5536.) Nigel spoke with Los, who was looking forward to her upcoming marriage. They spent four or five hours together in Moreno Valley, had dinner and a very nice time. (47 RT 5537.) Nigel was on vacation at his father's home just outside of Toronto, Canada, when he learned that Los was killed. (47 RT 5536.) He received a call from Rose Holschlag at 5:30 a.m., and could not believe it. (47 RT 5537.)

Nigel arrived at the Ontario airport and was met by representatives from the base, who took him to the children. (47 RT 5539.) The children were with a military escort waiting for Nigel. (47 RT 5538.) It was difficult for Nigel to go through the house with the children so they could pick out items to take with them to Germany. (47 RT 5539-5540.) The children barely had enough time to say goodbye to their neighborhood friends or schoolmates. They quickly had to get school records so they could be enrolled at school in Germany. (47 RT 5541.) They also had to make arrangements to transport Los's body to Iowa for the funeral, and return for the memorial service at March Air Force Base. (47 RT 5539.) Nigel took the children to Iowa for the funeral services. (47 RT 5541.) At the wake, Michelle had a very hard time accepting that her mother was dead. (47 RT 5541.) Los's fiancee, Paul Petrosky, accompanied them to them to Iowa. The children were very close to him because they saw him more than Nigel the previous year. (47 RT 5541.)

After the divorce, Nigel always had a place in his home for his children. But this was not the way that he expected. Nigel knew that he would have to deal with the children and the loss of their mother. (47 RT 5537.) Nigel lived in a two bedroom home with three persons, and now there were five. Michelle had to sleep in the living room until the landlord built another room. (47 RT 5540.) It also took about two months for the children to get their things from California. Nigel believes that Michelle felt like a stranger in a different world. (47 RT 5541.)

When the children came to Germany, they had a very difficult time and they received counseling from social psychiatrists. (47 RT 5538, 5542.) Michelle was in a shell and would not talk to anyone. It was apparent she was keeping something inside. About four months later, she discussed that she and her mother had a fight on the night Los was killed. (47 RT 5538, 5542.) Michelle had a lot of guilt and felt it was her fault her mother was killed because she had bad thoughts about her mother and went to bed that night without kissing her or telling her that she loved her. The next morning, Michelle woke up and found out that her mother was dead. (47 RT 5538.) As he got older, he began to wonder what happened to his mother. They had to explain it to him two or three times until he fully understood what happened to her. (47 RT 5543.)

Nigel estimated that it took about one year to one year and one-half before they finally bonded and became a family unit. (47 RT 5538.) The children had a hard time trusting and sharing their love because they did not want to lose a loved one again. (47 RT 5543.) The children enjoy visiting Los's family in Iowa. They went to their mother's grave site to keep her alive in their hearts and to preserve her memory. (47 RT 5544.) Nigel sees a lot of Los in her children, especially Michelle who resembles her mother in her speech and gestures. (47 RT 5544.)

Patrick was 10 years old and in the fifth grade. (47 RT 4446.) He was very young when his mother died, but has memories of her taking him to special places, like Chuck E. Cheese or a Mexican restaurant, and reading him stories before he went to bed. (47 RT 5546-5547.) Patrick thinks about his mother when he is in bed trying to fall asleep. He thinks about what a nice mother she was to him. (47 RT 5547.) Patrick has gone to his mother's grave site, which has flowers and a small American flag. (47 RT 5546.) Patrick does not know what it means for his mother to be dead. (47 RT 5548.)

Michelle was 15 years old and a sophomore at an American high school in Kaiserslautern, Germany. (47 RT 5549.) Michelle remembers the night her mother died. (47 RT 5550.) They had a fight that night because they were having a discussion about chores Michelle was supposed to be doing when Paul Petrosky came by their house. Los and Michelle argued because Michelle went to her bedroom. (47 RT 5550.) Michelle was mad at her mother and went to bed without saying good night. Michelle went to bed wishing that she could go live with her father. (47 RT 5551.) The next morning, Michelle was awakened by Petrosky's niece, who told her to get dressed. Michelle did so and went to the living room. (47 RT 5551.) Petrosky, his sons and the priest of their church told Michelle what happened to her mother. (47 RT 5551.) Michelle did not believe that her mother was dead. She continued to hope that her mother would return. (47 RT 5552.)

The next day, their father came for her and Patrick and made arrangements as to what items they were going to take with them to Germany. (47 RT 5552.) It was disheartening for a 10 year old to go through the process of going through her mother's clothing and jewelry to pick out mementos. (47 RT 5552-5553.) Michelle had two best friends, and was able to have five minutes with one of them to say goodbye. (47 RT 5553.) Michelle knew that she was going to live with her father in Germany, but she did not realize how much her life was going to change. (47 RT 5553.) She immediately began to miss her mother and thought about her daily. (47 RT 5553.) The week of the funeral in Iowa was very difficult for Michelle. The makeup on the corpse made her mother look completely different than what she looked like in life. (47 RT 5553-5554.) Also, a rosary her mother wanted to be buried with was missing. (47 RT 5554.)

Michelle tries to remember all the things she did with her mother, what her mother said, and the kind of person that her mother was. (47 RT 5554.) Her mother was a good role model. Michelle got her moral sense from her mother, which is to be a good person and not take advantage of others. (47 RT 5554.) Although her mother had a very busy schedule, with church and working two jobs, she was always involved in everything her children did and made time for them every day. (47 RT 5554-5555.) Patrick and Michelle wrote a letter to a committee for parent of the year and Los was a finalist. (47 RT 5555.)

Some things have changed since their mother was not there. (47 RT 5555.) Christmas was different without her mother. (47 RT 5557.) Michelle has her mother's birthday marked on a calendar and says an extra prayer for her on that day. (47 RT 5556.) The children visit her grave every time they go to Iowa. (47 RT 5555.) Initially, it was difficult for Michelle to visit her mother's grave. But it has become a place where she can feel close to her mother and remember her. (47 RT 5555-5556.) It has been very hard on Michelle that the last time she spoke with her mother they had a fight. Michelle felt that she caused her mother's death because that night she wished she could go live with her father. (47 RT 5556.)

Paul Petrosky was Los's fiancee. (52 RT 6090.) He has been in the Air Force for 20 years. (52 RT 6090.) They met when they were stationed in Turkey for several years. Petrosky was a radiology technician and Los worked in the OB-GYN clinic as a technician. (52 RT 6090-6091.) After working together, they became friends. (52 RT 6091.) Los was assigned in Germany and then at March Air Force Base. Petrosky had been assigned to George Air Force Base. Their relationship became personal and he was assigned to March Air Force Base. (52 RT 6091.) Petrosky and his children, and Los and her children, lived on the adjacent units in a duplex on base. (52 RT 6092.) Petrosky and Los planned to marry later that year when she was shot. (52 RT 6092.)

Petrosky described Los as a woman of many wonders who loved life, was bright and energetic, liked to fish and camp, and she would confront all challenges. (52 RT 6092.) Los was very family oriented and religious. Their families practiced Catholicism. Los was instrumental in having Petrosky's children baptized as Catholics. It was part of her goal to have their families become one family unit. (52 RT 6092-6093.)

Los's son Patrick was the love of her life. Los received an award for being runner-up as mother of the year. (52 RT 6093.) Los also received a Great Mom award that read as follows:

Yvonne Los is duly recognized as the great mom that she has been to Patrick. Furthermore, let it be known that this award has been bestowed in appreciation for her daily hugs and kisses, for her patience when healing bee stings and scraped knees, for her outstanding ability to maintain a sense of humor, and the courage that she displayed when presented with frogs, spiders and other such formidable creatures, and especially for the unsurpassed hours of love, laughter and learning she has so generously shared reading books with Patrick.

(52 RT 6094.)

Petrosky described Los as a great mother. (52 RT 6094.) When Los had to work late, she or Petrosky would pick up her children from the child care center and take them to work. This was a way of bonding and allowing the children to see what they did at work. (52 RT 6094.) Los was very close to Patrick. Michelle wanted to be like her mother in many ways. (52 RT 6096.) On the night Los was killed, she and Michelle had an argument and they did not have a chance to reconcile. For many months, it was difficult for Michelle to deal with the loss of her mother. Los and Michelle were very close and loved each other. (52 RT 6095.)

Petrosky also described Los as being very dedicated to the military, which was shown by her awards, activities and achievements. (52 RT 6095.) Los did things above the call of her duty. One of those things was her creation of a pre-admission clinic. (52 RT 6095-6096.) She looked for a place in the hospital to start a new clinic. (52 RT 6095.) Los saw a need for patients to be taken care of and smoothly transition from their admission to their surgery. (52 RT 6096.) It was a place where all paperwork and pre-surgery testing would be done. There was no area for that at the hospital, so Los created the pre-admission clinic. (52 RT 6096.) Los ensured that all plans, paperwork, and the regulations were complied with so that clinic was up in record time. (52 RT 6096.) In her spare time, Los provided in-home care for a disabled young person every Wednesday for many months. (52 RT 6097.)

On the night Los died, Petrosky saw her leave to go work out at a health club. (52 RT 6097.) Petrosky worked on a friend's car and thought that it was past the time when Los would return. (52 RT 6097.) Petrosky felt uneasy so he drove to the fitness center. When he arrived, a detective told him that Los was dead. (52 RT 6097.) Petrosky went to the dormitory on the base to tell their good friend Ray Costa that Los had been killed. (52 RT 6097.) Costa accompanied Petrosky so he could tell the children. The children were being

watched by Petrosky's oldest son when he left to look for Los. (52 RT 6098.) The children were sleeping and Petrosky did not want to wake them up. That night, Petrosky called Los's parents and family to tell them about her death. (52 RT 6098.)

The next morning, Petrosky told Patrick and Michelle that their mother would not be coming home anymore. (52 RT 6108.) Patrick was very young and looked at Petrosky to try to understand what happened. It hit Michelle a couple of minutes later and she ran to her bed to cry. Petrosky gave Patrick to Costa, and he went to try to console Michelle. (52 RT 6108.) After speaking with Michelle, Petrosky returned to speak with Patrick. (52 RT 6108-6109.)

Several weeks after his mother's murder, Patrick continued to fear that persons he was with would not be returning. Patrick would remain by a door to make sure that a person returned. (52 RT 6109.) Michelle became withdrawn and did not say much. But Petrosky could see the anguish caused by her mother's death. (52 RT 5109.)

Petrosky stayed at Los's house for the time it took to gather personal belongings, take care of financial matters and make sure the children were cared for. (52 RT 6109.) Petrosky reclaimed Los's car from impound after it had been processed for evidence. (52 RT 6110.) The car looked the same as it did at the crime scene, with blood and broken glass, which instantly triggered memories about the murder. (52 RT 6110.) The car was cleaned up and repaired. But even after that, all the carpets and upholstery had to be replaced because of the smell of blood. (52 RT 6110.)

Petrosky also had to arrange for Los's body to be cared for and transported by airplane to Iowa for her funeral. (52 RT 6109.) Petrosky accompanied her body to the funeral home, church and cemetery in Iowa. (52 RT 6110.) Petrosky was the last person to leave Los's grave site. He wore his

uniform and showed respect by remaining at attention until everyone left and the grave was covered. (52 RT 6110.)

Petrosky described Los as a person who loved him unconditionally. (52 RT 6106-6107.) Petrosky and Los could look at each other without speaking and know they were soul mates. Los infused Petrosky and the children with unconditional love. (52 RT 6107-6108.) Petrosky was saddened because that unconditional love had been taken away from him and his family. (52 RT 6108.) After her murder, his life would never be the same and he is haunted by her memory. If there was a second chance for a life with her, he would not hesitate to take that chance. (52 RT 6108.) Petrosky said it was sad and not fair that her murder occurred. (52 RT 6112.)

Los's Personal Characteristics

Air Force Captain Margaret Foltz worked with Technical Sergeant Los at the March Air Force Base hospital. Captain Foltz was assigned to the same day surgery clinic and Sergeant Los to the pre-admission clinic. (52 RT 6080.) Captain Foltz described Los as very upbeat, outgoing, and with a bubbly personality. (52 RT 6081.) Los was very independent because she was the only enlisted person who worked in that position. (52 RT 6081.) Los's job was to interview persons who were preparing for surgery. She would calm their fears, explain the surgical procedures and order all necessary tests prior to surgery. (52 RT 6081.) Los was recognized as the best employee at the hospital for two quarters in 1988. She competed and won the award for the entire year at the hospital. (52 RT 6082.) Los would bring her daughter to work. Captain Foltz could tell that Los was very proud of her daughter and was comfortable having her there at the hospital. (52 RT 6082.) Captain Foltz was off-duty when she received a telephone call at home informing her about the murder. She was stunned, shocked and in disbelief because a crime happened to a person that she knew. (52 RT 6083.) She was troubled when newscasters mis-pronounced Los's name. (52 RT 6083.)

Staff Sergeant Christopher Reusch was a medical technician at the March Air Force Base hospital where he became acquainted with Los. (52 RT 6085.) Sergeant Reusch worked at the intensive care unit. Los was the officer in charge of him and the other 11 to 15 persons in the unit. (52 RT 6082.) They took care of critically ill patients at the intensive care unit. (52 RT 6086.) As a supervisor, Los was in charge of their records and discipline, and she would represent them regarding any problems with the military chain of command. (52 RT 6086.) Sergeant Reusch considered Los to be a very good supervisor, whom employees could go to and rely on if they had any problems at the hospital. (52 RT 6086.) He described Sergeant Los as very outgoing and understanding. Los attained her position as a supervisor because she was very knowledgeable about her job and had the ability to deal with others. (52 RT 6086.) During the Gulf War, the hospital staff were deployed for three months at Weisbaden, Germany. (52 RT 6087.) They converted an old warehouse into a 300 bed hospital in expectation of mass casualties from a ground war. Los was in charge of the intensive care unit. (52 RT 6087.)

Sergeant Reusch was working at the intensive care unit when he heard about Los's death. (52 RT 6082.) He was shocked when he heard about her death. (52 RT 6087.) There was a dedication ceremony where their dormitory was named after Sergeant Los. (52 RT 6087.) The dedication ceremony included a color guard, the presence of various generals, the base commander and a number of persons including Reusch. (52 RT 6087-6088.) It was unusual for a barracks to be dedicated to a non-commissioned officer, because they are usually dedicated to persons who die during a war or conflict. (52 RT 6088.)

Williams's Lack Of Remorse

Chris L. testified that the day after Los was murdered there was a celebration at Natalie's house. (51 RT 6019.) Chris, Dearaujo, Williams, James, and all the other persons present were celebrating the murder. (51 RT 6019, 6022-6023.) As they were viewing the television news report about the murder Dearaujo said, "I killed that bitch." (51 RT 6020.) When Los's fiancee came on the news Chris said something like, "You're not going to marry no more fucker." (51 RT 6020.) All others present were viewing the newscast. They were not offended by Dearaujo's or Chris's comments and they also made similar comments. (51 RT 6023.)

Williams's Violent Criminal Activities

In September of 1991, Mario Loa dated Lisa Alvarez. (48 RT 5710; 50 RT 5953.) On September 21, Loa went to Alvarez's apartment at approximately 6:00 p.m. (48 RT 5712-5713; 50 RT 5938-5939.) Alvarez and her son shared the apartment with Latrissa Garrison and her daughter. (50 RT 5953, 5954; 51 RT 6037-6038, 6037-6038.) Loa, Alvarez and Garrison had a conversation, joked and laughed as they sat on Alvarez's bed. (48 RT 5713, 5721; 50 RT 5953, 5955; 51 RT 6040-6041.) At about 8:00 p.m., Loa noticed through the open bedroom door that a six foot tall and well-built African American man entered the apartment. (48 RT 5714, 5715, 5721; 50 RT 5939, 5943; 51 RT 6027.) Loa said, "Somebody's here." (48 RT 5723.) He was told it was Garrison's brother, Greg Brown. (48 RT 5714; 50 RT 5955.) Garrison left the bedroom and closed the door. (48 RT 5714, 5715, 5723; 50 RT 5940, 5955; 51 RT 6029.) Garrison knew Brown had a tendency of being obsessive with girlfriends and getting violent, so she tried to calm him down. (51 RT 6042.) A few minutes later, Garrison re-entered the bedroom and asked Alvarez to come out to the living room. (50 RT 5940; 50 RT 5940, 5955; 51

RT 6028.) Alvarez closed and locked the bedroom door. (50 RT 5941, 5956.) Brown had previously been dating Alvarez. (50 RT 5953-5954; 51 RT 6026, 6039-6040.) Alvarez went to the living room to speak with Brown. (50 RT 5955, 5956.) Brown was very angry, started screaming and yelling, and wanted to enter the bedroom because Loa was there. (50 RT 5955, 5956; 51 RT 6043.) Garrison and Alvarez told Brown to leave the apartment and go home. (51 RT 6030-6031, 6042.)

Brown began hitting and kicking the bedroom door. Brown kicked a hole into the door. (48 RT 5715, 5723; 50 RT 5941, 5956; 51 RT 6030, 6043-6045.) Loa heard Brown threaten to beat him up, so he ran to an open bedroom window. (48 RT 5716.) Brown left the apartment and went around the outside to the bedroom window. (50 RT 5956, 5957.) Alvarez heard a person on the porch say for Brown to get Loa. (50 RT 5957; 51 RT 6033.) As Loa tried to go out the bedroom window, he saw Brown who displayed a knife and said two or three times, "I'm going to kill you." (47 RT 5716, 5726; 50 RT 5940, 5943.) Brown began to climb the window to enter the bedroom. (48 RT 5717, 5726.) Garrison yelled for Loa to "come out of the room now." (51 RT 6045.) Loa ran through the bedroom and into the living room. (48 RT 5717; 50 RT 5944.) Williams lived across the street from Brown and Garrison. (51 RT 6037.)

Loa kept running and Williams tried to grab him. (48 RT 5717, 5727-5728; 50 RT 5945.) Loa forearmed Williams and knocked him down to the ground. (48 RT 5717, 5728; 50 RT 5945.) Garrison grabbed Brown and struggled with him for two to three minutes until he was able to pick her up and push her to the side. (51 RT 6046.) Alvarez remained in the apartment with the children. Garrison ran out of the apartment after Brown and yelled for neighbors to call the police. (50 RT 5957-5958; 51 RT 6034-6035, 6047.) Loa

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ran towards the front gate of the apartment building. Loa looked back and saw Williams chasing him. (48 RT 5718, 5728; 50 RT 5947.) Loa reached the gate, but could not open it. Williams caught up and jumped on Loa. (48 RT 5718; 50 RT 5948.)

They fell through the gate and on the ground where Williams held Loa. (48 RT 5718, 5728-5729.) Brown arrived and kicked Loa who was balled up in a fetal position with his hands up by his face. (48 RT 5718, 5730-5731; 51 RT 6049.) Loa was dizzy from getting kicked in the head but he stood up. (48) RT 5718.) Loa got up but was met by Brown who had a knife in his hand. (48) RT 5719, 5731; 50 RT 5949.) Brown attempted to stab Loa's head, but Loa grabbed Brown's hand. They struggled until Brown was able to pull away his hand and the knife cut Loa's finger. (48 RT 5719-5720, 5731-5732.) Garrison pushed Brown who backed up. (48 RT 5720, 5732; 50 RT 5950; 51 RT 6047, 6049-6050.) Loa ran away and scaled a fence. (48 RT 5720, 5732.) Brown and Williams ran off. (51 RT 6051.) Loa hid in a corner behind the fence for at least 15 minutes to determine that they were not coming after him. (48 RT 5720, 5732.) Loa jumped back over the fence. A man arrived and gave him aid at a laundry room. (48 RT 5720.) Loa washed the blood off his finger and wrapped it with a cloth. (48 RT 5720.) Alvarez and Garrison saw cuts on Loa's hand. (51 RT 6052.) Loa went to his car and drove home. (48 RT 5720.) Loa later went to a hospital to have his finger stitched. (48 RT 5720-5721.) Loa, Alvarez and Garrison spoke with police that night about the incident. (51 RT 6035, 6052.)

In January of 1992, Trina J. met Williams through Weatherspoon. Weatherspoon was dating her friend Adalene. (53 RT 6178-6179.) On January 3, 1992, Trina, Adalene, Williams and Weatherspoon were walking in Moreno Valley. (50 RT 5887; 53 RT 6178-6179, 6183-6184.) Subsequently, Trina and Williams had a disagreement. (53 RT 6178.) Williams broke the antenna of Trina's parked car and his hand was bleeding. (53 RT 6180-6181, 6184.) Trina hit Williams. (53 RT 6183.) Williams hit Trina in the mouth. (53 RT 6184.) On January 13, 1992, Trina reported this incident to Riverside County Sheriff's Deputy Keith McKay. (50 RT 5886.) Trina told Deputy McKay that she had been hit in the mouth by her ex-boyfriend, Williams. (50 RT 5887, 5889.)

Williams's Potential To Endanger Others In Prison

Williams was housed in Tank 15C, a mixed-race housing unit, at the Riverside County Jail. (48 RT 5624, 5627, 5634.) Martin Sanchez was among the over 30 inmates who were also housed there. (48 RT 5623, 5646.) On May 13, 1994, Sanchez asked his "homeboy" for a cup of coffee, because he saw someone leave a package of coffee in his friend's property box. (48 RT 5648-5650, 5663-5664.) Sanchez's homeboy was also a Hispanic inmate. (48 RT 5662-5663.) The homeboy asked other inmates if they had seen the coffee. The homeboy's friend said that he was informed that Williams had taken the coffee. (48 RT 5651, 5652, 5665-5666.) That morning, the homeboy and Williams fought over the coffee. (48 RT 5653.) Subsequently, Sanchez heard that the homeboy's friend told Williams that Sanchez snitched on Williams regarding the coffee. (48 RT 5654.)

The next day, Williams confronted Sanchez about being a snitch, and Sanchez did not back down from the challenge. (48 RT 5654, 5655-5656.) The inmates's code is that a showing of disrespect in jail is resolved by a physical confrontation. If an inmate backs down, he will be labeled a "punk" and subjected to physical violence by other inmates of his own race. (48 RT 5656-5657, 5667.) Williams and Sanchez fought each other. They continued to fight as one deputy in the unit ordered them to break it up and the other inmates viewed the fight. (48 RT 5628, 5658-5659.) Many deputies were called to assist to quell the altercation. (48 RT 5629-5630, 5634.) They entered the housing unit and separated Williams and Sanchez. (48 RT 5630, 5659-5670.) Sanchez was later interviewed by prison staff. He declined to speak about the fight or to press charges against Williams. (48 RT 5630.) Although fighting violates prison rule, it is not unusual that they are not reported given the code that inmates will not do so for fear of being branded as a snitch. (48 RT 5630-5631, 5638-5640.)

On July 3, 1994, Deputy Thomas Brewster was assigned to work at the county jail in Indio. (50 RT 5924-5925.) Approximately 25 to 30 inmates were housed in Unit 3. (50 RT 5925; 53 RT 6203.) It was a mixed-race protective custody unit. (50 RT 5930; 53 RT 6203.) The inmates housed there included Mark Heinzen, Williams, and Williams's good friend, Christopher Willis. (53 RT 6201-6202.) Williams introduced his sister to Willis at the jail. Williams's sister would visit Willis at the jail, they corresponded by mail and spoke to each other on the telephone. (53 RT 6202, 6214-6215.)

Williams did not like Heinzen, who was Caucasian, probably because he was gay. (53 RT 6204, 6205.) Inmate David Ramirez heard shouting, turned and saw Heinzen, who was sitting on his cot, arguing with Williams. (53 RT 6718, 6194-6196, 6218-6219.) Williams probably called Heinzen a "fag" and said something related to him being gay. (523 RT 6207, 6208.) Williams was angry and threatened Heinzen. (53 RT 6188.) Heinzen sat up on his cot and Williams walked up to Heinzen. (53 RT 6187-6188.) Williams punched Heinzen in the face. (53 RT 6188.) Heinzen came down from his bunk and he and Williams began throwing punches at each other. (53 RT 6188, 6197, 6208, 6219-6220.) Heinzen swung at Williams but did not land any punches. (53 RT 6210.) Williams hit Heinzen in the face more than once. (53 RT 6209.) Willis joined Williams in the altercation with Heinzen. (53 RT 6190, 6191-6192, 6198.) Williams punched Heinzen in the face and was getting the better of the fight. (53 RT 6188-6189.) Inmate Ramirez and a Caucasian inmate Michael Schecter interceded to assist getting Williams and Willis off Heinzen. (53 RT 6190, 6199, 6215.) Willis hit Schecter because he did not know if Schecter was joining the fight or breaking it up. (53 RT 6211, 6221.) Williams did not have any marks or injuries. (53 RT 5199, 6211.) Heinzen stood there with injuries to the area of his nose. The bride of his nose was bleeding and there was blood on his face. (53 RT 6090-6092, 6211.)

At 9:40 p.m., Deputy Brewster heard loud banging coming from the door of Unit 3. (50 RT 5925, 5931.) Based on his experience working at the jail, Deputy Brewster knew that meant there was a problem at that housing unit. (50 RT 5925-5926, 5932.) There was a window in the door and a window next to the door. (50 RT 5930.) Deputy Brewster saw inmate Mark Heinzen standing next to the door. He was out of breath, sweating, and his face was bleeding profusely. It looked like he had been assaulted. (50 RT 5926.) Deputy Brewster opened the door. He pulled inmate Heinzen out of the housing unit and asked what happened to him. (50 RT 5926, 5933.) Heinzen said that he was beat up by Williams and inmate Christopher Willis. (50 RT 5926.) Deputy Brewster placed inmate Heinzen in a holding cell, so he could get and question Williams and Willis. (50 RT 5934.) Williams and Willis were placed in separate holding cells and questioned. (50 RT 5934; 53 RT 6223-6224.) Deputy Brewster received information that there was an argument between Heinzen and Williams. (50 RT 5937.) Williams told Deputy Brewster that he hit Heinzen and Heinzen tried to fight back. He punched Heinzen four times in the head. (50 RT 5936.) Deputy Brewster subsequently took Heinzen to the hospital. (50 RT 5937.) He took photographs of Heinzen's injuries the next day. (50 RT 5936.)

In March of 1994, Donald Deloney was incarcerated at the Riverside County Jail. (49 RT 5837.) Because of his violent activities while in custody, including assault and robbery of other inmates, Deloney was moved to different housing units. (49 RT 5839.) Williams befriended Deloney and they became associates. (49 RT 5840; 52 RT 6138.) That association between them and some other inmates, mostly African-American but also included some Caucasian and Hispanic inmates, was manifested with violent activities at the jail. (49 RT 5839-5840, 5878; 52 RT 6143-6144.)

The commission of serious crimes in custody gives an inmate a reputation and clout within the jail. (49 RT 5841.) Shortly after Deloney arrived at Tank 4A, he and Williams began to exert their controlling influence over the other inmates. (49 RT 5844, 5847.) They would direct other inmates to do things or take things from them. The other inmates would not refuse for fear of physical reprisal. (49 RT 5847; 52 RT 6121-6123, 6130, 6132-6133.) Williams had a reputation for being quick tempered and violent. (49 RT 5847.) Williams beat up an inmate without being asked by Deloney so that Deloney could get a lower bunk. (49 RT 5848.) Deloney was 5'6" and weighed 207 pounds. He worked out and looked physically imposing. (49 RT 5850; 52 RT 6115.) Deloney got into fights with inmates at every unit where he was housed. (52 RT 6121.)

Williams and Deloney discussed how to manipulate their way into housing units with "weaker" inmates. They would do things to get into protective custody units to find such weaker inmates that they could victimize. (52 RT 6174.) Williams and Deloney targeted Caucasian inmates, because there were less of them at the jail and they considered them to be physically weaker. (49 RT 5866.) They also victimized inmates who were incarcerated for sex offenses, who have a stigma in jail as deserving any abuse perpetrated on them by other inmates. (49 RT 5866-5867.) When they were housed in Tank 15, Deloney saw Williams make sexual advances on an inmate in the dayroom. In Tank 4A, Deloney saw Williams force another inmate to orally copulate him. The victim consented out of fear that he could be raped by Williams. (49 RT 5868-5870; 52 RT 6155-6156.)

Wherever Williams and Deloney were housed, they would demonstrate their violent and aggressive nature. Because of that reputation, the other inmates in the tank knew what they were capable of doing if an inmate did not comply with their commands. (49 RT 5851; 52 RT 6139-6140.) Williams also possessed a shank. It was a toothbrush with a razor attached to it and secured with a cloth wrapped around it. (49 RT 5856; 52 RT 6152, 6158.) Williams also possessed an elongated pencil that could be used as a shank. (49 RT 5856.) Williams and Deloney robbed 13 or more inmates by force or fear. Only two inmates reported these incidents. (49 RT 5864-5865; 52 RT 6141, 6160.) Williams and Deloney would slap and push inmates around, and take things from them. (49 RT 5867.) Deloney also took items by forcing inmates to gamble with him. The inmates would not refuse out of fear and they would gamble until Deloney won. (52 RT 6141-6143.)

Deloney and Williams had commissary cards, but they lacked funds. So they would take commissary cards from other inmates to get items such as junk food, toiletries and stamps. (49 RT 5848-5849; 52 RT 6139, 6145, 6148.) Deloney and Williams would divide the commissary items they took from other inmates. (52 RT 6148.) For two to three days, Deloney and Williams took the commissary card of a Caucasian inmate, Timothy Goodfield, in Tank 4A. (49 RT 5849-5840, 5850-5852, 5875; 52 RT 6145-6146, 6151.) Even though inmates were prohibited from entering other inmate's cells, Williams would enter Goodfield's cell to demand his commissary card. Williams would tell Goodfield and his cellmate not to say anything to the deputies or they would face consequences. (49 RT 5868-5870, 5871.) They would withdraw the \$20 daily limit from the card and then return it to Goodfield. (49 RT 5852.) On one occasion, Goodfield did not want to give them the commissary card. (52

RT 5853.) Williams and Deloney approached Goodfield. Williams demanded the commissary card and grabbed Goodfield in the chest area. (52 RT 5854.) Williams and Deloney were able to "run the show" in the tanks where they were housed, until a report of that incident led to their re-assignment in high security segregated housing. (49 RT 5859, 5862-5863; 52 RT 6161.)

On January 3, 1995, at 3:00 p.m., a fight occurred at Tank 4A of the Riverside County Jail. (50 RT 5894, 5903.) Deputy Leo Marin was called to assist Deputy Sanders. (50 RT 5894.) The victim was inmate Goodfield. His cellmate, inmate Mark DePriest was the witness. Williams and inmate Deloney were the suspects. (49 RT 5765, 5780; 50 RT 5894-5895; 53 RT 6226.) Goodfield previously told DePriest that he had been sexually assaulted by Williams. (49 RT 5779.) At the nurse's station, Deputy Marin saw a personal property box with Williams's name on it. (50 RT 5896, 5908.) It was so full of commissary items, beyond what most inmates possessed, that it could not close. (50 RT 5896; 53 RT 6226.) The housing unit had a commissary machine. (50 RT 5911.) Each inmate has a commissary card with his booking number and photograph. The back of the card has a tape strip, like a credit card, that can be read by the machine to dispense items. (50 RT 5911-5912; 53 RT 6227.) The maximum amount allowed was \$20 per day. (50 RT 5912.) Deputy Marin also saw a shank in Williams's property box. It was a sharpened number 2 pencil that was jammed into the handle of a disposable razor to elongate the pencil. (50 RT 5896, 5921-5922.)

Deputy Mikael Marine assisted Deputy Sanders in the investigation of this incident. (53 RT 6226, 6232.) Deputy Marine received information that Williams and Deloney had taken items from Goodfield. (53 RT 6234.) Records are kept of an inmate's use of their commissary card. (53 RT 6228.) The records contain the inmate's booking number, time and date of usage, items purchased from the machine, and the amount debited. (53 RT 6228-6229.) On

December 31, 1994, at 11:30 p.m., Williams spent 10 cents on his card. (53 RT 6229.) January 3, 1995, was the last time his commissary card was used. (53 RT 6230.) Records for inmate Goodfield's commissary card indicated that it was used 30 times between 12:09 p.m. and 1:50 p.m. on January 3, 1995. This amounted to a purchase of an item every 30 seconds. (53 RT 6231-6232, 6235-6236.) Deputy Marine's opinion, based on his experience, was that the number of withdrawals noted on Goodfield's commissary card in such a short period of time were very unusual. (53 RT 6231.)

On May 25, 1995, Michael Hanna was incarcerated in Tank 15C-1 at the Riverside County Jail. (49 RT 5735.) Tank 15C-1 was a protective custody unit. (49 RT 5755-5756, 5758.) Hanna was Caucasian and had swastika tatoos, indicating that he did not like racial minorities. (49 RT 5736, 5745-5746.) The housing unit had about 20 to 22 inmates of mixed races, mostly African-American and Hispanic. In addition to Hanna, there were two or three other Caucasian inmates. (49 RT 5736-5737, 5746.) Hanna sat on a top bunk and several African-American inmates and a Hispanic inmate went to a corner and had a discussion. (49 RT 5738-5739.) One of the inmates was Williams, whom Hanna believed was the "shot caller" of the tank who would tell the other inmates what to do. (49 RT 5737-5738, 5742-5743, 5748.) Hanna had a verbal exchange with Williams. (49 RT 5738.)

Williams directed the Hispanic inmate to call Hanna down from the bunk for a fight. (49 RT 5738, 5742-5743, 5747-5748.) The Hispanic inmate approached Hanna, called Hanna a racist, and they started fighting. (49 RT 5738, 5740-5741.) Hanna's nose was split open as a result of the fight. Hanna was bleeding when deputies entered the tank. (49 RT 5752.) Hanna was interviewed as a nurse was examining his bloody nose. (49 RT 5757, 5762.) Deputy Jenkins had Hanna review the housing unit cards with each inmate's photograph on it. Hanna identified inmate Alan McHan, who is Caucasian, as

the inmate who hit him. (47 RT 5763.) Deputy Jenkins's report identified the two suspects as Williams and McHan. (49 RT 5756-5757.)

McHan testified at trial and denied that he fought with Hanna. (47 RT 5810-5811, 5818, 5825.) McHan testified that during the month or two before Hanna arrived, Williams was the "shot caller" of the tank. Williams was known as "Boxer." (49 RT 5812, 5816, 5817, 5830-5831, 5833, 5834.) Williams was basically the bully of the tank who would order other inmates to do menial tasks or order inmates to fight other inmates. (49 RT 5813.) McHan was on his bunk when Hanna arrived in the tank. (49 RT 5816.) He heard a door slam, looked up and saw Williams and a Caucasian inmate walking away from Hanna. (49 RT 5818, 5824-5825, 5830.) The Caucasian inmate had been "punked out," meaning betrayed his race, to the African-American inmates who had the most inmates and were ruling the tank. (49 RT 5811-5812, 5824.) Hanna was standing by the door with his mouth bleeding. (49 RT 5818.) Hanna pounded on the door to summon a deputy, and was taken out of the tank. (49 RT 5820.) Many inmates, including McHan, were questioned about the incident. (49 RT 5820.) McHan identified Williams and the Caucasian inmate as the ones who were involved in the altercation with McHan. (49 RT 5827-5828.)

On August 18, 1994, 47-year-old Dale Foster was housed in Tank 15C-1 in the county jail pending trial. (48 RT 5672-5673.) It was a mixed race tank. (48 RT 5687.) Williams arrived in the tank. (48 RT 5675.) Williams had previously been housed in that tank with Foster, but had no communication. (48 RT 5676.) The tank had three tiers of bunks. The protocol was for arriving inmates to take open bunks, usually in the top tier. (48 RT 5673.) Williams took the bottom bunk of an older Caucasian inmate, in his fifties, who did not want to argue with him and moved to an empty top bunk. (48 RT 5676, 5677, 5692.) Later that day, Williams wanted to take Foster's middle-tier bunk because he said he previously had that bunk. But Foster did not want to give it up. (48 RT 5677-5678, 5691, 5693, 5694.)

Williams started to pull the mattress off Foster's bunk as Foster was sitting on a table. (48 RT 5679.) Foster's personal items and blankets were on the mattress. (48 RT 5679.) Foster said, "No, that's my bunk," and put the mattress back on his bunk. (48 RT 5680.) Thereafter, Foster got up from a table to use the bathroom and was "sucker" punched so that he did not see it coming. (48 RT 5681, 5683, 5696.) Foster looked up and saw that Williams had punched him. (48 RT 5681-5682.) The punch hit Foster's eye glasses, which cut the area near his eye. (48 RT 5683.) A deputy looked through the window of the housing unit and entered to find out why Foster was bleeding. (48 RT 5682, 5686.)

Foster was taken to the nurse's station where he was examined by Carl Smith, R.N. (48 RT 5687, 5705, 5706.) Nurse Smith observed a laceration to Foster's right cheek as a result of the eyeglass frames or glass breaking the skin and there was much bleeding. (48 RT 5706.) He was concerned that Foster may have suffered a sub-orbital fracture. (48 RT 5706.) Nurse Smith had Foster transported to a hospital for x-rays, a tetanus shot and sutures. (48 RT 5682, 5687, 5707.) Foster has a scar on his cheek as a result of this incident. (48 RT 5683.) Foster did not press charges against Williams because he thought he would again see Williams. (48 RT 5683-5684.) Foster knew that part of the inmate's code was that it was not a good idea to "rat off" another inmate because they had to live with each other. (48 RT 5684.)

On December 29, 1995, Arturo Alatorre, age 33, was an inmate in the Riverside County Jail. (48 RT 5578.) Alatorre was assigned to Tank 19 with Williams. (48 RT 5578.) It was a mixed-race housing unit. (48 RT 5581.) The 20 inmates assigned to the tank agreed on assigned times for telephone use. (47 RT 5582.) Each inmate had an assigned time and could use the telephone

for up to 15 minutes. (47 RT 5583.) The schedule was posted by the telephones. (47 RT 5598-5599.) That day, Williams had the turn prior to Alatorre. (48 RT 5583.) Alatorre needed to use the telephone that day to call his employer at the assigned time. (48 RT 5583, 5585, 5601-5602.) Williams was on the telephone for over 15 minutes and Alatorre said he needed to use the telephone. (48 RT 5583, 5586, 5602.) Williams became hostile, pulled down his prison jumpsuit to his waist, took a fighting stance, and said, "Let's fight, let's get it on." (48 RT 5586-5587, 5603-5603, 5608-5609, 5619.) Alatorre replied that he was not afraid of Williams and that he was being a punk. (48) RT 5587, 5610.) Williams approached and threw a punch at Alatorre. (48 RT 5587, 5587, 5612-5613.) Alatorre ducked to avoid the punch, grabbed Williams in a wrestling hold, took him to the ground and held him. (48 RT 5588, 5613.) Other inmates yelled for Alatorre to punch or hit Williams, but he held Williams in the hope that an officer would enter to break up the fight. (48 RT 5588.) A deputy entered with the meal cart to distribute their food and the fight ended. (48 RT 5588, 5614.)

The inmates who controlled the tank said that Alatorre and Williams had to continue their fight after the inmates ate their meal. (48 RT 5588.) Alatorre and Williams resumed fighting. Alatorre was only wearing briefs and Williams ripped them during the fight. (48 RT 5590.) Alatorre was naked so the other inmates stopped the fight, provided him with a pair of shorts, and the fight resumed. (48 RT 5590, 5616.) During the fight, Alatorre grabbed Williams in a wrestling hold hoping that deputies would realize there was a fight in the tank and would break it up. (48 RT 5590, 5616.) Williams threw overhead or roundhouse punches as Alatorre held him. (48 RT 5591, 5617.) Over 20 deputies arrived in the hallway to prepare to enter the tank. The deputies said, "Break it up." (48 RT 5590, 5617.) A respected inmate named Alfredo told Williams and Alatorre to stop fighting. (48 RT 5591.) The deputies opened the

door and told Alatorre and Williams to come out. (48 RT 5591.) Williams and then Alatorre exited the tank and Alatorre was placed in a small cell. (48 RT 5591-5592.) Two female deputies asked Alatorre questions about the incident (48 RT 5592.) Because he would face retribution if he did so, Alatorre told them that nothing happened. (48 RT 5587-5588, 5592.) Alatorre returned to the tank and he did not see Williams again. (48 RT 5592.)

Defense Evidence

Impact Of Penalty On Williams's Family

Felicia Williams is Williams's sister. (53 RT 6247.) They have three other siblings, Adrian, Erica and Angie. The family moved from Riverside to Moreno Valley. Felicia and Williams went to school in Moreno Valley. The family remained intact until 1993, when Angie moved to Texas, where their family was originally from. (53 RT 6247-6248.) Their mother lived in Long Beach with Adrian and their father in Victorville. (53 RT 6251-6252.) Felicia lived with her boyfriend. (53 RT 6252.) Prior to Williams's arrest, Felicia, Adrian and Williams were living at home with their father. Their mother was taking care of their ill grandmother in Texas. Erica had moved in with her boyfriend. (53 RT 6252.) Williams was living at home on and off. Felicia had no idea what was happening in Williams's life. (53 RT 5250.)

Felicia described Williams as a respectful and helpful person who was liked by everyone in the neighborhood. Williams started a neighborhood watch and was trusted by others. (53 RT 6250.) She became aware Williams was arrested on the date of his arrest. She visited him in jail a few days later and learned of the charges against him which she could not believe he was capable of doing. (53 RT 6250.) It hurt her that Williams was facing the death penalty because she does not believe he should be charged with that penalty. (53 RT 6251.) It would hurt her if Williams is put to death because she looks up to her

older brother. Williams had always been there for her when she needed help throughout her life. (53 RT 6251.)

Jack Emmitt Williams, Sr. is Williams's father. (53 RT 6261.) The intact Williams family moved to Moreno Valley in 1981 or 1982. (53 RT 6262-6263.) Jack Williams, Sr. had more than one job. He had an automotive repair shop in Perris, was a landscaper and maintained 32 mobile homes. His wife was also employed. (53 RT 6263.) His wife had a minor substance abuse problem. (53 RT 6265.) His wife might be gone for months at a time when she periodically checked on her family or on her frail mother. She would sometimes take the children. (53 RT 6265-6266.)

Williams started third grade in Moreno Valley. (53 RT 6262.) He had some scholastic and attendance problems in middle school. (53 RT 6263-6264.) Jack Williams, Sr. spoke with teachers and counselors to determine a course of action to take regarding those problems. (53 RT 6263.) Williams dropped out of high school. Jack Williams, Sr. spoke with counselors who informed him that Williams was working at a slower pace than normal. (53 RT 6265.) They put Williams in an alternative or continuation school to allow him to go to school half-day and work half-day. Eventually, Williams dropped out of the continuation school. (53 RT 6264.)

Williams began working at age 16 or 17. (53 RT 6265.) At certain points, he tried to work with his father. Jack Williams, Sr. assigned Williams the landscaping portion of the business. Williams would open the office in the morning and take calls until he arrived. Thereafter, Williams would take his van and equipment and go out to service customers. Once Williams finished, he would drop off the equipment and either drive home in the van or get a ride from a friend. (52 RT 6265-6266.) He was acquainted with some of Williams's friends. He knew Weatherspoon, but not well. He knew Holland and heard that Holland has some problems with crimes. He also knew John H., and that he liked to drink. (53 RT 6266-6267.) Jack Williams, Sr. had no knowledge of Williams having any substance abuse problems. (53 RT 6266.) Other than normal disagreements between kids, he was not aware of any violent behavior by Williams. (53 RT 6268.)

When Williams turned 18, he worked part-time with Jack Williams, Sr. and sometimes lived at home. (53 RT 6267.) Prior to Williams's arrest, he was a normal carefree kid. He liked to joke around and make people laugh, go fishing, watch his father work on cars, and play basketball which was his favorite activity. (53 RT 6267.) Jack Williams, Sr. learned of Williams's criminal charges when he came home from work and spoke with police officers. (53 RT 6268.) Williams's arrest and trial have had a real devastating effect on his life. (53 RT 6268.) Shortly after Williams was arrested, their family was no longer a unit. (53 RT 6269.) Jack Williams, Sr. understands Williams is facing the death penalty. He cannot imagine his life without the son he raised from a baby. (53 RT 6269.)

Williams's Personal Characteristics

Linda Adame was Williams's sixth grade teacher Sunnymead Middle School in Moreno Valley. (55 RT 6386.) Adame really liked Williams. She remembered his personality and his smile. He was always respectful to Adame and the other adults. (55 RT 6387.) Williams did not exhibit any behavioral problems in the classroom. (55 RT 6387.) Williams had academic problems. He had difficulty with mathematics and his reading level was lower than it should have been. (55 RT 6387-6388.) Williams often did not turn in his homework. Adame realized that Williams did not have much help at home, but she does not think that she met his parents. (55 RT 6387.) His school attendance was fairly good. (55 RT 6388.) Adame felt that Williams's heart was in the right place. He was very respectful and wanted to learn. He was always good to Adame as a teacher. (55 RT 6388.)

Wendy Pospichal was Williams's seventh and eighth grade social studies teacher at Sunnymead Middle School. (54 RT 6283.) She taught world history. (54 RT 6284.) Williams was retained as a seventh grader and promoted to the eight grade half-way through the year. (54 RT 6284.) Williams was her student that entire year. He was 13 or 14 years old. (54 RT 6284.) At the beginning of the year, Williams did not do well in world history, in part due to some absences. (54 RT 6284.) Williams was frequently absent and at times late in getting to school. (54 RT 6285.) Pospichal could not recall if he had any problems doing homework. (54 RT 6284.) Williams was social, talkative and well-liked. (54 RT 6284, 6286.) Pospichal does not recall Williams at any time being disrespectful or a behavior problem. (54 RT 6285.) Pospichal described Williams as a trustworthy, helpful and enthusiastic student. (54 RT 6286-6287.) Pospichal recalled they had a Greek Olympics and Williams stayed after school many days working and sewing Greek costumes. Pospichal taught him how to sew. She recalls him taking an index card, writing "Made by Jack Williams" and sewing it into his toga. This showed a sense of pride in his work. (54 RT 6287.)

Pospichal does not recall initiating any conferences with Williams's parents. (54 RT 6285.) Williams invited her to his home to meet his family one day after school. Pospichal went to his home and his parents were anticipating her arrival. (54 RT 6285.) Williams's father was off in the background and his mother was very friendly. (54 RT 6287-6288.) It was the only time that Pospichal met his parents. (54 RT 6286.) She was invited to Williams's room because they were very proud of their goldfish. (54 R^T 6286.) Although the home was sparsely furnished, Williams's room was extremely tidy. (54 RT 6288.) She last saw him a couple of years later when they passed

at a crosswalk. Williams's sister was in her class a couple of years later, but Pospichal did not have any contact with Williams or his family at that time. (54 RT 6287.)

Rahin Brown is acquainted with Williams because they were neighbors on Dorner Drive in Moreno Valley. In 1987, Brown's family moved in two houses away from Williams's home on the same street. (53 RT 6523-6524.) Brown was a few years older than Williams. (53 RT 6255, 6260.) Brown and Williams attended different schools, but they were friends and saw each other regularly. (53 RT 6522.) They visited each other at their homes, played basketball and football on the street. (53 RT 6255.) Brown was acquainted with Williams's family and visited their home. (53 RT 6255-6256.) Brown knew Williams's father and was aware he had a landscaping or yard cleaning business. (53 RT 6256.) At age 17, Brown enlisted in the U.S. Navy and served abroad. Brown kept contact with Williams in writing and by telephone. (53 RT 6257, 6260.)

After he returned from his service, Brown enrolled at California Baptist College and lived at home. (53 RT 6257.) He resumed his personal relationship with Williams. (53 RT 6257.) They would go to the college to play basketball. Williams would join him for physical fitness activities or military training. (53 RT 6258.) Brown did not believe that Williams was a substance abuser. (53 RT 6258.) Brown encouraged Williams to join the military. (53 RT 6260.) Williams was a good friend and a nice person. (55 RT 6258.) Sometimes on Saturday mornings the Brown family would wake up and Williams would be cutting the lawn for them. Williams was like a family member. (53 RT 6258-6259.) Brown learned about the charges against Williams to be his friend and he did not know anything bad about Williams. (53 RT 6259.) Velma McDowell resided next-door to Williams's grandmother in Perris. (55 RT 6452-6453.) McDowell was acquainted with Williams's father and aunt, who owned the trailer where McDowell lived. (55 RT 6454.) Williams personally visited McDowell and also worked on her lawn. (55 RT 6453.) Williams was always respectful towards her. (55 RT 6453.) Williams was a businessman, but not pushy. Sometimes he would work on her lawn and tell her to pay for it when she had the money. (55 RT 6453.) Williams was very helpful and reasonably in charging her because she had a very large piece of land. (55 RT 6454.) Williams would help her son play Nintendo. Williams was also very helpful to her. He would either personally go or take her daughter to the store for her. McDowell described Williams as a good kid. (54 RT 6454.)

Testimony Regarding The Mario Loa Incident

Riverside County Sheriff's Deputy Gary Thompson was the detective assigned to the case regarding Mario Loa. (53 RT 6271.) Detective Thompson contacted Loa, who came to the Moreno Valley station on October 1, 1991. (53 RT 6272.) Loa said there were two suspects, but only identified Gregory Brown. The other suspect, Williams, was identified later. (53 RT 6272, 6275.) Loa said that he attempted to escape through a bedroom window but Brown was standing outside. Loa ran out to the living room and attempted to escape by running out of the apartment. (53 RT 6273.) Loa had to shove Williams out of the way to get out of the apartment. (53 RT 6275.) Loa ran to a fence and tried to climb it, but he was stopped by Brown. (53 RT 6274.) Brown grabbed Loa and pulled him to the ground. (53 RT 6274.) While on the ground, Brown threatened Loa with a knife and made a stabbing motion at him. (53 RT 6274.) Loa said that Williams chased him out to the gate and was involved with Brown in the assault. (53 RT 6275.)

Testimony Regarding The Jail Assault Of Michael Hanna

Martin Silva is an investigator for the Riverside County District Attorney's Office who is assigned to this case. (53 RT 6277-6278.) On March 18, 1998, Investigator Silva interviewed Michael Hanna and Alan McHan regarding a fight at the Riverside County Jail on May 25, 1994. (53 RT 6278-6279.) Hanna said that he saw a Caucasian inmate enter a cell and talk to a group of Caucasian inmates. After that conversation, the Caucasian inmate walked over, challenged Hanna to a fight, and struck Hanna. (53 RT 6278.) Investigator Silva's information was that McHan was the Caucasian inmate that hit Hanna. But McHan denied that he hit Hanna. McHan said the inmate that hit Hanna could have been either Caucasian or a 6' to 6'1" medium build, African-American inmate. (53 RT 6279.)

Conditions Of Williams's State Prison Confinement

Anthony Casas, a litigation consultant and former administrator with the California Department of Corrections, testified about the conditions of Williams's confinement, if he were sentenced to life without the possibility of parole. (54 RT 6289-6347; 55 RT 6389-6451, 6456-6465.) Casas opined that even with Williams's assaultive and violent incidents at county jail, he would not be a management problem when housed at state prison. (54 RT 6317; 55 RT 6392, 6398-6405, 6412.)

Prosecution Rebuttal Evidence

On April 25, 1998, Deputy Martin Trochtop was working in Tank 2A, an administrative segregation unit, at the Riverside County Jail. (55 RT 6467.) Williams had been housed in administrative segregation since February 22, 1996. (55 RT 6469.) Inmates in administrative segregation are in their cells 23 and one-half hours a day. (55 RT 6483.) Deputy Trochtop retrieved a note written by Williams that he placed in the door separating the two dayrooms in the unit. The note indicated that Williams had cigarettes and wanted another inmate to pass him a lighter. (55 RT 6470, 6474.) This raised security concerns so Deputy Trochtop contacted a sergeant and obtained permission to search Williams's cell. (55 RT 6473, 6475.) A cell search was conducted after Williams and his cellmate, Lester Wilson, returned to their cell. (55 RT 6474, 6482.) When the deputies approached the cell, Wilson had his face up against the window of the cell door. Williams got up from a small table, went to the toilet, flushed the toilet and walked up to the cell door. (55 RT 6473.) Deputy Trochtop searched the light fixture and found two pieces of a broken plastic mirror concealed in a homemade envelope, a partially sharpened piece of plastic mirror, a piece of clear plastic that was sharpened to a point to be useable as a shank, a \$1 bill and a newspaper dated December 27, 1997. (55 RT 6477-6482, 6489.)

Samuel Francis, a Correctional Lieutenant for the California Department of Corrections, described the prison management problems posed by inmates who possess weapons, or engage in physical or sexual assaults on other inmates. (55 RT 6495-6522; 56 RT 6523-6550.)

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ARGUMENT

I.

THE TRIAL COURT PROPERLY DISCHARGED JUROR NO. 12 WHO FORMED AN OPINION AND DISCUSSED IT WITH OTHER JURORS BEFORE THE CASE WAS SUBMITTED

Williams contends he was deprived of his federal and state constitutional rights to a fair trial, trial by jury, a unanimous verdict, due process and a reliable guilt and sentencing phase in a capital case (U.S. Const., 5th, 6th, 8th & 14th Amends; Cal. Const., art. I, § 16) because the trial court discharged Juror No. 12, C.B., without good cause. (AOB 127-151.) There was no abuse of discretion because the discharge was supported by evidence that Juror No. 12 refused to follow the trial court's instruction not to form or express an opinion until the case was completed and all the evidence was received. (See 39 RT 4728-4729.) Williams received adequate process and a fair trial.

"The California process for substitution of jurors under section 1089 and Code of Civil Procedure section 233 preserves the essential features of the jury trial required by the Sixth Amendment and due process clause of the Fourteenth Amendment." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.)

Penal Code section 1089 permits the trial court to discharge a juror if the juror is unable to perform his or her duty. Section 1089 provides:

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 unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

(See also Code Civ. Proc., §§ 233, 234.)

A hearing is required when the trial court is informed of allegations which, if proven true, would constitute good cause to discharge a juror. (*People v. Burgener* (2003) 29 Cal.4th 833, 878; *People v. Cleveland* (2001) 25 Cal.4th 466, 478.) A trial court has broad discretion regarding both the scope of the investigation and its decision to remove a juror for cause. (*People v. Bonilla* (2007) 41 Cal.4th 313, 350, citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1348; *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.) But the trial court should exercise that discretion with great care because the removal of a juror implicates a Williams's constitutional rights to a jury trial and due process. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) On appeal, the trial court's determination is reviewed for an abuse of discretion. (*People v. Leonard*, 40 Cal.4th 1370, 1409; *People v. Cunningham* (2001) 25 Cal.4th 926, 1029.)

In *Barnwell*, this Court recently noted that previous cases had provided two different formulations to the standard of review. A trial court's decision to discharge a juror was to be upheld if supported by the deferential "substantial evidence" standard. (*People v. Barnwell, supra*, 41 Cal.4th at p. 1052; citing *People v. Williams* (2001) 25 Cal.4th 441, 448; *People v. Carter* (2005) 36 Cal.4th 1114, 1140.) It was also stated, often in the same case, that a juror's disqualification had to appear in the record to be a "demonstrable reality." (*Ibid.*; citing *People v. Cleveland, supra*, 25 Cal.4th at p. 474; *People v. Marshall* (1996) 13 Cal.4th 799, 843; see also *People v. Boyette, supra*, 29 Cal.4th at p. 462, fn. 19.) The "demonstrable reality" standard "indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror." (*Ibid.*, quoting *People v. Cleveland, supra*, 25 Cal.4th at p. 488 [conc. opn. of Werdegar, J.].)

To dispel any uncertainty regarding the standard of review regarding the discharge of a sitting juror, in *Barnwell* this Court explicitly held:

that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.

(People v. Barnwell, supra, 41 Cal.4th at p. 1052.)

The "demonstrable reality" test involves a more comprehensive and less deferential review than the "substantial evidence" test. (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1052.) "[T]he reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at p. 1053.) To reach that conclusion, "the reviewing panel will consider not just the evidence itself, but the record of the reasons that the court provides." (*Ibid.*)

A juror who is unable or unwilling to follow the trial court's instructions may be discharged for good cause. (*People v. Williams, supra*, 25 Cal.4th at p. 441; *People v. Daniels* (1991) 52 Cal.3d 815, 865.) This Court stated that:

A juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of Penal Code section 1089. As soon as a jury is selected, each juror must agree to render a true verdict "according only to the evidence presented . . . and *to the instructions of the court*."

(*People v. Williams, supra*, 25 Cal.4th at p. 448, quoting Code Civ. Proc., § 232, subd. (b), italics added.)

"In appropriate circumstances a trial judge may conclude, based on the juror's willful failure to follow an instruction, that the juror will not follow other instructions and is therefore unable to perform his or her duty as a juror." (*People v. Ledesma* (2006) 39 Cal.4th 641, 738.)

Penal Code section 1125, subdivision (a), provides in pertinent part:

After the jury has been sworn and before the people's opening address, the court shall instruct the jury generally concerning its basic functions, duties and conduct. The instructions shall include, among other matters, admonitions that jurors shall not converse among themselves, or with anyone else, on any subject connected with the trial; . . .

Subdivision (b) of that section states:

The jury shall also, at each adjournment of the court before the submission of the cause to the jury, ... be admonished by the court that it is their duty not to converse among themselves, or with anyone else, on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.

It is serious misconduct for a juror to violate this duty. (People v. Majors (1998) 18 Cal.4th 385, 423.)

Williams and Dearaujo were jointly tried before separate juries. Williams's jury panel was identified as the "Red" jury, and Dearaujo's as the "Blue" jury. (See 7 Supp. RT/ 44 RT 5302; 12 RT 1498.) On January 27, 1998, prior to opening statements, the trial court so instructed Williams's jury as follows:

As judges of the facts, you must conduct yourselves at all times during the trial, even during recesses or times away from the courthouse, as a judge would conduct himself or herself. *This means you must not discuss the case or any subject connected to the trial with anyone, even amongst yourselves, until you have received all the evidence and the case has been submitted to you for your decision following the arguments of counsel and my instructions on the law.* During the course of this trial, and before you begin your deliberations, you must keep an open mind in this case, and upon all of the issues that you will be asked to decide. In other words, you must not form or express any opinion on *the case until the matter is finally submitted to you.*

(16 RT 2138, italics added.)

Prior to the noon recess, the trial judge informed the jurors that the parties stipulated that the trial court did not have to read an admonition to the jurors that it was required to read prior to any recess. (4 CT 801 ["The Court's admonition to the jury, after once having been given, shall be deemed to have been given just prior to every recess, adjournment, or continuance of the trial"]; 16 RT 2233.) The judge said he was going to read the admonition and thereafter it would be deemed that it had actually been read. The trial judge stated:

The admonition is as follows, and it's pretty much what you have already been instructed on. Ladies and gentlemen of the jury, *it is your duty not to converse among yourselves or with anyone else or, permit anyone else to address you on any subject connected with this trial, nor to form or express any opinion thereon until the case is finally submitted to you for your verdict.* So from now on I will simply say, have a good evening and see you tomorrow morning, please remember the admonition.

(16 RT 2233, italics added.)

The judge instructed the jurors to "remember the admonition" at every break and recess. (See, e.g., 17 RT 2360, 2438; 18 RT 2490, 2606; 19 RT 2680, 2747; 20 RT 2806, 2879-2880; 21 RT 2941, 3017.)

Williams claims that Juror No. 10 and Juror No. 12, a 62-year-old female, were the only African-American jurors on the panel. (See AOB 128-129.) On February 25, 1998, the jury heard the testimony of James H. and Mondre Weatherspoon, who are both African-American. (29 RT 3892-4061.) That day, the trial judge instructed the jurors to "remember the admonition" during breaks and recess. (29 RT 3965, 3980, 4018, 4061.) The following morning, the judge and counsel met in chambers regarding a note the courtroom deputy received from Juror No. 6. (30 RT 4062.) The note read as follows:

Dear judge: Yesterday, 2-25-98, Juror #12 of the Red Jury, [first name], made a comment to myself, Juror #6, "'I'm pissed right now," I asked her why? She made a gesture with her hands regarding Mr. [James H.] about the handcuffs. I told her there must be a reason and she said "'I know what the reason is." I assumed what she meant and dismissed it. [¶] Later when we were waiting outside the courtroom, coming back from lunch, [name] one of the jurors told me that [Juror No. 12] made the same comment to her at Lunch but, actually said "'The only reason he had handcuffs on, was because he was black."' [¶] I have thought about this and I do not know if I'm making more of this than should be. It does not bother me however. I know it is ridiculous.

(18 CT 5130-5131.)

Juror No. 6 was called to chambers so the trial court and counsel could determine the essence of Juror No. 12's comments. (18 CT 5020; 30 RT 4062.) Juror No. 6 was questioned by the judge. Juror No. 6 said that the previous morning when the jurors were entering the jury box James H. was handcuffed when he was brought into the courtroom. Juror No. 6 did not attach any significance to the handcuffs. (30 RT 4063.) Juror No. 12 sat down and Juror No. 6 said good morning to her. (30 RT 4063.) After greeting Juror No. 6, Juror No. 12 said, "I'm pissed right now." Juror No. 6 asked, "Oh, why?" Juror No. 12 made a gesture indicating the handcuffs. (30 RT 4063.) Juror No. 6 said, "Oh, there must be a good reason for that." (30 RT 4063-4064.) Juror No. 12 responded, "I know what the reason is." Juror No. 6 tried to forget about that comment. (30 RT 4064.) After they returned from lunch, Juror No. 7 stated that Juror No. 12 said the reason that James H. was in handcuffs was because he was African-American. (30 RT 4064.) Juror No. 6 said that it bothered her that Juror No. 12 would make that comment to another juror. (30 RT 4064.) Williams's counsel did not question Juror No. 6. (30 RT 4064.) Juror No. 6 affirmed to the trial court that Juror No. 12's comments or what occurred with the handcuffing of James H. would not prevent her from being a fair and impartial juror. (30 RT 4065.)

After Juror No. 6 left, counsel and the trial court discussed the matter. The prosecutor stated she had a disagreement with the courtroom deputies the prior day because for the first time they refused to take the handcuffs off an incustody witness. (30 RT 4065-4066.) The prosecutor noted it was a change in the prior courtroom procedure where the in-custody witnesses had their handcuffs removed before they entered the courtroom. (30 RT 4066.) The courtroom deputies told the prosecutor they kept the handcuffs on James H. because he had a verbal exchange with Dearaujo that morning. (30 RT 4066.) James H. and Dearaujo stared at each other. James H. called Dearaujo a

"snitch," said he was in jail because of Dearaujo, and they exchanged profanities. (29 RT 4009-4011.) The prosecutor noted that Weatherspoon was handcuffed when he testified that afternoon. (30 RT 4066.)

The prosecutor argued that if witnesses were handcuffed it could create the impression that they were more dangerous than Williams and Dearaujo, who were facing the death penalty. (30 RT 4066.) The trial judge noted that both Williams's and Dearaujo's juries saw James H. and Weatherspoon in handcuffs the previous day. (30 RT 4066.) Dearaujo's attorney argued if they discussed with the jury the handcuffing of those two witnesses, it could create an issue that did not exist. (30 RT 4067.) The prosecutor agreed, but expressed her view that if there was a racial motivation for the handling of in-custody witnesses, it could have an impact on the case. (30 RT 4067.) Williams's attorney argued that as long as Juror No. 12's comments did not have anything to do with the testimony by James H. and Weatherspoon, it was not an issue. He suggested that an admonition by the court would suffice without any discussion with the jury. (30 RT 4067.) The prosecutor suggested that the judge advise the jury about courtroom security in the handling of in-custody witnesses and state that it was not racially motivated. (30 RT 4067.)

The trial judge suggested that he could inform the jurors that one or more of the jurors had speculated as to why one or more of the witnesses who testified had been restrained, which was a matter of courtroom security and had no relevance regarding the credibility of a witness. The jurors were not to discuss or speculate about those matters, and the judge would ask if they were capable of following that admonition. (30 RT 4067-4068.) Williams's attorney said that such an admonition would suffice even though he did not know the extent of the comments by other jurors. (30 RT 4068.) The judge stated that they knew that Juror No. 7 was also involved in the conversation by Juror No. 12. (30 RT 4068.) The prosecutor argued that Juror No. 12 seemed to think

that African-American witnesses were being treated different than other witnesses. She suggested they had to inquire of all of Williams's jurors to determine if Juror No. 12's ability to follow her duty had been impaired by a belief of unequal treatment of witnesses based on race since Williams was African-American. (30 RT 4068-4069.) Williams's attorney argued that Juror No. 12 had expressed a concern, but thought an admonition by the court would suffice. (30 RT 4069.) The prosecutor noted that Juror No. 12 said she was "pissed" that James H. was shackled, so they did not know if she was so upset that an admonition would not suffice. (30 RT 4069.) The judge agreed that a further inquiry in chambers would be conducted. (30 RT 4069.) Williams agreed to waive his presence during the in chambers inquiry. (30 RT 4070.)

The judge informed Juror No. 12 that one of the jurors indicated that Juror No. 12 was distressed about seeing two witnesses in handcuffs the previous day and that Juror No. 12 thought it was because of their race. (18 CT 5020; 30 RT 4071.) Juror No. 12 responded, "Uh-huh." (30 RT 4072.) The trial court asked if it would affect her ability to be impartial to both parties in the case. (30 RT 4072.) Juror No. 12 responded, "No." She explained that she made that statement because she noticed that the other witnesses who were wearing orange jail jumpsuits were not handcuffed. (30 RT 4072.)

The judge stated that there was no express policy on restraints and that it varied according to the deputies in the courtroom. The judge assured Juror No. 12 that restraining a witness was not based on race, but on the individual courtroom deputy's perception of security issues and the custody status of the witness. (30 RT 4072.) Juror No. 12 responded that she noticed that Weatherspoon had handcuffs after James H. had been handcuffed. She decided that the probable reason for the handcuffing of those two witnesses was 'vecause of the outburst between James H. and Dearaujo earlier that day. (30 RT 4072.) Juror No. 12 said that her statement to the other juror was, "Why is he handcuffed? I don't know. Have you seen any other [witness] come in with the handcuffs?" (30 RT 4073.)

The judge stated that he wanted Juror No. 12 to understand that the decision to restrain those witnesses was not based on race, and asked if it would prejudicially affect her view of the evidence towards either the prosecution or the defendant. (30 RT 4073.) Juror No. 12 responded that she did not believe it would prejudice her, but that it was just a situation where she wondered why those witnesses were restrained. (30 RT 4073.) The judge stated that he learned of the shackling after the fact, and he probably should have informed the jurors that they should not speculate as to why some witnesses were shackled. (30 RT 4074.) Juror No. 12 said that, given her background and age, she had a tendency to wonder about things. She expressed that she thought she was impartial regarding the evidence, but if she did not see certain things she made "comparisons." (30 RT 4074.) Juror No. 12 stated that her "mistake" was that she expressed her opinions to other jurors. (30 RT 4074.) The trial court said that he wanted to tell the jury that they should not discuss their opinions with each other. But he told Juror No. 12 it was good they had that discussion because he did not want to overlook that different persons could be sensitized to certain things depending on their background. (30 RT 4074.) Juror No. 12 was excused. (30 RT 4075.)

Neither the prosecutor nor Williams's attorney questioned Juror No. 12. (30 RT 4074.) The prosecutor said she did not question Juror No. 12 out of a concern that it could impact the case, which was why she adamantly did not want in-custody witnesses to be restrained when they testified. (30 RT 4075.) The prosecutor argued that bringing in-custody witnesses into the courtroom in ankle shackles and handcuffs created an impression that they were more dangerous than the two un-handcuffed defendants on trial for capital murder. Also, Weatherspoon would continue his testimony that day and would have his

hands cuffed to his waist. So the prosecutor wanted to know who else heard Juror No. 12's remarks and if they were affected by them. (30 RT 4076.) The trial court stated that the only other juror who was specifically identified as having heard the comments was Juror No. 7. (30 RT 4077.)

The judge informed Juror No. 7 that she was called to chambers because a couple of jurors indicated that Juror No. 12 purportedly made a statement regarding her perception as to why certain witnesses were shackled and others were not. (18 CT 5020; 30 RT 4077-4078.) Juror No. 7 acknowledged that she heard Juror No. 12 make such a statement while three or four other jurors were present. (30 RT 4078.) Juror No. 7 said that she was seated near the front of the jury box and was bothered when James H. and the defendants "started going" at each other because she had not previously been exposed to gangs. (30 RT 4078.) Juror No 7 said her impression was that James H. was in shackles because he had committed something worse than the other in-custody witnesses, and not because he was African-American. (40 RT 4079, 4081.) But Juror No. 12 said, "No, you watch and see as they come through. You'll notice that the Black ones are in shackles." (30 RT 4078.) Juror No. 7 responded, "God, I hope not. I don't want to think that." (30 RT 4079.)

The judge told Juror No. 7 that their primary concern was to determine if that incident involving Juror No. 12 tainted the ability of any juror to decide the case on the merits and without prejudice to either party. (30 RT 4079.) Juror No. 7 said that her opinion was that you should judge a person based on what they did and not on their race. (30 RT 4079.) Juror No. 7 said that when they brought in the next witness [Weatherspoon], his legs were not shackled. Juror No. 12 said, "He doesn't have shackles on his feet." Juror No. 7 responded, "Well, you know, I'm glad." (30 RT 4079.) Juror No. 7 did not agree with Juror No. 12's opinion that the African-American in-custody witnesses were being shackled. (30 RT 4079.)

The prosecutor asked Juror No. 7 if Juror No. 12's statements regarding African-American in-custody witnesses being shackled would prevent her from being fair and impartial in this case since Williams was African-American. Juror No. 7 said that she did not know whether or not Juror No. 12 could be a fair and impartial juror. (30 RT 4080.) Juror No. 7 expressed an opinion that Juror No. 12 might be swayed by the fact that she had been around those types of kids. (30 RT 4081.) Juror No. 7 said that she and Juror Nos. 5, 6 and 12 usually had lunch together, and were possibly joined by Juror No. 10. (30 RT 4080.) Juror No. 7 recalls speaking with Juror No. 10, probably during the lunch break, about how nervous they were when James H. had an exchange with the defendants and courtroom deputies came over and told him to cool it. (30 RT 4080.) There were comments about how uneasy it made them feel, but they did not discuss anything specific about the case. (30 RT 4081.) Juror No. 12 said that she taught at a continuation school where she had gang members on both sides of the room. Juror No. 7 said that most of the jurors had not been exposed to that. (30 RT 4081.)

After Juror No. 7 was excused from chambers, Williams's attorney stated that it seemed the jurors were talking a lot, but he did not think they would learn anything further if they inquired from other jurors as to what was said or what were their opinions. Williams's attorney thought that a firm admonishment by the trial court would be an appropriate course of action. (30 RT 4081.) Dearaujo's attorney commented that it was his observation that the Blue jury had little or no contact with the Red jury and the inquiry focused on the Red jury. (30 RT 4082.) The prosecutor said that she had not had a similar circumstance come up during trial and would consult with persons in her office and research the issue, but she preferred that they deal with it before continuing the case. (30 RT 4082.)

The judge suggested that they tell the jury that whether or not an incustody witness was shacked was a function of their custodial status, but it should not be a factor in judging the credibility of that witness. (30 RT 4083.) Williams's attorney agreed. (30 RT 4083.) The bailiff stated that if John H. were recalled to the stand, it was his preference that John H. be shackled. Williams's attorney concurred. (30 RT 4083.) The prosecutor expressed her concern that the trial court's proposed admonition would lead jurors to perceive that any in-custody witnesses who were shackled were more dangerous than Williams and Dearaujo, who were facing the death penalty, but sat at counsel table with their arms unrestrained and to the jurors with apparently no restraints at all. (30 RT 4083-4084, 4089-4090.) The prosecutor argued that she had to prove her case with some in-custody witnesses, whose credibility could be influenced by the decision of a courtroom deputy to have their wrists shackled to their waist. (30 RT 4089-4090.)

The bailiff informed the judge that there was no uniform policy regarding the restraint of in-custody witnesses, which depended on an individual assessment of the trial judge, courtroom security staff, and the witness. (30 RT 4092.) The court asked if the courtroom security officer would have a problem with a policy during the trial that an in-custody witness testified without handcuffs unless it was otherwise brought to the court's attention. The security officer responded that he had no problem with such a policy. (30 RT 4093.)

The judge stated to counsel that he would tell the jury that he had not realized that there was no consistent policy regarding the level of restraints on in-custody witnesses and that it should not play a role in their assessment of the credibility of such a witness. (30 RT 4094.) The prosecutor said that she did not have a problem with such an admonition, but wanted the court to tell the jurors to assume that any shackling was for valid security concerns. (30 RT

4094.) The judge responded that he would tell the jurors that they were to assume that shackling was based on valid security concerns, but that it was not evidence in the case. (30 RT 4094.) Williams's attorney said, "That's fine." The trial court indicated that they had agreed on what he would tell the jury. (30 RT 4094.)

Dearaujo's attorney asked if they would be inquiring of the other jurors who may have been at lunch with Juror No. 12. (30 RT 4094.) The judge said that they would not because, after having heard from Juror No. 7, it did not appear that the jury had been tainted. (30 RT 4094.) The prosecutor stated that she wanted to research the issue before determining what to do regarding Juror No. 12. (30 RT 4094-4095.) Williams's attorney did not want any further inquiry of the other jurors. (30 RT 4095.)

After a recess, the judge informed the jurors that they looked into an issue the court had not previously considered, which had to do with a lack of consistency as to whether in-custody witnesses who testified were restrained or not restrained, which depended on the security officers who transported the incustody witnesses. The judge stated that there had been a perception that this. difference in treatment might be for reasons other than security interests and apologized to the jury for not being aware of the lack of consistency and any resulting misconceptions. (30 RT 4096-4097.) The judge reminded the jury that the level of restraint on a witness had absolutely nothing to do with a juror's evaluation of the credibility of an in-custody witness. (30 RT 4097.) The judge said that they were trying to get some consistency with a policy, but the jurors may still see some differences in restraining certain witnesses, but that such a determination was made on an individual basis as a matter of security. (30 RT 4097.) The judge reiterated that he wanted the jurors to understand that the restraint of an in-custody witness had no bearing on the credibility of that witness. The judge stated it was the type of outside factor or information that

should not influence the jury as they had previously been instructed by the court. (30 RT 4097.)

The judge told the jurors that by inquiring into this situation they got a feel as to how careful the jurors had been in following the admonition that they not discuss the merits of the case. (30 RT 4097-4098.) Even though the jurors had been careful, it was apparent that they had discussed ancillary matters that had to do with their duties as jurors. The judge asked the jurors to continue to be careful and discuss things that may affect their consideration about the case. (30 RT 4098.) The judge asked if there was anything that had occurred which might affect their ability to be fair and impartial to both sides in the case. If not, they would continue with the case. There was no affirmative response by the jury. (30 RT 4098.) Weatherspoon's testimony was resumed. (18 RT 5020; 30 RT 4099.)

On March 2, 1998, the prosecutor moved to discharge Juror No. 12. because, not only was she talking about the case, but she expressed a bias that only African-American in-custody witnesses were being shackled. (18 CT 5021; 31 RT 4142.) The prosecutor argued that, from Juror No. 12's perspective, the shackling was attributable to the prosecutor and prosecutor's investigator who kept the in-custody witnesses in the witness room and unshackled them as they entered the courtroom. (31 RT 4142-4143.) The prosecutor argued that the trial court could exercise its discretion to discharge Juror No. 12 because she disregarded a court order that she not talk about the case, and expressed an opinion and bias about matters connected with the case, she was incapable of performing her duties as a juror. (31 RT 4144-4146.) The prosecutor argued that because of the lack of a firm courtroom policy regarding the shackling of in-custody witnesses which was beyond her control, it caused Juror No. 12 to believe the prosecutor's office was racially motivated and was mistreating African-American young men who were being called as witnesses

in a case where there was an African-American defendant. (31 RT 4146.) Since Juror No. 12 expressed a bias, she should be excused for cause so that People could receive a fair trial. (31 RT 4146.)

Williams's counsel argued that, although he did not have the transcripts of the in-chambers proceeding, it was not his recollection that Juror No. 12 expressed any opinion that the shackling of the African-American in-custody witnesses was the fault of the prosecutor or the government. (31 RT 4146-4147.) During the chambers proceeding, they inquired about her state of mind and Juror No. 12 said that she could be fair and impartial to both sides. (31 RT 4147.) Williams's counsel argued that it was an out of court discussion and the record was not clear as to the nature or extent of the comments made by that group of jurors. (31 RT 4148.) Williams's counsel further argued that, as he previously did so, that an admonishment by the trial court would be sufficient to dispel the jurors of any perception that an in-custody witness who was shackled was more dangerous than the defendants. He noted that Juror No. 12 had not made such a comment. (31 RT 4148-4149.)

The judge proposed they proceed with trial until they obtained a copy of the transcript of the in-chambers proceedings. Once the trial court received the transcript, he could make a ruling on the motion to discharge Juror No. 12. (31 RT 4150-4151.) Weatherspoon's testimony was resumed. (18 RT 5021; 31 RT 4152.)

During the noon recess, the hearing on the motion to excuse Juror No. 12 resumed. (18 CT 5021.) The prosecutor and Williams's counsel acknowledged they had received a transcript of the prior in-chambers proceedings. (31 RT 4205.) The prosecutor argued that Juror No. 12's remarks were racist and offended various jurors, which prompted a juror to report it to the court. The prosecutor argued that Juror No. 12 should be replaced with an alternate juror so that the case could proceed with an impartial jury. (31 RT

4208.) Williams's counsel argued that Juror No. 12 and the other jurors did not express an opinion that the shackling of the in-custody witnesses was motivated by the People, and it did not necessarily raise a racial bias. (31 RT 4208-4209.) Williams's counsel further argued that they were entitled to have jurors with different backgrounds and experiences. Juror 12 expressed her understanding of what occurred as well as her willingness to obey the trial court's instructions. He argued there was no record, claim or charge of racial bias by Juror No. 12. (31 RT 4209.)

The judge denied the prosecutor's motion to discharge Juror No. 12. (18 CT 5021; 31 RT 4211.) The judge said it was not a clear case of misconduct because Juror No. 12 did not directly discuss the merits of the case in violation of the court's order, but discussed a matter of ancillary interest as to how the case was being conducted regarding the shackling of in-custody witnesses. (31 RT 4209-4210, 4211.) The judge noted that, when Juror No. 12 was admonished, she seemed to understand that it was important that she not allow it to affect her ability to be a fair and impartial juror. (31 RT 4211.) The judge also stated that when he spoke before both jury panels in open court, he advised them that the restraint of a witness was non-issue regarding the credibility of that witness. (42 RT 4211.)

On March 11, 1998, Juror No. 2 entered the courtroom to report a statement made by Juror No. 12 during the testimony of Glynn Brodbeck regarding the incident at the Taco Bell parking lot. (18 CT 5040; 37 RT 4735.) Brodbeck testified on March 5. (34 RT 4466-4499.) The People had rested their case-in-chief on March 9 (18 CT 5031; 35 RT 4529), and the defense case began on March 10. (18 CT 5038; 36 RT 4549.)

At the conclusion of the previous day's session, Juror No. 2 reported to the courtroom deputy that she heard another juror make a comment that disturbed her. (37 RT 4573.) Juror No. 2 told the judge that during the testimony of Glynn Brodbeck, that Juror No. 12 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." (37 RT 4574.) Juror No. 2 said that Juror No. 12 was serious when she made that comment to Juror No. 2. (37 RT 4574, 4576.) Juror No. 2 felt that this comment by Juror No. 12 indicated that she was not being impartial, especially since during the discussion about the handcuffing of in-custody witnesses the judge had admonished the jurors not to discuss the evidence. (37 RT 4575.)

Juror No. 2 said that Juror No. 12's comment occurred while the jurors were in the hallway waiting to enter the courtroom. (37 RT 4575.) Juror No. 2 was standing by a group of jurors who were talking. A female juror was discussing how she had quickly locked her car and entered the courtroom. Juror No. 2 said that juror made a statement similar to, "It's not like we haven't heard enough, so I'm kind of scared, I just wanted to lock my car and get out of the way." Juror No. 12 then said that, as far as she was concerned, the only truth lied in the parking lot and everything else was just lies. (37 RT 4575.) The bailiff then came out in the hallway and contacted the jurors. (37 RT 4576.)

The judge asked Juror No. 2 that, after hearing that comment, if she could still sit on the case and be impartial as she evaluated the evidence. (37 RT 4576.) Juror No. 2 replied, "Yes, I consider myself to be impartial, but I don't know about her." (37 RT 4576.) The judge then asked if anything said by Juror No. 12 tainted her so that she would be prejudiced against one of the parties. (37 RT 4576.) Juror No. 2 answered, "Absolutely not." Juror No. 2 said that she was not affected by Juror No. 12's comments regarding the handcuffing of the in-custody witnesses nor by her current comments. (37 RT 4577.)

The prosecutor asked Juror No. 2 what she heard Juror No. 12 say about the restraints. Williams's counsel objected as that not being at issue. (37 RT 4577.) The judge said that Juror No. 2 could answer that question because they had not previously spoken with her regarding Juror No. 12's comments about the restraints. (37 RT 4577.) Juror No. 2 said that she normally did not have lunch with that group of jurors. On that day, she sat with them in a circle. Juror No. 12 made a comment that it was the first African-American witness and if Juror No. 2 had noticed that his legs were shackled. (37 RT 4577.) Juror No. 2 responded, "No, I didn't. I didn't pay any attention." Juror No. 12 asked, "Well, why, because he was black?" (37 RT 4577.) Juror No. 2 said another juror said, "I would like to believe that is not the case." Juror No. 2 gathered her items and left. (37 RT 4578.) Juror No. 2 said that later during the trial they knew that the next witness [Weatherspoon] was African-American. Juror No. 12 was going to use the restroom and asked Juror No. 2 to let her know if his legs were shackled. Juror No. 12 returned from the restroom and was able to see the witness herself without any comment by Juror No. 2. (37 RT 4578.) The prosecutor and Williams's counsel had no additional questions for Juror No. 2, and she left the courtroom. (37 RT 4578-4579.)

The judge stated there was nothing more they could do that day because the jurors were not present since they would be reviewing jury instructions. (37 RT 4579.) The prosecutor asked that the court contact Juror No. 12 to discuss this matter the following morning to hear from her as the prosecutor anticipated renewing a motion to discharge Juror No. 12. (37 RT 4579.) The prosecutor argued that Juror No. 12 had made comments after the trial court had again admonished the jury not to discuss the case, and she expressed her opinion regarding the credibility of witnesses to other jurors in an attempt to influence them prior to the case being submitted to the jury. (37 RT 4579.) The trial court asked the clerk to contact Juror No. 12 to determine if she could be in court the next morning. (37 RT 4580.)

On March 12, 1998, the prosecutor filed a motion to discharge Juror No. 12 for cause. (18 CT 5043-5048.) That morning, Juror No. 12 appeared in court where she was told that another juror reported that she had expressed an opinion about a witness who had testified. (18 CT 5041; 38 RT 4620-4621.) Juror No. 12 said that she was confused and did not know what they were talking about. (38 RT 4621.) The trial court looked at his notes and quoted the juror as follows:

Last week, and I'm not sure of the date, it was during the time we had the gentleman of the Taco Bell incident - I can't remember his name. And 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.

(38 RT 4621.)

The judge said the juror attributed that statement to Juror No. 12. (38 RT 4261.) She responded, "They've got me confused with someone else. I did hear the statement. I heard that, but that's not something that I said." (38 RT 4621.) The judge asked Juror No. 12 if she could tell them who made that statement. Juror No. 12 replied that she could not, and that was everything that she heard. (38 RT 4621-4622.) Juror No. 12 said that she also heard another juror say that everyone in the courtroom was lying except the judge. (38 RT 4622.) Juror No. 12 then said, "And the parking lot statement, I'm not – see, I thought – I was talking about this parking lot over here." (38 RT 4622.)

The judge asked Juror No. 12 if she could tell them who was present and their location when the statement was made. (38 RT 4622.) Juror No. 12 responded that the statement was made when they were walking outside during a morning or lunch break. (38 RT 4622-4623.) Juror No. 12 said that she heard a statement about people telling the truth in the courtroom, but she did not know if it was in reference to the young man who was on the stand [Glynn

Brodbeck]. (38 RT 4623.) Juror No. 12 denied making the statement and said she was a big laugher and laughed as that statement was made. (38 RT 4623.) Juror No. 12 said she thought the statement was made by a female juror. (38 RT 4623.)

Williams's attorney did not question Juror No. 12. (38 RT 4623.) Dearaujo's attorney asked if any of Dearaujo's jury were nearby when the comment was made. (38 RT 4623-4624.) Juror No. 12 answered that they were going out the door and she is sure that Dearaujo's jury was not near them. (38 RT 4624.) The prosecutor did not have any questions for Juror No. 12. (38 RT 4624.)

Juror No. 12 moaned in response to the trial court thanking her for coming to court that morning. (38 RT 4624.) The trial court said that it was a capital case and they had to look into things that were reported. (38 RT 4624.) Juror No. 12 said she understood but asked if she could say something to the court. The judge responded, "Surely." (38 RT 4624.) Juror No. 12 stated:

I am a strong-opinionated person, okay. And I do have trouble with people accepting some things that I say, or they may add or whatever to that I say or whatever. And I guess that's what – it was maybe somebody would not like for me to be on the jury, to go into deliberations or whatever. I'm just wondering if, you know, if that's it, that I keep being pinpointed with things that are said or done as far as this particular trial is concerned.

(38 RT 4624-4625.)

The judge said that did not appear to be the case. (38 RT 4625.) The trial court noted that it was probably uncomfortable for Juror No. 12 to twice have been put on the spot. The judge asked if she could still be fair to both the State and the defendant, or if what had occurred had spoiled her ability to be a fair and impartial juror. (38 RT 4625.) Juror No. 12 responded as fe¹ows:

For what it's worth, Judge, I consider the source as to where the messages are coming from. And I do believe that I can be - I can be honest, because these are individual cases that are coming - they're

different, you know what I'm saying, the State and the defendant are different than I'm getting messages from other people. [¶] You're looking at me as if you don't understand what I'm saying. I feel I'm being attacked, but it has nothing to do with the separate entity.

(38 RT 4625-4626.)

The judge asked Juror No. 12 if her ability to work with the other jurors had been tainted by what had occurred. Juror No. 12 said that she did not think so because she felt secure with most of the persons on the jury. She added that she was a fair person who tried to look at things logically and make fair decisions. (38 RT 4626.) The trial court said, "We'll see you Monday." Juror No. 12 responded, "I'll cry all the way home" and left the courtroom. (38 RT 4626.)

The judge told counsel that he would have to wait to hear from the other jurors prior to making a decision. (38 RT 4627.) Williams's attorney stated that after hearing Juror No. 12, he recalled he was cross-examining Brodbeck and requested that they recess for the morning break because he needed to retrieve documents for cross-examination. Williams's attorney said that when the Red jury was leaving, he heard some muttering but he could not hear what was being said. (38 RT 4627.) The judge said that he thought they had to ask each juror whether they heard a similar statement and if so to whom it was attributable. The trial court noted that the statement reported by Juror No. 2 was a little cryptic, which he quoted exactly as it was reported. (38 RT 4627.) The prosecutor thought that they needed to conduct further inquiry of the other jurors. (38 RT 4627-4628.) The judge agreed, and said they would conduct further inquiry of the jurors when the trial resumed the following Monday. (38 RT 4628-4629.)

On the morning of March 16, the jurors were brought in individually for questioning by the trial court. (18 CT 5050; 39 RT 4684.) The following summarizes each questioned juror's responses:

The judge asked if Juror No. 1 heard a statement the previous week that indicated a juror had expressed an opinion about the case in violation of the court's admonition. (39 RT 4685.) Juror No. 1 said the other jurors had been pretty quiet and nothing came to mind. (39 RT 4685.) The prosecutor asked Juror No. 1 if on the date Brodbeck testified he heard a comment about the credibility of any of the witnesses. (39 RT 4685-4686.) Juror No. 1 responded that he could not recall any such comment. (39 RT 4685.) Juror No. 1 was admonished not to discuss this proceeding with the other jurors and was excused. (39 RT 4686.)

The judge asked Juror No. 2 to recount who was present and the comment that was made. (39 RT 4687.) Juror No. 2 said that Juror No. 12 made the comment on the day that Brodbeck was testifying. The jurors were in the hallway outside the courtroom. Juror No. 2 stated the seats were full so she stood by some jurors that were having a conversation. (39 RT 4688-4689.) An older female juror named "I." made a comment about making sure her car was locked and the windows rolled up because she previously left it unlocked, and that she wanted to get out of the lot because it was dark. Juror I. covered her mouth and said that she probably should not have made that comment. Juror No. 2 told her that she was not discussing anything about the case but only her personal experience. (39 RT 4689.) Juror No. 12 asked what Juror I. had said and Juror No. 2 recounted the comment by Juror I. (39 RT 4689-4690.) Juror No. 12 subsequently said that "as far as she was concerned, the only truth lied in the parking lot and everyone else was just lying." (39 RT 4690.) Juror No. 12 made a serious look at Juror No. 2 and then turned her back to Juror No. 2. (39 RT 4689, 4690.) The bailiff then came out to the hallway and said they could enter the courtroom. (39 RT 4689.)

The judge asked what was her understanding of Juror No. 12's comment about the truth "lied in the parking lot." (39 RT 4690.) Juror No. 2 responded

that she understood that comment to mean that Juror No. 12 felt that what had occurred in the parking lot was the truth and the everyone else was lying. (39 RT 4690.) The judge asked if any juror other than herself and Juror I. heard the comment by Juror No. 12. (39 RT 4690.) Juror No. 2 said she could not say for sure because there were many jurors having conversations in the hallway. But there was a gentleman who sat next to her in the jury box that was near them while he was sitting on the floor and reading a newspaper. (39 RT 4690-4691.) The judge asked if she was fairly certain that the comment was made by Juror No. 12. Juror No. 2 responded, "Absolutely, because I was right in front of her" when Juror No. 2 approached another female juror who had a similar job and they discussed work-related issues. (39 RT 4691.) Williams's attorney had no questions for Juror No. 2. (39 RT 4691.) In response to questions by the prosecutor, Juror No. 2 said that the conversation occurred during a break on the date when Brodbeck was testifying about the incident at the Taco Bell parking lot. (39 RT 4691-4692.)

Juror Nos. 3, 4 5, 6, 7, 8, 9, 10 and 11 did not recall hearing a comment reflecting on the credibility of a witness or about the case during a break on the date that Brodbeck testified about the incident at the Taco Bell parking lot. (39 RT 4693-4707.)

Juror No. 12 entered the courtroom and prior to being addressed by the judge she said, "I'm paranoid, I'm paranoid." (39 RT 4707.) The trial court said they were following up on what already discussed and asked if Juror No. 12 had thought about anything else that reflected on that statement. Juror No. 12 responded, "No." (39 RT 4708.) Neither defendant's counsel nor the prosecutor questioned Juror No. 12. (39 RT 4708.)

The judge noted that Alternate No. 1 had been seated on the jury, so Alternate No. 2 was called. (39 RT 4708.) Alternate No. 2 did not recall hearing a juror make a comment about the credibility of a witness while they were on a break on the date of the testimony about the Taco Bell incident. (39 RT 4710.) If a juror had made such a comment, it would have made an impression on Alternate No. 2, who takes a lot of notes. (39 RT 4710.) Alternate No. 2 added that there were a couple of times where Alternate 2 thought that other jurors might discuss a topic they should not get into, but the jurors would realize that and stop the conversation. Alternate No. 2 did not recall any other juror say anything in particular about the case. (39 RT 4710-4711.)

The judge informed Alternate No. 3 that they were inquiring about a comment by a juror who expressed an opinion about the credibility of witnesses that took place on the date of the testimony about the Taco Bell incident. (39 RT 4711-4712.) The judge asked if Alternate No. 3 had heard anything from a juror that would be similar to what the trial court had described. (39 RT 4712.) Alternate No. 3 responded, "Similar to what you are describing, no. I have heard a juror mention that somebody said something, probably what you are stating now, but that's it." (39 RT 4712.) Alternate No. 3 added that he heard a juror say that the juror thought that [Juror No. 12] "has her mind made up." (39 RT 4712-4713.) Alternate No. 3 confirmed that those comments came later, and were not related to, the issue regarding restraints of the incustody witnesses. (39 RT 4713.) Alternate No. 3 later indicated that he overheard a juror say that she was upset about a comment that was made by Juror No. 12. (39 RT 4712, 4714-4715.) In response to the prosecutor's questions, Alternate No. 3 said the comment he overheard could have occurred on the same day that Brodbeck testified. (39 RT 4716.) Juror No. 3 did not hear any other juror make a comment about the credibility of a witness. (39 RT 4716.)

Alternate No. 4 could not recall hearing a juror say that she heard another juror state an opinion about the credibility of a witness on the day the testimony of the Taco Bell incident was received by the jury. (39 RT 4717-4718.)

Alternate No. 5 also did not recall any such comment. (39 RT 4719.) Alternate No. 5 said that "everyone wants to talk about the case, but nobody does. As soon as they think about it, they stop, so we try to talk about food most of the time." (39 RT 4719.) Alternate No. 5 affirmed to the trial court that it was Alternate No. 5's experience that when a juror got close to the point where he or she was close to talking about the case, they exercised selfdiscipline and would then discuss an innocuous topic. (39 RT 4719-4710.) Alternate No. 5 said that about half the time he went to lunch by himself because he had things to do, and the other half with one or two other jurors. So Alternate No. 5 had not heard any other jurors make any remarks about the case. (39 RT 4720.)

The prosecutor renewed her motion to discharge Juror No. 12. (39 RT 4720-4721.) The prosecutor argued that Juror No. 12's denial that she made the comment regarding the credibility of witnesses during testimony about the Taco Bell incident was not credible. Juror No. 2, who reported the comment, was clear and precise that it was Juror No. 12 who made the comment, what the comment was, and that she was quite upset about that comment. (39 RT 4721.) The prosecutor also argued that Alternate No. 3 corroborated that Juror No. 2 was upset about remarks that had been made by Juror No. 12. (39 RT 4721.) The prosecutor further argued that Juror No. 12 should be discharged because she violated the trial court's repeated admonition by forming an opinion about the case and expressing it to other jurors both on the date that Brodbeck testified, as well as during her previous comments where she told other jurors that the shackling of the African-American in-custody witnesses was based on their race. (39 RT 4722.)

The prosecutor argued that there were three separate occasions where Juror No. 12 had violated the trial court's admonition that a juror not discuss the case until all of the evidence was received and the case was submitted to the jury. (39 RT 4722.) First, Juror No. 12 made a remark about an in-custody witness being shackled because he was African-American when the jurors were seated in the courtroom as counsel were in the hallway waiting to see the trial judge; Second, that day during lunch Juror No. 12 reiterated her remark that it was the African-American jurors who were being shackled; and, Third, after being admonished by the trial court in chambers, as well as the juries being admonished in open court, Juror No. 12 made a remark that directly went to the merits of the case in clear disregard of the admonishment that a juror not form or express an opinion about the case and not discuss matters connected with the case. (39 RT 4722-4723.) The prosecutor asserted that the trial court had to make a credibility determination between Juror No. 2, who was adamant that Juror No. 12 made the remark and had no motive to accuse Juror No. 12, and Juror No. 12 who claimed that some other juror made a remark that everyone but the judge was lying. (39 RT 4724.) The prosecutor argued that if the trial court concluded that Juror No. 12 made the remark, she should be discharged from the jury for cause. (39 RT 4724.)

Williams's counsel argued that the persons who heard Juror No. 12's comments did not feel it was very significant or that it was a comment about the evidence presented in the case, but only that the comment was upsetting to Juror No. 12. (39 RT 4725-4727.) Williams's counsel further argued that sometimes jurors realized they were getting into areas they should not discuss and they stopped. He suggested this might have been an incident where that occurred. Williams's counsel argued that the comment attributed to Juror No. 12 was not very clear as to whether it stated an opinion regarding the merits of the case or

the credibility of a witness, so it did not constitute a sufficient basis to discharge Juror No. 12. (39 RT 4726.)

After the noon recess, the judge and counsel convened outside the presence of the jury. (39 RT 4726.) The prosecutor argued that Juror No. 12 was a very intelligent woman with a master's degree who denied making the comment so that she would not be excused from the jury. The prosecutor argued the People would not get a fair trial if Juror No. 12 remained on the jury. Williams's counsel submitted. (39 RT 4727.) Dearaujo's counsel noted that the inquiry of the Red jury showed there was no contact with Dearaujo's jury. (39 RT 4727-4728.)

The trial court concluded that cause was shown to discharge Juror No. 12 and granted the prosecutor's motion. (18 CT 5050; 39 RT 4730, 4739.) The judge noted that he reviewed the transcripts of the testimony regarding the various incidents that involved Juror No. 12. (39 RT 4728.) The first incident regarded the restraint of in-custody witnesses. The trial court noted that Juror No. 12's comment, which she shared with other jurors, reflected a racial bias that James H. and Mondre Weatherspoon were restrained because they were African-American and not because of a security interest. (39 RT 4728.) After the judge inquired of Juror No. 12 and explained the basis for the restraints, Juror No. 12 indicated that it would not affect her ability to be a fair and impartial juror. The judge noted that Juror No. 12 stated that one of the things she learned from that incident was not to share her opinions with other jurors. (39 RT 4728.)

The judge stated that the second comment by Juror No. 12 had a direct bearing on the merits of the case. While the initial part of the statement, "the truth lies in the parking lot," could be construed various ways. But the second part about all the other witnesses lying was not ambiguous and directly violated the trial court's admonition that a juror not form or express an opinion on matters regarding the case until all the evidence had been received. (39 RT 4828-4729.) The judge noted that Juror No. 12 made this statement after the court forcefully reminded all the jurors in open court about their duties as jurors after the incident regarding Juror No. 12's first comment. (39 RT 4729.)

The judge stated that Juror No. 12 had committed three legal violations: first, she formed an opinion about the merits of the case prior to the case being submitted in violation of a court order; second, she expressed that opinion to other jurors; and, third, when confronted about making the statement, she lied. (39 RT 4729.) The judge concluded that Juror No. 12 was not credible when she denied making the comment. But Juror No. 2 was credible and had no motive to make up an allegation against Juror No. 12. (39 RT 4729.) The judge stated that Juror No. 12 had shown a predisposition to see things through her own bias, and her belief that other jurors wanted her off the jury would affect her ability to evaluate the evidence without being distracted by outside factors or considerations. (39 RT 4729-4730.) The judge further stated that Juror No. 12's inability to be truthful with the court, and her direct violation of the admonition that she not form or express an opinion until the case was concluded, indicated that Juror No. 12 lost her ability to fulfill her duties as a juror and comply with her oath. (39 RT 4730.) The judge stated that he reluctantly concluded that Juror No. 12 should be discharged and replaced with an alternate juror. (39 RT 4730.)

The judge informed Juror No. 12 she was discharged from the jury and thanked her for her service. (39 RT 4731.) In open court, the judge noted that both juries were present except for Juror No. 12, who had been excused and Alternate No. 2 was asked to take her place. The judge stated that all jurors had been sworn, so they did not have to take an additional oath. The judge admonished the jury of their duty not to discuss any subject connected to the

trial, and not to form or express an opinion until the case was fully submitted for their verdict. (39 RT 4731.) The trial court properly excused Juror No. 12.

In order to reach a conclusion that there was a demonstrable reality of cause to discharge a juror, this Court:

will consider not just the evidence itself, but the record of the reasons the court provides. A trial court facilitates review when it expressly sets out its analysis of the evidence, why it reposed greater weight on some part of it and less on another, and the basis of its ultimate conclusion that a juror was failing to follow the oath. In taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality.

(People v. Barnwell, supra, 41 Cal.4th at p. 1053.)

In the instant case, the trial court did not abuse its discretion by discharging Juror No. 12 because the evidence demonstrates that Juror No. 12's refusal to follow the trial court's admonishment not to form or express an opinion until the case was completed and all the evidence was received (see 39 RT 4728-4731). (*People v. Williams, supra,* 25 Cal.4th at p. 441; *People v. Daniels, supra,* 52 Cal.3d at p. 865.) Williams claims that race was a factor because Juror No. 12, who is African-American, was twice singled out for questioning about comments she made. (AOB 147.) But Williams's counsel failed to object to her discharge on those grounds at trial. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 987, fn. 16 [holding a criminal Williams waived his right to object to the trial court's discharge of a juror on federal constitutional grounds due to his failure to state his objections on those grounds at trial].) It is a speculative claim that has no basis in the record.

Williams also speculates that the misconduct allegation against Juror No. 12 was a way to get rid of an obstreperous juror rather than for any actual wrongdoing. (AOB 148.) That contention also lacks any support in the record. The trial court clearly admonished the juries, including Juror No. 12, that it was their duty as jurors not to discuss amongst themselves or with anybody any subject connected with the trial. Their duty as jurors also included not forming an opinion about the case, or expressing it to anyone, until the case was concluded and submitted to the respective jury for a verdict. (16 RT 2233.) At every recess and break, including on the dates when Juror No. 12 stated her opinions to the other jurors, the trial court instructed the jurors to "remember the admonishment." (29 RT 3965, 3980, 4018, 4061 [February 25, 1998, date of the testimony of James H. and Mondre Weatherspoon]; 34 RT 4493, 4513 [March 5, 1998, date of the testimony of Glynn Brodbeck].)

The jurors were mindful of the trial court's admonition. During the inquiry of the Red jury, Alternate Nos. 2 and 5 stated that if a juror was close to talking about the case, he or she would exercise self-discipline and stop the conversation or change the topic. (39 RT 4710-4711, 4720.)

Juror No. 12 was highly intelligent and educated, but she could not exercise the same self-discipline as other jurors in following the admonition. During the inquiries, Juror No. 12 admitted to the trial court that she was a "strong-opinionated person" who had "trouble" with others not accepting her opinions and made the "mistake" of expressing her opinions to other jurors prior to the case being submitted for their consideration. (30 RT 4074; 38 RT 4624-4625.)

Juror No. 12 told three other jurors her opinion that two in-custody witnesses testified while handcuffed because they were African-American. James H. and Weatherspoon testified with handcuffs because of courtroom security considerations that arose from the threatening verbal exchange between James H. and Dearaujo. (29 RT 4009-4011; 30 RT 4066, 4078.) Juror No. 12, however, formed an opinion that they were handcuffed because of their race and expressed that she was upset as a result. (30 RT 4063, 4072.) Juror No. 12 disregarded the trial court's reminder of the admonishment prior to the morning and lunch breaks that date (29 RT 3965, 3980, 4018) and expressed her opinion

to Jurors Nos. 2, 6 & 7 during the morning and lunch breaks. (18 CT 5130-5151; 30 RT 4063-4064, 4072, 4078-4079; 37 RT 4577-4578.) Juror No. 6 was troubled that Juror No. 12 would make such a comment to another juror, so she reported it to the trial court. (18 CT 5130-5131; 30 RT 4064.) The trial judge believed that Juror No. 12's opinion demonstrated a racial bias. (39 RT 4728.) But the judge denied the prosecutor's motion to discharge her at that time because Juror No. 12's comment regarding handcuffing was as to the ancillary matter of courtroom security rather than the merits of the case. (31 RT 4209-4211.) The judge accepted Juror No. 12's claim that she understood that courtroom security was the basis for restraining those witnesses. The judge also accepted her claim that she would not allow that incident to affect her ability to be a fair and impartial juror. (30 RT 4073-4074; 31 RT 4211.) The judge also relied on its reminder to both juries in open court of the admonishment, as well as its advisal that the restraint of a witness had not an issue regarding the credibility of that witness. (30 RT 4097-4098; 42 RT 4211.)

Five court days later, on March 5, Juror No. 12 again disregarded the trial court's advisal and repeated her acknowledged "mistake" of stating her opinion to other jurors. (18 CT 5040; 37 RT 4735.) Juror No. 12 told Juror No. 2 that as far as Juror No. 12 was concerned, "the truth lied in the parking lot" and "everyone else was just lying." (37 RT 4574, 4576.) Juror No. 2 reported that statement because the trial court made a point of reminding the jurors of their admonishment not to discuss the case after the incident Juror No. 12 commented about the shackling of James H. and Weatherspoon. (37 RT 4575.) Later, when Juror No. 12 was initially confronted about making the statement, she initially claimed she did not make that statement, but heard it. (38 RT 4621.) Juror No. 12 then claimed she heard a juror comment that everyone in the courtroom was lying except the judge. (38 RT 4622.) Juror No. 12 then admitted making a statement, but claimed it had to with the parking

lot at the courthouse as follows: "And the parking lot statement, I'm not – see, I thought – I was talking about this parking lot over here." (38 RT 4622.) The next day there was an inquiry of all the jurors. (18 CT 5050; 39 RT 4684.) As soon as Juror No. 12 entered the courtroom she said, "I'm paranoid, I'm paranoid." (39 RT 4707.)

Based on the foregoing, the trial court properly determined that Juror No. 12 was not credible when she denied making the statement to Juror No. 2. (39 RT 4729.) The trial court found suspicious her remark that she was a "laugher" and laughed when she heard another juror make that statement. (38 RT 4623; 39 RT 4729.) The trial court found that remark cast suspicion on Juror No. 12's story and "didn't have the ring of truth." (39 RT 4729.) The trial court's determination that Juror No. 12 lied when she denied making the statement is supported by the evidence and is entitled to deference. (See *People* v. Barnwell, supra, 41 Cal.4th at p. 1053 [reviewing court to afford deference to a trial court's factual determinations based on first-hand observations of juror who exhibits disqualifying bias during deliberation].) The trial court found Juror No. 2's testimony about Juror No. 12's statement to be credible and that she lacked a motive to fabricate such an allegation. (See Id. at p. 1052 ["Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfied that the [substantial evidence] standard is sufficient to uphold the finding [of good cause]."].)

Williams claims that Juror No. 12's statement to the other jurors was not an opinion about the merits of the evidence, but was the type of "speculation" on the weight of conflicting evidence regarding the incident at the Taco Bell parking lot which this Court has not characterized as misconduct. (AOB 146-147, citing *People v. Majors, supra*, 18 Cal.4th at pp. 424-425.) But *Majors* clearly states that it is "serious misconduct" for a juror to violate the duty set forth in section 1122, subdivisions (a) & (b) to not "converse amongst themselves or with anyone else or any subject connected with the trial, or . . . form or express any opinion thereon until the cause is finally submitted to them." (*People v. Majors, supra*, 18 Cal.4th at pp. 422-423.) In *Majors*, this Court upheld a trial court's finding, including credibility determinations, that discussions between jurors prior to the case being submitted did not focus on the evidence or the outcome of the case so that Williams failed to state that such misconduct occurred. (*Id.* at pp. 424-425.) This was so because there was no concrete evidence that the jurors made improper statements about the evidence or the merits of the case. (*Id.* at p. 425, citing *People v. Kramer* (1897) 117 Cal. 647, 649.)

Here, the trial court found that Juror No. 12 made a statement that clearly went to the merits of the case before the case was submitted to the jury in violation of the trial court's admonishment that was consistent with section 1122, subdivisions (a) & (b). (39 RT 4729.) Juror No. 12 made the statement when Glynn Brodbeck was testifying about the incident at the Taco Bell parking lot. (39 RT 4688-4689.) The trial court noted that the initial part of Juror No. 12's statement, "the truth lies in the parking lot," could be construed various ways. But her statement that "everyone else was just lying" was a clear expression of Juror No. 12's opinion regarding the merits of the case. (39 RT 4828-4729.) Juror No. 12's behavior and demeanor provided substantial evidence for the trial court's decision to discharge her, despite her claim that she could remain fair and impartial. (*People v. Lucas* (1995) 12 Cal.4th 415, 489.)

Williams's contention that the discharge violated the federal Constitution is based on an argument that the discharge violated section 1089. (AOB 148-151.) This Court has rejected that premise and held that section 1089 "does not offend constitutional proscriptions." (*People v. Collins* (1976) 17 Cal.3d 687, 691.) Since the trial court did not violate that statute, it necessarily disposes of Williams's constitutional claims. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1410.) The record shows a demonstrable reality that Juror No. 12 violated the trial court's admonishment and had made her mind up about the case prior to its final submission to the jury. There was thus substantial evidence supporting the trial court's cautious decision to discharge Juror No. 12 and seat an alternate juror.

II.

THE TRIAL COURT PROPERLY DISCHARGED JUROR NO. 10 WHO WAS SLEEPING AND REFUSED TO DELIBERATE

Williams contends he was deprived of his constitutional rights to a fair trial, trial by jury, a unanimous verdict, due process and a reliable guilt and sentencing phase in a capital case (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, § 16) because the trial court discharged deliberating Juror No. 10, without good cause and without making an inquiry of Juror No. 10. (AOB 152-202.) There was no abuse of discretion because the discharge was supported by evidence that Juror No. 10 was sleeping and violated her duty as a juror by refusing to deliberate after a proper and sufficient inquiry of the jurors was conducted. (See 45 RT 5423-5425.)

A defendant has a constitutional right to a trial by an impartial jury. That is one in which no member has improperly been influenced, and every member is "capable and willing to decide the case solely on the evidence before it." (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294.) The right to an impartial jury means the

Williams is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to a unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citations.]

(People v. Nesler (1997) 16 Cal.4th 561, 578.)

Under section 1089, a trial court may discharge a juror if good cause is shown that the juror is unable to perform his or her duty. In *People v. Bonilla*, *supra*, 41 Cal.4th 350, this Court stated:

The trial court has the authority to discharge jurors for good cause, including sleeping during trial. [Citation.] When the trial court receives notice that such cause may exist, it has an affirmative obligation to investigate. [Citation.] Both the scope of any investigation and the ultimate decision whether to discharge a given juror are committed to the sound discretion of the trial court.

Courts have refused to discharge a juror for sleeping absent convincing proof that the juror actually slept during material portions of the trial. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.)

Section 1089 has also been applied to permit the removal of a juror who refuses to deliberate on the theory that such a juror is "unable to perform his duty" within the meaning of that section. (*People v. Cleveland, supra*, 25 Cal.4th at p. 475.) This Court has defined refusal to deliberate as:

consist[ing] 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.

(People v. Leonard, supra, 40 Cal.4th at pp. 1410-1411, quoting People v. Cleveland, supra, 25 Cal.4th at p. 485.)

When a trial court is alerted to the possibility of juror misconduct, "the court 'must "make whatever inquiry is reasonably necessary" 'to resolve the matter." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255, quoting *People v. Hedgecock* (1990) 51 Cal.3d 395, 417.) A court has "considerable discretion" in conducting the requisite investigation (*People v. Prieto* (2003) 30 Cal.4th 226, 274.), including interviewing the individual jurors (*People v. Thomas*

(1990) 218 Cal.App.3d 1477, 1482). The trial court, however, must be cautious that its investigation does not intrude on the independent deliberative processes of the jury. (*People v. Cleveland, supra*, 25 Cal.4th at p. 475; *People v. Keenan* (1988) 46 Cal.3d 478, 535-536.)

As previously discussed, on March 16, 1998, Juror No. 12 was discharged and replaced by Alternate No. 2. (18 CT 5050-5051; 39 RT 4731.) On March 18, 1998, both parties rested their guilt phase cases and closing arguments began. (18 CT 5053; 41 RT 4960.) On March 23, 1998, the trial court instructed the jury, and then it retired to begin deliberations. (18 CT 5055; 43 RT 5118-5172.) The jury deliberated on March 24, 25 and 26. (18 CT 5056-5058.)

On March 26, Juror No. 10 requested to see the judge regarding a personal matter. (18 CT 5152; 45 RT 5303, 5305.) In chambers, Juror No. 10 said her driver's license had been suspended. She inquired if her jury service could be considered to be community service because she did not want to drive to court with a suspended license. (45 RT 5307.) The judge and counsel advised her to speak with the traffic commissioner regarding this matter. (45 RT 5308-5310.) Juror No. 10 concluded her discussion about her suspended license, and the following exchange occurred:

Juror No. 10: I can ask this while I'm here before I go back [to deliberation]. What is not deliberating? If you don't have any comments, is that considered not deliberating?

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. Okay. Thanks.

(45 RT 5310-5311.)

After Juror No. 10 left chambers, the prosecutor expressed a concern to the judge and Williams's counsel that they may have left Juror No. 10 with the impression that it was permissible for her to say that she had made up her mind and would not talk about it anymore with the other jurors. The prosecutor's concern was raised when Juror No. 10 said, "I'll take note of that." (45 RT 5311-5313.) The trial court said that if the prosecutor felt that the court left Juror No. 10 with an incorrect impression, they could speak with her again. (45 RT 5313.) The prosecutor asked that they again speak with Juror No. 10 because she did not think that a juror who said, "I've made up my mind, I'm not going to change it" was not deliberating. (45 RT 5313.)

Juror No. 10 was summoned to chambers and the following discussion occurred:

The Court: We asked that you come back in here in because the attorneys felt that I perhaps left you with the wrong impression when you asked what it means to not deliberate.

Juror No. 10: Oh.

The Court: And the appropriate response should have been that if the jury has a question regarding the subject, the foreperson should direct a note to the Court in this regard and the Court would address to the jury as a whole on the subject –

Juror No. 10: Okay.

The Court: rather than an individual going back and saying, well, the Court told me such and such, which would be improper.

Juror No. 10: Oh.

The Court: So we hope you return to the jury and resume deliberating.

Juror No. 10: Oh, it was just something that I wanted to know.

The Court: Okay.

Juror No. 10: Okay.

The Court: Thanks.

Juror No. 10: Thank you.

(45 RT 5317-5318; see 18 CT 5153 [written note].)

On March 30, the jury resumed deliberations. (18 CT 5064.) Juror No. 9 entered chambers and asked to be excused because she had been struggling with her conscience during deliberations to the point of becoming physically ill. (45 RT 5323.) Juror No. 9 said that even though the evidence was sufficient to convict Williams of first degree murder as an aider and abettor, she admitted that she could not follow the law and impose the special circumstance because Williams was not the actual shooter. (45 RT 5323-5324.) Juror No. 9 left chambers. (45 RT 5325.) After argument by counsel, including argument by Williams's counsel that it was premature to excuse Juror No. 9 (45 RT 5325-5326), the trial court granted the prosecutor's motion to discharge Juror No. 9. (45 RT 5627, 5329-5330.) Juror No. 9 was discharged and replaced with Alternate No. 3. (18 CT 5064; 45 RT 5331.)

Later that day, Alternate No. 4 was contacted about a death in the family. Alternate No. 4 was placed on call. (18 CT 5064.) Juror No. 1 had written a letter to the court and asked to be excused from duty because his terminally ill wife was being released from the hospital and he needed to care for her. (19 CT 5156-5160; 45 RT 5321.) The judge and counsel concurred that they would ask Juror No. 1 to continue to deliberate. (45 RT 5321-5322.) The judge informed Juror No. 1 that they had taken his request under advisement and asked him to continue to deliberate. (45 RT 5331.) After a recess, Juror No. 1 was called outside the presence of the other jurors and informed that he was excused from duty. No objection by counsel was noted on the record. (45 RT 5335-5336.) In the presence of the jury, the trial court noted that Juror No. 1 had been excused and was replaced by Alternate No. 5. (18 CT 5064; 45 RT 5337.)

On March 31, the jury continued deliberations. (18 CT 5066.) The next day, the trial court and counsel convened in chambers. (45 RT 5349.) The courtroom deputy informed the court and counsel that when he walked out to the hallway to escort the jurors to the jury room the jurors noted that Juror No. 10 was missing and asked where she was. (45 RT 5349.) One of the jurors inquired if she was talking to the trial court, and the deputy said no. (45 RT 5349.) The jurors told the deputy they wanted to speak to the judge, either individually or as a group about Juror No. 10. (45 RT 5349.)

The judge told counsel that Juror No. 10 had called in sick. (45 RT 5349.) The courtroom clerk explained that she received a recorded telephone message from Juror No. 10 who said she was running a temperature and was going to see the doctor, so she would not be present in court that day. (45 RT 5349.) About 30 minutes later, the clerk received another voicemail from Juror No. 10, who stated that she was not going to see the doctor because she had diarrhea and would be staying home that day. (45 RT 5349.) The clerk then

contacted the attorneys to inform them about the voicemails. (45 RT 5349.) The clerk was eventually able to speak with Juror No. 10, who said her telephone had been off the hook, her voicemail machine in the living room and she was not able to timely get the clerk's message that she call the court. (45 RT 5350.) Juror No. 10 said that she would not be able to make it to court by 1:30 p.m. because she was not feeling well and was still running a temperature. (45 RT 5350.) The clerk asked if Juror No. 10 could make it to court the following morning at 9:30 a.m. Juror No. 10 said she hoped so, but would call the clerk around 4:30 p.m. to indicate how she was feeling. (45 RT 5350.)

The judge told counsel that he was reluctant to leave the other 11 jurors stewing in their frustrations and was inclined to hear what they had to say. (45 RT 5350.) The courtroom deputy added that he sensed the jurors's frustrations preceded the fact that Juror No. 10 was late that day, and he thought it was some other problem. (45 RT 5350.) The prosecutor noted that Juror No. 10 was chronically late, and had some issues with staying awake during the course of the trial. (45 RT 5350.) Williams's counsel disputed that Juror No. 10 was chronically late. He acknowledged that Juror No. 10 had been late on occasions, but not in a way to disrupt the proceedings. Williams's counsel did not comment about Juror No. 10 having trouble staying awake. (45 RT 5350.) Williams's counsel argued that it was only one day that Juror No. 10 had been ill, and he felt it was not proper to discuss any concerns or problems the jurors were experiencing without all the jurors being present. (45 RT 5351.) The judge responded that he was not concerned about Juror No. 10's illness as they had been fortunate that it occurred minimally during the trial. The judge's concern was with the agitation felt by the jurors. (45 RT 5351.) The prosecutor disagreed with Williams's counsel's position that they could not inquire about the jurors's frustrations without all the jurors being present. (45 RT 5355.)

The judge proposed that they could ask the jury foreperson to put in writing the nature of their concern without formally convening the jury. (45 RT 5357.) Williams's counsel argued that they did not have information that there was a problem with Juror No. 10's deliberation or interaction with the other jurors to rise to the level of cause to require an inquiry of the jurors. (45 RT 5358.) The judge replied that, until they heard something specific from the jurors, they would not know why the jurors practically attacked the courtroom deputy in the hallway to say that they wanted to speak with the court either individually or collectively about Juror No. 10. (45 RT 5358.) The trial court suggested that the jury foreperson write down the nature of the problem. That way they could decide if it was something that could wait until the next day when they would better know the status of the impact of Juror No. 10's illness on her ability to rejoin deliberation because they were facing time pressures. (45 RT 5358-5359.) Williams's counsel submitted on the matter. (45 RT 5358.)

The judge asked the courtroom deputy to ask the foreperson to write out what the jurors wanted to address to the court and then provide it to the clerk. (45 RT 5359.) A recess was taken. (45 RT 5359.) The foreperson, Juror No. 3, wrote the following note:

Regarding juror number 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. Upon her return from lunch she mentioned at the table that 'My lawyer can put holes on 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 on juror number 11. [¶] There is a

number of issues that other jurors would like to discuss with you. Sorry for the inconvenience.

(19 CT 5168-5169.)

After the recess, both counsel acknowledged reading the foreperson's note. (45 RT 5359.) The prosecutor suggested that, based on the allegations contained in the note, the trial court needed to conduct an inquiry of the jurors. (45 RT 5339.) The prosecutor argued that they could inquire of the jurors that afternoon and perhaps ask Juror No. 10 to come to court early the next morning so they could speak with her. (45 RT 5359-5360.) Williams's counsel stated that would be appropriate. (45 RT 5360.)

The judge noted that they had to deal with the reference in the note that Juror No. 10 may be consulting outside sources, and asked if there were any other areas of inquiry. (45 RT 5360.) The prosecutor suggested they should also inquire about Juror No. 10 sleeping during deliberations, and whether she was protracting deliberations to avoid return to work. (45 RT 5360.) The prosecutor stated that the judge had to talk with Juror No. 10 about sleeping during trial on the date that the tape of Williams's statements to police were played to the jury. (45 RT 5360.) The judge replied, "Well, there had been problems with her sleeping before." (45 RT 5360.) The judge said the first time he noticed her sleeping he did not say something to Juror No. 10 because he did not want to embarrass her. (45 RT 5360.) The judge noted that he had the courtroom deputy take a glass of water to Juror No. 10 as a way to wake her, which she rejected. The trial court commented that Juror No. 10 could at least turn the pages of the transcript over in unison with the other jurors and Juror No. 10 snapped back at the judge. (45 RT 5361.)

Thereafter, the trial court asked Williams's counsel if he had any suggestions regarding the inquiry of the jurors. Williams's counsel responded that he had no suggestions at that time. (45 RT 5361.)

After the noon recess, outside the presence of the jury the judge noted that when they previously spoke with Juror No. 10 she stated that she did not associate with the other jurors and avoided other persons. (45 RT 5362.) The jurors were questioned individually, and the following summarizes each questioned juror's responses:

The foreperson, Juror No. 3, said the jury was frustrated with Juror No. 10. (45 RT 5363.) Juror No. 3 described that during deliberations they go around the table to allow each juror to speak. While this occurred, Juror No. 10 appeared to be sleeping. Her eyes were closed and her head was up against the wall as the jurors conducted their discussions. (45 RT 5363.) The previous day, during deliberations, Juror No. 3 and three other jurors observed Juror No. 10 and they all thought that she was sleeping. (45 RT 5363.)

When the jury discussed a topic in this manner, when it was Juror No. 10's turn she has no comment. Juror No. 10 refused to participate in discussions and the other jurors did not know her opinion. (45 RT 5363, 5368.) During discussions, Juror No. 10 would get up and leave to go to the bathroom. When Juror No. 10 returned and the other jurors went back over the topic they were discussing, Juror No. 10 did not offer her opinion. (45 RT 5364.) Juror No. 3 stated that the previous day the jury took a vote. When Juror No. 10 returned after the noon break, she stated: "I don't remember voting on that." (45 RT 5364.)

Juror No. 3 stated the previous week that they would read a charge, he would inquire if any the jurors wanted to discuss it and then they would proceed to vote on the charge. After voting on the charge, they would move on to the next charge. (45 RT 5364.) After moving on for an hour or so, Juror No. 10 would bring up a point about a charge they had already voted on. (45 RT 5364.) If any juror had a question, it was written down and Juror No. 3 read it to the other jurors and they discussed it. But when they reached Juror No. 10

she had nothing to say. During discussions on a topic, most of the jurors would refer to their notes and noted similar things. When the discussion reached Juror No. 10, she would not want to discuss that topic. (45 RT 5365, 5368.) Juror No. 3 noted that on an occasion when Juror No. 10 disagreed she said, "I don't believe it is this way." When she was asked to discuss why she disagreed, Juror No. 10 would refuse to discuss it with the other jurors and would state that was her opinion and "that is it." Since Juror No. 10 was not discussing the topics, he asked that she write down her point of view so that they could discuss why she did not agree or felt a certain way. But Juror No. 10 refused to do it. (45 RT 5363-5364, 5368.) Juror No. 10 would not discuss with the other jurors her feelings towards the facts or the law in the case. (45 RT 5368.)

Juror No. 10 also noted that 30 to 45 minutes prior to the lunch break, or prior to the end of the day, Juror No. 10 would refuse to deliberate and just "clams up." Even after agreeing to take a vote, Juror No. 10 would say that she had a headache and did not want to discuss that charge or state, "I'm not going to vote until we get back." (45 RT 5365.) Juror No. 3 saw Juror No. 10 jot things down on pieces of paper when she went though the counts and jury instructions. Other jurors noticed that Juror No. 10 had taken papers out of the jury room when she left for lunch. Upon returning from break, Juror No. 10 would change her opinion on a topic and would raise questions regarding legal terms. (45 RT 5365-5366.) On March 31, when they returned from lunch, in reference to the transcript of Williams's interview by police, Juror No. 10 said that her lawyer "could poke holes in this thing." (45 RT 5367, 5370.)

Juror No. 3 said that Juror No. 10 told him that she did not want to return to work so she wanted deliberations to go as long as possible. (45 RT 5367.) Juror No. 10 made a similar statement that she did not want to return to work to at least two other jurors, and that she needed some time to file a stress claim to avoid returning to work. (45 RT 5367.) Juror No. 3 said it was his

impression, and that of other jurors, that the longer they were in court the better it was for Juror No. 10. (45 RT 5368.)

The prosecutor asked if Juror No. 10 refused to express to the other jurors the reasons for holding a particular view regarding an evidentiary issue. Juror No. 3 responded, "She just doesn't want to tell us." (45 RT 5369.) Juror No. 3 explained that when they ask Juror No. 10 why she believed something was a certain way, Juror No. 10 responded, "Because that is the way I believe," and she provided no reason or explanation for her position. (45 RT 5369.) Juror No. 3 said that he took the extra step of asking Juror No. 10 to write down her reasons for any disagreement so that the jurors could discuss it, but Juror No. 10 refused. (45 RT 5369.) The prosecutor asked for Juror No. 3's view on whether Juror No. 10 was engaged in a give-and-take process with the other jurors. (45 RT 5369-5370.) Juror No. 3 responded, "In my view, no. She... does not accept our views at all. She's closed her mind. If we break it down step by step, she does not open her mind to anything we say." (45 RT 5370.)

Williams's counsel said the previous Monday they had a juror who expressed a difficulty with reaching opinions. He asked Juror No. 3 if the jury's frustration had to do with Juror No. 10, or something that was going on with other jurors as well. (45 RT 5371.) Juror No. 3 stated that the jury tried to be fair and put aside their personal feelings and follow the law as instructed by the court during deliberations, but they did not know what to do regarding Juror No. 10. (45 RT 5371.) Juror No. 3 said that during the previous week of deliberations the issue of whether race had anything to do with the case was brought up and they "sort of talked about it." Juror No. 3 commented that race had nothing to do with the case. The juror who was previously excused [Juror No. 12] took that comment personally and they had a little blow up. Juror No. 3 apologized to all the other jurors and he thinks that most of the jurors accepted his apology. (45 RT 5372.) Juror No. 3 said that it was his feeling

and that of the other 10 jurors that they have tried to proceed with deliberations but could not currently do so because of Juror No. 10. (45 RT 5372.) The judge told Juror No. 3 that they intended to speak with the other jurors and admonished him not to divulge their discussions. (45 RT 5372.)

Juror No. 1 acknowledged seeing Juror No. 10 sleep during deliberations. (45 RT 5374.) Juror No. 1 sat across the table from Juror No. 10 and observed her attention stopped and her eyes closed when the discussion reached the second juror seated past her. Juror No. 10 would keep her eyes closed for at least 15 minutes while the discussion continued. After Juror No. 10 opened her eyes, she would not say anything. (45 RT 5374.) Juror No. 1 said this began to occur after the jury had been deliberating for a day and one-half. (45 RT 5375.)

Juror No. 1 was not aware of Juror No. 10 prolonging deliberations to avoid returning to work. (45 RT 5375-5376.) Juror No. 1 could not see if Juror No. 10 was writing anything down during deliberations. But Juror No. 1 said there was a feeling that Juror No. 10 had been consulting outside sources even though she had not stated that to Juror No. 1. (45 RT 5376.) Juror No. 1 said that Juror No. 10 "very reluctantly" discussed her viewpoint with other jurors. Juror No. 1 explained that Juror No. 10 only stated if she liked or disliked something, but did not offer any detail or explanation for her position. (45 RT 5376.) Juror No. 10 had been asked to state the basis for her position either verbally or in writing, but Juror No. 10 would not do so. Juror No. 10 also had not stated why she refused to do that. (45 RT 5377.)

The prosecutor asked what caused Juror No. 1 to have an impression that Juror No. 10 may be consulting outside sources. Juror No. 1 explained that prior to lunch the jury would vote on an issue. After the break, Juror No. 10 returned with her lunch and within three minutes began to question something that they concluded discussing prior to the lunch break. Juror No. 10 started to question a technical part of the charges as written. (45 RT 5377.) Juror No. 1 felt the jurors in good faith had attempted to get Juror No. 10 to exchange her views on the law and the evidence in the case either verbally or in writing. However, Juror No. 10 would not exchange her views on the law and evidence with the other jurors. (45 RT 5378.)

Juror No. 2 sat two seats away from Juror No. 10. Juror No. 2 had clearly observed Juror No. 10 sleeping during deliberations on more than one occasion. (45 RT 5379.) Juror No. 2 could tell that Juror No. 10 was sleeping and not just relaxing because Juror No. 10 pulled a baseball cap she wore down lower so that other jurors could not see her eyes and she curled up in her chair. (45 RT 5380.) Also, discussions during deliberations went around the table in an orderly way. When the discussion reached Juror No. 10 she would state, "I have nothing to say," and would go to sleep. Juror No. 2 stated that occurred "more than a couple of times." (45 RT 5380.)

Juror No. 2 noted that when Juror No. 10 did not want to participate during discussions, she would get up from the table, go to the restroom and stay there. (45 RT 5380.) Juror No. 2 stated, "How are we supposed to move ahead if she [Juror No. 10] is just not cooperating." (45 RT 5380.) Juror No. 2 stated that during the beginning of deliberations, Juror No. 10 would explain the basis for taking a position. But as the charges they were discussing became stronger and more complicated, when Juror No. 10 was asked for what law or evidence she had to back up her position she would only reply, "I just don't think so." (45 RT 5381.) Juror No. 10 would also prevent them from moving forward by not discussing her positions with the other jurors. Juror No. 10 would make statements such as, "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," and "You guys talk about what you want, but I'm not going to say anything." (45 RT 5381.)

Juror No. 2 felt that among the jurors she was the closest to Juror No. 10. Juror No. 10 shared a lot of personal things with her, including growing up in Moreno Valley near where the crimes occurred. (45 RT 5381.) But Juror No. 2 noted that when Juror No. 10 returned from the lunch break she was a totally different person because her personality changed. (45 RT 5381.) Prior to the break, they may have reached a point where they voted on a matter and moved on to a different matter. When Juror No. 10 returned from the lunch break, she would have a totally different opinion than how she had previously voted or indicated. (45 RT 5381-5382.)

Juror No. 2 saw Juror No. 10 write things down on small pieces of paper and place them in her agenda. On more than one occasion during deliberations, when Juror No. 10 returned from lunch, she would refer to many legal terms that the other jurors did not know about. The other jurors would ask where she saw that term or to refer them to a certain page, but Juror No. 10 would not tell them where she received that information. (45 RT 5382.) Juror No. 10 said that she runs errands during lunch and when she returns from the break she eats her lunch in front of the other jurors. (45 RT 5382.) Juror No. 1 was talking about Williams's interview with the detectives when Juror No. 10 stated loudly in front of the other jurors, "My lawyer can put holes in this interview." (45 RT 5383.)

Prior to starting deliberations, Juror No. 10 told Juror No. 2 that she did not look forward to returning to work because she was being paid for as long as she served on the jury. (45 RT 5383.) At one point, Juror No. 2 commented that she was glad that deliberations were going pretty well and they would be concluded soon. (45 RT 5383-5384.) Juror No. 10 responded, "Don't count on it, I don't think it's going to go this fast" in reference to the counts they were going to discuss. (45 RT 5384.) In response to questions by the prosecutor, Juror No. 2 said that Juror No. 10 refused to respond to inquiries from the other jurors regarding her positions. Juror No. 10 responded with statements such as, "When I'm ready to tell you, you'll find out," or "When I'm ready to say something, you'll hear from me." (45 RT 5384.) Juror No. 10 would not offer any support for a position that she had taken. The foreperson, Juror No. 3, asked Juror No. 10 if she would write down her concerns and they would discuss it, but Juror No. 10 refused to do that. (45 RT 5384.) Juror No. 2 felt that the other jurors in good faith tried to get Juror No. 10 to participate during deliberations to express her opinions and to explain the legal or factual basis for her positions. (45 RT 5384.) Juror No. 2 indicated there were a couple of instances where Juror No. 10 did not understand certain terms and Juror No. 4 explained them to her. (45 RT 5384.)

Juror No. 2 noted that at one point Juror No. 10 said, "I'm the only African-American in this room and I want to make sure, I have to double check everything." (45 RT 5385.) Juror No. 10 said she felt she was being picked on because of her race, but Juror No. 2 said that was not the case. Juror No 2 noted that race was not an issue regarding the case and that all the jurors had been very patient with Juror No. 10 after she made that statement. (45 RT 5385.) All the jurors told Juror No. 10 not to bring race into the matter because that was not an issue in the case. Juror No. 10 responded, "Okay, you know, I could go that way, but I guess I won't." (45 RT 5383.) Juror No. 2 described how the jurors had been very patient with her. Juror No. 10 and how willing they were to discuss things with her. Juror No. 2 repeated that the other jurors in good faith tried to give Juror No. 10 the opportunity to express not only her opinion but also the reasons for her opinion. (45 RT 5385-5386.) But Juror No. 10 only did that when she felt like doing it. The other times she either

refused to do so or goes to the restroom for a while to avoid doing so. (45 RT 5386.)

In response to questions by Williams's counsel, Juror No. 2 said the jury's current frustrations did not have anything to do with things that regarded jurors other than Juror No. 10. (45 RT 5386.) Juror No. 2 said that the previous week a juror that was excused [Juror No. 9] and Juror No. 10 were expressing problems with feelings they would have if they made certain decisions and reached the penalty phase. The other jurors kept reassuring them that they should not bring up the penalty phase at that time. (45 RT 5386-5387.) Juror No. 2 said that on an occasion when they were at the table in the deliberation room, Juror No. 10 shared with her that she had to go to the general area of Moreno Valley where she had lived to "double check everything" because "she had to be sure she was doing the right thing." (45 RT 5388.)

Juror No. 2 said that Juror No. 10 would go to the restroom as a method of avoiding to participate in discussions during deliberation. Juror No. 10's stay in the restroom could be lengthy enough so that two or three other jurors may have expressed their opinions while she remained in the bathroom. (45 RT 5387-5388.) Juror No. 2 said that Juror No. 10 deliberated when she felt like it. Juror No. 10 would sit at the table, write things down, flip through papers and do "her own thing" while ignoring the other jurors. (45 RT 5389.) Juror No. 2 described how the jurors would discuss a topic, will be asked if they need any testimony read back, and if they are ready to vote and vote on it prior to the lunch break. After the break, Juror No. 10 would state that she wanted to take back her vote or votes. Juror No. 10 was the only juror who was asking for a read back of testimony, and that occurred after the lunch break. Juror No. 10 did not discuss things with the other jurors. When she returned from the lunch break, she would sit for no more than five minutes before having a question about legal terms. Juror No. 10 would state a position that she refused to state during the morning session, and would not discuss the basis for taking that position. The other jurors would ask why she did not previously indicate that she had any doubts about the items they had voted on. (45 RT 5390-5391.) Also, if a juror said something that Juror No. 10 did not agree with, she would state, "I don't care what you all say, I don't want to talk about it anymore." That would be the end of her conversation. (45 RT 5391.)

The prosecutor asked Juror No. 2 if anybody asked Juror No. 10 if she was talking to somebody on the outside about the case. (45 RT 5392.) Juror No. 2 said they knew that Juror No. 10 had appointments with her lawyer because she had a custody issue or family matter regarding her ex-husband. (45 RT 5392.)

Juror No. 4 could not say if Juror No. 10 necessarily was sleeping, but that she was "not with them" because she was not on target with the issue that the others jurors at the table were discussing at the time. Juror No. 10 would be flipping through pages in a book and jotting notes on small pieces of paper, but not about the subject the jurors had been discussing. Juror No. 10 was not mentally on the same topic that the other jurors were discussing, which was frustrating and annoying to the other jurors. (45 RT 5393-5394.) Juror No. 4 cited as an example that they started a discussion about a vote they had taken and Juror No. 10 said that she voted the opposite of the way that she wanted to vote. (45 RT 5394.) Also, there was an issue that was voted on two occasions, once during the previous week and again the previous day. After the lunch break, Juror No. 10 wanted to re-open the vote on that topic. (45 RT 5394.)

The judge asked if Juror No. 10 discussed the facts, evidence or law to support her position. (45 RT 5394-5395.) Juror No. 2 responded, "No, that is what worries us, too, she will say she disagrees without saying why." (45 RT 5395.) Juror No. 10 simply stated the other jurors did not prove what they said. When the other jurors identify specifics to support their position, Juror No. 10

responded, "I don't believe it." (45 RT 5395.) Juror No. 4 also said that Juror No. 10 quibbled over legal points that she read but did not understand. Juror No. 4 cited an example where Juror No. 10 claimed that the word "facilitate" meant to control. Juror No. 4 had knowledge of Latin and explained the origin of the word to her. (45 RT 5395-5396.)

Juror No. 4 said that the jurors would leave their notepads in the jury room. On the date Juror No. 10 asked to speak with the court, when Juror No. 10 returned to the jury room she took the notepad out of her book or back pack and placed it on the table. That was the only occasion he saw Juror No. 10 take her notepad with her. (45 RT 5369-5370.) Juror No. 4 said the previous day Juror No. 10 made the comment about her lawyer putting holes in the police interview of Williams that the jurors had been discussing. Juror No. 4 thought that was not a good remark for her to make. (45 RT 5397.)

Questioned by the prosecutor, Juror No. 4 said that Juror No. 10 went to the restroom frequently without saying she was going, but he did not specifically pay attention as to when she would do so. (45 RT 5397-5398.) The jurors received four copies of the jury instructions and they gave one copy to Juror No. 10. (45 RT 5398.) Juror No. 4 felt that probably was a mistake because Juror No. 10 kept flipping though the pages of the instructions. (45 RT 5398.) Juror No. 4 said that once they ironed out procedural problems that arose from the "blow-up" that resulted from the foreperson's inexperience, things were smoother in deliberations because everyone got a turn to talk. The jurors "bent over backward" to make sure that Juror No. 10 said everything that she wanted to say. (45 RT 5398.)

The courtroom deputy noted that it was 3:20 p.m. and they took a recess. (45 RT 5399.) After the recess, the clerk said she received a telephone message from Juror No. 10 who said she was still very ill and would probably not make

it to court the following day. The clerk contacted Juror No. 10 and told her she would again contact Juror No. 10 before leaving that day. (45 RT 5933.)

The prosecutor argued that the trial court should discharge Juror No. 10 based on her illness, even though there were other grounds to do so, so that the proceedings would not be further delayed which could cause the prosecution to lose some penalty phase witnesses and both juries were only time qualified through April of 1998. (45 RT 5401-5402.) Williams's counsel objected because they did not know if Juror No. 10's illness would extend beyond one day. But he agreed that if Juror No. 10 did not show up the following day, "she's pushing it." (45 RT 5402.) The trial court noted that time was of the essence in terms of some of the People's penalty phase witnesses and because they were holding up the verdict in Dearaujo's case to coincide with that of Williams's case. (45 RT 5402-5403.) The trial court wanted to question the remaining jurors while they had time. (45 RT 5403.)

Juror No. 5 noted there were times Juror No. 10 was laying back in her chair with her eyes closed. Juror No. 5 did not know if she was sleeping, but Juror No. 10 definitely was not paying attention to what was going on during deliberations. (45 RT 5404.) Juror No. 5 said there were occasions when jurors were discussing a certain topic and Juror No. 10 would have no idea what they had been discussing. Juror No. 10 would say something that was completely off the subject that the jurors had been discussing. (45 RT 5405.)

Juror No. 5 saw Juror No. 10 writing on small scraps of paper and that she would flip through papers while the jurors were having discussions. (45 RT 5406.) Juror No. 5 described their "round robin" type of discussions where the jurors would express their feelings or comments on a certain topic. When they reached Juror No. 10 and she did not want to share her comments, she would state that she had nothing to say. (45 RT 5406.) There were times when Juror No. 10 would take a position on a topic but refused to discuss the evidence or reasoning to support her position. (45 RT 5406-5407.) If there was any disagreement by Juror No. 10, she would not explain the reason for her disagreement to allow the other jurors to understand her position. Juror No. 5 said that Juror No. 10 would just go "off on her own little tangent." (45 RT 5407.)

Juror No. 5 did not hear Juror No. 10 say that she was interested in prolonging deliberations to avoid returning to work. But Juror No. 5 heard other jurors say that Juror No. 10 made that statement. Juror No. 5 did not really talk much to Juror No. 10, who kept to herself. (45 RT 5407.) Juror No. 5 observed Juror No. 10 take a certain position on a topic during the morning session, and then change her position during the afternoon session. (45 RT 5407.)

Although Juror No. 5 could not say if Juror No. 10 had been consulting outside sources, it seemed as if she did because after she returned from the break she would bring up other aspects of a topic that was previously discussed and the other jurors did not know the source of that information. (45 RT 5408.)

Juror No. 5 felt that the other jurors in good faith tried to include Juror No. 10 in their discussions so that if she would have participated the other jurors may have understood her point of view. (45 RT 5408.)

Juror No. 6 saw Juror No. 10 with her eyes closed during deliberations, but Juror No. 6 could not say whether or not she was sleeping. Juror No. 6 could say that Juror No. 10 was sleeping when the judge instructed the jurors prior to deliberations. (45 RT 5411.) Juror No. 6 saw Juror No. 10 write things on small pieces of paper and place them in her agenda. But Juror No. 6 did not know what Juror No. 10 was writing down. (45 RT 5411, 5414.) Juror No. 6's impression was that Juror No. 10 had spoken with somebody during the lunch break. (45 RT 5412.) Juror No. 10 sometimes refused to talk to the other jurors during deliberations. Juror No. 10 would say, "I'm not talking to you, if I have something to say, I'll say it." (45 RT 5412.) When Juror No. 10 disagreed with the other jurors, she refused to tell them why she disagreed. (45 RT 5414-5415.) It is only when Juror No. 10 agreed with the other jurors that she opened up a little bit to discuss things with them. (45 RT 5415.) Juror No. 6 described how they would ask Juror No. 10 if she was ready to vote, and Juror No. 10 would respond "yes" and vote. After returning from the lunch break, Juror No. 10 would completely change her mind on the matter she had voted on. (45 RT 5412.) That occurred during both weeks of deliberations. (45 RT 5414.) Juror No. 10 would also forget that she voted. Juror No. 10 also did not recall some of the testimony and she did not take notes during trial. Juror No. 10 had requested that a lot of the testimony be read back because Juror No. 10 could not recall trial testimony. (45 RT 5412-5413.)

Juror No. 6 heard Juror No. 10 say that she did not want to return to work. (45 RT 5413.) Juror No. 10 also distanced herself from the other jurors, who have invited her to lunch and tried to include her. (45 RT 5413.)

After Juror No. 6 left chambers, the judge stated to counsel that they had spoken with half of the jury and were getting essentially the same information. (45 RT 5415.) Williams's counsel suggested they inquire of Juror No. 11, who had indicated he was having financial concerns because of the length of the trial. (45 RT 5415.)

Juror No. 11 said he was not paying attention to Juror No. 10 during deliberations because he was focusing on what he was doing. Juror No. 11 did notice that there were times Juror No. 10 closed her eyes and could have been sleeping. (45 RT 5416-5417.) Juror No. 11 heard other jurors say that Juror

No. 10 indicated that she wanted to delay deliberations because she did not want to return to work. (45 RT 5417.)

Juror No. 11 did not see Juror No. 10 take anything out of the jury room. But when Juror No. 10 returned from lunch for further deliberations she would discuss technical points and argue that certain wording was incorrect. (45 RT 5417-5418.) Juror No. 11 did not know why Juror No. 10 would bring that up, or where she received that information. (45 RT 5418.) Juror No. 11 noted that the jurors were not allowed to consult a dictionary, but Juror No. 10 was picking out certain terminology. (45 RT 5418.) Juror No. 11 heard Juror No. 10 say that her lawyer could poke holes in a matter they were discussing. (45 RT 5418.)

Juror No. 11 noted how on two occasions, once during each week of deliberations, there were discussions prior to lunch where Juror No. 10 was coming up with ideas. But after returning from lunch, Juror No. 10 stopped talking. They would go around the table asking each juror for their point of view. When they reached Juror No. 10 she said, "I ain't got nothing to say." That was the extent of her discussion. (45 RT 5418.) Juror No. 11 also related an occasion where Juror No. 10 agreed with the other jurors on a point. After returning from lunch, Juror No. 10 said she had a problem with it, said it was not right, and asked if they had voted on that point. (45 RT 5420.)

The other jurors tried in good faith to include Juror No. 10 during deliberations. Juror No. 11 noted that things got a little heated when they tried to get Juror No. 10 to express her views and Juror No. 11 had to tell a few of the jurors to calm down because it would not get them anywhere with deliberations. But things started to heat up again and jurors were getting very irritated with Juror No. 10. (45 RT 5420-5421.) Although the other jurces tried to include Juror No. 10 and have asked her to state her reasons for positions she

has taken, there are times she refused and stated, "I have nothing more to say on it." (45 RT 5421.)

Juror No. 11 stated that it was becoming difficult for him to work enough to pay his rent and other bills. He worked all night and came to court in the morning. He was not getting much sleep which caused him aggravation. (45 RT 5419.)

After Juror No. 11 left chambers, the judge asked counsel if they wanted further inquiry of any of the jurors. Both the prosecutor and Williams's counsel said that they did not. (45 RT 5421.) The courtroom clerk informed the trial court that Juror No. 10 left a message that she was still vomiting and running a temperature so she probably would not be coming to court the following morning. The clerk would again call Juror No. 10 at 4:30 p.m. (45 RT 5422.) The prosecutor noted more case authorities in support of her motion to discharge Juror No. 10. (45 RT 5422.) Williams's counsel urged the judge to wait until the following day to see if Juror No. 10 appeared in court to inquire of her prior to making a decision and for Williams to be present. (45 RT 5422.)

The trial court noted that based on Juror No. 10's telephone message, it did not appear that she would be coming to court the following morning. Rather than risk losing another day for deliberations, the judge decided to state his findings regarding Juror No. 10. (45 RT 5422-5423.)

The trial court concluded that Juror No. 10 had a problem staying awake and had been sleeping. (45 RT 5423.) The court noted there were enough credible statements by the jurors for the judge to find that it was more likely than not that Juror No. 10 had been sleeping. (45 RT 5423.) The court found that the statements by the jurors regarding Juror No. 10 sleeping or being inattentive during trial and deliberations was consistent with what the judge observed during the trial. (45 RT 5423.) The court made that finding particularly in light of her conduct during the course of the trial. The court noted that on many occasions he directed the courtroom deputy to go to Juror No. 10 and wake her up and give her a cup of water. The court stated that occurred not only when they were playing the tape of Williams's interview, but during the entire course of the trial. (45 RT 5423.) When the interview tape was played, all the other jurors were following along and turning their transcript pages. But Juror No. 10 would suddenly wake up, turn several transcript pages at once, and then repeat this process. (45 RT 5423.) The court finally had to say something to Juror No. 10, but it embarrassed her and she was a little angry with the judge. The court also noted that during a discussion he had with Juror No. 10, she even laughed about falling asleep. (45 RT 5423.)

The trial court could not find that it was established that Juror No. 10 was intentionally prolonging deliberations to avoid going to work. The court noted it may have been an offhand comment by Juror No. 10 and the court could not tell for sure that she was taking such an action. (45 RT 5423-5424.) The court also concluded that he could not determine that it was more likely than not that Juror No. 10 was consulting outside sources. Although the court suspected that she might be consulting outside sources, she could have been reflecting during the lunch period and had a change of heart. (45 RT 5424.)

The trial court found that it was very clear that Juror No. 10 violated her oath by not deliberating. (45 RT 5424.) Juror No. 10 would take a position and refuse to discuss the basis to her position. (45 RT 5424-5425.) The court found that in both the first session of deliberations and the second session with the substituted jurors, Juror No. 10 showed a consistent pattern of when she disagreed with the other jurors she simply stated a position and stonewalled, using various devices to do that. (45 RT 5425.) The court noted that it was apparent that Juror No. 10 constantly refrained from deliberating because during the inquiry the jurors over and over noted that Juror No. 10 had nothing to say, and if she had something to say she would say it. (45 RT 5425.) The trial court noted that Williams's jury had expressed their frustration. The jurors were provided with a time line for the case. The judge said he could appreciate the jurors's concern that they were not moving forward with the case because of Juror No. 10's absence. (45 RT 5425.) The trial court ordered that Juror No. 10 be discharged as a juror. (45 RT 5425.) The court asked the clerk to contact Alternate No. 4 to be present the following morning at 9:30 a.m. to begin deliberations. (45 RT 5426.)

Williams's counsel objected to the court's order and argued the jurors did not articulate the reasons for Juror No. 10's disagreement with the other jurors, but only that she would not talk any further after disagreeing. (45 RT 5426-5427.) Williams's counsel argued that could equally lead to an inference that Juror No. 10 had already expressed a point and did not wish to express it again. (45 RT 5626.) The court noted that it was not appropriate to inquire about the deliberation process and he avoided determining what verdict they were favoring. (45 RT 5427.) The court said it was abundantly clear from the jurors's statements, without delving into specific issues, that Juror No. 10 was stonewalling on major issues that the jurors had voted on. (45 RT 5427.) The court noted that although there were instances where Juror No. 10 discussed the evidence as stated by Juror No. 11, it was pretty clear from the inquiry of the jurors that Juror No. 10's norm was a predisposition to not deliberate. (45 RT 5427.)

In open court and in the presence of the jury, the trial court stated that he decided to excuse Juror No. 10 and the remaining alternate would be substituted the following morning. The court stated that the jury should resume deliberating from the beginning as they were aware of from prior juror substitutions. (45 RT 5428-5429.)

Williams claims the trial court abused its discretion in discharging Juror No. 10 because the evidence did not show that Juror No. 10 was asleep for substantial amount of time or that she missed any significant portion of jury deliberations. (AOB 183-186.) But the trial court did have convincing proof, both from its own observations and the testimony of the jurors, that Juror No. 10 slept during material portions of the trial and during deliberations. (See *Hasson v. Ford Motor Co., supra*, 32 Cal.3d at p. 411.)

The trial court noticed that Juror No. 10 had problems staying awake and slept throughout the course of the trial. On many occasions the judge directed the courtroom deputy either wake her or offer her a glass a water to do so. (45 RT 5360, 5423.) Juror No. 10 periodically slept when the tape of Williams's statements to the detectives was being played for the jury. While the tape was played, all the jurors followed along and turned the transcript pages in unison. But Juror No. 10 would sleep, suddenly wake up and turn multiple transcript pages at once. Juror No. 10 repeated this process while the tapes of Williams's interviews were played for the jury. (45 RT 5360, 5423.) When the judge had a discussion with Juror No. 10, she laughed about falling asleep and became angry with the judge. (45 RT 5423.)

The trial court's observation that Juror No. 10 slept during the trial was supported by the testimony of the jurors. Juror No. 6 saw Juror No. 10 sleeping when the court instructed the jurors prior to deliberations. (45 RT 5411.) Juror No. 10 was given one of the four copies of the jury instructions. (45 RT 5345.) Juror Nos. 2 & 4 observed Juror No. 10 flipping through the papers and ignoring the other jurors as they discussed matters. (45 RT 5389, 5398.) Juror No. 6 stated that during deliberations Juror No. 10 requested that a lot of the trial testimony be read back because she could not recall the trial testimony and did not take notes. (45 RT 5412-5413.) Juror No. 2 noted that Juror No. 10 was the only juror who requested a read-back of the testimony after the lunch break. That occurred after she had previously declined requesting a read back and had already voted on a matter. (45 RT 5390-5391.)

The jurors also testified that Juror No. 10 slept during deliberations. The foreman, Juror No. 3, stated that during discussions Juror No. 10's eyes were closed and her head was up against the wall. (45 RT 5363.) On one occasion, Juror No. 3 and three other jurors observed Juror No. 10 and they all thought that she was sleeping. (45 RT 5363.) Juror No. 10 sat directly across from Juror No. 1 who acknowledged seeing her sleeping during deliberations. (45 RT 5374.) Juror No. 1 observed Juror No. 10's attention stop and her eyes close when the round-table discussion when past her. Juror No. 10 would keep her eyes closed for at least 15 minutes as the discussion continued. Juror No. 10 would open her eyes and not say anything. (45 RT 5374.)

Juror No. 2 sat two seats away and clearly saw Juror No. 10 sleeping during deliberations on more than one occasion. (45 RT 5379-5380.) Juror No. 2 could tell that Juror No. 10 was sleeping because she pulled a baseball cap down lower to cover her eyes and curled up her chair. (45 RT 5380.) When the discussion reached Juror No. 10, she would state that she had nothing to say and would return to sleep. (45 RT 5380.) Juror Nos. 4 and 5 could not definitively tell if Juror No. 10 was sleeping, but they noticed that she was not paying attention to what was occurring during deliberations. Juror No. 10 would have no idea what the other jurors were discussing and would state things that were completely off the topic of discussion. (45 RT 5393-5394, 5404-5405.) Juror Nos. 6 and 11 saw Juror No. 10 with her eyes closed during deliberations. Juror No. 11 said there were times when Juror No. 10 closed her eyes and could have been sleeping. (45 RT 5415-5416.)

Based on the foregoing, it was a demonstrable reality that Juror No. 10 slept during crucial portions of the trial, including the playing of the tapes of Williams's statements to the detectives and the trial court's closing instructions to the jury prior to deliberations. Juror No. 10 also slept during deliberations

to an extent where she was "not with" the other jurors in their discussions, flipped through the jury instructions, and requested read back of trial testimony that was a carry-over from her sleeping during trial. The trial court properly exercised its authority to discharge Juror No. 10 for good cause because she was sleeping during the course of the trial and during deliberations. (*People v. Bonilla, supra,* 41 Cal.4th at p. 350; *People v. Bradford, supra,* 15 Cal.4th at pp. 1348-1349; § 1089.)

Williams also claims that the inquiry of the jurors indicates that Juror No. 10 deliberated to a point until she reached a decision where she was unpersuaded by the State's case against him and refused to change her mind, rather than a refusal to deliberate. (AOB 188-189.) But the testimony by the jurors supports the trial court's finding that when Juror No. 10 wanted to she had "nothing to say," and refused to explain her views or listen to those of the other jurors. (45 RT 5424-5425.) Juror No. 10 asked the trial court what it was not to deliberate, took note of that and proceeded to do it. (45 RT 5310-5311.)

This Court has defined a refusal to deliberate as a juror who "will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views." (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.) This Court also gave three examples of a failure to deliberate, all of which were present with Juror No. 10.

First, is expressing a fixed conclusion and refusing to consider other points of view. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.) Juror Nos. 1 through 6 and 11 all described Juror No. 10 taking a fixed position and refusing to consider other points of view. Juror No. 10 had "closed her mind" and refused to participate in a give-and-take process with other jurors who in good faith attempted to get her to express her opinions and explain the factual and legal bases for her positions. (45 RT 5370, 5378, 5384, 5398.) Unlike the other jurors who would consult their notes and explain their positions, Juror No.

10 would just make a statement such as: "I don't believe it is this way," "because that is the way I believe," "I just don't think so," and would refuse to provide a legal or factual basis for her position either verbally or in writing. (45 RT 5363-5365, 5368-5369, 5377, 5381, 5395.)

Second, is refusing to speak to other jurors. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.) On multiple occasions, when the discussion reached Juror No. 10, she would state "I have nothing to say," "I don't want to say anything right now so I'm not saying it," "When I have something to say, I'll say it" and "I don't care what you all say, I don't want to talk about it anymore." That would be the extent of Juror No. 10's discussion. (45 RT 5380-5381, 5384, 5391, 5406, 5412, 5418.)

Third, is attempting to separate oneself physically from the other jurors. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.) In order to avoid participation in deliberation discussions, Juror No. 10 would get up from the table, go to the restroom and remain there for a substantial period of time. (45 RT 5380, 5386.)

The record in this case reveals that Juror No. 10's conduct of "having nothing to say" periodically occurred throughout deliberations, and often when she disagreed with a statement made by another juror. (45 RT 5391, 5395, 5406-5407, 5415-5416.) As the charges the jurors discussed became stronger and more complex, when Juror No. 10 was asked for any evidence or law to support a position she was taking she would respond, "I just don't think so." (45 RT 5381.) Williams asserts the trial court improperly discharged Juror No. 10 as being too ill to continue deliberations. (AOB 187-188.) The trial court did not discharge her on that basis. The judge noted that based on Juror No. 10's telephone message to the clerk it appeared that she would not be coming to court the following morning. Rather than risking the loss of another day of

deliberations to a jury whose time commitment was stretched, the judge decided to state his findings at that time. (45 RT 5422-5423.)

Williams asserts that Juror No. 10's statements such as "I don't believe it" indicate that Juror No. 10 was not persuaded by the People's case rather than a failure to deliberate. (See AOB 194.) Williams's claim is speculative and not supported by the record. Juror Nos. 2 and 3 testified about Juror No. 10 making such a statement when, in response to her claim that the jurors did not prove what they said, they identified specific facts to support their positions. (45 RT 5363-5365, 5395.) Juror No. 10 was mentally "not with" the other jurors because she did not take notes during the trial, slept during trial including during the playing of the tapes of Williams's statements, and slept while the judge read the concluding instructions, and flipped through papers and wrote notes on slips of paper while the jurors discussed matters. (45 RT 5360-5361, 5365-5366, 5389, 5393-5394, 5406, 5411-5413, 5423.) Like discharged Juror No. 9, Juror No. 10 may have believed the People's case but had thoughts of not following the law to impose the special circumstance to avoid dealing with the penalty phase. (45 RT 5386-5387.) During the inquiry of the jurors, the trial court was cognizant and careful not to specifically inquire about the jurors's thought processes. (45 RT 5427). (People v. Cleveland, supra, 25 Cal.4th at p. 485; In re Hamilton, supra, 20 Cal.4th at p. 294, fn. 17.) Regardless of whether or not Juror No. 10 may have believed the People's case, the record supports the trial court's finding that Juror No. 10 clearly refused to deliberate.

Williams also claims that the "dynamic of race" divided the jurors, and that division was eliminated by removing both African-American jurors, Juror Nos. 10 and 12. (AOB 194-198.) Williams's claim lacks support in the record and is conjecture. As previously discussed, the record shows a demonstrable reality the Juror No. 12 violated the trial court's admonishment and had made

her mind up about the case prior to its final submission to the jury. There was thus substantial evidence supporting the trial court's cautious decision to discharge Juror No. 12 which had nothing to do with her race. (See Arg. I, *ante.*) The same is true of Juror No. 10.

During deliberations, Juror No. 10 noted that she was the only African-American juror and "to be sure" she wanted to "double-check everything." (45 RT 5385.) Juror No. 10 said she felt she was being picked on because of her race. (45 RT 5385.) Juror No. 2 was the juror who had the closest personal relationship with Juror No. 10. (45 RT 5381.) She assured Juror No. 10 that was not the case. (45 RT 5385.) After Juror No. 10 made that statement, all the jurors were very patient with her and "bent over backwards" to make sure she said everything that she wanted to say. (45 RT 5385, 5398.) There was also a discussion of whether race should be part of the case. The foreperson and other jurors stated that it should not as it was not an issue in the case. (45 RT 5372, 5383.) Juror No. 12 took such a comment personally and had a "blow-up" with Juror No. 3, for which he apologized to all the jurors. (45 RT 5372.) Juror No. 10 responded that she "could go that way, but I guess I won't." (45 RT 5383.) When they had an opportunity to address the judge and counsel, neither Juror No. 10 nor Juror No. 12 claimed that any discord or problem during deliberations resulted because of their race. (30 RT 4071-4075; 38 RT 4620-4626; 39 RT 4731; 45 RT 5303-5311, 5317-5318, 5432-5435.)

This Court has noted that it is "virtually impossible to divorce completely one's background from one's analysis of the evidence." (*People v. Steele* (2002) 27 Cal.4th 1230, 1266.) But "[a] juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence" (*Ibid.*) That is what the jurors urged Juror No. 10 to do when they stated that race should not be part of the case. The juror's discussions during deliberations are properly and necessarily

curtailed to the extent that they must: (1) decide the case based solely on the facts in evidence, (2) apply no law other than that which the judge instructed upon, (3) not discuss the subject of penalty or punishment, and (4) decide the case only on a legal basis. (43 RT 5119-5121, 5151-5152; see CALJIC Nos. 1.00, 1.02 & 17.42.)

Williams also claims that reversal is required because the trial court failed to conduct a sufficient inquiry which was improper under *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1067. (AOB 199-200.) Williams's claim is incorrect. Case law, including *Castorena*, stresses that the trial court has considerable discretion in investigating juror misconduct, and that discretion is not abused "simply because it fails to investigate any and all new information obtained about a juror during trial." (*Id.* at p. 1065; *People v. Prieto, supra*, 30 Cal.4th at p. 274.) A trial court that is alerted to the possibility of such misconduct must "make whatever inquiry is reasonably necessary to resolve the matter." (*People v. Hayes, supra*, 21 Cal.4th at p. 1255; *People v. Hedgecock, supra*, 51 Cal.3d at p. 417.) The trial court's considerable discretion includes interviewing the individual jurors. (*People v. Thomas, supra*, 218 Cal.App.3d at p. 1482.)

The court in *Castorena* held that the trial court prejudicially abused its discretion when it failed to conduct an adequate inquiry in to allegations of juror misconduct where the trial court "did not have the requisite facts upon which to decide whether [the discharged juror] in fact failed to carry out her duty as a juror to deliberate or whether the jury's inability to reach a verdict was due, instead, simply to [the juror's] legitimate disagreement with the other jurors." (*People v. Castorena, supra*, 47 Cal.App.4th at p. 1066; see *People v. Diaz* (2002) 95 Cal.App.4th 695, 703 [quoting *Castorena*].)

The court in Castorena stated that:

a trial court's failure to question each juror privately regarding a juror misconduct claim presents an issue of abuse of discretion, not one of constitutional magnitude, such as whether the defendant was denied his or her right to a fair trial under the federal or state Constitutions. [Citation.]

(*People v. Castorena, supra*, 47 Cal.App.4th at p. 1065.)

Unlike Castorena, in this case the trial court's own observations and inquiry of Juror Nos. 1 through 6 and 11 revealed a demonstrable reality that Juror No. 10 failed to deliberate and slept during material portions of the trial and during deliberations. The judge's observation of Juror No. 10 during the course of the trial to see if she was sleeping was a sufficient inquiry. (See People v. DeSantis (1992) 2 Cal.4th 1198, 1233-1234 [trial court's "selfdirected inquiry" of observing several jurors closely to see if they were sleeping, and determination that none were dozing, was sufficient without a more formal hearing].) After hearing from Juror Nos. 1 through 6, the judge noted they inquired from half of the jurors. The trial court then stated, "It looks like we're just getting pretty much the same thing over and over again, unless you want to do one or two more." (45 RT 5413.) Williams's counsel requested that they hear from Juror No. 11, who was having a financial hardship because of the length of the case. (45 RT 5415.) The record shows that the judge made the inquiry that was reasonably necessary to resolve the matter. (People v. Hayes, supra, 21 Cal.4th at p. 1255; People v. Hedgecock, supra, 51 Cal.3d at p. 417.) The trial court did not abuse its "considerable discretion" in conducing the substantial inquiry of over half the jurors, which revealed a demonstrable reality that Juror No. 10 violated her oath by refusing to deliberate.

The record shows a demonstrable reality that Juror No. 10 violated her duty as a juror by sleeping during trial and deliberations and by refusing to deliberate. There was thus substantial evidence supporting the trial court's cautious decision to discharge Juror No. 10 and seat an alternate juror.

THE RECORD SUPPORTS THE CONCLUSION THE JURY DELIBERATED AFTER JUROR NO. 10 WAS REPLACED

III.

Williams contends that when Juror No. 10 was discharged, the existing jurors coerced the new juror into accepting their view of the evidence and rendered unreliable verdicts in violation of his rights to trial by an impartial jury (U.S. Const., 14th Amend.; Cal. Const., art. I, § 16 & art. VI) and to a reliable death judgment (U.S. Const., 5th, 6th, 8th & 14th Amends.) (AOB 203-214.) Williams's claim is speculative and he cannot meet his burden of showing that the alternate juror was coerced into rendering a verdict without deliberations. In fact, the jury's actions after Alternate No. 4 was placed on the jury indicates they deliberated as instructed by the trial court prior to reaching its verdicts.

As previously discussed, a criminal Williams has a constitutional right to a trial by an impartial jury, which is one where no member has improperly been influenced, and every member is "capable and willing to decide the case solely on the evidence before it." (In re Hamilton, supra, 20 Cal.4th at pp. 293-294.) "Because a defendant charged with a crime has a right to a unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citations.]" (*People v. Nesler, supra*, 16 Cal.4th at p. 578.) But "[w]here an alternate juror, approved by defendant in voir dire, is allowed to deliberate on the jury panel, the defendant bears a heavy burden to demonstrate that he was somehow harmed thereby." (People v. Thomas, supra, 218 Cal.App.3d at p. 1486.) This Court has stated that, "Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case." (People v. Pride (1992) 3 Cal.4th 195, 265.) Moreover, the substitution of an alternate juror after deliberations have begun does not offend the constitution if the reconstituted jury is instructed to begin deliberations anew. (*People v.* Collins, supra, 17 Cal.3d at p. 694; People v. Thomas, supra, 218 Cal.App.3d at p. 1486.)

The morning of April 2, 1998, outside the presence of the jury, the trial court asked the clerk to note for the record the conversation she had with Juror No. 10. The clerk said that at about 4:00 p.m. the previous day she called Juror No. 10 to inform her that she was excused from the jury and could report to work the next day. (45 RT 5430.) Juror No. 10 said "okay" and asked "why?" The clerk said she was not at liberty to discuss it at that time. Juror No. 10 responded "okay" and hung up the telephone. (45 RT 5430.) About 30 minutes later, Juror No. 10 called the clerk and said she wanted an explanation as to why she was being excused. The clerk said they received a note from the foreperson, had an inquiry and the judge found that she should be excused. (45 RT 5430.) Juror No. 10 said that the jurors were doing something illegal in the deliberation room and she wanted to speak with the judge. The clerk told Juror No. 10 she would relate that to the judge and would call her in the morning. (45 RT 5430.) Juror No. 10 told the clerk there should be a mistrial. The clerk said that Juror No. 10 should bring that up with the judge. (45 RT 5431.)

The clerk noted that Juror No. 10 arrived in court that morning at 8:00 a.m. (45 RT 5431.) The trial court said that based on Juror No. 10's allegation, he passed that information to counsel. Since Juror No. 10 was present, it would be proper for Juror No. 10 to state for the record what she claimed to be "illegal." (45 RT 5431.) The prosecutor said that it sounded as if Juror No. 10 had been speaking with an attorney, but it would be fair to hear from her. Williams's counsel said it had been his request that they hear from Juror No. 10 and that he knew she would be in court that morning. (45 RT 5432.)

Juror No. 10 entered chambers and the judge said she had the opportunity to state for the record what she believed was illegal with the jury. (45 RT 5432.) Juror No. 10 claimed she was taking antibiotics and pain

medication because she had an ear infection, so she was "drugged" and "dragging." (45 RT 5432-5433.) Juror No. 10 said that when the alternate jurors came onto the jury the judge instructed them to start deliberations as if they had not previously deliberated, but the matter was not re-deliberated. (45) RT 5433.) Juror No. 10 said that the jurors spent a week and one-half deliberating before taking votes on issues. When the alternates entered the jury, they were merely asked about how they felt about certain charges and then they voted. (45 RT 5433.) Juror No. 10 said that she felt that was not fair because she believed that when the alternates were substituted they had to start their deliberations all over again. (45 RT 5433.) Juror No. 10 said jurors had asked to have certain testimony read back, but that was not done. One day the jurors voted on 11 charges based on how the jurors previously felt before the two alternates came onto the jury. To Juror No. 10 it did not seem like that procedure was in compliance with the court's instruction and she felt it was not fair. (45 RT 5433-5334.) Juror No. 10 said she did not think the jury was deliberating with an open mind because she had been verbally attacked, screamed at and cut off. (45 RT 5434.) Juror No. 10 said that a female juror who left also was, but the man who left the jury was very quiet. (45 RT 5434.) Juror No. 10 then stated:

And its not everybody, but it's just like anybody who speaks up the way you doing it, the way I understand the law is – and mind you, I'm the one who has most of questions that come here because I want to make sure I'm doing it right. They're not doing it right, and its not fair and it's just really bothering me.

(45 RT 5434-5435.)

The prosecutor asked Juror No. 10 if she called the clerk the previous day to say she would not make it to court the following day because she was ill. (45 RT 5435.) Juror No. 10 responded that she was ill and had just woken up at 2:30 p.m., but told the clerk she did not know at that point whether she would be able to make it court the next day. Not that she would not be making it to

court the following morning. (45 RT 5435.) Williams's counsel had no questions for Juror No. 10. (45 RT 5435.)

After Juror No. 10 left the courtroom, Williams's counsel indicated he may move for a mistrial on the ground that, upon the seating of the two alternate jurors, the jury did not deliberate to the degree or manner they were instructed to do so by the court. Williams's counsel said he wanted to review the transcripts of the inquiry of the jurors before deciding whether to file that motion. (45 RT 5436.) The judge said that if Williams's counsel filed the motion the court would hear it. (45 RT 5436.) The trial court noted that germane to Juror No. 10's comments, the instruction that the jury deliberate anew did not necessarily mean that the jury had to repeat every step and nuance of deliberations, including having the same testimony re-read or the same words spoken. (45 RT 5437.) Williams's counsel agreed with the court, but argued it appeared to him that Juror No. 10 had been deliberating and did not want to repeat expressing her position, rather than simply not discussing it at all. (45 RT 5437.) Williams's counsel stated he would probably file a formal mistrial motion. (45 RT 5438.)

In open court and in the presence of the jury, the judge informed the jurors that Juror No. 10 had been excused and asked Alternate No. 4 to take her place. (45 RT 5440.) The judge instructed the jurors pursuant to CALJIC 17.51:^{5/} (1) not to consider the fact that a juror was replaced by an alternate for

^{5.} CALJIC 17.51 states:

A juror has been replaced by an alternate juror. You must not consider this fact for any purpose. [¶] The People and Williams have the 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 deliberations anew. This means that each remaining original juror must set aside and disregard the earlier

any purpose; (2) that the People and Williams had the right to a verdict that was reached only after full participation of the jurors who return a verdict, and (3) that right could be assured only if they began deliberations from the beginning and they discarded past deliberations as if they had not taken place. (45 RT 5440-5441.) The judge said the jury could retire to begin deliberations in accordance with all the previous instructions. (45 RT 5441.)

On April 8, the jury advised the clerk that it had reached a verdict. (46 RT 5448.) Williams's counsel said he would not waive his previous objections and would go forward with the mistrial motion that was scheduled to be heard on April 13. The prosecutor stated the motion had not yet been filed, but expected to receive it from Williams's counsel. (45 RT 5449.) The jury then returned its verdicts and findings. (45 RT 5451-5464.) After the verdict, the judge noted that Williams's counsel had not yet filed his pleadings. Williams's counsel stated that he previously made an oral motion. The judge scheduled the motion would be heard on April 13. (56 RT 5465-5466.)

On April 10, Williams's counsel filed a mistrial motion. (19 CT 5245-5251.) On April 13, a hearing on the motion was continued to accommodate the prosecutor's penalty phase witnesses. (46 RT 5483.) On April 14, the motion was heard and denied. (19 CT 5253; 46 RT 5564-5569.) Williams's counsel argued that the ground for his mistrial motion was that discharged Juror No. 10 conveyed that the jury did not begin deliberations anew once the alternates had been seated. (48 RT 5565.) Williams's counsel said his motion did not address other things raised by Juror No. 10, like the apparent "racial" incident that came up during deliberations. (48 RT 5565-5566.)

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.

The prosecutor argued that regarding the claim that the jury did not deliberate anew, the prosecutor argued it was based on discharged Juror No. 10's misapprehension about what that meant. (48 RT 5566.) The prosecutor argued that Juror No. 10 erroneously believed this required that all testimony that had been read back had to be repeated to the new jury. (48 RT 5566.) The prosecutor noted that two jurors had been substituted the previous Monday morning. The judge read the jury the correct admonition, the jury was provided new verdict sheets, deliberated for two full days, had a read-back of testimony, and had questions answered by the time that Juror No. 10 came to court with her allegation. The prosecutor argued the record itself indicated that the jury was deliberating anew. (48 RT 5566.)

Although Williams's counsel argued that CALJIC No. 17.51 required redeliberation, the gist of Juror No. 10's comments was that when the new jurors were added there was no interchange but it was "tell us what you think and we will tell you what we decided." (48 RT 5569-5570.) Williams's counsel noted that Juror No. 10 said that to her that was not right because they were supposed to act as if they never previously discussed the matter. Williams's counsel argued that, to the extent that was the case, the judge did not inquire from the other jurors. (48 RT 5570.)

The trial court stated that it was aware of the language of CALJIC No. 17.51, but noted that if it was interpreted absolutely literally it would require the jurors to pretend that nothing occurred and erase from their brain everything that occurred. The judge stated that the reality was that the instruction meant that in good faith the jurors had to start from the beginning discussing issues and show a willingness to include the newly seated juror so that all decisions would be made with 12 jurors participating in that function. The judge said that to require the original jurors to go back and duplicate every step of the original deliberations would not only be silly but probably impossible. (48 RT 5569.)

The trial court concluded that it was clear from the jurors they interviewed regarding the conduct that lead to Juror No. 10 being excused that the jury was deliberating. The court noted that, as stated by the prosecutor, the newly constituted jury asked for a readback of testimony and asked additional questions. Accordingly, the judge was satisfied that the newly constituted jury was deliberating anew within the meaning of CALJIC No. 17.51 and denied Williams's mistrial motion. (48 RT 5569.)

A claim similar to Williams's was considered and rejected in *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333-1334.) There, the trial court discharged a "holdout" juror who had refused to deliberate and had disobeyed the court's instructions not to take his notes home. (*Id.* at p. 1333.) On appeal, Thomas argued that the juror's dismissal "had a coercive effect on the alternate juror." (*Ibid.*) The appellate court rejected this claim, finding "There is nothing in the record to suggest that the alternate juror did not deliberate properly." (*Ibid.*) The trial court had informed the jury that a juror had been replaced; the jury could not speculate as to why the juror was replaced or consider for any purpose the reasons for the juror's excusal; and the jury was required to set aside all past deliberations and start anew. (*Id.* at pp. 1333-1334.)

Here, the judge gave similar instructions to Williams's jury after Juror No. 10 was discharged and replaced with Alternate No. 4. (45 RT 5440-5441.) The judge also noted that the reconstituted jury asked for a readback of testimony and asked additional questions, so it was apparent it was deliberating anew within the meaning of CALJIC No. 17.51 and denied Williams's mistrial motion. (48 RT 5569.) As in *People v. Thomas, supra*, 26 Cal.App.4th 1334, "In the absence of any contrary evidence, we may validly presume that the jurors followed the court's instructions." (*Ibid.*) The only evidence Williams suggests supports a finding that the jurors is that the newly reconstituted jury reached verdicts on nine of the eleven counts on April 2, 1998, and the two

remaining verdicts and some of the enhancements on April 6, the next working day after they deliberated for an additional four or five hours. (AOB 107, citing 18 CT 5068-5095.) This Court recently stated in *People v. Leonard, supra*, 40 Cal.4th 1413:

But the brevity of the deliberations proves nothing. (See generally *People v. Daugherty* (1953) 40 Cal.2d 876, 890 [guilty verdict after 75 minutes of deliberations at guilt phase of capital trial did not demonstrate jury bias]; *People v. Mundt* (1939) 31 Cal.App.2d 685, 690 [guilty verdict after six minutes of deliberation not improper].) The newly constituted jury was not required to deliberate for the same length of time as the original jury, nor was it required to review the same evidence. When, as here, there are no indications to the contrary, we assume that the jurors followed the trial court's instructions and started afresh. (See *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions."].)

(Ibid.)

The trial court properly denied Williams's mistrial motion because the record supports the conclusion that after Juror No. 10 was discharged the jury deliberated anew. Accordingly, Williams has failed to show a violation of either the state or federal Constitution.

IV.

THE TRIAL COURT DID NOT HAVE A DUTY TO INSTRUCT THE JURY WITH ANY LESSER INCLUDED OFFENSES OF FIRST DEGREE FELONY MURDER

Williams contends the trial court erred by not charging the jury with the lesser included offenses of first degree felony-murder, second degree felonymurder and voluntary manslaughter, and by so doing it imputed the special circumstance to him resulting in a defective verdict which violated his rights to due process and a fair trial (U.S. Const., 5th, 6th, 8th & 14th Amends.) (AOB 215-229.) The trial court did not have a duty to instruct on any lesser included offense because there was substantial evidence that Williams was guilty of the first degree felony-murder of Yvonne Los, and not solely the claimed lesserincluded offenses. No constitutional error resulted from the trial court's instructions to the jury.

Williams was prosecuted for the first degree felony-murder of Los and the jury was so instructed. (8 RT 813; 41 RT 4963; 43 RT 5143-5144.) Penal Code section 189 provides in relevant part that, "All murder . . . which is committed in the perpetration of, or attempt to perpetrate, certain enumerated felonies, including [carjacking, robbery], is murder of the first degree" The felony-murder rule dispenses with the showing of malice, express or implied, ordinarily required to establish first and second degree murder, and "artificially imposes malice as to one crime as to the defendant's commission of another." (*People v. James* (1998) 62 Cal.App.4th 244, 277-278.) Thus, "[t]he mental state required [for felony-murder] is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, not malice aforethought is needed." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140-1141.)

In sum, the felony-murder rule makes the perpetrator of an enumerated offense automatically guilty of murder when he or she personally causes the death of another in the course of committing the target offense. The rule goes further, however, by extending culpability beyond the actual killer to persons "jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate" the predicate felony. (*People v. Martin* (1938) 12 Cal.2d 466, 472.) As this Court has clarified, culpability for felony-murder based upon a killing by a co-felon 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.) This Court stated in *Cavitt* that:

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.

(People v. Cavitt, supra, 33 Cal.4th at p. 193.)

Regarding a trial court's duty to instruct on lesser included offenses, this Court has stated that:

[e]ven absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence that the Williams is guilty only of the lesser.

(People v. Carter, supra, 36 Cal.4th at pp. 1114, 1184.)

In other words, the trial court is required to instruct "only if there was evidence that, if believed by the trier of fact, would absolve Williams of the greater offense, but not of the lesser." (*People v. Jenkins* (2005) 140 Cal.App.4th 805, 817; citing *People v. Memro* (1995) 11 Cal.4th 786, 871.) The sua sponte rule to instruct is designed to protect not only a defendant's "constitutional rights to have the jury determine every material issue presented by the evidence" but also ""the broader interest of safeguarding the jury's function of ascertaining the truth."" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) In *People v. Breverman* (1998) 19 Cal.4th 142, this Court explained that:

[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever the evidence that Williams is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is "evidence from which a jury composed of reasonable [persons] could . . . conclude []"" that the lesser offense, but not the greater, was committed.

(Id. at p. 162; see also People v. Birks (1998) 19 Cal.4th 108, 118.)

Speculation is not evidence and will not warrant the giving of an instruction on a lesser included offense. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174; *People v. Wilson* (1992) 3 Cal.4th 926, 942.) A trial court's error in failing to instruct on a lesser included offense is reviewed for prejudice under

People v. Watson (1956) 46 Cal.2d 818, 836-837 [state law error assessed under reasonable probability standard]. (People v. Breverman, supra, 19 Cal.4th at pp. 149, 178.)

Williams claims the trial court should have instructed the jury with the lesser included offense of second degree felony-murder based on the target offense of Dearaujo discharging a firearm at a vehicle in a grossly negligent manner under section 246.3. (AOB 215-224.) But the evidence showed that Dearaujo shot Los in the perpetration or attempt to perpetrate a robbery, with the pistol provided by Williams who previously instructed Dearaujo to shoot a victim if the victim resisted. Accordingly, the trial court did not err by only instructing the jury with first degree felony-murder because the jury had substantial evidence to convict Williams of the greater offense, and not merely the claimed lesser one.

During discussions about jury instructions, Williams's counsel requested that the jury be instructed with CALJIC No. 8.33 [Second Degree Felony-Murder-In Pursuance of Conspiracy]. (37 RT 4591.) The judge indicated that "the People's exclusive theory of homicide as to both Williams's is first degree murder based on murder during the course of a robbery." (37 RT 4591.) The judge noted the requested instruction would apply to inherently dangerous felonies that are not listed in Penal Code section 189, and disallowed giving this instruction to the jury. (37 RT 4592.)

Although not expressly set forth in the Penal Code, second degree felony-murder is a court-created crime that acts as a substitute for the mental component of malice. (See, e.g., *People v. Randle* (2005) 35 Cal.4th 987, 995, fn. 3; *People v. Howard* (2005) 34 Cal.4th 1129, 1135-1136; *People v. Patterson* (1989) 49 Cal.3d 615, 626.) Under this rule, a homicide that results from the commission of a felony that is inherently dangerous to human life, other than the felonies enumerated in Penal Code section 189 to support first

degree murder, is second degree murder. (People v. Howard, supra, 34 Cal.4th at p. 1135.) An "inherently dangerous felony' is an offense carrying 'a high probability' that death will result." (People v. Patterson, supra, 49 Cal.3d at p. 627.) When the felony-murder rule applies, "the only criminal intent required is the specific intent to commit the particular felony.' [Citation.]" (*People v.* Dillon (1983) 34 Cal.3d 441, 475.) Penal Code section 246.3, a general intent crime, requires the following elements: "(1) Williams unlawfully discharged a firearm; (2) Williams did so intentionally; (3) Williams did so in a grossly negligent manner which could result in the injury or death of a person." (People v. Overman (2005) 126 Cal.App.4th 1344, 1361; quoting People v. Alonso (1993) 13 Cal.App.4th 535, 538.) Section 246.3 was enacted in 1988 "to address the 'growing number of urban California residents engaged in the dangerous practice of discharging firearms into the air during festive occasions.' [Citation.]" (Overman, supra, 126 Cal.App.4th at p. 1361.) This crime "involve[s] the intentional discharge of a firearm in any grossly negligent *manner* which presents a significant risk that personal injury or death will result." (Id. at p. 1362.)

Williams claims the only evidence linking him to the Los murder was that he furnished a weapon to Dearaujo, and it was not clear whether Dearaujo or Lyons would use it to commit a robbery. (AOB 220-223.) Williams argues there was support for a second degree felony-murder instruction because the homicide was a "reflexive act" by Dearaujo, whom he describes as a "slow-witted and panicky teenager who did not know how to handle a volatile situation and could not make good decisions quickly." (AOB 223-224.) But it cannot be said that the evidence only demonstrated Dearaujo grossly discharged Williams's pistol at the car occupied by Los, especially since the evidence showed that Dearaujo shot Los at a very close range of no more than one to three feet. (18 RT 2453-2457, 2461-2462.)

Dearaujo shot Los because she saw his face and she resisted during the attempted robbery of her car. (26 RT 3672.) During the earlier meeting at Natalie D.'s house, Williams instructed the persons there, including Dearaujo, that if a victim of a carjacking resisted, they should shoot the victim. (19 RT 2710; 22 RT 3046-3047, 3137; 29 RT 4055.) Williams advocated that if they faced resistance, they should "cap" "shoot" or "pop" a crime victim "when it needed to be done." (21 RT 2992-2994; 22 RT 3049; 23 RT 3180; 31 RT 4272-4273.) Later that night, when they drove in John H.'s van looking for Holland and Andrew C. after the attempted carjacking at the K-Mart parking lot, Williams directed the persons in the van, including Dearaujo, that, "If they don't give up the car, shoot them." (39 RT 4749; 40 RT 4819-4820.) Williams also said they should shoot anyone who saw their face. (40 RT 4812, 4823.) Dearaujo complied with Williams's instructions five days later when he faced resistance from Los, who saw his face, so he shot her at close range during the attempted robbery. The evidence was much stronger than merely showing that Dearaujo fired a shot in a grossly negligent manner at an occupied vehicle. Williams's speculative claim did not warrant the judge instructing the jury on second degree felony-murder. (People v. Mendoza, supra, 24 Cal.4th at p. 174; People v. Wilson, supra, 3 Cal.4th at p. 942.)

Williams also claims that his mere "loaning" of his weapon to Dearaujo and Lyons amounted to nothing more than criminal negligence. So the jury could have found him guilty as a aider and abettor of the lesser included offense of voluntary manslaughter. (AOB 226-227.) Although not requested by Williams's counsel, the trial court had no duty to give this instruction. Voluntary manslaughter is not a lesser included offense of felony-murder. (See *People v. Cavitt, supra,* 33 Cal.4th at p. 197; *People v. Balderas* (1985) 41 Cal.3d 144, 198 [222 Cal.Rptr. 184, 711 P.2d 480].) Contrary to his claim on appeal, Williams knew that he provided his pistol to Dearaujo and Lyons so that they could go to the parking lot of the Family Fitness Center to steal someone's car.

The jury heard testimony that Williams had previously instructed the group gathered at Natalie D.'s house that parking lots were good places to commit carjackings. (29 RT 4058.) On the date of the Los murder, Williams handed his .380 Beretta pistol, a jacket and a blue bandana to Dearaujo. (19 RT 2624, 2628-2629; 21 RT 2904-2905, 2955, 2956.) Williams directed Dearaujo and Lyons to carjack a four door light colored car, put the victim in the trunk and be prepared to "dispose" of the victim later. (19 RT 2622, 2625; 20 RT 2836; 21 RT 2928, 2956.) Williams also told them they were to meet him by a trash can in the parking lot of Gordy's Market so they could drive to Anaheim. (19 RT 2625; 21 RT 2905-2906.)

Williams's own admissions to the detectives after his arrest contravene his claim on appeal. Williams said he handed either Dearaujo or Chris L. the .380 caliber pistol at the end of Ramsdell Street by Gordy's Market so that it could be used for the carjacking. (Exh. 68 at pp. 11, 22, 23, 29, 32, 40.) He also admitted he knew that Dearaujo and Chris were going to use the pistol to commit a carjacking as they walked to the area of the Family Fitness Center. (*Id.* at pp. 28-29, 32.) Dearaujo and Chris had knives, but Chris was going to use a knife. (*Id.* at p. 40.) They were supposed to meet in the parking lot by Gordy's Market after the carjacking. (*Id.* at p. 39.) From there, Williams would go in the car with Dearaujo and Chris, since they did not know how to get to Anaheim. (*Id.* at pp. 39-40.)

Substantial evidence shows that first degree felony-murder (Pen. Code, § 189), but not necessarily second degree felony-murder, was violated. Also, voluntary manslaughter is not a lesser-included offense of first degree felonymurder. Accordingly, Williams's constitutional rights were not violated because the trial court found no duty to instruct on any lesser included offenses because there was no substantial evidence to support them.

Even if the trial court had a sua sponte duty to instruct on second degree felony-murder, it would not warrant reversal because there was no "reasonable probability that the error affected the outcome." (People v. Breverman, supra, 19 Cal.4th at p. 149; citing People v. Watson, supra, 46 Cal.2d at p. 836.) The evidence to support Williams's conviction for first degree murder was formidable. Williams handed his .380 Beretta pistol, a jacket and a blue bandana to Dearaujo with the expectation that a carjacking would occur. (19) RT 2624, 2628-2629; 21 RT 2904-2905, 2955, 2956.) After his arrest, Williams told the detectives that he handed either Dearaujo or Chris L. the .380 caliber pistol at the end of Ramsdell Street by Gordy's Market so that it could be used for the carjacking. (Exh. 68 at pp. 11, 22, 23, 29, 32, 40.) The jury also heard defendant's taped statements to the detectives, where he ultimately admitted that he knew that Dearaujo and Chris were going to use the pistol to commit a carjacking as they walked to the area of the Family Fitness Center. (Id. at pp. 28-29, 32.) Williams knew that Chris L. was going to use a knife during the carjacking. (Id. at p. 40.) They were supposed to meet in the parking lot by Gordy's Market after the carjacking. (Id. at p. 39.) Accordingly, there is no reasonable probability that the error of which Williams complains of affected the result.

V.

THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S QUESTION REGARDING THE LIABILITY OF PRINCIPALS

Williams claims that the trial court committed prejudicial error in failing to direct the jury to a different jury instruction than the one it referred to in its response to a jury question. (AOB 233-246.) This claim is not only waived because there was no objection on the basis raised in this appeal, it also lacks merit as the trial court properly responded to the question.

Penal Code section 1138 provides, in part:

After the jur[ors] have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given. . . .

A trial court has "a primary duty to help the jury understand the legal principles it is asked to apply." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015.) But when a Williams approves of the trial court's response to a jury question during deliberations, any claim of error with respect to that response is waived. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 373.) Furthermore, where trial counsel fails to objection to the court's response to a jury question, the failure to object may be construed as approval of that response. (*People v. Boyette, supra*, 29 Cal.4th at p. 430; *People v. Price* (1991) 1 Cal.4th 324, 414 [3 Cal.Rptr.2d 106, 821 P.2d 610].)

On March 24, 1998, the deliberating jury submitted the following question:

Need clarification of law – If A-B-C-D were involved in planning and talking about a robbery at 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.

(19 CT 5146.)

On March 25, 1998, the judge and counsel conferred to discuss this matter. (44 RT/7 Supp. RT 5229-5231.) The judge's proposed response was to refer the jurors to the instructions on aiding and abetting as well as a response to the question. (44 RT/7 Supp. RT 5230.) The judge asked Williams's counsel if there was anything legally incorrect in the proposed response and, if so, the judge would change it. (44 RT/7 Supp. RT 5231.) Williams's counsel responded, "I'll just submit on the matter. I don't see any

- I don't think there is, but I would submit on the matter." (44 RT/7 Supp. RT

5231.) The judge responded to the question as follows:

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. [¶] 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 offense committed by the person(s) ("B-C-D" in your hypothetical) he aids and abets.

(19 CT 5147.)

Later that day, the jury submitted the following question to the court: "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 following proceedings were held in chambers:

The Prosecutor: The answer to their question is [CALJIC] 3.00, just plain as day. That's the answer.

The Court: Well, my response, refer to 3.00.

The Prosecutor: I would say the whole set, which starts at 3.00, and the language is right there, the very first thing you read, apparently, but we already told them to refer to the whole set and that apparently did not do it, and the specific answer to that specific question is exactly 3.00.

Defense Counsel: But there are –

The Prosecutor: That one instruction answers that question.

Defense Counsel: Yes, well -

The Prosecutor: – which is to what level are principals responsible. Each principal, regardless of the extent or manner of participation, is equally guilty, principals included, and its defined. Defense Counsel: I'm not waiving my objection to 3.00 or any of that group, but that language is in 3.00.

The Court: Okay. Your objection is noted and the answer is to refer to instruction 3.00.

(44 RT 5243.)

The judge responded to the jury's question as follows: "You are referred to Instruction 3.00." (19 CT 5149.)

Williams argues that reversal is required because the judge failed to properly explain the legal issue to the jury because, instead of simply referring the jurors to CALJIC No. 3.00 [Principals–Defined],^{6/} he should have told the jurors to re-read CALJIC No. 8.27 [First Degree Felony–Murder–Aider and Abettor],^{7/} which explains the causal and temporal findings necessary for aider

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.

(19 CT 5188; 43 RT 5131.)

7. The judge instructed the jury with CALJIC No. 8.27 as follows:

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 who either directly or actively commit the act constituting the 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 or instigate by acts or advice its commission, are guilty of murder of the first degree whether the killing is intentional, unintentional or accidental.

^{6.} The jurors were instructed with CALJIC No. 3.00 that:

and abettor liability in a felony-murder case. (AOB 234-236.) But his defense counsel never requested the judge to instruct the jurors with CALJIC No. 8.27 in response to this question. (44 RT 5243.) Other than noting a previous objection that Williams's counsel made to the entire set of instructions regarding aiding and abetting starting with CALJIC No. 3.00 (42 RT 5117), he acknowledged that the language that was responsive to the jury's question was contained in CALJIC No. $3.00.^{\frac{8}{2}}$ (44 RT 5243.)

Accordingly, Williams's counsel's failure to specifically object to the court's response to the jury's question should be construed as an approval of that response and a waiver of Williams's claim on appeal. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 430; *People v. Price*, *supra*, 1 Cal.4th at p. 414.) Further, the claim that the court should have responded by directing the jurors to CALJIC No. 8.27 is waived by Williams's trial counsel's failure to suggest or request that it be part of the trial court's response. (*People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. Ramsey* (2000) 79 Cal.App.4th 621, 630.)

In any event, the trial court's response to the jury's question was proper. In *People v. Beardslee* (1991) 53 Cal.3d 68, this Court explained a trial court's duty regarding questions and requests for clarification as follows:

The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky.

(19 CT 5198; 43 RT 5144.)

^{8.} Williams's counsel originally requested aiding and abetting instructions (19 CT 5178), and during the discussion with the trial court he did not state an objection to instructing the jury with series starting with CALJIC 3.00. (37 RT 4587.)

(People v. Beardslee, supra, 53 Cal.3d at p. 97.) However,

a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.

(*Ibid*.)

The original instructions in this case were "full and complete." (People v. Beardslee, supra, 53 Cal.3d at p. 97.) CALJIC No. 3.00, as well as the referral to the entire series of instructions on the law of aiding and abetting in response to the previous question, provided an accurate statement of the law relevant to the jury's question. Williams claims that the jury's note "clearly indicated" that it was not fully convinced that the prosecution proved that Williams was an aider and abettor to felony-murder and was prejudiced by the court's referral to CALJIC 3.00 because it insinuated that Williams was equally (AOB 234, 238-239.) as guilty as Dearaujo. Williams's assertion is speculative and it is not supported by the record. The hypothetical contained in the jury's previous question was a scenario that more closely mirrored counts eight and nine, where Williams directed Dearaujo and Chris L. to rob the Classy B's liquor store (19 RT 2730-2732, 2734; 20 RT 2813-2814, 2816; 21 RT 2922; 22 RT 3063; Exh. 68 at p. 28), but because it closed they robbed Charles Estey and his mother, Patricia Lee Smith Estey, at the L.A. Times office. (19) RT 2742, 2744-2745, 2748; 21 RT 2815, 2818-2819; Exh. 68 at pp. 23, 78.)

Under these circumstances, the court was within its discretion in determining that directing the jury's attention to the applicable instruction was sufficient to answer the jury's question. (*People v. Beardslee, supra*, 53 Cal.3d at p. 97; *People v. Davis* (1995) 10 Cal.4th 463, 522.) The court's response only addressed the single issue raised in the jury's question. "We find no reasonable likelihood that, given these instructions, the jury did not under stand what types of [other] criminal activity it could consider." (*People v. Seaton*

(2001) 26 Cal.4th 598, 687.) Further, Williams cannot show any prejudice because the court's response to these questions occurred prior to April 2, 1998, when Juror No. 10 was replaced by an alternate juror and the jurors were instructed to deliberate anew. (45 RT 5428-5429.) Accordingly, even if there was any error, based on this record it would be harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Flood* (1998) 18 Cal.4th 470, 480-481.)

VI.

THE JURY WAS PROPERLY INSTRUCTED ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

The judge instructed the jury with CALJIC No. 3.02 on the natural and probable consequences doctrine of aider and abettor liability.^{9/} Using CALJIC No. 3.01 (19 CT 5188-5189; 43 RT 5131-5132), the judge defined aiding and abetting. With CALJIC No. 8.80.1, the judge told the jury that, in order to

(19 CT 5189; 43 RT 5132-5133.)

^{9.} The judge told the jury that:

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 defendants guilty of 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 Williams 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 the natural and probable consequences of the commission of the crimes of robbery.

return a true finding on the special circumstance allegation, the jury had to find that Williams "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." (19 CT 5198-5199; 43 RT 5144-5145.) The judge also informed the jury with CALJIC No. 8.81.17 that the special circumstance was "not established if the attempted robbery was merely incidental to the commission of the murder." (19 CT 5199; 43 RT 5145-5146.)

On appeal, Williams claims that his conviction must be reversed because by instructing the jury with CALJIC No. 3.02, the trial court substituted a negligence standard for the requirements that an aider and abettor to felonymurder who is not the actual killer must have a causal and temporal relationship between the underlying felony and the homicide. (AOB 247-248.) Williams further claims that the natural and probable consequences doctrine is unconstitutional in capital cases because it permits criminal liability to be imposed on a negligence standard. (AOB 250-251.) Williams's claims not only lack merit, but such arguments were rejected by this Court in *People v*. *Coffman and Marlow* (2004) 34 Cal.4th 1, 106-107. Williams presents no compelling reasons to revisit this Court's prior holding on the issue. The jury was properly instructed.

On March 11, 1998, during discussions about the jury instructions, Williams's counsel stated, "Your Honor, consistent with my motion under [section] 1118.1 [that the evidence was not sufficient to support such an instruction], I would object to the giving of the special circumstance instruction on behalf of Mr. Williams." (37 RT 4593; see 36 RT 4531-4533 [argument at section 1118.1 motion].) The judge replied, "All right. Having found that he is a major participant and showed a reckless disregard for human life, the Court

will allow the instructions as follows: The 8.80.1, 8.83.1, 8.83.2, 8.83.3 and 8.81.17." (37 RT 4393.) On March 19, Williams's counsel stated that he: "objected to [CALJIC Nos.] 2.03, 2.06, the entire aiding and abetting set 3.00 through 3.13 and the conspiracy set, 6.10.5 through 6.24, and also 8.80.1, that's the special circumstance jury instruction in conformance with my 1118.1 motion." (42 RT 5117.) Williams did not voice the objections that he now raises on appeal. He has, therefore, forfeited the objections. But there is no merit in his contentions.

In People v. Cavitt, supra, 33 Cal.4th 197, this Court stated that:

The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a co-felon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. ([*People v.*]*Burton* [(1971)] 6 Cal.3d [375,] 388.) 'The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.'

(Ibid.)

The natural and probable consequences doctrine is one theory under which an aider and abettor may be convicted. "[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Here, the intended crime was a robbery. "Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.'" (*Ibid.*) When the natural and probable consequences doctrine applies, an aider and abettor "is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets." (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) Thus, as relevant here, "if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*People v. McCoy, supra*, 25 Cal.4th at p. 1117, citing *People v. Prettyman* (1996) 14 Cal.4th 248, 260, 267.)

For Williams to be convicted under the natural and probable consequences doctrine,

the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.

(*Prettyman, supra*, 14 Cal.4th at p. 262, fn. omitted.) Thus, it is clear that in applying the natural and probable consequences doctrine, the jury must make a finding as to the crime committed by the defendant's confederate.

As further explained in People v. Woods (1992) 8 Cal.App.4th 1570,

[a]Ithough the perpetrator and the aider and abettor need not be tried jointly, the jury first must determine the crimes and degrees of crimes originally contemplated and committed, if any, by the perpetrator. Next, the jury must decide whether the aider and abettor knew of the perpetrator's intent to commit the originally contemplated criminal acts and whether the aider and abettor intended to encourage or facilitate the commission of those acts. In other words, the jury must determine if the aider and abettor is liable vicariously for, i.e., guilty of, the crime or crimes originally contemplated. Then the jury must determine whether other crimes and degrees of crimes charged against the aider and abettor were committed by the perpetrator. If so, the jury must determine whether those crimes, although not necessarily contemplated at the outset, were reasonably foreseeable consequences of the original criminal acts encouraged or facilitated by the aider and abettor.

(People v. Woods, supra, 8 Cal.App.4th at p. 1586.)

As this Court has stated, "at trial each juror must be convinced, beyond a reasonable doubt, that Williams aided and abetted the commission of a criminal act, and that the offense actually committed was a natural and probable consequence of that act." (*Prettyman, supra*, 14 Cal.4th at p. 268.) This is because under the natural and probable consequences doctrine, an aider and abettor is "guilty ... of any reasonably foreseeable offense committed by the person he aids and abets." (*People v. Croy, supra*, 41 Cal.3d at p. 12, fn. 5.)

CALJIC No. 3.02 "correctly instructs the jury on the natural and probable consequences doctrine." (People v. Coffman and Marlow, supra, 34 Cal.4th at p. 107; see also *People v. Nguyen* (1993) 41 Cal.App.4th 518, 535.) Further, to the extent that Williams "contends that imposition for liability for murder on an aider and abettor under this doctrine violates due process by substituting a presumption for, or otherwise excusing, proof of the required mental state, [he] is mistaken." (Id. at p. 107.) As previously discussed, the jury was also instructed with: (a) CALJIC No. 3.01, which advised them that an aider and abettor must act with an intent to commit, encourage or facilitate the commission of the target crime; (b) CALJIC No. 8.80.1, which advised them that for a true finding on the special circumstance allegation they had to find that 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 Yvonne Los;" and (c) CALJIC No. No. 8.81.17, which advised them that the special circumstance was "not established if the attempted robbery was merely incidental to the commission of the murder." These concepts fully informed the jury of applicable legal principles of vicarious liability in this case.

(*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 107; accord, *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1104.)

As in *Coffman and Marlow*, this Court should reject Williams's argument that the application of the natural and probable consequences doctrine in a capital case unconstitutionally predicates liability for murder on mere negligence. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 107.) This

Court explained that:

Liability as an aider and abettor requires knowledge that the perpetrator intends to commit a criminal act together with the intent to encourage or facilitate such act; in a case in which an offense that the perpetrator actually commits is different from the originally intended crime, the natural and probable consequences doctrine limits liability to those offenses that are reasonably foreseeable consequences of the act originally aided and abetted.

(*Ibid.*, citing *People v. Nguyen*, *supra*, 41 Cal.App.4th at p. 531.)

There was no error in the above-referenced instructions as given in this

case. Accordingly, Williams is not entitled to relief as to this claim.

VII.

THE JUDGE DID NOT HAVE A DUTY TO INFORM THE JURY THAT THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE IS AN OBJECTIVE TEST

Williams contends the trial court erred by not sua sponte modifying CALJIC No. 3.02 to tell the jury that the natural and probable consequences doctrine is an objective test, rather than a subjective one. (AOB 252-258.) Williams claims this omission violated his state and federal constitutional rights to due process and a jury trial (U.S. Const., 5th, 6th, 8th & 14th Amends.), and undermined the reliability of guilt phase findings (U.S. Const., 8th Amend.). (AOB 258.) Williams's contention lacks merit.

Williams argues that since the prosecution relied on a natural and probable consequences doctrine, the trial court assumed it had a sua sponte duty

to instruct the jury with CALJIC No. 3.02, but did so without further informing the jury it was an objective test. (AOB 254-255.) Williams's argument ignores the fact that felony-murder dispenses with the showing of malice which is ordinarily required to establish first or second degree murder. (*People v. James*, *supra*, 62 Cal.App.4th at pp. 277-278.) Here, the prosecutor was not relying on a natural and probable consequences doctrine to establish first degree murder, but on a theory of felony-murder. (41 RT 4963.) The prosecutor argued that Williams could be found liable for first degree felony-murder either as an aider and abettor or as a co-conspirator. (See 41 RT 4980-4981.) The jury was instructed on both theories of vicarious liability. (See 19 CT 5188-5189, 5192-5193; 43 RT 5131-5133, 5136-5138.) Further, Williams has not cited any authority for the proposition that a trial court has a sua sponte duty to instruct the jury that the natural and probable consequences doctrine is an objective test.

In *People v. Prettyman, supra*, 14 Cal.4th 266-270, this Court held that when the prosecution relies on the "natural and probable consequences" doctrine of aider and abettor liability, the trial court has a sua sponte duty to identify and describe the target crimes that a Williams may have assisted or encouraged. But *Prettyman* does not hold that this duty also includes telling the jury that it must apply an objective test, as Williams claims.^{10/} As previously discussed, *People v. Cavitt, supra*, 33 Cal.4th 187, this Court noted the deterrent purpose of the felony-murder rule to hold persons who commit the felonies enumerated in Penal Code section 189 strictly responsible for any

^{10.} CALJIC No. 3.02 permits a trial court to instruct the jury as follows: [In determining whether a consequence is "natural and probable," you must apply an objective test, based not on what Williams 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.]

killing committed by a co-felon, regardless if it is intentional, negligent or accidental. (*People v. Cavitt, supra*, 33 Cal.4th at p. 197.) This Court further stated that:

The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly.

(Ibid.)

Williams argues that there was no mandatory inference in this case that Williams knew that Dearaujo and Chris L. would use his pistol to commit a robbery or that he shared that purpose when he loaned them the weapon. (AOB 524.) But as Justice Werdegar noted in *Cavitt*:

complicity appears broader under the felony-murder rule that under the natural and probable consequences doctrine, which we have described as resting on foreseeability (*People v. Croy, supra*, 41 Cal.3d at p. 12, fn. 5), in that a felon may be held responsible for a killing by his or her co-felon, under the felony-murder rule, even if the killing was not foreseeable to the non-killer because 'the plan as conceived did not contemplate the use or even the carrying of a weapon or other dangerous instrument.' (2 La Fave, Substantive Criminal Law, *supra*, § 15.5(c), p. 452.)

(Id. at p. 212, fn. 2 [conc. opn. of Werdegar, J.].)

An accomplice is liable for felony-murder even if the killing was not a natural and probable consequence. (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1019; *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658.) That is because "[t]his rule is in accord with the general principle that felons are liable for felony-murder without any strict causal relation and even if accidental or 'wholly unforeseeable.'" (*People v. Escobar, supra,* 48 Cal.App.4th at p. 1019.) Even if the law was as Williams asserts, the judge did not have a sua sponte duty to give the instruction that he contends. (*Id.* at p. 1020, holding that if a "natural and probable consequence" modification to a jury instruction was

applicable to felony-murder, it had to be requested by defense counsel under *People v. Cox* (1991) 53 Cal.3d 618, 669 [rejecting a claim that it was error to omit a modification to aiding and abetting instructions to require the jury to find whether the crime was a "natural and probable consequence" of the act encouraged].) Accordingly, Williams's claim lacks merit and should be denied.

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LAW OF CONSPIRACY

Williams claims his conviction must be reversed because the trial court failed to instruct the jury to determine whether there was one conspiracy or multiple conspiracies. Williams alleges this instructional error reduced the prosecutor's burden of proof which violated his rights to due process, trial by jury, and a reliable guilt and sentencing determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.) (AOB 259-275.) Williams's contention lacks merit.

Williams was charged with eleven substantive crimes (2 CT 352-359), for which the jury were instructed that he could be directly liable as a perpetrator (19 CT 5188; 43 RT 5131), or vicariously liable either as an aider and abettor or as a conspirator (19 CT 5188-5189, 5192-5193; 43 RT 5131-5133, 5136-5138). Williams was not charged with the substantive crime of conspiracy. (Pen. Code, § 182.) Accordingly, whether there was a single conspiracy or multiple conspiracies was not relevant to the jury's determination of Williams's guilt of the charged crimes.

"Parties to a crime are principals and accessories." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, p. 122; Pen. Code, § 30.) Penal Code section 31 defines principals as, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission" (See also Pen. Code, § 971.) Aiding and abetting and conspiracy are alternative theories of criminal liability. The natural and probable consequences doctrine applies both to aiding and abetting and conspiracy. (See, e.g., *People v. Prettyman, supra*, 14 Cal.4th at pp. 260-261; *People v. Croy, supra*, 41 Cal.3d at p. 12, fn. 5.)

Under the doctrine as it applies to aiding and abetting, a person may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet but also for any other crime that is the natural and probable consequence of the target offense. (*People v. Prettyman, supra*, 14 Cal.4th at p. 254; *People v. Croy, supra*, 41 Cal.3d at p. 12, fn. 5.) Under that doctrine as it applies to conspiracy, a person may be held criminally responsible not only for the crime he or she conspired to commit, but for any deed of a conspirator which was done in furtherance of the object of the conspirator or which was the natural and probable consequence of any act of a co-conspirator done in furtherance of the object of the conspirator. (*People v. Hardy* (1992) 2 Cal.4th 86, 188; *People v. Kauffman* (1907) 152 Cal. 331, 334.)

A conspiracy may be found where two or more people agree to commit a crime, they specifically intend both to agree and to commit the crime, and one of them performs an overt act in furtherance of their agreement. (*People v. Jurado* (2006) 38 Cal.4th 72, 120.) The natural and probable consequences doctrine does not require that the conspirator be present when the natural and probable consequence of the crime is committed. "'It is not necessary that a party to conspiracy shall be present and personally participate with his coconspirators in all or any of the overt acts." (*People v. Morante* (1999) 20 Cal.4th 403, 417; quoting *People v. Benenato* (1946) 77 Cal.App.2d 350, 356, disapproved on another ground in *In re Wright* (1967) 65 Cal.2d 650, 654-656.)

During a discussion about jury instructions, Williams's counsel objected to the conspiracy group of standard instructions because a conspiracy theory was not charged in the information. (37 RT 4589.) The prosecutor argued that

conspiracy was being used as a theory of vicarious liability, along with aiding Accordingly, she was requesting an instruction regarding and abetting. conspiracy when it is not pleaded as a charged crime. (37 RT 4589-4590.) The judge approved the instructions. (37 RT 4590.) The judge instructed the jury with CALJIC Nos. 6.10.5 [Conspiracy and Overt Act–Defined–Not Pleaded as Crime Charged], 6.11 [Conspiracy–Joint Responsibility], 6.12 [Conspiracy-Proof of Express Agreement Not Necessary], 6.13 [Association Alone Does Not Prove Membership in Conspiracy], 6.14 [Acquaintance With All Co-Conspirators Not Necessary], 6.16 [When Conspirator is Not Liable for Act or Declaration of Non-Conspirator], 6.18 [Commission of Act in Furtherance of a Conspiracy Does Not itself Prove Membership in Conspiracy], 6.20 [Withdrawal From Conspiracy] and 6.24 [Determination of Admissibility of Co-Conspirator's Statements]. (19 CT 5192-5193, 5194-5195; 43 RT 5136-5140.)

On March 31, 1998, during deliberations the jury submitted the following note to the judge: "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?" (19 CT 5165.)

After a recess, the judge asked counsel if they had an answer to the jury's question. (45 RT 5342.) The prosecutor said that she had not formulated one, but felt that Williams's counsel would disagree with any proposed answer and would want the jury referred to a pattern instruction. Williams's counsel replied, "That's a good idea." (45 RT 5342.) Williams's counsel pointed out that instruction was CALJIC No. 6.10.5. (45 RT 5342.) The judge inquired if it would be appropriate to tell the jury that once a conspiracy was established, any crime committed in the furtherance of that conspiracy came within the parameters of that conspiracy. (45 RT 5343.) The prosecutor argued that

would be appropriate, and then to refer the jurors to the conspiracy instructions. (45 RT 5343.) Williams's counsel noted that he felt the conspiracy instruction were drafted to be very encompassing, so they did not clarify when a conspiracy began and when it ended. But he did not think that the pattern instructions should be further clarified. He argued it was a factual issue as to whether there was a conspiracy, when it began, and who participated "as per the instruction." (45 RT 5343.)

The judge proposed that, subject to Williams's counsel objection, to tell the jury as follows:

You, the jury, 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 the 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.

(45 RT 5344.)

Williams's counsel responded that, subject to his prior objection, the judge's proposed instruction seemed to highlight CALJIC No. 6.10.5, so he did not see any blatant problems with that response. (45 RT 5344.) The judge's response to the jury was identical to the proposed response that was discussed with counsel. (19 CT 5166.)

On appeal, for the first time, Williams claims that this note shows that the jury did not understand the law of conspiracy, and that this was an admonishment by the court that there was only one conspiracy. He asserts this was an inquiry as to whether there was a single conspiracy or multiple conspiracies, which was a clearly factual question that the jury should have decided. (AOB 265-266.) Williams's contention lacks merit. As Williams acknowledges, California courts are divided as to whether the determination of the existence of a single versus multiple conspiracies is one of law or fact. (AOB 266-268; see *People v. Morocco* (1987) 191 Cal.App.3d 1449, 1453 [question of fact for the jury]; see also *People v. Cook* (1984) 151 Cal.App.3d 1142, 1146; but cf. *People v. Liu* (1996) 46 Cal.App.4th 1119, 1133 [not question of fact for the jury]; *People v. Davis* (1989) 211 Cal.App.3d 317, 322.) In cases where a conspiracy is charged, some courts have held that a trial court is required to instruct the jury to determine whether single or multiple conspiracies exist only when there is evidence to support alternative findings. (See *People v. Vargas* (2001) 91 Cal.App.4th 506, 554; *People v. Jasso* (2006) 142 Cal.App.4th 1213, 1220 ["Specifically, an instruction is warranted where the evidence could support a finding that there was one overall agreement among the various parties to perform functions in order to carry out the objectives of the conspiracy. [Citations.].") As the *Jasso* court noted, other courts have found no duty to give such an instruction. (*Jasso, supra*, 142 Cal.App.4th at p. 1220, fn. 5; citing *People v. Liu, supra*, 46 Cal.App.4th at p. 1133 [no duty to instruct]; *People v. McLead* (1990) 225 Cal.App.3d 906, 921; *People v. Davis, supra*, 211 Cal.App.3d at pp. 322-323.)

As previously discussed, this is not a chase where conspiracy was charged as a crime, but it was used as an alternative liability theory with respect to the charged crimes. Also, defense counsel failed to argue to the trial court that the jury should have been instructed to determine whether single or multiple conspiracies existed either during the discussion regarding the conspiracy instructions to be read to the jury, or at the discussion regarding an answer to the jury's question. At that latter discussion, Williams's counsel's position was that jurors be referred to CALJIC No. 6.10.5, and that the court not elaborate on the pattern instructions. (45 RT 5342-5343.) Williams's counsel failed to argue in favor, or to produce any specific authority, to support the giving of such an instruction. As this Court has stated, "Of course, neither the absence nor the presence of a pattern jury instruction on a given subject excuses a party from the ordinary obligation to submit proposed instructions to

the trial court, as set forth in section 1095.3. [Citations.]" (*People v. Simon* (2001) 25 Cal.4th 1082, 1109-1110.)

The conspiracy instructions in this case were "full and complete." (*People v. Beardslee, supra*, 53 Cal.3d at p. 97.) Here, the trial court instructed the jury with CALJIC No. 6.10.5, which states in relevant part that:

A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of robbery, and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as such in this case. [¶] In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged act was committed. $[\P][\P]$.

(19 CT 5192; 43 RT 5136.)

The judge also instructed the jury with CALJIC No. 6.16 that:

Where a conspirator commits an act or makes a declaration which is neither in furtherance of the object of the conspiracy not the natural and probable consequence of an attempt to attain that object, he alone is responsible for and is bound by that act or declaration, and no criminal responsibility therefor attaches to any of his confederates.

(19 CT 5194; 43 RT 5139.)

Jurors are presumed to be intelligent persons capable of understanding and correlating all jury instructions. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.) All of the instructions that the trial court gave were correct statements of the law and properly informed the jury of its responsibility to find aiders and abettors as well as co-conspirators liable for all crimes naturally and probably resulting from those they intended and assisted in committing. (*People v. Prettyman, supra*, 14 Cal.4th at pp. 254, 260-263; *People v. Croy, supra*, 41 Cal.3d at p. 12, fn. 5; *People v. Kauffman, supra*, 152 Cal. at p. 334; *People v. Hardy, supra*, 2 Cal.4th at p. 188.)

Williams argues that Natalie D. testified that the purpose of the conspiracy was for the group to make money so they could purchase a home, invest in stocks and become legitimate businessmen. But when Los was shot, Dearaujo and Chris L. were simply trying to get transportation to a party. Williams claims the fact he provided the gun and knew they were going to "do dirt" did not bring him within the ambit of the conspiracy. So if there was only one conspiracy, the Los homicide would be outside the ambit of that conspiracy. (AOB 272.) Williams's claim is speculative and was necessarily rejected by the jury.

There was substantial evidence to find Williams liable under an aiding and abetting theory for the first degree felony-murder of Yvonne Los. It was also substantial under a conspiracy theory. Prior to the series of crimes from May 14-20, 1993, Williams spoke about forming a criminal gang with his friends, George Holland, Rodney M., Andrew C. and Tony P. (21 RT 2991; 28 RT 3837-3838, 3919-3920, 3939, 3951-3952.) Williams and Mondre Weatherspoon had spoken about committing crimes together, and forming the "Pimp-Style Hustler's" gang of which they were going to be the leaders. (29 RT 4031-4033; 31 RT 4159.) Weatherspoon testified that the focus of the gang was to make money, both legally and illegally, and to seek adventure. (29 RT 4032.) The meeting at Natalie D.'s house was the emanation of the amalgamation of Williams and his group with Weatherspoon and his group, that included Steve M., James H. and Alfredo G., of the gang they had previously discussed. (31 RT 4040.) At that meeting, Williams discussed the formation of the gang to commit crimes to have fun and make money. (19 RT 2706, 2712; 20 RT 2795; 21 RT 2888-2889, 2988-2992, 2994; 22 RT 3045, 3048-3049; 24 RT 3429, 3432; 25 RT 3464, 3560; 28 RT 3825-3827, 3839-3840,

3942-3943; 31 RT 4262-4264; 32 RT 4302-4303.) During the meeting, it was discussed that, as a new gang, they had to terrorize the neighborhood to obtain a reputation by committing crimes like robberies, kidnapping, carjacking and murder. (29 RT 4041.)

Even without a financial incentive, the attempted carjacking and resulting murder of Los clearly fell within the conspiratorial objective of "having fun," "seeking adventure" and "terrorizing the neighborhood" by committing violent crimes. Also, the evidence pointed to much greater guilt than Williams claims on appeal. It was Williams, and not Dearaujo and Chris L., who wanted a car to go to a party. He also did much more that just provide them a pistol with only the simple knowledge that Dearaujo and Chris L. were going out to "do dirt," which included: (1) handing his pistol to Dearaujo (19 RT 2624, 2628-2629; 21 RT 2904-2905, 2955, 2956.); (2) directing Dearaujo and Lyons what type of car to take, to put the victim in the trunk and later dispose of the victim (19 RT 2622, 2625; 20 RT 2836; 21 RT 2928, 2956); (3) after the vehicle was taken, where to meet Williams so they could later drive to Anaheim. (19 RT 2625; 21 RT 2905-2906.) Williams's own statements contravene his claim on appeal. He admitted to the detectives that: (1) he provided the pistol so that it could be used for the carjacking to be perpetrated by Dearaujo and Chris L. (Exh. 68 at pp. 11, 22, 23, 29, 32, 40.); (2) that Chris L. was going to use a knife (Id. at p. 40.); (3) that they would meet after the carjacking in the parking lot by Gordy's Market (Id. at p. 39.); and, (4) thereafter he would drive them to Anaheim (*Id.* at pp. 39-40.).

Williams also cannot show any prejudice because the court's response to the March 31, 1998, question which he claims showed confusion about the law of conspiracy occurred prior to April 2, 1998, when Juror No. 10 was replaced by an alternate juror and the jurors were instructed to deliberate anew. (45 RT 5428-5429.) Accordingly, even if there was any error, based on this record it would be harmless beyond a reasonable doubt. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324; *People v. Flood, supra*, 18 Cal.4th at pp. 480-481.)

IX.

THE TRIAL COURT DID NOT HAVE A DUTY TO INSTRUCT THE JURORS THEY HAD TO UNANIMOUSLY AGREE AS TO CONSPIRACY

Williams claims that his conviction must be reversed because the trial court failed to instruct the jury that they had to unanimously agree on any conspiracy and to find it beyond a reasonable doubt violated his rights to due process, trial by jury, and reliable guilt and penalty determinations in a capital case (U.S. Const., 5th, 6th, 8th & 14th Amends.). (AOB 276-288.) Williams's claim lacks merit because the trial court did not have a sua sponte duty to so instruct the jury in his case.

In a criminal case, a jury verdict must be unanimous. (*People v. Collins, supra,* 17 Cal. 3d at p. 693.) The jury must agree unanimously Williams is guilty of a specific crime. (*People v. Diedrich* (1982) 31 Cal. 3d 263, 281.) When the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

The requirement of unanimity as to the criminal act "is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Russo, supra*, 25 Cal.4th at p. 1132; citing *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) "The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count." (*People v. Russo, supra*, 25 Cal.4th at p. 1132, quoting *People v. Deletto* (1983) 147 Cal.App.3d 458, 472.) On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the "theory" whereby the defendant is guilty. (*People v. Russo, supra*, 25 Cal.4th at p. 1132; citing *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1026.)

In deciding whether to give the unanimity instruction, one must look to its purpose. The jury must agree on a "particular crime" (*People v. Russo, supra*, 25 Cal.4th at pp. 1134-1135; citing *People v. Diedrich, supra*, 31 Cal.3d at p. 281.) Unanimity as to exactly how the crime was committed is not required. The unanimity instruction is appropriate "when conviction on a single count could be based on two or more discrete criminal events," but not "where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event." (*Russo, supra*, 25 Cal.4th at p. 1135; citing *People v. Perez* (1993) 21 Cal.App.4th 214, 223.)

In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, the court should give the unanimity instruction. (*People v. Russo, supra*, 25 Cal.4th at p. 1135.)

The second situation is present in this case, where Williams was charged with 11 separate and distinct crimes that were argued under alternate theories. Although that could leave room for disagreement to exactly how each crime was committed, or defendant's precise role, the jury was not required to unanimously agree on the basis or "theory" of the defendant's guilt, whether aiding and abetting or conspiracy. (*People v. Russo, supra*, 25 Cal.4th at p. 1132; *People v. Jenkins, supra*, 22 Cal.4th at pp. 900, 1024-1025, quoting *People v. Davis* (1992) 8 Cal.App.4th 28, 45 ["[j]urors need not unanimously agree on whether the defendant is an aider and abettor or a principal even when different evidence and facts support each conclusion."].)

Williams's argument on appeal is premised on a claim that the prosecutor argued that there was a single conspiracy in this case that began with the meeting at Natalie D.'s house in the evening of May 14, 1993. (AOB 280.) As previously discussed, it is also premised on a claim that the trial court's response to the jury's note of March 31, 1998, somehow was an admonishment that there was a single conspiracy. (AOB 281; see 19 CT 5166; 45 RT 5344.) Both premises are erroneous.

As previously discussed, Williams was not charged with the crime of conspiracy and the jurors were so instructed. (19 CT 5192; 43 RT 5136.) With CALJIC No. 2.91, the judge told the jury that, "The burden is on the People to prove beyond a reasonable doubt that the Williams is the person who committed the crime for which he is charged." (19 CT 5187; 43 RT 5130.) The judge also instructed the jury with CALJIC No. 17.02 as follows:

Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of any or all of the crimes in Counts I through XI. Your finding as to each Count must be stated in a separate verdict.

(19 CT 5200; 43 RT 5147.)

Not only did the judge not instruct the jurors that there was a single conspiracy, the prosecutor did not argue that to the jury. While arguing to the jury, the prosecutor informed the jury of 11 separate counts charged against Williams. (41 RT 4962-4966.) The prosecutor informed the jurors that they

could find Williams guilty under the alternative legal theories of aiding and abetting and conspiracy. (41 RT 4968-4971.) The prosecutor used the discussion of crimes by the persons present at Natalie D.'s house and their piling into John H.'s van to demonstrate the concepts of the law of conspiracy that required an agreement between two or more persons to commit a crime and an overt act in the furtherance of that conspiracy. (See 41 RT 4971-4974.)

Under the circumstances of this case, there was no requirement that a unanimity instruction be given. Accordingly, Williams's claim that a reversal is warranted lacks merit.

X.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONSCIOUSNESS OF GUILT

At trial, the court relied on two instructions (CALJIC Nos. 2.03 & 2.06) to inform the jury that if it found Williams made willfully false or deliberately misleading statements about the charged crimes, and/or attempted to suppress evidence, it could consider such statements or efforts as tending to show consciousness of guilt. Both instructions also included the cautionary advisement that such "conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."^{11/}

If you find that a defendant attempted to suppress evidence against himself in any manner, such as by intimidation of a witness, this attempt

^{11.} Pursuant to CALJIC Nos. 2.03 and 2.06, the trial court instructed the jury as follows:

If you find that before this trial the defendant made a willfully false or misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

Williams claims these instructions were improper because: (1) they authorize permissive inferences in a criminal case of a defendant's consciousness of guilt from false statements and attempts to suppress evidence; and, (2) they are impermissibly argumentative by lightening the prosecution's burden of proof by focusing the jury's attention to evidence favorable to the prosecution, and also place the judge's imprimatur on such evidence. Williams asserts that, as a result, CALJIC Nos. 2.03 and 2.06 violate his rights to a fair trial as guaranteed by due process of law (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15), right to have his guilty found beyond a reasonable doubt by an impartial and properly instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and right to a fair trial and a reliable capital guilt and penalty determinations (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17.) (AOB 289-298.) Williams's claims are identical to those that have been previously rejected by this Court. Additionally, Williams's claims lack merit and should be denied.

During discussions about jury instructions, the prosecutor requested CALJIC No. 2.03 to be given as to Williams because Williams lied and mislead the detectives during his interviews, which showed a consciousness of guilt. (37 RT 4585, 4586.) Williams's counsel objected to the instruction. (37 RT 4585.) The trial court approved giving CALJIC No. 2.03 as to Williams. (37 RT 4586.) Subsequently, the prosecutor requested CALJIC No. 2.06 be given as to Williams and Dearaujo, because there was evidence that Williams directed that the pistol be given to Tony P. and it was subsequently disassembled in an

(19 CT 5183; 43 RT 5124.)

may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

effort to conceal it as evidence of the Los homicide. It was also based on Dearaujo taking the bag of property over to Rodney M.'s residence after the homicide. (37 RT 4596.) Williams's counsel objected to the instruction. (37 RT 4596.) The trial court found there was evidence that, if believed, would support the suggested inference and he approved instructing Williams's jury and Dearaujo's jury with CALJIC No. 4597.) Williams's counsel then argued that it was not disputed that Chris L. hid the pistol in the attic of Natalie D.'s house, but he did not believe that Lyons was directed to do so. (37 RT 4597-4598.) The prosecutor argued that she believed that was discussed during Chris L.'s testimony. (37 RT 4598.) Williams's counsel later stated for the record that he objected to CALJIC Nos. 2.03 and 2.06. (42 RT 5117.)

An instruction on consciousness of guilt under CALJIC No. 2.03 is properly given when the evidence supports the inference that Williams prior to trial made a willfully false or deliberately misleading statement concerning the charged offense. (*People v. Kelly* (1992) 1 Cal.4th 495, 531.) The instruction is applicable "based on defendant's inconsistent and contradicted statements to police attempting to minimize involvement" in an offense. (*People v. Stitely* (2005) 35 Cal.4th 514, 555.) A defendant's inconsistent statement to police, initially denying and then admitting commission of the crimes, provide the requisite evidentiary support for the instruction. (*People v. Kelly, supra*, 1 Cal.4th at p. 531.) CALJIC No. 2.03 applies "whether or not the Williams himself contradicts his earlier statement," and is properly given where the defendant's pretrial statement is shown to be false "by the testimony of the prosecution witnesses." (*People v. Snow* (2003) 30 Cal.4th 43, 96.)

This Court has continued to uphold CALJIC No. 2.03 against the identical challenges raised by Williams. CALJIC No. 2.03 is a cautionary instruction that "benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory.

[Citations.]'" (*People v. Boyette, supra*, 29 Cal.4th at p. 438.) CALJIC No. 2.03 does not improperly endorse the prosecution's theory or lessen its burden of proof, and is not an improper pinpoint instruction. (*Ibid.*; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; *People v. Kelly, supra*, 1 Cal.4th at p. 531.) The Court in *Jackson* addressed CALJIC Nos. 2.03, 2.06 and other "consciousness of guilt" instructions, and held they were not improper pinpoint instructions:

[E]ach of [these] instructions made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying such activity was not itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.] We therefore concluded that these consciousness-of-guilt instructions did not improperly endorse the prosecution's theory or lessen its burden of proof.

(People v. Jackson, supra, 13 Cal.4th at p. 1224.)

The language of the consciousness-of-guilt instructions "sufficiently protects against conviction based on the defendant's false statements or consciousness of guilt alone." They are also not argumentative or biased in favor of the prosecution. (*People v. Stitely, supra*, 35 Cal.4th at p. 555.) Also, "insofar as the jury believed defendant lied about the charged crimes, the instruction did not generate an irrational inference of consciousness of guilt. [Citation.]." (*Ibid.*; see also *People v. Cain* (1995) 10 Cal.4th 1, 34 [instruction does not permit jury to infer that whether the defendant possessed the requisite intent]; *People v. Medina* (1995) 11 Cal.4th 694, 792.)

Both of Williams's interviews with the detectives show the type of "inconsistent and contradicted statements to police attempting to minimize involvement" in an offense (See Ex. 68 at pp. 1-87) that this Court determined were proper for the jury to be instructed with CALJIC. No. 2.03. (*People v. Stitely, supra,* 35 Cal.4th at p. 555.) But Williams argues that even if this is so,

they were about matters that were collateral to the murder of Los. (AOB 292.) In *People v. Crandell* (1988) 46 Cal.3d 833, the defendant faced multiple felony charges, and argued that CALJIC No. 2.03 should have been limited to the murder charge because there was no evidence he made false statements relating to the kidnapping and assault charges. This Court rejected this argument, and held that CALJIC No. 2.03 did not "assume the existence of evidence relating to each charge," but merely instructs the jury "on the use of such evidence should it be found to exist." (*People v. Crandell, supra,* 46 Cal.3d at p. 870.) Accordingly, Williams's contention lacks merit. The trial court properly instructed the jury with CALJIC No. 2.03.

Regarding CALJIC No. 2.06, Williams claims that it was not proper because Tony P.'s testimony did not suggest that Williams ordered, or even knew, that the gun was disassembled to hide it from the police. Williams asserts that was impermissibly overbroad because it related to events after the murder and did not provide for a logical or rational inference that he intended to rob Los. (AOB 293-294.)

But contrary to Williams's assertion, it is well-settled that CALJIC No. 2.06 does not lessen the prosecution's burden of proof. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 102; *People v. Jackson, supra*, 13 Cal.4th at pp. 1223-1224.) It is also well-settled that CALJIC No. 2.06 is properly given if there is some evidence on the record that, if believed, would support an inference that the defendant did suppress evidence, reflecting a consciousness of guilt. (*Coffman and Marlow, supra*, 34 Cal.4th at p. 102.) The facts supporting such an inference need not be conclusively established before CALJIC No. 2.06 may be given. (*Ibid.*) Here, the jury heard testimony that, on May 22, 1993, Chris L. went with his friends, cousins Jason D. and Jeremy D., to Tony P.'s house. Chris told Tony that he was looking for Williams. Tony directed Chris to a nearby home where he found Williams. Williams directed

Chris to take the.380 caliber pistol to Tony 's house. Chris demonstrated the pistol to Jason and Jeremy before he gave it to Tony. (20 RT 2761, 2857, 2858-2859; 21 RT 2913; 24 RT 3430; 25 RT 3446-3447.) Chris gave Tony the pistol and a plastic bag containing eight or nine casings. (25 RT 3454-3456; 3532.) Chris told Tony that Williams would pick up the pistol later that morning. (25 RT 3455, 3456, 3520, 3577.) Tony put the pistol and bag with the shell casings under his pillow and went to sleep. (25 RT 3520.) Tony kept the pistol in his closet. (25 RT 3456.) This evidence was sufficient to support the contested instruction. The trial court was not required to find that Williams attempted to suppress the weapon prior to giving that instruction.

Even if the evidence did not support the trial court's decision to give CALJIC Nos. 2.03 and/or 2.06, any error would be harmless either People v. Watson, supra, 46 Cal.2d at pp. 836-837, or Chapman v. California (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], [beyond-a-reasonable doubt harmless error standard for federal constitutional error]. (See People v. Guiton (1993) 4 Cal.4th 1116, 1129-1130.) These instructions presented the jury with a permissive inference, so that if they found that Williams made a deliberately false or deliberately misleading statement, and/or attempted to suppress evidence, they further cautioned the jury that such conduct was insufficient by itself to prove guilt, and that they had decided what weight and significance, if any, of such evidence. The jury were also told to disregard any instructions that were inapplicable to the facts [CALJIC No. 17.31 – 19 CT 5202; 43 RT 5151], and this Court presumes the jury followed the trial court's directive. (People v. Waidla (2000) 22 Cal.4th 690, 725.) Moreover, the evidence against Williams was so significant that any error in giving CALJIC Nos. 2.03 and 2.06 was harmless under any standard.

XI.

SUFFICIENT EVIDENCE SUPPORTED THE JURY'S FINDING OF THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

Williams claims that the evidence was too weak of his major participation and/or reckless indifference to human life to support the jury's finding of the robbery-murder special circumstance. Williams asserts this requires the jury's true finding under Penal Code section 190.2(a)(1) must be set aside and his death penalty stricken. (AOB 299-326.) Williams's contention lacks merit because the jury was presented with sufficient evidence to find beyond a reasonable doubt the charged special circumstance.

The special circumstance alleged was that the murder was committed by Williams while he was engaged in the commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime of attempted robbery (§§ 644/211), within the meaning of Penal Code section § 190.2, subd. (a)(17)(i). (2 CT 352-353; 3 RT 135.) Because Williams was not the actual killer, the jury was instructed with the language of Penal Code section 190.2, subdivision (d).^{12/} The jury found the special circumstance to be true. (2 CT 5071; 46 RT 5451-5455.)

To determine the sufficiency of the evidence to support a special circumstance finding, this Court applies the same test used to determine the sufficiency of the evidence to support a conviction of a criminal offense. This Court reviews the whole record in the light most favorable to the judgment below to determine whether it discloses "substantial evidence -- that is, evidence which is reasonable, credible, and of solid value" such that a reasonable trier of fact could find the special circumstance beyond a reasonable doubt. (*People v. Elliott* (2005) 37 Cal.4th 453, 466; *People v. Maury* (2003) 30 Cal.4th 342, 396.) A special circumstances finding cannot be reversed

12. The judge instructed the jury with CALJIC No. 8.80.1 as follows:

If you find that the Williams in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true or not true: [1] That the murder of Yvonne Los was committed while the Williams 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 the 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 Williams 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 Williams acts with reckless indifference to human life when that Williams knows or is aware that his acts involve a grave risk of death to an innocent human being. [¶] In order to find the special circumstance alleged in this case to be true or untrue, you must agree unanimously. $[\P]$ You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied.

(19 CT 5198-5199; 43 RT 5144-5145.)

simply because the circumstances might also reasonably be reconciled with a contrary finding. The finding must be upheld if the circumstances reasonably justify the jury's findings. (*People v. Guerra, supra*, 37 Cal.4th at p. 1129.)

In 1998, Penal Code section 190.2, subdivision (d), provided:

Notwithstanding subdivision (c), every person not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

(Pen. Code (West 1998 Compact Edition).)

This provision was intended to conform our state law to the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137, 158 [107 S.Ct. 1676, 95 L.Ed.2d 127].) (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn. 16.) In 1982, the United States Supreme Court held that the Eighth Amendment did not permit the death penalty to be imposed on a person "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (*Enmund v. Florida* (1982) 458 U.S. 782, 797 [102 S.Ct. 3368, 73 L.Ed.2d 1140].) The *Tison* Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Tison v. Arizona, supra*, 481 U.S. at p. 158.)

In *Enmund*, the defendant was the driver of a "getaway" car in the armed robbery of a dwelling. His accomplices murdered the victims inside the dwelling when they resisted. Under Florida's first degree murder law, the defendant was found guilty of capital murder on a vicarious liability theory and sentenced to death. (*Enmund v. Florida, supra*, 458 U.S. at pp. 783-788.) The

sole evidence of Enmund's involvement in the felony-murder was his role as a getaway driver. The United States Supreme Court held that the Eighth Amendment prohibited the death sentence because no evidence was presented that Enmund "killed or attempted to kill, ... [or] intended or contemplated that life would be taken. ..." (*Enmund v. Florida, supra*, 458 U.S. at p. 801.) As the high court explained later, Enmund's participation was too tangential to justify a death sentence because he was a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state." (*Tison v. Arizona, supra*, 481 U.S. at p. 149 [explaining *Enmund v. Florida, supra*, 458 U.S. at p. 782].) Enmund's mere culpability as a getaway car driver in the robbery was insufficient to support the death penalty.

In *Tison*, the defendants were brothers who helped their father, a convicted murderer, escape from prison. Both smuggled weapons into the prison. They knew their father previously had killed a prison guard during an earlier escape attempt. After the escape, the brothers helped their father and another escaped murderer kidnap and rob an innocent family. They watched as their father and the fellow escapee murdered the family, and they then continued to assist the killers. (*Tison v. Arizona, supra*, 481 U.S. at pp. 151-152.) Although the Tison brothers were not shown to have intended to kill, the United States Supreme Court upheld the death penalty in their cases. The court found that they were "major" or "substantial" participants in the kidnapping and robbery, and they acted with a reckless indifference to human life. Unlike the getaway driver in *Enmund*, the Tison brothers were "actively involved in every element of the kidnapping-robbery and ... [were] physically present during the entire sequence of criminal activity culminating in the murder . . . and the subsequent fight." (*Id.* at p. 158.)

The facts of the case supported a finding the Tison brothers "subjectively appreciated" that their "acts were likely to result in the taking of innocent life." (*Tison v. Arizona, supra*, 481 U.S. at p. 152.)

Proposition 115, which took effect on June 6, 1990, eliminated the requirement of intent to kill as an element of the felony-murder special circumstance with respect to an accomplice. Instead, for a felony-murder special circumstance to be found true, an accomplice must have been a major participant and acted with reckless indifference to human life. (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 298.) In *People v. Estrada* (1995) 11 Cal.4th 568, this Court determined that "*Tison* is the source of the language of Penal Code section 190.2, subdivision (d), and the constitutional standards set forth in that opinion are therefore applicable to all allegations of a felony-murder special circumstance, regardless of whether the People seek and exact the death penalty or a sentence of life without parole." (*Estrada, supra,* at pp. 575-576.)

The phrase "reckless indifference to human life" in section 190.2, subdivision (d) means that the Williams "was subjectively aware that his or her participation in the felony involved a grave risk of death." (*People v. Estrada, supra,* 11 Cal.4th at p. 577.) The level of participation required to be a "major participant" was discussed in *People v. Proby* (1998) 60 Cal.App.4th 922. There, the court rejected the defendant's dictionary definition of "major," under which he claimed a common understanding the word required his role to be "greater in dignity, rank, importance, interest, number, quantity or extent." (*Id.* at pp. 930-931.) Instead, the court noted that the common meaning of "major" also includes "notable or conspicuous in effect or scope" and "one of the larger or more important members or units of a kind or group." (*Ibid.*) In applying this less restrictive common understanding of the term "major," the court concluded that sufficient evidence supported a finding of major

participation where the Williams provided the actual shooter with the gun used to commit the murder, saw the victim after he was shot but made no attempt to assist him or determine if he was dead or alive, proceeded to the safe, took money from it and left the store. (*People v. Proby, supra,* 60 Cal.App.4th at p. 929.)

Other courts have found similar involvement to constitute "major" participation. In *People v. Smith* (2005) 135 Cal.App.4th 914, the appellate court found the meaning of the term "major," in "major participant" included ""notable or conspicuous in effect or scope.""" (Id. at p. 928.) The court found the evidence supported the special circumstances allegation against codefendant Tafolla, who stood outside the victim's motel room as a lookout while the other defendant beat the victim to death. The court found concluded that, "Tafolla's contributions were 'notable and conspicuous' because he was one of only three perpetrators, and served as the only lookout to an attempted robbery occurring in an occupied motel complex." (Ibid.; citing People v. Hodgson (2003) 111 Cal.App.4th 566, 579-580 [defendant was "major participant" where robbery involved only two perpetrators and defendant helped actual killer escape].) In People v. Bustos (1994) 23 Cal.App.4th 1747, the court found sufficient evidence supported the special circumstances allegation against Loretto, a co-defendant who did not actually attack the victim, when Loretto had committed prior robberies with the attacker, planned the charged robbery with the attacker and fled the scene with the attacker and the proceeds, leaving the victim to die. (Id. at p. 1755.) In People v. Mora (1995) 39 Cal.App.4th 607, the defendant was also found to be a major participant where the evidence showed that he did not intend for the victim to be killed by his accomplice, but he had arranged the accomplice's entry into the victim's house and, once the victim was shot, the defendant carried through with the robbery, leaving the victim there to die and threatening the remaining victim. (Id. at p. 617.) That a defendant does not witness the actual killing during a robbery does not necessarily lead to a conclusion that the evidence is insufficient to support findings he or she was a major participant. (*People v. Proby, supra*, 60 Cal.App.4th at pp. 929-930.)

On March 10, 1998, the trial court heard Williams's motion to strike or enter a judgement of acquittal as to the special circumstance pursuant to section 1118.1. (36 RT 4531.) Williams's counsel argued the reckless indifference was not established because he asserted that under *Tison*, *Enmund*, and as illustrated by the facts of *Estrada* and *Bustos*, it required something more than what could occur during the course of a robbery. (36 RT 4532.) Williams's counsel also argued that Williams was not a "major participant" because although his own statement indicated that he gave the gun to either Dearaujo or Chris L., he did not direct them to do any specific acts. (36 RT 4533.)

The prosecutor argued that she had introduced sufficient evidence to permit the jury to find that Williams acted with reckless indifference to Los's life, and that he was a major participant in the crime. (36 RT 4533-4534, 4535.) The prosecutor asserted that *Tison, Enmund, Estrada* and *Bustos* supported her position. The prosecutor argued that it was not a requirement that Williams be present, and there was abundant evidence to show that the carjacking was the idea of Williams. The prosecutor asserted that reckless indifference had been established because Williams enlisted Dearaujo and Chris L. to commit the carjacking for him. Williams handed them the pistol at the same location mentioned by Chris L. Williams told them where to get the car, what kind of car to get, and gave his jacket to Dearaujo so he could wear it during the robbery. Williams had previously discussed that a life could be taken during the course of a robbery, and it was something he admitted in his statements to the detectives. (36 RT 4534.) The prosecutor noted that, although not specifically defined by case law, a common usage of "major

participant" was "notable or conspicuous involvement." She argued that his major participation was established because, but for Williams deciding that they needed to get a car to go to Anaheim and party, and his direction that Dearaujo and Chris L. go carjack Los, she would be alive today. (36 RT 4535.)

The trial court denied Williams's section 1118.1 motion. (36 RT 4536.) The judge found that it was abundantly established that Williams was a major participant. The judge noted that Williams was either the primary or the co-"moving force" of the group that engaged in these crimes, which was the mosaic of the case. This was not limited to an incident, but continued throughout all the charged crimes, including the murder of Los. The judge said that, in some respects regarding this group, Williams was almost a 20th century equivalent of Fagin from Oliver Twist. (36 RT 4535.) Williams's reckless indifference to human life was shown by his exhortation to "smoke" or "cap" any victim who resisted and by his furnishing of his pistol to his young recruits. The judge found that Williams had to be aware that by furnishing a loaded gun to persons who were going to commit a carjacking, the risk of a victim resisting and his direction that they kill those who resisted, it was much more than the mere furnishing of a weapon that he argued. (36 RT 4536.) The judge concluded that Williams's motion should be denied because the evidence established that Williams knowingly engaged in criminal activities that carried a grave risk of death and he was a major participant. (36 RT 4536.)

The essence of Williams's claim is that his involvement in the Los homicide was limited to furnishing a weapon to Dearaujo and Chris L. in the event they decided to "do dirt" – commit a crime – on their own. Williams asserts that this evidence only shows vicarious liability for felony-murder, but not the reckless indifference to human life or major participation to sustain a true finding of the special circumstance as required by *Tison*. (See AOB 299-300, 318-320.) But as properly found by the trial court, the jury was presented

with sufficient evidence to find that the Williams was recklessly indifferent to Los's life and a major participant in the events that resulted in her death.

Carjacking is an inherently dangerous and heinous felony. (People v. Antoine (1996) 48 Cal.App.4th 489, 495, 498.) The Legislature views carjacking and abductions committed during carjackings to be serious crimes that deserves serious punishment. (See, e.g., People v. Lopez (2003) 31 Cal.4th 1051, 1057; Assem. Com. on Pub. Safety, Analysis of Sen. Bill No. 60 (1993-1994 Reg. Sess.) July 13, 1993, p. 1.) During the meeting at Natalie D.'s house, Williams discussed how to commit a carjacking. He told the persons gathered that his pistol would be used to commit the carjacking, the victim put in the trunk, and the perpetrator would then take the car. (19 RT 2710; 20 RT 2794; 21 RT 3002-3003, 3050; 24 RT 3330-3331; 25 RT 3469; 29 RT 4036; 29 RT 4054.) Williams demonstrated how to commit a carjacking by having Dearaujo act as the driver, Williams opening the imaginary car door, and then putting his .380 caliber pistol up against Dearaujo's body. (22 RT 3046-3047, 3137; 23 RT 3180.) Williams said that if the carjacking victim resisted, the perpetrator should "shoot them." (19 RT 2710; 22 RT 3046-3047, 3137; 29 RT 4055.) Williams said that carjacking victims would be kidnapped and taken to a remote area of Moreno Valley known as the "Badlands." (21 RT 2996-2998.) Williams advocated homicide when the perpetrator faced resistance from a crime victim. He said when it "needed to be done," the perpetrator should "cap'em," "shoot 'em," or "pop them." (21 RT 2992-2994; 22 RT 3049; 23 RT 3180; 31 RT 4272-4273.) They discussed good places for carjackings, such as parking lots and hotels. (29 RT 4058.) After the failed attempted carjacking later that night at the K-Mart parking lot, where the victims Deena Meza and Debby Phillips screamed and ran away (19 RT 2724-2725; 23 RT 3222; 24 RT 3338; 27 RT 3795, 3797; 28 RT 3865, 3868-3869) Williams directed the persons in the van, including Dearaujo and Chris L., that, "If they don't give up the car, shoot them" and to shoot anyone who saw their face. (39 RT 4749; 40 RT 4812, 4819-4820, 4823.)

The evidence also shows that every time that Williams provided his pistol to Dearaujo and Chris L., he did so with the expectation that an inherently dangerous felony would occur. On May 13, 1994, Williams and Weatherspoon advised Dearaujo how to commit the robbery of the Circle K store in Riverside, Williams handed his pistol to Dearaujo, and Dearaujo committed the armed robbery. (27 RT 3730-3743; 30 RT 4127-4133; 31 RT 4223.) Two days later, Williams planned the robbery of the Classy B.'s liquor store with Dearaujo and Chris L. He showed them how to commit the robbery, including using his pistol to accomplish it. (19 RT 2729-2732, 2734-2735; 20 RT 2811-2814, 2816; 21 RT 2893, 2922; 22 RT 3063.) Williams gave his pistol to Dearaujo and Chris L. carried two knives to use during the robbery. (19 RT 2738; 22 RT 3066, 3155.) Although Dearaujo and Chris L. did not rob the Classy B.'s, they accomplished Williams's objective by robbing Mr. Estey and his mother at the L.A. Times office. (19 RT 2744-2747; 20 RT 2750-2751, 2818; 33 RT 4328-4329, 4333, 4336-4338, 4342, 4350, 4354, 4356, 4350.)

On the date of the Los murder, Williams handed his .380 Beretta pistol, a jacket and a blue bandana to Dearaujo. (19 RT 2624, 2628-2629; 21 RT 2904-2905, 2955, 2956.) After his arrest, Williams told the detectives that he handed either Dearaujo or Chris L. the .380 caliber pistol at the end of Ramsdell Street by Gordy's Market so that it could be used for the carjacking. (Exh. 68 at pp. 11, 22, 23, 29, 32, 40.) Williams must have anticipated that the carjacking victim might attempt to flee, increasing the likelihood of gunfire. (*Tison v. Arizona, supra*, 481 U.S. at pp. 150-151 ["Participants in violent felonies like armed robberies can frequently 'anticipate that lethal force . . . might be used . . . in accomplishing the underlying felony""].) Accordingly, the evidence substantially showed that Williams"was subjectively aware that his or her participation in the felony involved a grave risk of death." (*People v. Estrada, supra,* 11 Cal.4th at p. 577.)

Williams was also a major participant in the felony-murder of Yvonne Los. The evidence showed that he was more than just an aider and abettor, he was directly involved in planning and facilitating the carjacking that lead to her death. Williams's claim that he merely provided the pistol without any knowledge of what Dearaujo and Chris L. were going to do with it is contravened by the evidence. Chris L. testified that Williams directed Dearaujo and Lyons to carjack a four door light colored car, put the victim in the trunk and be prepared to "dispose" the victim later. (19 RT 2622, 2625; 20 RT 2836; 21 RT 2928, 2956.) Williams also told them they were to meet him by a trash can in the parking lot of Gordy's Market so they could drive to Anaheim. (19) RT 2625; 21 RT 2905-2906.) It is well-settled that the testimony of a single witness, if believed by the finder of fact, is sufficient to establish that fact. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) The jury also heard Williams's taped statements to the detectives, where he ultimately admitted that he knew that Dearaujo and Chris were going to use the pistol to commit a carjacking as they walked to the area of the Family Fitness Center. (Exh. 68 at pp. 28-29, 32.) Williams knew that Chris L. was going to use a knife during the carjacking. (Id. at p. 40.) They were supposed to meet in the parking lot by Gordy's Market after the carjacking. (Id. at p. 39.) From there, Williams would go in the car with Dearaujo and Chris, since they did not know how to get to Anaheim. (Id. at pp. 39-40.)

Unlike the hypothetical "non-major participant" described by the Court in *Tison* – who "merely [sat] in a car away from the actual scene of the murders acting as the getaway driver to a robbery" – the evidence shows that Williams directed the carjacking and participated in its planning, and provided his pistol to facilitate its commission. In addition, part of the plan was that Williams was

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going to meet Dearaujo and Chris L. at a nearby designated place so that he would drive them far away from the scene of the carjacking in the stolen vehicle. (*Tison v. Arizona, supra*, 481 U.S. at p. 158 [noting that major participant and reckless indifference elements "often overlap"].) Williams's conduct clearly falls within the types of major participation that has been upheld against challenge that he makes in this appeal. (See *People v. Smith, supra*, 135 Cal.App.4th at p. 928; *People v. Proby*, 60 Cal.App.4th at pp. 929-930; *People v. Mora, supra*, 39 Cal.App.4th at p. 617; *People v. Bustos, supra*, 23 Cal.App.4th at p. 1755.)

Based on the foregoing, the jury was presented with sufficient evidence to conclude that Williams acted with reckless indifference to human life while acting as a major participant in the underlying felony to sustain their true finding of the special circumstance. Accordingly, Williams's conviction and death judgment should be affirmed.

XII.

WILLIAMS'S LEGS WERE PROPERLY SHACKLED AND HE WAS NOT PREJUDICED BECAUSE THE JURY WAS NOT AWARE THAT HE WAS RESTRAINED

Williams claims that the trial court's order imposing leg restraints on him violated his rights to due process, to counsel, to present a defense, and to a reliable guilt and penalty phase determination (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16, & 17.) (AOB 327-343.) Williams has waived this claim by failing to object to his leg restraints in the trial court. In addition, his contention lacks merit and, in any event, is harmless because he cannot show any resulting prejudice as the jury was not aware that he was restrained.

It is well settled that Williams may be subjected to physical restraints in the courtroom during jury trial, upon "a showing of manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.)

'Manifest need' arises only upon a showing of unruliness, an announced intention 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. Cox, supra, 53 Cal.3d at p. 651 [quoting Duran].)

A trial court's need to physically restrain Williams cannot be based on rumor or innuendo. But a formal evidentiary hearing is not required. (*People* v. Lewis and Oliver (2006) 39 Cal.4th 970, 1032.) It is the trial court, not law enforcement personnel, that must make a decision to physically restrain Williams in the courtroom. (*People v. Hill* (1998) 17 Cal.4th 800, 841.)

Although a trial court may not order shackling based solely on the seriousness of the pending charges, the court does not abuse its discretion by order shackling based on a Williams's recent violent, disruptive, or threatening behavior aimed at corrections officials while incarcerated for the pending charges. (*People v. Garcia* (1997) 56 Cal.App.4th 1349, 1355 ["Violence while in custody or a recent history of escape also justifies the use of restraints."]; see also *People v. Hamilton* (1985) 41 Cal.3d 408, 421-424 [affirming shackling based on appellant's disruptive behavior while incarcerated].)

Shackling must be objected to or the issue is waived on appeal. A reviewing court will not disturb a trial court's decision to shackle a defendant absent an abuse of discretion. (*People v. Medina, supra,* 11 Cal.4th at p. 731; *People v. Pride, supra,* 3 Cal.4th at p. 231; *People v. Stankewitz* (1990) 51 Cal.3d 72, 95; see generally *People v. Jordan* (1986) 42 Cal.3d 308, 316 [explaining a trial court abuses its discretion only when it exercises such discretion in an "arbitrary, capricious or patently absurd manner that resulted in

a manifest miscarriage of justice."].) Absent evidence that the jury was aware Williams was restrained, any error in the trial court's order is harmless. (*People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Coddington* (2000) 23 Cal.4th 529, 651.)

On January 27, 1998, the judge pre-instructed the jury and the prosecutor gave her opening argument. (16 RT 2129-2181.) After the jurors left the courtroom for the evening recess, the judge stated that he had been approached by security personnel who requested that at least initially Williams wear a leg restraint that remains flexible and only locks if he tries to run. The device was not obtrusive and not visible to any member of the jury. The judge explained that this was suggested by security personnel because of his incidents of disruptive behavior while incarcerated at the county jail. (16 RT 2182-2183.)

Williams's counsel said that he was prepared to discuss that issue because he told Williams to expect that the court would consider restraining him. Williams's counsel commented that Williams had not been a problem during his transportation to court, and to his knowledge the incidents that may have occurred in jail were "pretty old at this point." (16 RT 2183.) Williams's counsel then stated: "Other than that, I told Mr. Williams already to expect to have a leg restraint. He's seen it already and knows what it is. In light of what happened last week, it's something we expected to happen with anybody. I won't give the name." (16 RT 2183.)

The judge responded that, in light of what occurred the previous week, the restraint would be inspected carefully each time it was applied. If there were any concerns above using that regular restraint, security officers could ask to revisit the issue. (16 RT 2183.)

The next day, after the jurors left the courtroom for the morning recess, the following exchange occurred:

Williams's counsel: Yes. Mr. Williams has a couple of concerns. First of all, this leg brace is very, very uncomfortable. And I am not going to suggest that he wear the belt, but hopefully tomorrow it's a better fit, because he's going to have to be here all day.

The Court: I don't know if – admittedly, I've never seen it, don't know, in a very general sense, whether it's adjustable or not.

Williams: Good for somebody tall. It's cutting me. It's built for somebody tall.

The prosecutor: There's always leg shackles.

Williams's counsel: I don't think it would be too oppressive to sit. We can find out tomorrow, and maybe leg shackles would be the alternative. Since he does not have to stand up, the jury would not see it, but I'll alert the court. . . .

(16 RT 2211.)

As Williams acknowledges on appeal, the record does not indicate any further discussion about his leg brace. (See AOB 329-330.) Williams has waived his challenge to his leg shackling on appeal by his failure to object to it at trial. He cannot challenge the trial court's decision to restrain him absent a manifest abuse of discretion. (*People v. Medina, supra*, 11 Cal.4th at p. 731; People v. Stankewitz, supra, 51 Cal.3d at p. 95.) The record showed that Williams's counsel advised him to expect being restrained because of his disruptive behavior while housed at the county jail, which is a proper basis for shackling Williams at trial. (People v. Garcia, supra, 56 Cal.App.4th at p. 1355; People v. Hamilton, supra, 41 Cal.3d at pp. 421-424.) Further, Williams does not claim on appeal, nor does the evidence show, that the jury was aware that he was restrained during trial. The trial court and his counsel indicated that his leg restraints were not visible to the jury. (16 RT 2182; 17 RT 2211.) During the discussion about the restraints on witnesses Weatherspoon and James H., the prosecutor noted to the jury that Williams and Dearaujo were not handcuffed and did not appear to be restrained. (30 RT 4076.) Accordingly,

any error in the trial court's order is harmless. (*People v. Anderson, supra*, 25 Cal.4th at p. 596; *People v. Coddington, supra*, 23 Cal.4th at p. 651.)

XIII.

WILLIAMS'S DEATH SENTENCE DOES NOT VIOLATE THE PROPORTIONALITY REQUIREMENT OF THE EIGHTH AMENDMENT OR INTERNATIONAL LAW

Williams asserts that California's death penalty law lacks any requirement that the prosecutor prove that Williams had a culpable state of mind before a death sentence be imposed. As such, a Williams convicted of felony-murder may be executed for an unintentional or accidental killing. Williams claims this violates the proportionality requirement of the Eighth Amendment as well as international human rights law regarding the death penalty. (AOB 344-363.) Williams's contention lacks merit because California law requires a showing of culpability before the death penalty may be imposed.

Both the federal and state Constitutions, under the "cruel and unusual punishment" provisions (U.S. Const., 8th Amend; Cal. Const., art. I, § 17), preclude the imposition of punishment that is disproportionate to the crime or the criminal. (*Solem v. Helm* (1983) 463 U.S. 277, 284 [103 S.Ct. 3001, 77 L.Ed.2d 637]; *Enmund v. Florida, supra*, 458 U.S. at p. 788; *People v. Young, supra*, 34 Cal.4th at p. 1231; *People v. Dillon, supra*, 34 Cal.3d at pp. 477-478; *In re Lynch* (1972) 8 Cal.3d 410, 425-428.) In *People v. Anderson* (1987) 43 Cal.3d 1104, this Court concluded that intent to kill is not an element of the felony-murder special circumstance, but when the defendant is an aider and abettor rather than the actual killer, intent to kill must be proved. (*Id.* at pp. 1138-1139, 1147.) *Anderson* is consistent with established United States Supreme Court authority.

As previously discussed, in 1982, the high court held that the Eighth Amendment did not permit the death penalty to be imposed on a person "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (*Enmund v. Florida, supra*, 458 U.S. at p. 797.) In 1987, the Supreme Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Tison v. Arizona, supra*, 481 U.S. at p. 158.)

The special circumstance alleged was that the murder was committed by Williams while he was engaged in the commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime of attempted robbery (§§ 644/211), within the meaning of Penal Code section 190.2, subd. (a)(17)(i). (2 CT 352-353; 3 RT 135.) Because Williams was not the actual killer, the jury was instructed with CALJIC No. 8.80.1. In pertinent part, this instruction told the jurors that they could not "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." (19 CT 5198-5199; 43 RT 5144-5145.) The jury found the special circumstance to be true. (2 CT 5071; 46 RT 5451-5455.) The verdict form reflects that the murder of Yvonne Los was committed by Williams "as alleged in the allegation of the special circumstance, within the meaning of Penal Code section 190.2(a)(17)(i)." (18 CT 5071.) The evidence, jury instructions and verdict all reflected that a true finding of the special circumstance depended on a showing "sufficient to satisfy the Enmund culpability requirement," which was Williams's reckless indifference to human life and major participation in the murder of Los. (Tison v. Arizona, supra, 481 U.S. at p. 158.) It could not be imposed for a negligent or accidental killing as claimed by Williams. Accordingly, the special circumstance imposed on Williams does not violate the proportionality requirement of the Eighth Amendment.

Williams also asserts that a death judgment for "simple felony-murder" violates Article 6(2) of the International Covenant on Civil and Political Rights, which provides that the death penalty may only be imposed for the "most serious crimes." (See AOB 359.) "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations]." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; see *People v. Brown* (2003) 33 Cal.4th 382, 403-404.) "On the contrary, it is *American* conceptions of decency that are dispositive[.]" (*Sanford v. Kentucky* (1989) 492 U.S. 361, 369, fn. 1 [109 S.Ct. 2969, 106 L.Ed.2d 306].) Because Williams's trial did not involve any violations of state of federal constitutional law, this Court should "decline to find the law defective based on any provision of international law." (*People v. Brown*, *supra*, 33 Cal.4th at p. 404.)

XIV.

THE TRIAL COURT PROPERLY DENIED THE CONFLICT OF INTEREST ALLEGED BY PUBLIC DEFENDER'S OFFICE

Williams claims that the trial court committed reversible error by not correcting what he asserts to be "an obvious conflict situation" which violated his right to a reliable penalty determination (U.S. Const., 6th Amend.), due process (U.S. Const., 5th & 14th Amends.), and state constitutional provision that ensures fairness in the adversary criminal process (Cal. Const., art. I, §15). Williams asserts the trial court should have allowed his counsel to withdraw his representation after a representative of the Riverside County Public Defender's Office, who employed his counsel, asserted that a conflict may exist because

they represented some of the in-custody witnesses that testified for the prosecution during the penalty phase, which created a situation of divided loyalties that compromised his penalty phase defense. (AOB 364-408.)

Williams's contention lacks merit. Williams's counsel stated that he did not believe there was an actual conflict of interest. Further, the trial court properly concluded there was no actual conflict because, based on Williams's counsel's representation, he did not previously represent any of the witnesses, he did not have any confidential information regarding those witnesses, and he was diligent in maintaining his ethical obligations by finding impeachment materials through other sources.

A criminal Williams's right to the effective assistance of trial counsel includes the right to representation that is free from conflicts of interest. (*Wood v. Georgia* (1981) 450 U.S. 261, 271 [101 S.Ct. 1097, 67 L.Ed.2d 220]; *People v. McDermott* (2002) 28 Cal.4th 946, 990 [federal and state constitutional rights to the assistance of trial counsel include the right to representation by counsel without any conflict of interest].)

Under the Sixth Amendment, when counsel is burdened by an actual conflict of interest, prejudice is presumed; the prejudice arises, however, 'only if the Williams demonstrates that counsel "actively represented conflicting interests" and that an "actual conflict of interest adversely affected his lawyer's performance." [Citations.]

(People v. Jones (1991) 53 Cal.3d 1115, 1134.)

Conflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his [or her] responsibilities to another client or a third person or by his [or her] own interests.' [Citation.]

(Ibid.)

Although 'most conflicts of interest seen in criminal litigation arise out of a lawyer's dual representation of co-defendants, the constitutional principle is not narrowly confined to instances of that type.' [Citation.] Thus a conflict may exist 'whenever counsel is so situated so that the caliber of his [or her] services may be substantially diluted.' [Citations.]

(People v. Hardy, supra, 2 Cal.4th at pp. 135-136.)

"A conflict may arise if a former client is a witness in a new case because the attorney is forbidden to use against a former client any confidential information acquired during that attorney-client relationship. [Citations.]" (*People v. Cox* (2003) 30 Cal.4th 916, 949.) "But if the attorney possesses no such confidential information, courts have routinely held that no actual or potential conflict of interest exists." (*Ibid.*) For example, in *People v. Clark* (1993) 5 Cal.4th 950, this Court found that no actual or potential conflict existed where the public defender possessed no confidential information stemming from his prior representation of three prosecution witnesses. (*Id.* at pp. 1001-1002.) In *People v. Belmontes* (1988) 45 Cal.3d 744, this Court held that the record did not establish that counsel had an actual or potential conflict of interest stemming from his firm's prior representation of the co-defendant, because the attorney possessed no confidential information stemming from that earlier representation. (*Id.* at pp. 774-777.)

In this case, Williams made no showing to the trial court that an actual conflict of interest existed; or potential conflict of interest existed that adversely affected his counsel's performance in the penalty phase. On April 20, 1998, Donald Deloney was called by the prosecutor in the penalty phase to testify about violent activities he committed with Williams while they were incarcerated at the Riverside County Jail and Williams's counsel began his cross-examination. (49 RT 5836-5879.) The following morning, Williams's counsel told the trial court that he advised the prosecutor that the Public Defender's Office was investigating whether there was a potential conflict of interest with Deloney and he asked that his cross-examination of Deloney be postponed for that purpose. (50 RT 5880.) The prosecutor stated that would

not be a problem and she would re-schedule other witnesses to accommodate that request. (50 RT 5880-5881.)

On April 22, Floyd Zagorsky from the Public Defender's Office specially appeared on behalf of Williams to request an *in camera* hearing to assess whether a conflict existed. (51 RT 5960-5961.) The prosecutor noted her concern that Williams's counsel had been assigned to the case for a number of years, the case had been in trial for four months, and a conflict was being discussed a week prior to closing arguments in the penalty phase. (51 RT 5961.) Although Mr. Zagorsky had not indicated the nature of the conflict, the prosecutor assumed it may be that he was previously represented by the Public Defender's Office regarding a carjacking that he testified about. The prosecutor argued that Deloney said he did not have a concern with Williams's counsel or anyone looking at his file. But Williams's counsel informed the prosecutor that he did not previously represent Deloney and had not looked at his public defender file. (51 RT 5961-5962.)

During the *in camera* proceedings, Attorney Zagorsky indicated that he did not know why the conflict situation with Deloney was not previously discovered, but wanted to discuss it with the court because the Public Defender's Office previously represented him. (51(a) RT 5963-5964.) Zagorsky argued that a way of resolving the conflict was to determine that Deloney was a confidential informant under Penal Code section 1127a, subdivision (a),^{13/} striking his testimony and admonishing the jury not to consider it. Zagorsky also argued that, if Deloney was not a confidential informant, the trial court had three options for resolving the conflict: (1)

^{13.} Penal Code section 1127a states that "an 'in-custody informant' means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the Williams while both the Williams and the informant are held within a correctional institution." (Pen. Code, § 1127a, subd. (a).)

declare a mistrial, relive the Public Defender's Office, appoint new counsel, and re-set the penalty trial; (2) apprize Williams and Deloney of the conflict to determine if they would waive it; or (3) if there was no waiver, appoint independent counsel to cross-examine Deloney. (51(a) RT 5965-5967.) Zagorsky asked the trial court for additional time to allow for a computer search to determine if there were any other prosecution witnesses that were previously represented by his office. (51(a) RT 5966-5967.) The trial court granted Zagorsky's request and indicated they would reconvene later that morning. (51(a) RT 5967.) In open court, the trial told the prosecutor that he granted Zagorsky further time to determine if there were any other issues regarding the conflict and he would inform the jury they would take a recess. (51(a) RT 5969.)

After the recess, the trial court stated that before resuming the in camera proceedings, an issue was raised as to whether Deloney was an in-custody informant. The trial court concluded that section 1127a did not apply to Deloney because, after reviewing his testimony, the trial court determined that Deloney was testifying as a percipient witness. (51(a) RT 5970-5971.) The trial court stated that they would be resuming the in camera proceedings and asked the prosecutor to exit. (51(a) RT 5971.) Upon resuming, the trial court told Zagorsky that it raised the section 1127a issue with the prosecutor because the People had a right to be heard on that issue. The trial noted that section 1127a excludes codefendants and percipient witnesses, and concluded that it did not apply to Deloney. (51(a) RT 5973.) Returning to the claim of conflict, Zagorsky said that the Public Defender's Office also previously represented David Ramirez and Christopher Willis, who would be testifying for the prosecution. Zagorsky said he did not believe that Williams's coursel had previously represented them. (51(a) RT 5975.) Zagorsky also stated that his office had represented Timothy Goodfield, who was listed as a potential witness and mentioned in Deloney's testimony. (51(a) RT 5975-5976.) Zagorsky also indicated that his office also previously represented Michael Hanna, Dale Foster and Arturo Alatorre who had testified, but he was not indicating whether or not there was a conflict with those witnesses. (51(a) RT 5977.) Zagorsky further said that his office had previously represented Martin Sanchez, but he did not believe there was a conflict as to Sanchez. (51(a) RT 5977-5978.)

Zagorsky argued that he believed that there potentially was an issue as to whether all of the witnesses he mentioned were in-custody informants under section 1127a. (51(a) RT 5978.) The trial court noted that section 1127a did not have anything to do with the *in camera* hearing on confidentiality. Nevertheless, that section has certain requirements such as notice and a written statement of any promises, but it does bar such testimony as Zagorsky had argued. The trial court stated the section excluded codefendants, percipient witnesses and coconspirators, and it was clear that Deloney was a percipient witness and would be a codefendant if he had been prosecuted for his conduct in jail. (51(a) RT 5979.) Zagorsky responded, "I'll submit it on that at this point." (51(a) RT 5979.) The trial court also concluded that, based on the testimony of the in-custody witnesses that Zagorsky mentioned, they all purported to be percipient witnesses to events that occurred while Williams was in custody so they did not come within the provisions of section 1127a. As to the in-custody witnesses who had not yet testified, the trial court could not yet make that determination. (51(a) RT 5979.)

Regarding the claimed conflict, the trial court concluded that they were not yet at a state where a waiver would be required because that only occurs if in fact there is a conflict. (51(a) RT 5978-5979.) The trial court noted that a conflict was clear in a waiver case which Zagorsky previously referenced to the court, *Alcocer v. Superior Court* (1998) 206 Cal.App.3d 951 (see 51(a) RT 5966), because the attorney who represented the defendant had previously represented the witness. (51(a) RT 5980.) The trial court also noted that he reviewed conflict cases involving the public defender's office, including *People* v. Pineda (1973) 30 Cal.App.3d 860; Leverson v. Superior Court (1983) 34 Cal.3d 530 [which disapproved *Pineda* on another ground]; and, *People v*. Clark, supra, 5 Cal.4th 950. (51(a) RT 5980.) The trial court wanted to inquire from Williams's counsel if he had any connection with the cases of the witnesses that were previously represented by the Public Defender's Office either as the attorney of record or as in *Leverson* where there was a round table discussion where attorneys in a public defender's office discussed cases they were currently involved in so as to gain privileged information that would create a conflict. (51(a) RT 5980.) Zagorsky agreed that the trial court could address that matter to Williams's counsel. (51(a) RT 5980-5981.) But Zagorsky argued that he believed there may be information in Deloney's file that an attorney may want to use in cross-examination, but he did not think he could divulge it to the court. (51(a) RT 5981.) The trial court said that may be true in a situation where the same attorney previously represented the witness and it created a situation of divided loyalty where the attorney would either have to go "soft" during cross-examination to the detriment of his current client, or use the privileged information to harm his former client, the witness, during cross-examination. (51(a) RT 5981-5982.)

The trial court noted that in *People v. Clark, supra*, 5 Cal.4th 950, it was a capital case where two public defender's were co-counsel, one who previously represented a witness. That attorney reported as an officer of the court that he did not communicate to co-counsel any of the information he had obtained from the witness and the co-counsel conducted the cross-examination of the witness. The trial court observed that this Court concluded that it was proper for the trial court to accept the attorney's representation so it could find that the counsel who conducted the cross-examination did not have a situation of a divided loyalty. (51(a) RT 5982-5984.) The trial court also noted, and quoted, People v. Williams (1970) 11 Cal.App.3d 1156, where an appellate court approved a procedure where a public defender who had confidential information about a witness was advised to terminate his representation, refrain from disclosing that confidential information to his co-counsel, and arrange for co-counsel to conduct cross-examination of that witness. (51(a) RT 5894-5895.) The trial court asked if, other than asking Williams's counsel as an officer of the court if he had any information regarding those witnesses, did Zagorsky have anything else he wanted to raise regarding the claimed conflict. (51(a) RT 5985.) Zagorsky said that he thought it was their intention to proceed with the case, the trial court had to make a decision as to whether or not the Public Defender's Office could continue to represent Williams in this case. (51(a) RT 5985.) Zagorsky asserted that he had only reviewed Deloney's file at that time, and he believed there was a conflict as to Deloney in a case where Williams's life was at stake. Zagorsky was not prepared at that time to address whether there was a conflict with any of the other witnesses. (51(a) RT 5985-5986.)

The trial court asked Williams's counsel if the identity of those witnesses had been disclosed by the prosecutor's office in a witness list. (51(a) RT 5986.) Williams's counsel acknowledged that at some point during the course of the proceedings their names had been disclosed. Also, at some point appropriate discovery was provided to him regarding the witnesses that were currently the concern of the potential conflict. (51(a) RT 5986.) Williams's counsel also acknowledged to the trial court that he did not recall ever personally representing any of those witnesses, that he had no information about their cases, that he never read their files, and that he did not possess any confidential information about those witnesses or potential witnesses. (51(a) RT 5987.) Williams's counsel stated that he did not see any actual conflict

simply because the Public Defender's Office had previously represented Deloney and was currently representing Williams. Since he personally did not possess any confidential information and had not looked at the files concerning those witnesses, he could address whether there was a conflict. (51(a) RT 5987-5988.)

Zagorsky stated that his office would check to verify whether Williams's counsel had access to or handled any of the cases involving the witnesses. (51(a) RT 5990.) The trial court subsequently said that, if Williams's counsel stated, as an officer of the court, that he had not seen Deloney's file and understood it was not proper to do so, the court would take his word. The trial court noted that in the years that Williams's counsel had practiced before the court, he would not hesitate to take Williams's counsel's word and the court was not concerned about his ethics. (51(a) RT 5992.) Zagorsky argued that it was the Public Defender's Office, and not the individual attorney, that represented the client, especially in the penalty phase where they had to do everything possible to zealously represent Williams. (51(a) RT 5992-5993.) The trial court noted that could create a breach of ethics an attorney owed to a prior client who was now a witness. (51(a) RT 5993.)

The trial court stated that, based on the legal authority it had read and noted, it could accept the word of Williams's counsel, as an officer of the court, that he had no personal connection to the witness that was previously represented by the Public Defender's Office, or was in possession of any confidential information by virtue of another person in the office providing it to him. (51(a) RT 5993-5994.) The trial court noted that, in such a situation, there was no actual conflict and Williams's counsel could continue his representation. The trial court said he was prepared to do so, subject to attorney Zagorsky's continuation of his examination as to any potential conflict with the other witnesses. (51(a) RT 5994.) Zagorsky reiterated that he believed there

was a conflict with Deloney. The trial court clarified, and Zagorsky acknowledged, it was because Zagorsky believed there was something in Deloney's file that might be of benefit to Williams's counsel in his cross-examination of Deloney, and not because there had been a personal connection between them. (51(a) RT 5994.)

Zagorsky said that lunch time was approaching and he wanted to review the cases the court had cited. He also wanted the trial court to indicate if it was going to appoint independent counsel for Deloney regarding any waiver of the conflict. (51(a) RT 5995.) The trial court stated that, at that point, it was not going to ask Deloney for a waiver because it did not find an actual conflict existed as it assumed the Public Defender's Office, even in a capital case, was not willing to commit an ethical violation by divulging any confidential information regarding Deloney to Williams's counsel. (51(a) RT 5995-5996.) Zagorsky replied he wanted to determine what was the best way for the case to proceed while being mindful of their ethical responsibilities to their former clients and to Williams. (51(a) RT 5996.) Zagorsky affirmed that he would continue looking at the public defender cases involving the witnesses to make sure that Williams's counsel had no connection to them. (51(a) RT 5997.) The noon recess was taken. (51(a) RT 5997.)

That afternoon, Zagorsky said that there was nothing in their records to suggest that Williams's counsel had any actual contact with the cases of the witnesses he had named. (51(a) RT 5999.) Zagorsky argued that, based on his raising the issue of a conflict, *Alcocer* applied and Williams should be appointed an independent counsel and waiver of the conflict should be obtained from the witnesses as well as Williams. (51(a) RT 5999-6000.) The trial court responded that, based on the information it had received, there was no actual conflict of interest. Williams's counsel had assured the court that to the best of his knowledge he had not previously represented the in-custody witnesses and

he did not possess any confidential information from their files while they were clients of the Public Defender's Office. (51(a) RT 6000.) Zagorsky then argued that the question was whether Williams's counsel, as a member of the Public Defender's Office, had an ethical obligation to do everything to impeach those witnesses, which would include exploring their files. (51(a) RT 6000.) The trial court responded that it did not see how, even in a capital case, that Williams's counsel could ethically review the public defender files of those witnesses without breaching their attorney-client privilege. (51(a) RT 6001.) Zagorsky then argued that if Williams's attorney was insulated from looking at those files, it may create an ethical problem because Williams's attorney and the Public Defender's Office had to do everything possible to represent Williams and impeach those witnesses. (51(a) RT 6002.) The trial court suggested that the presentation of witnesses proceed and Deloney's cross-examination be suspended until Zagorsky could complete his review of the files of the other witnesses. (51(a) RT 6002-6003.) The in camera proceedings were recessed and the trial resumed. (51(a) RT 6003.)

On the morning of April 23, Zagorsky again wished to address the trial court *in camera*. (52 RT 6057.) Zagorsky stated that he was able to review a portion of the files. He asserted that, in addition to Deloney, there was a conflict with Dale Foster, who had already testified, and Timothy Goodfield, who was on the witness list. (52(a) RT 6058-6059.) The trial court asked Zagorsky if the conflict was based on the fact that the Public Defender's Office was because it was previously the attorney of record for those witnesses and it was currently representing Williams. Zagorsky responded, "That's correct, your Honor." (52(a) RT 6059.) Williams's counsel told the trial court that he was not familiar with those witnesses. (52(a) RT 6059.) Zagorsky again argued that this presented a waiver situation as in *Alcocer* and that Deloney should be appointed independent counsel. (52(a) RT 6060-6061.) The trial court

responded that there was nothing for Williams to waive because there was no actual conflict as his counsel was not previously involved in the representation of those witnesses. (52(a) RT 6061.) The trial court stated that Zagorsky's position appeared to be one of automatic disqualification in a situation where the Public Defender's Office previously represented a witness who testified against a defendant it currently represents. (52(a) RT 6062.) Zagorsky argued his position was that disqualification was proper when someone in the Public Defender's Office reviewed the files of former clients who were now witnesses and a conflict was declared. Zagorsky stated that, based on what he had seen in the files of the witnesses he believed there was a conflict. (52(a) RT 6062.) Zagorsky said he wished to return to court in the afternoon once he had completed his review of all the files to continue discussing this matter. (52(a) RT 6063.)

Subsequently, Zagorsky asked the trial court, to be clear, if the court had made a finding that there was no conflict as to Williams's counsel continuing to represent the Williams. The trial court responded, "That's correct." (52(a) RT 6064.) Zagorsky then asked if the trial court was finding that there was a conflict as to the Public Defender's Office. (52(a) RT 6064-6065.) The trial court responded that the authority it consulted allowed to differentiate one attorney from a public defender's office from another attorney in that office where the attorney of record is not involved in a conflict that might exist with a potential witness who was previously represented by an attorney in the same office. The trial court did not know if he was required to make a ruling as to the entire Public Defender's Office. (52(a) RT 6065.) Zagorsky indicated he would return after the lunch break. (52(a) RT 6065-6066.)

After the noon recess was taken, Zagorsky asked to make a further appearance *in camera*. (52(a) RT 6098-6099.) Zagorsky said he reviewed all of the files and believed there was a conflict as to Arturo Alatorre, Dale Foster,

Michael Hanna and Martin Sanchez, who had testified, as well as Christopher Willis and Timothy Goodfield, who had not yet testified. (52(a) RT 6100.) Zagorsky could not indicate if there was a conflict with David Ramirez, because it was a very common name and they did not have specific identifying information. (52(a) RT 6100.) Zagorsky argued that, based on the information contained in their files, they contained information that would affect their credibility or impeachment during cross-examination. (52(a) RT 6100-6101.) Zagorsky commented that, based on the court's prior comments, he assumed the trial court would order him not to provide that information to Williams's counsel. (52(a) RT 6101.) The trial court responded that, out of an excess of caution and if necessary, he would order that because it would be an ethical breach for an attorney who possessed confidential information from an attorney-client relationship to provide it to another attorney who did not have that relationship, when they are in the same public defender's office. (52(a) RT)6101.) Zagorsky then asked if the trial court was also ordering Williams's counsel not to try to develop outside sources to obtain impeachment information as to those witnesses. The trial court responded, "Oh, absolutely not." The trial court did not want to restrict what Williams's counsel could do without violating his ethical duties. (52(a) RT 6101.) Zagorsky then stated that, without violating his ethical duties, it appeared that Williams's counsel had been diligent to develop outside sources to get information regarding those witnesses. (52(a) RT 6101-6102.) Zagorsky asked the trial court if it would be appointing independent counsel for any of the witnesses to advise them regarding any waiver, or to conduct cross-examination of those witnesses. (52(a) RT 6102-6103.) The trial court responded that presupposed that there was an actual conflict. But since the trial court found that Williams's attorney had no actual direct or indirect connection to any of the witnesses who were previously represented by the Public Defender's Office, there was no conflict for Williams to waive. (52(a) RT 6104.) The following exchange then occurred:

Mr. Zagorsky: As I understand, [Williams's counsel] is proceeding with the case on behalf of [Williams].

The Court: I asked [Williams's counsel], and I keep asking him: Other than the relationship with the Public Defender's Office having represented at some earlier time one or more of these respective witnesses, whether [Williams's counsel] sees any actual conflict in continuing to represent [Williams].

Williams's Counsel: Not concerning my representation of these individuals.

The Court: Then, yes.

(52(a) RT 6104-6105.)

In a similar case involving government law offices, the Fourth District Court of Appeal, Division Two, addressed the issue of vicarious disgualification of the Riverside County Public Defender's Office due to prior representation of a prosecution witness. (Rhaburn v. Superior Court (2006) 140 Cal.App.4th 1566.) Defendant Rhaburn was arrested and appointed a public defender. (Id. at p. 1569.) Prior to trial, the prosecutor requested that the public defender's office be disqualified because it represented a prosecution witness, Carry Barnett, Sr., in a criminal proceeding nine years earlier in 1996. (Id. at pp. 1569-1570.) The Public Defender's Office objected to the disqualification, noting that office records of 1996 cases were kept off-site in a location unknown to the assigned counsel and that his supervisors instructed him to make no inquiries regarding the files. (Id. at p. 1570.) The public defender argued that he did not join the office until 2000 and represented to the trial court that, "he did not feel that the fact that his office previously represented Carry Barnett, Sr. would have any effect on his cross-examination." (Ibid.) The public defender also objected to the delay in the trial that a substitution would require. Defendant Rhaburn indicated that he felt there was no conflict and that he wanted to proceed with the trial. (*Rhaburn v. Superior Court, supra,* 140 Cal.App.4th at p. 1570.) Nevertheless, the trial court granted the motion to disqualify the public defender. (*Ibid.*)

On appeal, the court discussed California Rule of Professional Conduct 3-310(E), which provides that an attorney "may not without the informed consent of the former client, accept employment adverse to the former client where, by reason of the representation of the former client, the [attorney] has obtained confidential information." (Rhaburn v. Superior Court, supra, 140 Cal.App.4th at p. 1574; citing Rules Prof. Conduct, rule 3-310(E) (1992).) In 1980, the California State Bar Standing Committee on Professional Responsibility and Conduct issued a formal opinion interpreting this rule. The Committee held that the entire public defender's office should be disqualified from representing a defendant where a previous client is also involved in the case as a potential witness. (Ibid.; citing State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Op. 1980-52.) The Court of Appeal concluded, however, that: "in the twenty-five years since the State Bar issued its opinion, courts have begun to develop more flexible strategies for dealing with potential conflicts, and, in many cases, have rejected rules of automatic disqualification." (Rhaburn v. Superior Court, supra, 140 Cal.App.4th at pp. 1576-1577.)

The appellate court noted that this Court held in a number of criminal cases that no actual or potential conflict of interest resulted from the former representation of a witness from the public defender's office. (*People v. Clark, supra*, 5 Cal.4th at p. 950; *People v. Lawley* (2002) 27 Cal.4th 102; *People v. Cox, supra*, 30 Cal.4th at p. 916.) The court also noted that was particularly the case when the attorney in the matter before the court had not received any pertinent confidential information from the witness. (*Rhaburn v. Superior*)

Court, supra, 140 Cal.App.4th at p. 1578; citing *People v. Cornwell* (2005) 37 Cal.4th 50, 75.) The court indicated that its decision was supported by factors that were specific to the public defender's office, including: (1) its lack of financial interest in its cases; (2) its heavy caseload such that, "[t]here is a good reason to assume that the average public defender is unlikely to remember any confidential information imparted by the average past client . . ., and no reason to suppose such information remains permanently floating in the office either or is the subject of repeated conversations.;" (3) the special expertise it possesses and that frequent disqualifications would increase the cost of legal services for public entities. (*Rhaburn v. Superior Court, supra,* 140 Cal.App.4th at pp. 1579-1580.) The court also indicated that defendant Rhaburn also had an interest in conflict-free counsel and he "expressly indicated that he wanted the public defender to continue."

Based on policy and practicality, the appellate court concluded that the trial court "erred in applying a rigid rule of vicarious disqualification in the situation presented where trial counsel did not have a 'a direct and personal' relationship with the witness." (*Rhaburn v. Superior Court, supra,* 140 Cal.App.4th at p. 1581; citing *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 705.) The appellate court directed the trial court to evaluate the totality of the circumstances in determining whether there was a reasonable possibility that the individual attorney represented the defendant had either obtained confidential information about the witness collected by his office, or may inadvertently acquire such information through file review, office conversation, or otherwise. (*Ibid.*) The appellate court stated that:

We also stress in a case that does not involve 'direct and personal' representation of the witness, the courts should normally be prepared to accept the representation of counsel, as an officer of the court, that he or she has not in fact come into possession of any confidential information acquired from the witness and will not seek to do so.

(Ibid.)

Here, Williams's counsel affirmed to the trial court that to his knowledge he did not previously represent any of the prosecutor's in-custody witnesses, and that he did not possess any confidential information regarding those witnesses. (51(a) 5987-5988; 52(a) 6105.) Given counsel's representation, it was entirely proper for the trial court to accept that representation (51(a) 5992-5994) and allow him to continue to represent Williams. (52(a) 6064, 6105.) (Rhaburn v. Superior Court, supra, 140 Cal.App.4th at p. 1581.) As noted in *Rhaburn*, this Court has held in a number of criminal cases that no actual or potential conflict of interest resulted from the former representation of a witness from the public defender's office. (*Id.* at pp. 471-473; citing *People v. Clark*, supra, 5 Cal.4th at p. 950; People v. Lawley, supra, 27 Cal.4th at p. 102; People v. Cox, supra, 30 Cal.4th at p. 916), particularly in a situation where Williams's counsel had not received any pertinent confidential information about the incustody witnesses. (Rhaburn, supra, at p. 1578; citing People v. Cornwell, supra, 37 Cal.4th at p. 75.) The Rhaburn opinion indicates that government lawyers, such as a public defender's office, may properly utilize the technique of ethical screening in instances involving subordinate lawyers with no direct and personal relationship with the government office's former client. (*Rhaburn, supra*, at p. 1581.)

Further, the record does not show that Williams's counsel went "soft" or "pulled his punches" during his cross-examination to attack the credibility or impeach the in-custody witnesses who were previously represented by the Public Defender's Office that testified in the penalty phase – Donald Deloney (49 RT 5872-5879; 52 RT 6115-6173, 6175), Arturo Alatorre (48 RT 5594-6517), Dale Foster (48 RT 5685-5700), Michael Hanna (49 RT 5743-5751, 5753-5754), Martin Sanchez (48 RT 5661-5671), David Ramirez (53 RT 6194-6200) and Christopher Willis (53 RT 6213-6224). In fact, Zagorsky represented to the trial court that Williams's counsel had been diligent to find

sources outside of the Public Defender's Office to obtain information regarding those witnesses. (52(a) 6101-6102.)

Williams also claims that the thrust of Zagorsky's argument regarding section 1127a was that the prosecution must have possessed and failed to disclose favorable defense evidence as to Deloney and the other in-custody witnesses. Williams asserts that as such it was a constitutional violation and his right to a fair trial was compromised. (See AOB 405-407.) But Williams failed to object to the alleged prosecutorial misconduct at the time it allegedly occurred and he did not request an admonishment, so the claimed error is waived. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1000; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1253 [claim that the prosecutor presented perjurious testimony].) Separately and alternatively, there was no misconduct.

A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) The misconduct must be "of sufficient significance to result in a denial of the defendant's right to a fair trial." (*United States v. Agurs, supra,* 427 U.S. at p. 108.) A prosecutor's misconduct "that does not render a trial fundamentally unfair" violates California law "only if it involves " the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" (*People v. Espinosa* (1992) 3 Cal.4th 806, 820; accord, *People v. Farnam* (2002) 28 Cal.4th 107, 167.)

Williams's claim is refuted by the record. As previously discussed, Zagorsky argued that the conflict situation could be avoided if Deloney was determined to be an "in-custody informant" and his testimony stricken. (51(a) RT 5965-5967, 5978.) The trial court properly determined that section 1127a did not apply to Deloney, nor would it apply to the other witnesses, because they were testifying as percipient witnesses to events by Williams while incarcerated at the Riverside County Jail. (51(a) 5970-5971, 5979.) More importantly, Williams's counsel acknowledged to the trial court the prosecutor had disclosed the names of the in-custody witnesses as well as provided "appropriate discovery" to him. (51(a) RT 5986.)

The trial court properly found on this record that a potential or actual conflict of interest did not exist. (*People v. Cox, supra*, 30 Cal.4th at pp. 949-950.) Accordingly, Williams has not shown that the trial court erred in denying the conflict of interest alleged by the Public Defender's Office.

XV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Williams asserts that his death sentence is invalid because of the likelihood that the jury failed to understand penalty instructions regarding the meaning of life without the possibility of parole which would lead them or assume that such a sentence would be carried out. Williams claims the trial court's failure to ensure that the jury understood its sentencing responsibility violated his right to a jury trial (U.S. Const., 6th Amend.), a reliable penalty determination (U.S. Const., 8th & 14th Amends.), and due process (U.S. Const., 5th & 14th Amends). (AOB 409-427.) Williams's contention lacks merit because it was properly instructed and is not conceivable the alleged uncertainty affected the jury's penalty verdict.

Williams's counsel submitted a memorandum requesting the trial court to specially instruct the jury that they were to assume that any sentence which it imposed would be carried out. (19 CT 5278-5282.) He requested the following special instruction: You must assume that if you sentence the defendant to death he will be executed in the gas chamber or by lethal injection. If you choose the sentence of life in prison without the possibility of parole, you must assume that he will not be paroled.

(19 CT 5282.)

During a discussion of the penalty phase instructions, the trial court noted and quoted this Court's decision in *People v. Hawthorne* (1992) 4 Cal.4th 43 ([no sua sponte duty to instruct jury that, if imposed, it must assume the death penalty will be carried out] *Id.* at pp. 75-76). (54 RT 6371.) The trial court then stated, "Well, I'll reread the case, but that's where I'm headed on the matter. It would appear to me that this is not a matter that needs to be instructed on unless the jury asks questions that require the Court to address those at the time." (54 RT 6371.)

On May 6, 1998, the trial court gave the introductory and concluding instructions on the two penalty options – life without the possibility of parole

and death – CALJIC Nos. $8.84^{14/}$ and $8.88.^{15/}$ Later that day, the jury submitted the following questions:

If we vote for life imprisonment without the possibility of parole. Does that mean no good time off at all or he may be able to get out in 40 or 50 years or whatever. Will he spend his natural life in prison and never get out. [¶] If we vote for death penalty can the judge overturn the decision?

(19 CT 5337.)

14. The trial court instructed the jury with CALJIC No. 8.84 that:

It is the law of this state that the penalty for a Williams found guilty of murder of the first degree shall be death or confinement in the state prison for life without the possibility of parole in any case in which the special circumstances alleged in this case have been specially found to be true. [¶] Under the law of this state, you must now determine which of these penalties shall be imposed on the defendant.

(19 CT 5347; 56 RT 6631.)

15. The trial court instructed the jury with CALJIC No. 8.88 in pertinent part that:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole shall be imposed on the defendant. [¶][¶].....To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [¶] You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree. [¶] Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(19 CT 5349-5350; 56 RT 6634-6636.)

The prosecutor and Williams's counsel acknowledged receipt of the question. (56 RT 6651.) The judge proposed the following response:

Ladies and gentlemen of the jury, in regards to your question concerning whether or not good time applies to the defendant's sentence should you render a verdict of life without the possibility of parole, or will the Williams spend his natural life in prison, the Court instructs you that you are not to speculate on such issues but are to follow the Court's instructions previously given. [¶] As to your remaining question as to whether the trial judge could overturn your decision of death, you are instructed that you are not to speculate as to such issues but instead are instructed to concentrate on your responsibilities and functions as you have previously been instructed.

(56 RT 6651-6652.)

Williams's counsel stated, "That really dodges it." (56 RT 6652.) The prosecutor responded that case law suggested that when jurors asked if a death sentence meant death, or life without parole was actually without parole, the response could not simply be "yes," but as was suggested in the court's response, the jurors should be told that should not really play a part in their penalty phase deliberations. (56 RT 6652-6655.) The judge responded that, having read those lines of cases, they could not tell the jury that life is life and death is death, because there are too many things that can happen. But the cases always say the jurors should not speculate. The judge noted they should be cautious not to predispose the jurors to favor one sentence over the other. (56 RT 6655-6656.) Accordingly, the judge simply wanted to remind the jury that they had been given the instructions as to what they are to consider and concentrate on and they should not speculate as to any of the areas they had asked questions about. (56 RT 6656.) Williams's counsel responded, "Well, I agree with the Court, I agree with the Court." (56 RT 6656.)

As to the second question, the prosecutor commented that she and Williams's counsel had previously discussed off the record how they had to dodge answering that question because the jury should not be thinking about what the trial court may do in the future if they render either verdict, so she agreed with the proposed response. (56 RT 6657.) Williams's counsel commented that both questions were about a specific narrow area, so he agreed with the judge's analysis and said he reluctantly concurred. (56 RT 6657.) The judge thought the jury formulated the question about good time credits from the penalty phase testimony. (56 RT 6657.) Williams's counsel clarified that it came up during the testimony of Correctional Lieutenant Samuel Francis. (56 RT 6657.) Francis testified that every inmate, including those serving a sentence of life without parole, would get a chance to accrue credits. (See 56 RT 6541-6542.) The following discussion occurred:

The Court: -- so forth came up. It was in some innocuous manner, and maybe that's what stuck in their mind. They're wondering, gee, I wonder if it applies to an LWOP, but my only concern was if I tell them right up front these are matters that you are not supposed to be going into, stick to the format that you got in the instructions, that might be the best way. Well, however inartfully I may phrase that, unless there is an objection, I'll go ahead and give them the one I proposed.

Prosecutor: Yes, your Honor.

Williams's Counsel: Yes, sir.

(56 RT 6658.)

The trial court's response was identical to the proposed response discussed with counsel. (19 CT 5338.)

Williams acknowledges that arguments similar to his present argument have been rejected by this Court. (AOB 421; citing *People v. Martinez* (2003) 31 Cal.4th 673, 698-700; *People v. Prieto, supra*, 30 Cal.4th at p. 226; and *People v. Smithey* (1999) 20 Cal.4th 936, 1009.) The trial court did not err by declining Williams's request to instruct the jury, or to answer the jury's question, in a way that defined life imprisonment without the possibility of parole as meaning that he would stay in prison for his natural life. This Court has explained in prior cases that such an instruction is not accurate given the Governor's power of commutation and pardon, and because of the possibility of appellate reversal. (People v. DePriest (2007) 42 Cal.4th 1, 58; People v. Kipp (1998) 18 Cal.4th 349, 378-379 [and cases cited therein].) "[T]he concept of life without the possibility of parole is clear." (DePriest, supra, 42 at p. 58; citing People v. Arias (1996) 13 Cal.4th 92, 172; People v. Sanders (1995) 11 Cal.4th 475, 562.) Williams also acknowledges that this Court concluded that CALJIC Nos. 8.84 and 8.88 resolved any ambiguity on the issue of whether a defendant who receives a life sentence is eligible for parole. Further, it was distinguishable from the situations found defective by the United States Supreme Court in Simmons v. South Carolina (1994) 512 U.S. 154, 169 [114 S.Ct. 2187, 129 L.Ed.2d 133]; and, Shafer v. South Carolina (2001) 532 U.S. 36 [121 S.Ct. 1263, 149 L.Ed.2d 178]. (AOB 421; see People v. DePriest, supra, 42 at pp. 58-59; People v. Wilson (2005) 36 Cal.4th 309, 355 [noting that, unlike CALJIC Nos. 8.84 & 8.88, which instruct the jury that it can sentence a defendant to either death or "confinement in the state prison for life without the possibility of parole," in Simmons and Shafer the juries were instructed that the alternative to a death sentence was one of "life imprisonment" without any mention that a capital defendant who received such a sentence would not be eligible for parole].)

But Williams argues that the "problem" not addressed by this Court's previous cases is that:

neither instruction fully addresses [] the empirical research showing that juries believe that through some formula, even a capital defendant might become eligible for parole. That is, most citizens believe that a sentence 'to life' (e.g., "15 years to life") means that technically there will be no parole. Nonetheless, similarly sentenced defendants are routinely paroled.

(AOB 421-422.)

Williams fails to allege the "empirical research" upon which his claim is based. Nevertheless, this Court has rejected a similar argument. In *People v. Abilez* (2007) 41 Cal.4th 472, this Court stated that:

Citing social science studies that he claims suggest that almost 25 percent of capital case jurors believe that a sentence of life without parole will result in an ultimate sentence of 10 years or less, and that over 75 percent believe that such a prisoner will be paroled sometime within his lifetime, defendant contends the standard instruction failed to define adequately the meaning of life imprisonment without the possibility of parole and the trial court erred by failing sua sponte to correct it. We have, however, already found CALJIC No. 8.84 adequately informs the jury of the meaning of a life sentence. (*People v. Smithey, supra*, 20 Cal.4th at pp. 1008-1009.)

(Id. at p. 527.)

As also stated in *Abilez*, this Court has "already explained in our prior cases that *Shafer* is distinguishable and does not cast doubt on our previous cases addressing the issue. (*Id.* at p. 528 (citing *People v. Prieto, supra*, 30 Cal.4th at pp. 269-271; *People v. Turner* (2004) 34 Cal.4th 406, 438 ["Defendant conceded that CALJIC No. 8.84 adequately conveyed parole ineligibility]".) Further, "[a]s defendant presents no reason to question those decisions, we reject his claim." (*Ibid.*)

Williams also argues that the jury's note indicated that they did not understand the instructions and, under Penal Code section 1368, the trial court had a sua sponte duty to "clear up any instruction confusion expressed by the jury." (AOB 425; citing *People v. Beardslee, supra*, 53 Cal.3d at pp. 96-97.) This Court should reject Williams's claim because the trial court's refusal to respond more fully to the jury's question did not constitute prejudicial error. In *People v. Silva* (1989) 45 Cal.3d 604, this Court found no prejudicial error in refusals to respond to comparable jury requests for clarification as to the possibility of a defendant's release from prison. Here, as in *Silva*, "[t]he [trial court's] response left the jury in the same position as when the jury asked the question – i.e., uncertain of the answers. It is inconceivable that such uncertainty affected the jury's verdict." (*People v. Silva, supra,* 45 Cal.3d at p. 641.) Accordingly, Williams is not entitled to relief as to this claim.

XVI.

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE

Williams claims that the volume and emotional nature of the impact evidence presented in the penalty phase overwhelmed any realistic notion that the jury would impartially assess the propriety of a death verdict in his case. Williams also claims the prosecutor's penalty phase theme was a subtle appeal to race by showing that an extraordinary and valuable Caucasian life (Yvonne Los) was "snuffed out" by an African-American defendant of little societal value. Williams asserts that, individually and collectively, the claimed improper appeals to the jury's emotion violated Williams's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and were so highly prejudicial to warrant reversal. (AOB 428-485.) Williams not only failed to preserve many of these claims by objecting in the trial court, but they also lack merit and legal support.

The Eighth Amendment allows the introduction of victim impact evidence, or evidence of the specific harm caused by the defendant, when admitted to allow the jury to meaningfully assess the defendant's moral culpability and blameworthiness. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair."" (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1056, quoting *Payne v. Tennessee, supra*, 501 U.S. at p. 825.) Under California law, "[u]nless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant as a circumstance of the crime under factor (a)." (*People v. Lewis and Oliver, supra*, 39 Cal.4th at pp. 1056-1057.) "On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Edwards* (1991) 54 Cal.3d 787, 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.)

On April 13, 1998, the penalty phase began. (19 CT 5243; 47 RT 5488.) That day, the jury heard victim impact testimony from Los's parents, Richard and Rose Holschlag, brother David Holschlag, sister Susan Baker, former husband Nigel Los, son Patrick Los, and daughter Michelle Los, without any objection to their testimony by Williams. (47 RT 5488-5556.)

On April 23, Williams moved, under Evidence Code section 402, to exclude the penalty phase testimony of the friends of Yvonne Los -Christopher Reusch, Margaret Foltz and Paul Petrosky. (52 RT 6069.) Williams's counsel argued that under *People v. Edwards*, supra, 54 Cal.4th 787, the testimony of Los's friends was not permissible. Williams's counsel asserted that their testimony was not victim impact evidence, but was "emotional evidence" that concerned Los's character, friendship and diligence as a worker. Williams's counsel argued that such emotional testimony would divert the jury from its proper role of assessing the factors in Penal Code section 190.3. Williams's counsel also noted that he reviewed two videotapes – one regarding the dedication in the name of Los of a barracks at March Air Force Base and a memorial service, and a second tape containing a series of photographs with a music track. (52 RT 6069.) Williams's counsel argued that the sound track on the video tape containing the photographs also would invite an "emotional" -i.e., irrational and subjective - response. (52 RT 6069-6070.) Williams's counsel acknowledged that the photographs were supported by the testimony of Paul Petrosky. But he argued that they were repetitive of photographs that had been previously introduced at the guilt phase, and asserted that the jury did not need "mood music" to review the photographs. (52 RT 6070-6071.)

The prosecutor noted that Exhibit 82 was the videotape containing the photographs, and Exhibit 83 was of the dedication of the barracks at March Air Force Base. (52 RT 6071-6072.) The prosecutor noted that she would offer Exhibit 83 through the testimony of Sergeant Christopher Reusch. She argued that in that videotape, Los's family members were present at the ceremony but were not crying. It was a military dedication ceremony that was not long, so it was not emotional or prejudicial under Evidence Code section 352. (52 RT 6071-6072.) The prosecutor intended to offer Exhibit 82 through the testimony of Paul Petrosky. This seven-minute videotape contained some of the same photographs as in the photo boards that were introduced at the guilt phase, some new photographs, and some music. The prosecutor noted that this videotape could be played without the music. (52 RT 6072.)

The prosecutor argued that, pursuant to *Edwards*, the jury was entitled to hear evidence that Yvonne Los was a 32-year-old living human being who had a family and friends who have missed her because of her death. (52 RT 5072-5073.) The prosecutor argued that still photos in Exhibit 82 were less emotional that a videotape depicting the victim when she was alive, which had been approved in case authority. (52 RT 6073.) As to Exhibit 83, it depicted a single event, the dedication of Los Hall at March Air Force Base, but also showed a memorial service where a flag was presented to Los's parents. (52 RT 6074.)

The judge asked Williams's attorney if his primary objection was as to Exhibit 82. Williams's counsel responded, "That is correct." (52 RT 6074.) The judge then asked if there were objections to Exhibit 83. Williams's counsel responded that it was because the subject of the videotape appealed to things other than the impact of Los's death on her family, which was outside the scope of *Edwards* and *Payne*. (52 RT 6075.) The judge noted the difficulty that they were discussing admissibility of evidence while in the midst of the penalty trial. The judge stated he could not evaluate Williams's objections until he played the videotapes to evaluate them and asked what was their total time. (55 RT 6075.) The prosecutor responded that their duration was seven minutes (Exh. 82) and ten minutes (Exh. 83). (52 RT 6075.) The judge asked if by viewing the initial part of each tape he could get a sense of their content so as to not have to view its entirety. (52 RT 6075.) Williams's counsel, counsel for Dearaujo and the prosecutor all answered affirmatively. (52 RT 6075.6076.)

After a recess, the judge said that he had an opportunity to view representative portions of both videotapes. (52 RT 6076.) The judge ruled that Exhibit 82 was admissible, but ordered that the music be deleted because it did not add anything probative and might be emotionally appealing. He ruled that Exhibit 83 was admitted as it is. (52 RT 6076.) The judge concluded that neither exhibit could reasonably be construed as inviting a irrational or purely subjective response, but was probative under factor (a) as evidence and argument of the specific harm caused by Williams as noted in *People v*. *Edwards*. With the modification of striking the audio portion of Exhibit 82, both videotapes were admitted. (52 RT 6077-6078.)

The jury then heard the testimony of Captain Margaret Foltz; Staff Sergeant Steven Reusch, through whose testimony Exhibit 83 was played for the jury; and Paul Petrosky, through whose testimony Exhibit 82 was played for the jury. (52 RT 5080-6112.)

Contrary to Williams's claim that the testimony of Los's friends – Captain Foltz, Sergeant Reusch and Paul Petrosky – invited an irrational or purely emotional response, California law allows testimony about "the devastating effects of a capital crime on loved ones and the community" under Penal Code section 190.3, subdivision (a), as a relevant circumstance of the crime. (*People v. Lewis and Oliver, supra*, 39 Cal.4th at pp. 1056-1057.) In *People v. Leonard, supra*, 40 Cal.4th 1370, this Court has stated that:

[t]he evidence that close friends and relatives of the victims suffered emotional trauma as a result of their deaths was permissible victim impact testimony, and the prosecutor properly commented on it in his closing argument.

(*Id.* at p. 1419, citing *People v. Panah* (2005) 35 Cal.4th 395, 494-495; *People v. Benavides* (2005) 35 Cal.4th 69, 107.)

Accordingly, the trial court properly allowed their testimony about Los's personal characteristics and the impact of her death on them to be presented at the penalty phase.

Williams further asserts that testimony of the "extensive life history" of Yvonne Los was "unfairly inflammatory" and should have been excluded. (AOB 455-459.) This testimony was presented through her parents, siblings and children. (47 RT 5488-5556.) Williams acknowledges that his counsel did not object to their testimony at trial, but claims review by this Court is appropriate because any objection would have been futile as evidenced by the trial court's admission of the videotapes and testimony of Los's friends over his objection. (AOB 439, fn. 116.) As is the case regarding admission of any evidence, Williams has forfeited this claim by his failure to object to the admission of their victim impact testimony at trial. (Evid. Code, § 353, subd. (a); *People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1050; *People v. Harris* (2005) 37 Cal.4th 310, 352.) Williams's claim of futility is speculative, especially since Los's family members testified 10 days prior to Williams's motion regarding the videotapes and testimony by her friends. Further, their testimony was relevant. The State may choose to admit evidence of the specific harm caused by a defendant. This includes the loss to society and to the victim's family of a unique person. This Court has held that constitutional

limits on victim impact evidence was not surpassed where various witnesses painted a portrait of a victim as "compassionate, loyal, and extroverted, and made clear that they mourned her loss." (*People v. Huggins* (2006) 38 Cal.4th 175, 238.) Nothing precludes the children of murder victims (such as Patrick and Michelle) from describing their loss. (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1057, citing *People v. Boyette, supra*, 29 Cal.4th at pp. 441, 444.) Also, impact evidence can include the victim's charitable and church activities, as was testified about Yvonne Los in this case. (*Ibid.*; citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.) Contrary to Williams's assertion, such testimony would be admissible over any objection because the victim impact testimony from Los's family and friends was short, it focused on their expected emotions, it was not unduly inflammatory. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 106.)

Williams also asserts that for victim impact evidence to be consistent with the holding in *Payne v. Tennessee, supra*, 501 U.S. 508, three "safeguards" should apply: (1) victim impact testimony should be limited to testimony by a single witness; (2) the testimony must describe the effect of the murder on a family member who was present at the scene during or immediately after the crime; and (3) it should be limited to effects that were known or reasonably apparent to the Williams at the time he or she committed the crime. (AOB 449-451.) Nothing in the holding of *Payne* imposes the limitations proposed by Williams. Further, "victim impact testimony is not limited to the victim's relatives or to persons present during the crime." (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1057, citing *People v. Pollock, supra*, 32 Cal.4th at p. 1183.)

Williams's claim that the videotapes and accompanying photos "magnified" the prejudicial effect of the victim impact testimony. (AOB 477.) In *People v. Prince* (2007) 40 Cal.4th 1179, this Court discussed the admission

of videotapes during the penalty phase. In *Prince*, the trial court admitted as victim impact evidence an approximately 25 minute videotape of one of the murder victims that was interviewed by a local television station. The court also admitted victim impact evidence from several other witnesses. (*People v. Prince, supra,* 40 Cal.4th at p. 1209.) This Court found no prejudicial error. This Court stated that:

Case law pertaining to the admissibility of videotape recordings of victim interviews in capital sentencing hearings provides us with no bright-line-rules by which to determine when such evidence may or may not be used. We consider pertinent cases in light of a general understanding that the prosecution may present evidence for the purpose of "reminding the sentencer . . . [that] the victim is an individual whose death represents a unique loss to society" (*Payne v. Tennessee, supra,* 501 U.S. at p. 825), but that the prosecution may not introduce irrelevant or inflammatory material that "diverts the jury's attention from its proper role or invites an irrational, purely subjective response." (*People v. Edwards, supra,* 54 Cal.3d at p. 836.)

(People v. Prince, supra, 40 Cal.4th at p. 1288.)

In *Prince*, this Court discusses cases that permitted, and cases that disapproved, introduction of videotape victim impact evidence. The cases that permitted the admission of such videotapes included *Whittlesey v. State* (1995) 340 Md. 30 [665 A.2d 223, 251] [90-second videotape of the victim playing the piano because "the tape could illustrate the victim's talent better than any photograph"]; *State v. Allen* (1999) 2000 NMSC 2 [128 N.M. 482, 994 P.2d 728] [three-minute videotape regarding the victim's life]; and *State v. Gray* (Mo. 1994) In *People v. Kelly* (2007) 42 Cal.4th 763, 794, this Court noted that *Hicks v. State* (1997) 327 Ark.727 [940 S.W.2d 855], which upheld the admission of a 14-minute videotape containing approximately 140 photographs of the victim's brother. On the other hand, cases that did not permit the showing of videotapes included *U.S. v. Sampson* (D. Mass. 1994) 335 F.Supp.2d 166, 191 [excluding a 21-minute videotape consisting of 200 photographs of the victim from birth

to death and set to "evocative contemporary music"]; and *Salazar v. State* (Tex. Crim.App. 2002) 90 S.W.3d 330 [remanding a 17-minute "video montage" tribute to the victim of approximately 140 photographs set to emotional music, including Celine Dion's song "My Heart Will Go On," from the film Titanic (20th Century Fox 1997)]. (*People v. Prince, supra*, 40 Cal.4th at pp. 1288-1289; see also *People v. Kelly, supra*, 42 Cal.4th at pp. 794-796.)

This Court cautioned in *Prince* that:

Courts must exercise great caution in permitting the prosecution to present victim-impact evidence the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents.

(People v. Prince, supra, 40 Cal.4th at p. 1179.)

Here, the record shows the trial court viewed representative portions of both videotapes as permitted by counsel, and exercised its discretion. The trial court concluded that neither videotape could be construed as inviting an irrational or purely subjective response, but was probative under factor (a). The judge also determined that the music on Exhibit 82 may elicit an emotional response, so he ordered that it be eliminated before it could be shown to the jury. (52 RT 6076-6078.) Further, neither videotape exceeds in length or content what has been found to be proper by this Court. As previously discussed, in *Prince* this Court did not find as prejudicial the introduction of an approximately 25-minute videotape of one of the murder victims that was interviewed by a local television station, along with victim impact evidence from several other witnesses. (*People v. Prince, supra*, 40 Cal.4th at p. 1209.) In *Kelly*, this Court did not find prejudicial a 20-minute videotape which:

[c]onsists of a montage of still photographs and video clips of [the victim]'s life, from her infancy until shortly before she was killed at the

age of 19, narrated calmly and unemotionally by her mother. Throughout much of the video, the music of Enya – with most of the words unrecognizable – plays in the background; the must is generally soft, not stirring. One segment shows [the victim] singing a couple of songs with a school group, including 'You light up my life.' Part of the time she was singing solo, with her mother explaining that every student was required to sing solo. The videotape concerns [the victim]'s life, not her death. It shows scenes of her swimming, horseback riding, at school and social functions, and spending time with her family and friends. The closest it comes to referring to her death is the mother's saying near the end, without noticeable emotion, that she does not want to dwell on this 'terrible crime.' There is no mention of the facts of the murder or of defendant. The video ends with a brief view of [the victim]'s unassuming grave marker followed by a video clip of people riding horseback in Alberta, Canada, over which the mother said this is where [the victim] came from and was the 'kind of heaven' in which she belonged.

(People v. Kelly, supra, 42 Cal.4th at pp. 796-797.)

Finally, Williams asserts that the detailed testimony about Los's virtues "invited invidious comparisons" with Williams that was a subtle appeal to race, which the prosecutor specifically asked the jury to make during closing argument. (AOB 460-645.) But this argument was rejected by this Court in *Kelly*. In *Kelly*, the defendant contended that the victim impact evidence "creates an intolerable risk of improper comparisons between the victim and the defendant." (*People v. Kelly, supra*, 42 Cal.4th at p. 799.) This Court stated that, "[w]e see nothing in *Payne v. Tennessee, supra*, 501 U.S. 808, or our own cases, that prohibits comparing the victim and the defendant." (*Ibid.*) This Court also rejected as specious an argument by a defendant that the victim impact evidence created "the danger that racial discrimination will affect the jury's decision." (*Ibid.*) Similar to this Court's finding in *Kelly*, there was noting in the testimony of Los's family and friends and the videotapes (47 RT 5488-5556; 52 RT 5080-6112), the prosecutor's penalty phase argument to the jury (56 RT 6559-6591), or anything else in the penalty trial that suggested that

the jury should impose the death penalty for racial motives or reasons. (*People v. Kelly, supra*, 42 Cal.4th at p. 799.)

Contrary to Williams's assertion, the presentation of the victim-impact testimony and evidence in this case, either individually or collectively, was proper under state law and did not violate the federal Constitution.

XVII.

THE TRIAL COURT DID NOT HAVE A DUTY TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE

Although not requested by Williams, he argues that the trial court had a sua sponte duty to properly instruct the jury on the proper use of victim impact evidence. (AOB 480-485.) Based on part of an instruction suggested for use in Pennsylvania, Williams suggests that an appropriate instruction to be used in California, would state as follows:

Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Further, you must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the defendant, the crime, and the appropriate punishment to be imposed.

(AOB 483.)

Williams has forfeited this claim of error because it was his obligation to request any clarification or modification of the instruction that he wished the trial court to make. (*People v. Lang, supra,* 49 Cal.3d at p. 1024.) Nevertheless, this Court has previously rejected arguments that a trial court must instruct the jury not to be influenced by emotion that results from the presentation of victim impact evidence. (*People v. Carey* (2007) 41 Cal.4th 109, 134, citing *People v. Griffin* (2004) 33 Cal.4th 536, 591 [trial court need not give duplicative instructions]; *People v. Ochoa* (2001) 26 Cal.4th 398 [proposed instruction that jury may not impose the death penalty as a result of an irrational, subjective response to emotional evidence is duplicative of CALJIC No. 8.84.1]; *People v. Harris, supra,* 37 Cal.4th 359 [proposed instruction cautioning jury against subjective response to emotional evidence and argument confusing for failure to specify whether the subjective reaction was that of the victim's family or the jury].) The penalty phase instructions provided by the trial court, which included CALJIC No. 8.84.1,^{16/} were sufficient to inform the jury of it responsibilities in evaluating victim impact evidence. (*People v. Morgan* (2007) 42 Cal.4th 593, 624.) Further, Williams's proposed instruction "would not have provided the jury with any

You will now be instructed as to all of the law that applies to the penalty phase of this trial. [1] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. [¶] You are to be guided by the previous instructions given in the first phase of this case which are applicable and pertinent to the determination of penalty. However, you are to disregard any instructions given in the first phase which had prohibited you from considering pity or sympathy for the defendant. In determining penalty, the jury may consider, among other things, mercy and sympathy for the defendant. [¶] You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. In your consideration of whether the sentence of death is appropriate, you should not consider race, color, religious beliefs, national origin, or sex of the Williams or the victim. Both the People and the Williams have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(19 CT 5347; 56 RT 6631-6632.)

^{16.} The jury was instructed with CALJIC No. 8.84.1 as follows:

information it had otherwise not learned from CALJIC No. 8.84.1." (*People v. Morgan, supra,* 42 Cal.4th at pp. 593, 624; quoting *People v. Ochoa, supra,* 26 Cal.4th at p. 455.) Accordingly, Williams's claim that the trial court had a duty to instruct the jury on the appropriate use of victim impact evidence lacks merit.

XVIII.

THE TRIAL COURT DID NOT HAVE A DUTY TO INSTRUCT ON LINGERING DOUBT

Williams contends that the trial court's denial of his motion to give his proposed penalty phase instruction on lingering doubt violated his rights to a fair jury trial (U.S. Const., 6th Amend.), to a reliable penalty determination (U.S. Const., 8th & 14th Amends.) and to due process (U.S. Const., 5th & 14th Amends.). (AOB 486-500.) Williams's contention lacks merit as the trial court properly exercised its authority to deny his motion.

Williams's counsel submitted a memorandum requesting the trial court to specially instruct the jury on lingering doubt. (19 CT 5276-5278.) He requested the following special instruction:

If you have any lingering doubt concerning the guilt of the Williams as to any one of those charges of which he was found guilty, or if you have any lingering doubt concerning the truthfulness of any of the special circumstance allegations which were found to be true, you may consider that lingering doubt as a mitigating factor or circumstance. [¶] A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of the jurors a reasonable doubt.

(19 CT 5278.)

During discussing of the penalty phase instructions, the following discussion occurred:

The Court: Now, your other pleadings had to do with lingering doubt?

Williams's Counsel: Yes.

The Court: I think the law is fairly clear that your're free to argue that, but I'm not required to instruct on it.

Williams's Counsel: I'd submit the matter on my moving papers.

The Court: That will be the order.

(54 RT 6368-6369.)

"Notwithstanding the defendant['s] motion to have the trial court instruct on lingering doubt, the trial court was within its authority to deny the motion." (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1067; citing *People v. Cleveland* (2004) 32 Cal.4th 704, 739; *People v. Sanchez* (1995) 12 Cal.4th 1, 77; *People v. Abilez, supra,* 41 Cal.4th at p. 531 [noting this argument has been rejected by this Court many times in previous cases].) A lingering doubt instruction is not required by either federal or state law. (*People v. Geier* (2007) 41 Cal.4th 555, 615; citing *People v. Lawley, supra,* 27 Cal.4th at p. 166.) Further, this Court has also held that this concept is sufficiently covered in CALJIC No. 8.85. (*Ibid.*; citing *People v. Lawley, supra,* 27 Cal.4th at p. 166; *People v. Sanchez, supra,* 12 Cal.4th at pp. 77-78.)

Here, the jury was instructed with CALJIC No. 8.85. (19 CT 5347-5348; 56 RT 6632-6633.) But Williams argues that the evidence, when combined by the notes from the jurors, made it not only possible, but probable, that the jurors had no doubts about Williams's guilt, yet had "deeply troubling lingering doubts about his moral culpability such that not so instructing the jury caused him prejudice." (See AOB 496-497.) But the jury could have considered any lingering doubt it may have had under Penal Code section 190.3, factor (k), with which the jury was instructed. (19 CT 5348; 56 RT 6633.) This Court has stated that, "[t]he jury need not be specifically instructed that lingering doubt is a factor to consider, as that concept is encompassed in factor (k)." (*People v. Abilez, supra*, 41 Cal.4th at p. 531, quoting *People v. Avila* (2006) 38 Cal.4th 491, 615.) Further, as admitted by Williams, there was no doubt about Williams's guilt as to the charged crimes. (*People v. Lewis and Oliver, supra*, 49 Cal.4th at p. 1067; citing *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1187 ["Under these circumstances, we do not believe defendant would have derived any additional benefit had the requested instruction been given"]; *People v. Fauber* (1992) 2 Cal.4th 792, 864 [same].) Accordingly, there is no error.

XIX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.85

Williams asserts that CALJIC No. 8.85 is constitutionally flawed because it permits jurors to aggravate his sentence to death on that basis of factors which are mitigating factors as a basis of state law – factors (d), (e), (f), (g), (h) and (j) – and, as such, capital defendants do not receive the reliable and individualized sentencing determination required by the Eighth and Fourteenth Amendments. (AOB 501-504.) Williams's contention lacks merit.

Williams's counsel filed a motion to modify or supplement certain penalty phase instructions, including CALJIC No. 8.85 (see 19 CT 5289-5298) and proposed his own instruction be given after CALJIC No. 8.85. (19 CT 5299-5300.) But the trial court instructed the jury with CALJIC No. 8.85, the standard instruction regarding the Penal Code section 190.3 factors in mitigation and aggravation that are to be considered by the jury in determining which sentence to impose. (19 CT 5347-5348; 56 RT 6632-6633.) Williams acknowledges that this Court has previously rejected the basis contention of his argument. (AOB 501; citing *People v. Farnam, supra*, 28 Cal.4th at pp. 191-192.) In *People v. DePriest, supra*, 42 Cal.4th 1, this Court rejected an argument similar to that made by Williams. In rejecting this challenge, this Court stated that "the trial court was not compelled to delete inapplicable factors, designate factors as aggravating or mitigating, or state when the balance

of factors warrants death." (*People v. DePriest, supra*, 42 Cal.4th at p. 59; citing *People v. Stitely, supra*, 35 Cal.4th at p. 574; *People v. Ray* (1996) 13 Cal.4th 313, 355-356.) In *People v. Ramos* (2004) 34 Cal.4th 494, 530, this Court rejected a claim that CALJIC No. 8.85 was deficient because it does not inform the jury that mitigating factors are relevant only to mitigation because this Court has "considered and rejected the identical contention in several recent cases, and no evidence suggests the jury was unable to properly apply the instruction." Based on the foregoing, the jury was properly instructed and there was no error.

XX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88

Williams contends that instructing the jury with CALJIC No. 8.88 violated his federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and corresponding rights under the state Constitution. (AOB 505-509.) Williams asserts four challenges to this instruction, acknowledges that they have all been previously rejected by this Court, but claims they were incorrectly decided and should be reconsidered. (AOB 507-508; citing *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) Williams fails to provide any good reason for this Court to reconsider its prior holdings, and his claims should be rejected.

Williams proposed a supplement and a modification to CALJIC No. 8.88. (19 CT 5302-5303.) But the trial court instructed the jury with CALJIC No. 8.88, the standard instruction describing the duties of the jury at the penalty phase. (19 CT 5349-5350; 56 RT 6634-6636.)

First, Williams claims that instead of telling the jury that it "shall impose" a sentence of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances" as stated in section 190.3, CALJIC No. 8.88 only informs the jury that the death penalty may be imposed if the aggravating circumstances are "so substantial" in comparison to mitigating circumstances, which prevents an individual sentencing determination. (AOB 508-509, citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347 [100 S.Ct. 2227, 65 L.Ed.2d 175].) But this Court has held that CALJIC No. 8.88 "does not prevent either the proper weighing of aggravating and mitigating factors, or an individualized sentencing determination." (*People v. DePriest, supra*, 42 Cal.4th at p. 60; citing *People v. Moon* (2005) 37 Cal.4th 1, 42-44.)

Second, Williams claims that the instruction improperly lowers the prosecutor's burden of proof below that required by section 190.3 because it fails to inform the jury that it has discretion to impose life without the possibility of parole even in the absence of mitigating circumstances. (AOB 513-514.) But this Court has also held that CALJIC No. 8.88 did not "improperly reduce the prosecution's burden of proof" because the prosecution does not bear such a burden at the penalty phase. (*People v. Abilez, supra*, 41 Cal.4th at p. 531; citing *People v. Cornwell, supra*, 37 Cal.4th at pp. 103-104.)

Third, Williams claims that the "so substantial" standard for comparing mitigating and aggravating circumstances is constitutionally vague and improperly reduces the prosecutor's burden of proof below the level required by section 190.3. (AOB 515-517.) This Court has held, however, that this instruction "is not vague and imprecise." (*People v. Abilez, supra*, 41 Cal.4th at p. 530; citing *People v. Perry* (2006) 38 Cal.4th 302, 320 [CALJIC No. 8.88 is not vague].) It has also held that the phrase "so substantial" in connection with the mitigating circumstances was not a suggestion that the jury did not have the power to return a life sentence if they found the mitigating factors outweighed the aggravating factors. (*Id.* at p. 530; citing *People v. Boyette, supra*, 29 Cal.4th at p. 465.)

Fourth, Williams claims that the instruction fails to convey that the jury's central duty is to determine the appropriate punishment because by using the language "warrants death instead of life without parole," it does not inform the jurors as to what circumstances render a death sentence to be "appropriate." (AOB 517-518.) But this Court has held that

[b]y advising that death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty[.]

(People v. Smith (2005) 35 Cal.4th 334, 370.)

This Court has consistently rejected each of the challenges raised by Williams to CALJIC No. 8.88. (See *People v. Abilez, supra*, 41 Cal.4th at pp. 530-531; *People v. Geier, supra*, 41 Cal.4th at p. 619; *People v. DePriest*,

supra, 42 Cal.4th at p. 60.) There is no good reason for this Court to reconsider its prior holdings, and Williams's claims should be rejected.

XXI.

THE DEATH PENALTY WAS NOT DISPROPORTIONATE TO WILLIAMS'S CULPABILITY

Williams argues that the death penalty is disproportionate to his personal culpability such that its imposition violates the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. (AOB at 520-526.) Williams's claim lacks merit because the death sentence is not so disproportionate to his offense to "shock the conscience" or to "offend fundamental notions of human dignity." (See *People v. Stanley* (2006) 39 Cal.4th 913, 967.)

In order to determine whether a defendant's sentence is disproportionate to his or her personal culpability, this Court examines the following factors: (1) "the circumstances of the offense, including its motive," (2) "the extent of the defendant's involvement," (3) "the manner in which the crime was committed," (4) "the consequences of defendant's acts," and (5) "the defendant's personal characteristics, including age, prior criminality, and mental capabilities." (*People v. Tafoya* (2007) 42 Cal.4th 147, 198, quoting *People v. Rogers* (2006) 39 Cal.4th 826, 895.) Here, Williams's death sentence was not grossly disproportionate to his individual (or "intercase") culpability. (See *People v. Dillon, supra*, 34 Cal.3d at p. 441.)

Williams argues that he is less personally culpable than the defendant in *Dillon*. (AOB 523.) In that case, this Court reduced a conviction and sentence for first degree murder to second degree murder where a 17-year-old Williams with no prior criminal record panicked, and shot and killed a man who guarded a field from which the Williams and his companions intended to steal marijuana. (*People v. Dillon, supra*, 34 Cal.4th at pp. 450-452, 477-489.)

Contrary to Williams's contention, his individual culpability was far greater than the defendant in *Dillon*.

When the crimes that lead to the murder of Yvonne Los occurred, Williams was 18 years old. (25 RT 3532.) Williams carried a .380 caliber semi-automatic Beretta pistol all the time, usually tucked in the waistband of his pants. (19 RT 2623-2624, 2705, 2775; 20 RT 2775; 21 RT 2892, 2985-2986; 22 RT 3042.) Williams planned to transform a group of lost teenagers who were not attending school or working, but were drinking alcohol and smoking marijuana, into a gang that would commit crimes to make money. (21 RT 2991-2992; 24 RT 3317.) As previously discussed, Williams and his group committed or attempted to commit various armed robberies and carjackings prior to the murder of Los.

Carjacking is an inherently dangerous and heinous felony. (*People v. Antoine, supra*, 48 Cal.App.4th at pp. 495, 498.) Carjackings "involve confrontation between the perpetrator and the rightful owner. The confrontation entails great fear, serious injury and even death. Violence and use of firearms are not uncommon." (*In re Travis W.* (2003) 107 Cal.App.4th 368, 375, 376.)

Williams was quite aware of this cruel reality when he informed the "Pimp-Style Hustlers," including Dearaujo and Chris L., how to commit carjackings. Williams told them that his pistol would be used to commit the carjacking, the victim put in the trunk, and the perpetrator would then take the car. (19 RT 2710; 20 RT 2794; 21 RT 3002-3003, 3050; 24 RT 3330-3331; 25 RT 3469; 29 RT 4036; 29 RT 4054.) Williams also demonstrated how to commit a carjacking by having Dearaujo act as the driver, Williams opening the imaginary car door, and then putting his .380 caliber pistol up against Dearaujo's body. (22 RT 3046-3047, 3137; 23 RT 3180.) Williams said that if the carjacking victim resisted, the perpetrator should "shoot them." (19 RT

2710; 22 RT 3046-3047, 3137; 29 RT 4055.) He said when it "needed to be done," the perpetrator should "cap'em," "shoot 'em," or "pop them." (21 RT 2992-2994; 22 RT 3049; 23 RT 3180; 31 RT 4272-4273.) After the failed attempted carjacking later that night at the K-Mart parking lot, Williams directed the persons in the van, including Dearaujo and Chris L., that, "If they don't give up the car, shoot them" and to shoot anyone who saw their face. (39 RT 4749; 40 RT 4812, 4819-4820, 4823.)

The evidence also shows that every time that Williams provided his pistol to Dearaujo and Chris L., he did so with the expectation that a carjacking would occur. Williams handed his .380 Beretta pistol, a jacket and a blue bandana to Dearaujo. (19 RT 2624, 2628-2629; 21 RT 2904-2905, 2955, 2956.) After his arrest, Williams told the detectives that he handed either Dearaujo or Chris L. the .380 caliber pistol at the end of Ramsdell Street by Gordy's Market so that it could be used for the carjacking. (Exh. 68 at pp. 11, 22, 23, 29, 32, 40.) The jury also heard defendant's taped statements to the detectives, where he ultimately admitted to that he knew that Dearaujo and Chris were going to use the pistol to commit a carjacking as they walked to the area of the Family Fitness Center. (*Id.* at pp. 28-29, 32.) Williams knew that Chris L. was going to use a knife during the carjacking. (*Id.* at p. 40.) They were supposed to meet in the parking lot by Gordy's Market after the carjacking. (*Id.* at p. 39.)

Under these circumstances, Williams's death sentence is not disproportionate to his "personal responsibility and moral guilt." (*People v. Tafoya, supra*, 42 Cal.4th at pp. 198-199, quoting *People v. Marshall* (1990) 50 Cal.3d 907, 938.) It also does "not shock the conscience or offend notions of human decency." (*People v. DePriest, supra*, 42 Cal.4th at p. 61, quoting *People v. Stanley, supra*, 39 Cal.4th at p. 967.)

XXII.

WILLIAMS IS NOT ENTITLED TO RELIEF BASED UPON INTERNATIONAL LAW

Williams contends he was deprived of a fair trial and a reliable penalty determination in violation of customary international law. Williams asserts that because the death penalty in the United States and in California is applied with discrimination and racism, it violates international law. (AOB 527-565.) Williams's claims do not entitle him to relief in this Court.

This Court has consistently rejected claims that a death sentence violates international law. (See *People v. Geier*, *supra*, 41 Cal.4th at p. 620; citing *People v. Ramirez* (2006) 39 Cal.4th 398, 479; *People v. Panah*, *supra*, 35 Cal.4th at pp. 500-501; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) Further, in *People v. Tafoya*, *supra*, 42 Cal.4th at p. 199, this Court held that:

Because defendant has failed to establish his premise that he suffered violations of state or federal constitutional law, or that his rights to due process of law and to be free from racial discrimination were violated, we need not consider the applicability of those international treaties and laws to this appeal. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1055.) In any event, "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Carey* (2007) 41 Cal.4th 109, 135 [59 Cal.Rptr.3d 172, 158 P.3d 743]; see *People v. Cook* (2006) 39 Cal.4th 566, 620 [47 Cal.Rptr.3d 22].)

Accordingly, contrary to Williams's claim, a death sentence that complies with federal and state constitutional and statutory requirements does not violate international law. (*People v. Tafoya, supra,* 42 Cal.4th at p. 199; *People v. Ramos, supra,* 34 Cal.4th at pp. 533-534.)

XXIII.

WILLIAMS'S CHALLENGES TO THE CAPITAL SENTENCING SCHEME LACK MERIT

Williams challenges the constitutionality of California's death penalty on a variety of grounds. (AOB 566-630.) These same claims have been presented to, and rejected by, this Court. Because Williams fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should all be rejected without additional legal analysis. (*People v. Schmeck* (2005) 37 Cal.4th 240, 303-304; *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. California's Death Penalty Statute Performs The Narrowing Function

Williams contends his death penalty is invalid because Penal Code section 190.2 is impermissibly broad because it does not meaningfully narrow the class of persons eligible for that penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 568-572.) But section 190.2, which sets forth the special circumstances that, if found true by the jury, render a Williams eligible for the death penalty, adequately narrows the category of death-eligible defendants in conformity with the requirements of the Eighth and Fourteenth Amendments. (*People v. Tafoya, supra,* 42 Cal.4th at p. 197; *People v. Abilez, supra,* 41 Cal.4th at p. 533; *People v. Hoyos* (2007) 41 Cal.4th 877, 926; *People v. Rogers, supra,* 39 Cal.4th at pp. 892-894.)

B. Factor (a) Does Not Permit Arbitrary And Capricious Imposition Of The Death Penalty

Williams contends that Penal Code section 190.3, subdivision(a) [factor (a)]'s as applied allows for arbitrary and capricious imposition of the death

penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 572-579.) But this Court has held that a jury's consideration of the circumstances of the crime under factor (a) (§ 190.3, subd. (a)) does not result in arbitrary or capricious imposition of the death penalty. (*People v. Prieto, supra,* 30 Cal.4th at pp. 226, 276; see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Factor (a), which permits the jury to consider the circumstances of the capital crime as an aggravating factor, is not unconstitutionally overbroad, arbitrary, capricious or vague. (*Tuilaepa, supra,* 512 U.S. at p. 973; *People v. Guerra, supra,* 37 Cal.4th at p. 1165; *People v. Hoyos, supra,* 41 Cal.4th at p. 926; *People v. Bolden* (2002) 29 Cal.4th 515, 566.)

C. California's Statutory Scheme Does Not Lack Procedural Safeguards

Williams claims that California's statutory scheme lacks certain procedural safeguards to prevent arbitrary and capricious sentencing. (AOB 579-621.) Williams's contentions lack merit and have previously been rejected by this Court.

The death penalty law is not unconstitutional for failing to impose a burden of proof – whether beyond a reasonable doubt or by a preponderance of the evidence – as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence [see AOB 581-615]. (*People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Brown, supra*, 33 Cal.4th at pp. 382, 401; *People v. Crew* (2003) 31 Cal.4th 822, 860.) As this Court stated in *People v. Abilez, supra*, 41 Cal.4th 533, the death penalty law is not unconstitutional for: (a) failing to require that jurors be unanimous with respect to aggravating factors (*People v. Gray* (2005) 37 Cal.4th 168, 236); (b) failing to require the jury to return written findings (*People v. Boyette, supra*, 29

Cal.4th at p. 466); (c) for failing to require juror unanimity with regard to the aggravating factors (*People v. Boyette, supra*, 29 Cal.4th at p. 466); (d) for failing to require that the jury find the aggravating factors were proved beyond a reasonable doubt, that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt, or that death is the appropriate penalty beyond a reasonable doubt (*People v. Bell* (2007) 40 Cal.4th 582, 620); and (e) for failing to impose a burden of proof on either party, even if only proof by a preponderance of the evidence (*People v. Stanley, supra*, 39 Cal.4th at p. 964; People v. Boyette, supra, 29 Cal.4th at p. 466). Further, the United States Supreme Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], Ring v. Arizona (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and Blakely v. Washington (2004) 542 U.S. 961 [125 S.Ct. 21, 159 L.Ed.2d 851] have not changed this Court's conclusions regarding burden of proof or jury unanimity. (People v. Tafoya, supra, 42 Cal.4th at p. 198; People v. Hoyos, supra, 41 Cal.4th at p. 926; People v. Abilez, supra, 41 Cal.4th at p. 535; People v. Stevens (2007) 41 Cal.4th 182, 212.)

The death penalty statute is not unconstitutional insofar as it does require comparative, or inter-case, proportionality review [see AOB 615-619]. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1186; *People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1067; *People v. Stanley, supra*, 39 Cal.4th at p. 966.) The jury's consideration of unadjudicated criminal conduct in aggravation under factor (b) (§ 190.3, subd. (b)) is constitutional, and jury unanimity regarding such conduct is not required [AOB 620-621]. (*People v. Kelly, supra*, 42 Cal.4th at pp. 800-801; *People v. Brown, supra*, 33 Cal.4th 382, 402.) The use of such adjectives in the sentencing factors such as "extreme" (see factors (d) and (g) [§ 190.3, subds. (d), (g)]) and "substantial" (see factor (g) [§ 190.3, subd. (g)]) in the list of mitigating factors does not render the statute

unconstitutional [AOB 621]. (*People v. Kelly, supra*, 42 Cal.4th at p. 801; *People v. Avila, supra*, 38 Cal.4th at pp. 614-615.)

Finally, principles of Equal Protection do not require this Court to give capital defendants the same sentence review that is afforded to other felons under the determinate sentencing law. (*People v. Kelly, supra*, 42 Cal.4th at p. 801; *People v. Cox, supra*, 30 Cal.4th at pp. 916, 970; *People v. Lewis* (2001) 26 Cal.4th 334, 395; *People v. Anderson, supra*, 25 Cal.4th at p. 602.) As aptly noted by this Court in *People v. Cox*:

[I]n *People* v. *Allen* [(1986)]42 Cal.3d 1222, we rejected "the notion that equal protection principles mandate that the 'disparate sentencing' procedure of section 1170, subdivision (f) must be extended to capital cases." (*Id.*, at pp. 1287-1288.) Section 1170, subdivision (f), is intended to promote the uniform-sentence goals of the Determinate Sentencing Act and sets forth a process for implementing that goal by which the Board of Prison Terms reviews comparable cases to determine if different punishments are being imposed for substantially similar criminal conduct. (42 Cal.3d at p. 1286.) "[*P*]ersons convicted under the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause [citations]." (People v. Williams [(1988)] 45 Cal.3d [1268,] 1330.)

(*People v. Cox, supra*, 53 Cal.3d at p. 691, emphasis added.)

Accordingly, Williams's Equal Protection claim should be rejected, since he is not similarly situated to a Williams sentenced under the determinate sentencing law.

XXIV.

THE CUMULATIVE EFFECT OF ANY ERRORS DOES NOT REQUIRE REVERSAL

Williams argues that, even if no single error requires reversal of his conviction and death sentence, the cumulative effect of the guilt and penalty phase errors alleged by him compels reversal. Williams asserts this cumulative effect denied him of his rights to a fair trial and reliable guilt and penalty phase determinations (U.S. Const., 5th, 6th, 8th & 14th Amends.) (AOB 631-636.) Because there were no individual errors of any kind as previously discussed, this Court should reject Williams's claim that any cumulative effect warrants reversal of his conviction and death sentence. (See *People v. Kelly, supra* 42 Cal.4th at p. 801; *People v. DePriest, supra*, 42 Cal.4th at pp. 61-62; *People v. Tafoya, supra*, 42 Cal.4th at p. 199.)

XXV.

WILLIAMS WAIVED HIS CLAIM THAT HE IS ENTITLED TO HAVE THE TRIAL COURT CONSIDER HIS ABILITY TO PAY A \$10,000 RESTITUTION FINE BY HIS FAILURE TO OBJECT TO ITS IMPOSITION OR REQUEST A HEARING ON THE MATTER

Williams contends in his supplemental brief that this Court must reduce his restitution fine from \$10,000 to \$100 or remand the case for a restitution hearing because the trial court did not consider his ability to pay when imposing the fine. (Supp. AOB 1-5.) Williams waived this issue by failing to object to the amount of the restitution fine or request a hearing on the issue of his ability to pay. In any event, his claim also lacks merit.

Williams committed his crimes in the instant case in May of 1994. (2 CT 352-359; 3 RT 135.) On August 24, 1998, at the sentencing hearing, the trial court imposed a \$10,000 restitution fine pursuant to section 1202.4. (19 CT 5375.) The trial court did not state on the record its reasons for setting the amount of the fine at \$10,000. Williams did not object to the imposition of the restitution fine or request a hearing on the matter. (64 RT 7202-7213.) On September 2, further proceedings were held to correct Williams's sentence. At that hearing, Williams did not object to the restitution fine that had been imposed. (64 RT 7214-7217.)

Williams has waived the instant claim because he did not raise the issue of his ability to pay a restitution fine in the trial court. Williams argues that he did not waive the instant claim because under the recent case of *People v*. *Vieira* (2005) 35 Cal.4th 264, 305, he is entitled to benefit from amendments to the restitution statutes which became effective while his case has been pending on appeal. (Supp. AOB 2.) The holding in *Viera* is inapplicable to the instant case because the amendments to the restitution statutes requiring the court to consider a defendant's ability to pay were made prior to the time he committed his crimes and was sentenced, not while his case was pending on appeal.

Williams alleges that although it is true an earlier version of Penal Code section 1202.4 was in effect at the time of his trial, which did not require courts to consider a defendant's ability to pay, a more recently enacted version controls while his case is on appeal. (Supp. AOB 3.) At the time Williams committed his crimes in May of 1994, Penal Code section 1202.4, subdivision (a) provided, "In any case in which a defendant is convicted of a felony, the court shall order the defendant to pay a restitution fine as provided in subdivision (a) of Section 13967 of the Government Code." (Stats 1990, ch. 45, § 4.) Former Government Code section 13967, subdivision (a) provided that "[I]f the person is convicted of one or more felony offenses, the court shall impose a separate and additional restitution fine of not less than two hundred dollars (\$200), *subject to the defendant's ability to pay*, and not more than ten thousand dollars (\$10,000)."^{12/} (Stats.1992, ch. 682, § 4, emphasis added.)

^{17.} The 1992 amendment to Government Code section 13967, which added the "ability to pay" language became effective September 12, 1992. Prior to that time, Government Code section 13967, subdivision (a) provided in pertinent part that "[I]f the person is convicted of one or more felony offenses, the court shall impose a separate and additional restitution fine of not less than one hundred dollars (\$100) and not more than ten thousand dollars (\$10,000)." (Stats.1991, ch. 657, § 1, p. 3020.)

In 1994, former Government Code section 13967 and Penal Code section 1202.4 were amended to delete the requirement that the restitution fine be imposed "subject to the defendant's ability to pay," but requiring the court to consider all relevant factors, including the defendant's ability to pay, in setting the amount of the restitution fine.^{18/} (Stats. 1994, ch. 1106, §§ 2, 3.)

18. Effective November 30, 1994, Penal Code section 1202.4, subdivision (a) was amended to provide:

In any case in which a Williamsis convicted of a felony, the court shall order the Williamsto pay a restitution fine as provided in subdivision (a) of Section 13967 of the Government Code. The restitution fine shall be in addition to any other penalty or fine imposed and shall be ordered regardless of the defendant's present ability to pay. However, if the court finds that there are compelling and extraordinary reasons related to the defendant's ability to pay, the court may waive imposition of the fine.

(Stats.1993-94, 1st Ex.Sess., ch. 46, § 3.) Effective January 1, 2005, Penal Code section 1202.4 was amended to provide in pertinent part:

(a)(1) It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any Williamsconvicted of that crime.

. . . .

. . .

(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine. The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000) if the person is convicted of a felony.

(d) In setting the amount of the fine pursuant to subdivision (b) in excess of the to hundred dollar minimum (\$200)..., the court shall consider any relevant factors including, but not limited to, the defendant's ability to pay....

(Stats. 1994, ch. 1106, § 3.) Former Government Code section 13967 was

In *Vieira*, the trial court imposed a \$5,000 restitution fine pursuant to former Penal Code section 1202.4 and former Government Code section 13967, subdivision (a). (People v. Vieira, supra, 35 Cal.4th at p. 304.) At the time Vieira committed his crimes and was sentenced in 1991, neither Penal Code section 1202.4 or Government Code section 13967 required the court to consider a defendant's ability to pay in setting the amount of the restitution fine. (People v. Vieira, supra, 35 Cal.4th at pp. 304-305 & fn. 14.) On appeal, Vieira argued that he was entitled to benefit from the 1992 amendment to Government Code section 13967 which required that the restitution fine only be imposed "subject to the defendant's ability to pay." (Ibid.) This Court held that Vieira was not entitled to benefit from the 1992 amendment because it was repealed in 1994. (Id. at p. 305.) However, because a defendant is generally entitled to benefit from favorable amendments made to a restitution statute which become effective while the case is on appeal, this Court remanded the case for the trial court to re-consider the restitution fine under the current version of Penal Code section 1202.4, which requires the court to consider the defendant's ability to pay when setting the amount of the fine. (*Ibid.*)

Unlike in *Vieira*, where the defendant's ability to pay the restitution fine did not become relevant until after the restitution fine was imposed and the case was pending on appeal, defendant's ability to pay restitution was required to be considered by the trial court at the time of sentencing. At the time Williams

amended to provide:

Notwithstanding Section 13340, the proceeds in the Restitution Fund are hereby continuously appropriated to the board for the purpose of indemnifying persons filing claims pursuant to this article. However, the funds appropriated pursuant to this section for administrative costs of the State Board of Control shall be subject to the annual review through the state budget process.

(Stats. 1994, ch. 1106, § 2.)

committed his crimes in May of 1994, imposition of a restitution fine under Government Code section 13967 was subject to the defendant's ability to pay. At the time of his sentencing in August of 1998, Penal Code section 1202.4 had already been amended to require the trial court to consider the defendant's ability to pay in setting the amount of the restitution fine. Thus, Williams's failure to raise the issue of his inability to pay a restitution fine at the time of the sentencing hearing, request a hearing on the issue, or object to the \$10,000 fine when it was imposed by the trial court waived the instant claim. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1297-1299.)

Williams's claim is also without merit. Williams argues that this Court must reduce his restitution fine to the statutory minimum of \$200 and have prior deductions from his prison trust fund account restored. (Supp. AOB 4-5.) The trial court properly imposed a \$10,000 restitution fine in the instant case because Williams did not present any evidence or argument that he did not have the present or future ability to pay the fine.

Williams relies on *People v. Saelee* (1995) 35 Cal.App.4th 27, 28-29 to argue that his fine should be reduced to the statutory minimum because the trial court did not consider his ability to pay when imposing the restitution fine. (Supp. AOB 3-4.) *Saelee* is factually distinguishable from the instant case. In *Saelee*, the issue was whether the Williams was entitled to benefit from the 1992 amendment to Government Code section 13967 requiring the court to consider a defendant's ability to pay when his crimes were committed prior to the effective date of the amendment.

As previously discussed, in this case, Williams committed his crimes in May of 1994, after the September 12, 1992, effective date of the amendment to Government Code section 13967 which made the restitution fine subject to the defendant's ability to pay. In addition, his sentencing in 1998 was after the 1994 amendment to Penal Code section 1202.4 required the trial court to

consider a defendant's ability to pay in setting the amount of the restitution fine. Thus, this Court should assume that the trial court fulfilled its duty and considered Williams's ability to pay when it imposed the restitution fine. (Evid. Code, § 664; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1485-1486.) The trial court was not required to state its reasons for imposing a specific restitution fine on the record and was not required to make any express findings regarding defendant's ability to pay. (Gov. Code, § 13967; Pen. Code, § 1202.4, subd. (d); *People v. Menius, supra*, 25 Cal.App.4th at p. 1298; *People v. Frye, supra*, 21 Cal.App.4th at p. 1485; *People v. Staley* (1992) 10 Cal.App.4th 782, 785.) The burden to show an inability to pay a restitution fine was on Williams. (§ 1202.4, subd. (d); *People v. Romero* (1996) 43 Cal.App.4th 440, 449.) Since Williams did not present any evidence that he was unable to pay a restitution fine, the trial court properly imposed a \$10,000 fine. Accordingly, this Court must reject Williams's claim.

CONCLUSION

Accordingly, for the foregoing reasons respondent respectfully requests that the judgment be affirmed.

Dated: February 12, 2008

Respectfully submitted,

EDMUND G. BROWN JR. Attorney General of the State of California

DANE R. GILLETTE Chief Assistant Attorney General

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ADS:ada SD1998XS0009 80205613.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 95744 words.

Dated: February 12, 2008

Respectfully submitted,

EDMUND G. BROWN JR. Attorney General of the State of California

ANTHONY DA SILVA

Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. JACK EMMIT WILLIAMS** Case No. : **S073205**

I declare:

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

On <u>February 13, 2008</u>, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

R. CLAYTON SEAMAN, JR. ATTORNEY AT LAW P.O. BOX 12008 PRESCOTT, AZ 86304-2008 (2 Copies) (COUNSEL FOR JACK EMMIT WILLIAMS)

CLERK FOR DELIVERY TO: HONORABLE TIMOTHY HEASLETT RIVERSIDE COUNTY SUPERIOR COURT RIVERSIDE HALL OF JUSTICE 4100 MAIN STREET, DEPARTMENT 21 RIVERSIDE, CA 92501

CLERK OF THE COURT - SF SAN FRANCISCO SUPREME COURT OF THE STATE OF CALIFORNIA 350 MCALLISTER STREET SAN FRANCISCO, CA 94102 ROD PACHECO DISTRICT ATTORNEY WESTERN DIVISION, MAIN OFFICE 4075 MAIN STREET RIVERSIDE, CA 92501

MICHAEL R. SNEDEKER STAFF ATTORNEY CALIFORNIA APPELLATE PROJECT (SF) 101 2ND STREET, SUITE 600 SAN FRANCISCO, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 13, 2008, at San Diego, California.

ANNETTE AGUILAR Declarant

Signature

80206595.wpd