IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ROBERT CARRASCO, Defendant and Appellant.	)	No. S077009 [LA Superior Court No. BA 109453] *Automatic Appeal/Death Penalty*

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgments of Conviction and Death in the Superior Court for the County of Los Angeles

Honorable Michael B. Harwin, Judge

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TABLE OF CONTENTS

Ineffective Assistance Of Counsel

Guilt Phase

TABLE OF AUTHORITIES

Federal Cases

Constitutional Provisions

California Statutes and Rules

Miscellaneous

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgments of death. (California Penal Code, section 1239, subd. (b).)

INTRODUCTION

This case presents the exceptional circumstance of a court denying to a defendant the appointment of counsel. The indigent Appellant, facing the death penalty in two separate and unrelated murder cases, was unable to pay the attorney who had been retained long before by the family when there was only one non-capital accusation. The trial court denied repeated motions for the appointment of counsel and for the assistance of a second lawyer. Further, the court only authorized $1,500 for both an investigation

and the services of forensic experts. That resulted in a trial that was unfair under any reasonable standard. Consequently, Appellant was deprived of the right to counsel, a fair trial, effective representation, a reliable and fair penalty phase process, due process of law, and equal protection of the law, guaranteed by Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The lawyer, Robert H. Beswick, warned that if not appointed, or permitted to withdraw and replaced through the appointment of other counsel, he would be prejudicially ineffective because he could not afford to represent Appellant without being paid. More importantly, the court's refusal to appoint counsel warrants a presumption of prejudice due to state interference with the right to counsel and mandates a new trial.

Mr. Beswick had been retained regarding the first homicide, but was not paid beyond a down payment. The family ran out of what little money it had, and Appellant had nothing. Mr. Beswick was neither hired nor appointed regarding the later second murder charge or the escape. He repeatedly moved for his own appointment on all the charges. He honestly explained that defending Appellant required simultaneously preparing separate defenses in three separate cases, for in addition to the two murder charges there was also a distinct escape accusation. The cases were extremely complex, and the prosecution was seeking the death penalty requiring separate preparation for the penalty phase. Mr. Beswick explained that he would be overwhelmed without being either appointed or released, and his law practice would be financially destroyed.

The lawyer also moved for the appointment of second counsel. Again, he frankly admitted that it would be impossible to provide effective representation with assistance. The lawyer admitted that he was simply overwhelmed by the enormity of the situation.

There is a reversal *per se* standard for state-induced ineffective assistance of counsel claims. Nonetheless, there are enough grounds demon-

strating that the failure to appoint Mr. Beswick or release him from the case and appoint another attorney, resulted in Appellant being deprived of the right to counsel and other fundamental rights. Appellant had an absolute right to the appointment of counsel. Further, the lawyer warned the court well in advance of trial that he was unprepared for both the guilt and penalty phase. He was beleaguered by not being paid and the sheer magnitude of having to defend against two separate murder cases in which the prosecution was seeking the death penalty. Compounding the problem was the court's refusal to provide the assistance of co-counsel.

As a consequence of the trial court turning a deaf ear to Appellant's plight, the attorney was ineffective in representing the accused. There is extensive evidence before this Court of the deficient representation flowing from the court's refusal to appoint an attorney or co-counsel to assist, through evidence presented in a new trial motion. It was exactly as Mr. Beswick had warned the court. There was no preparation for the guilt or penalty phases, and not even an investigator working on the case. Thus there were no witness interviews, other than the lawyer briefly speaking to a few family members who walked up to him at a hotdog stand just before the beginning of the penalty phase.

Mr. Beswick was simply unable to keep up with the case. He was on a legal treadmill and continually losing ground. These failures individually and cumulatively preordained the guilt and death verdicts. The attorney was so beleaguered by the enormity of the task before him coupled with the need to make money through paying clients, that he was unable to function at a minimally acceptable level.

Nevertheless, prejudice is presumed where, as here, there is an actual or constructive denial of counsel at a critical stage of the proceedings. Further, state interference resulting in a denial of fundamental rights, mandates a reversal and new trial. The showing of prejudice is not required. State interference with counsel's ability to represent a criminal defendant is not

subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. By the court refusing to appoint Mr. Beswick or release him from the case and appoint other counsel, Appellant had no chance of a fair trial.

There are various other errors presenting hereafter. The police claimed to have lifted a fingerprint from a spray can found in the glove compartment of a vehicle connected with one of the homicides. Yet when the defense asked to examine the actual can, the prosecution revealed that it had been lost by the police. Evidence of Appellant's brief jail escape was introduced at the guilt phase, even though it was not connect with either homicide, and its prejudice far outweighed any possible probative value. It is also asserted that there was instructional error related to the escape.

STATEMENT OF CASE

On February 12, 1996, Appellant and Shane Matthew Woodland were charged with murdering Allan Friedman. (CT[1] (Supplemental II) 1-4 [Probable Cause Determination], 15-16 [Amended Felony Complaint, Feb. 14, 1996].) The Information alleged that they murdered Allan Friedman in violation of California Penal Code section 1192.7(c)(1), that a handgun was used in violation of section 12022(a)(1), and that Appellant used a firearm within the meaning of sections 1203.06(a)(1) and 12022.5(a) also causing the offense to become a serious felony under section 1192.7(c)(8). (CT (Supplemental II) 209-210.)

The preliminary hearing was held April 9-10, 1996, with Appellant being represented by Tom Kontos. (CT (Supplemental II) 55-201.) Woodland and Appellant were held to answer the charges in the superior court.

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1. "CT" denotes the Clerk's Transcript on Appeal, followed by the page reference, and citations to the Reporter's Transcript on Appeal are denoted "RT." All statutory references are to the Penal Code unless otherwise specified.

(CT (Supplemental II) 199-200.) The charges remained non-capital, with no special circumstances being alleged. An Information was then filed in the superior Court. (CT (Supplemental) 209-210 [Information, Apr. 24, 1996].) 209-210 [Information, Apr. 24, 1996].)

Robert H. Beswick was substituted in as counsel for Appellant on July 17, 1996. (CT (Supplemental II) 228; RT A11-14.) Motions were filed on behalf of the co-defendant Woodland to dismiss the charges, redact alleged statements of Appellant, and to exclude evidence. (CT (Supplemental II) 229-273.) Mr. Beswick filed severance and discovery motions, a pleading seeking exclusion of evidence lost by the prosecution. (CT (Supplemental II) 275-282 [Motion To Sever Defendant Robert Carrasco's Case From Codefendants, Sept. 9, 1996]; CT (Supplemental II) 283-288 [Defendant Robert Carrasco Notice of Motion and Motion for Discovery, Sept. 9, 1996]; (CT (Supplemental II) 292-302 [Defendant Robert Carrasco Notice of Motion and Motion for Discovery, Dec. 29, 1996]; CT (Supplemental II) 327-333 [Defendant Robert Carrasco's Motion for Preclusion Sanction, Feb. 10, 1997]; CT (Supplemental) 398-406 [Motion for Severance, Jan. 28, 1998].) Other than those for discovery, the motions all denied. (RT 11.)

Over a year after the initial murder charge, a second murder and robbery charge was added that was unrelated to the first, with four special circumstance allegations: financial gain, multiple murder, robbery, and that the killings were especially heinous, atrocious, and cruel manifesting exceptional depravity. (CT 255-257 [Indictment, Mar. 12, 1997].) A separate escape charge was then added. (CT (Supplemental IV) 1-2 [Felony Complaint, June 4, 1997], 130-131 [Information, July 11, 1997]. The prosecution gave formal notice on August 17, 1997, that it was seeking the death penalty. (CT 267, CT (Supplemental II) 357; RT A-121.)

Having not been paid due to the indigency of the client and his family, Mr. Beswick began pursing a series of motions seeking his own ap-

pointment and the appointment of second counsel. It was requested that if not granted, he should be released from the case and replaced by another attorney.

- CT (Supplemental II) 343-347, 361-366; [In Camera Motion for Appointment of Additional Counsel In Capital Case, Aug. 13, 1997]
- CT (Supplemental II) 376-382A [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Nov. 14, 1997]
- CT (Supplemental II) 385-390 [Application To Be Appointed As Counsel, Jan. 8, 1998]
- CT (Supplemental II) 392-396 [Supplemental declaration of Robert H. Beswick In Support of Motion To Be Appointed As Counsel, Jan. 16, 1996].)

As detailed in the pleadings, Mr. Beswick was never hired to represent Appellant in the second murder or escape charges. Neither the client nor his family had any funds to pay the attorney on the first murder charge beyond an initial retainer, much less for the additional murder case and the separate escape accusation. The lawyer had not been paid in over two years. The murder cases were separate and unrelated. Nevertheless, the court refused to appoint him or allow for assistance from co-counsel. (CT (Supplemental II) 367, 370, 375.) The trial judge explained to Mr. Beswick that the basis was financial for refusing to appoint him or grant assistance from another lawyer :

Mr. Beswick:

> I appreciate the court's consideration.
>
> Obviously, my stance was it was a single murder case, now it's turned into a second murder case death penalty and escape.
>
> As I tried to bring to the court's attention, I've got much more than I bargained for and much longer trial [than] I anticipated.

The Court:

> I understand. I don't, in good conscience, see how I can bill the county for that.

(RT 3 (Jan. 28, 1998).)

Five days later the trial proceedings began. Jury selection was February 2-19, 1998. (CT (Supplemental II) 158-168; RT 12-1048.) The guilt phase was February 23-March 16, 1998. (CT 325-331, 335, 339-343, 346-352, 358, 361, 369; RT 1073-2971.) On March 24, 1998, the jury returned verdicts finding Appellant guilty of all charges and the that the special circumstances were true. (CT 461-464; RT 2983-3005.) The penalty phase began the same day Appellant was found guilty. (RT 3006.) Following a day and a half of testimony, the jury returned death verdicts on March 27, 1998. (CT 488-499; RT 3182-3187.)

On March 27, 1998, two weeks after the death verdicts, six declarations from members of Appellant's family were filed to "revoke" the death penalty. There was no accompanying motion or involvement of Mr. Beswick. (CT 504-506 [Declaration of Martha Heredia in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 507-509 [Declaration of Eva Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 510-512 [Declaration of Barbara Carrasco-Gamboa in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 513-516 [Declaration of Leandra Kamba in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 517-519 [Declaration of Frances Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 520-522 [Declaration of Ricardo Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15, 1998].) They were prepared by family members and a sister, Leandra Kamba, a legal secretary, signed the proof of service for each. (CT 506, 509, 512, 516, 519, 522.)

One month after the death verdicts William Pitman replaced Mr. Beswick, for the purpose of representing Appellant in new trial and sentencing proceedings, on April 27, 1998. (CT 544.) Thereafter motions

seeking a new trial were filed on behalf of Appellant. (CT 546-592 [Notice of Motion and Partial Motion for New Trial, June 19, 1998]; CT 624-659 [Notice of Motion and Motion for New Trial, Aug. 3, 1998].) The issues raised pertained to the problems Mr. Beswick predicted would occur if he were not appointed and also provided the assistance of co-counsel. These included: being unprepared to try the case; failing to conduct an investigation and thus no strategic basis for any decisions; not presenting essentially any defense at the guilt phase; no investigator retained for preparation of the guilt or penalty phase; meeting only briefly with the client; failing to follow any of the leads that his client provided; brief and superficial interview with some family members at a hotdog stand just prior to the beginning of the penalty phase; agreeing for an unrelated escape charge to be tried with the two murder accusations; failing to object to the playing of a police video tape that contained prejudicially inadmissible statements; failing to utilize evidence of a video tape containing two police interviews of a pivotal witness in which his statements were materially different from his trial testimony; introduction of an unsubstantiated defense theory in the opening statement that was neither investigated nor corroborated with no related evidence produced during the trial; informing the jury of inadmissible anonymous calls to the police which identified Appellant as the murderer of Allan Friedman;, failure to retain essential expects; not investigating and presenting mental health and social background evidence at penalty phase including Appellant's long-term drug use, multiple head injuries, death of his father, presence of an abusive step-father, and growing up in a violent environment; opening the door to inadmissible evidence of Appellant's history of arrests and an incident in which he allegedly threatened someone 18 years earlier. Extensive evidence was presented supporting the trial attorney's failings. (RT 3240-3918.)

Appellant was sentenced to death on February 5, 1999. (CT 765-770; RT 3919-3923.) On February 22, 1999, the court rendered the Commitment of Death; Death Warrant. (CT 771-782B; RT 3931-3933.) Thereafter Appellant was transferred to death row, San Quentin Prison, where he remains.

STATEMENT OF FACTS

Camacho Homicide

Guilt phase

In late 1994, Robert Carrasco, Appellant, was employed at the Ross-Swiss Dairy in Los Angeles. He had worked there for many years, beginning as a driver doing deliveries, then worked on the docks loading and unloading trucks, and finally became as a relief man. (RT 1203, 1243.) He was well regarded by fellow employees, and was thus elected as their union representative. That meant that if an employee had a work-related, Appellant would represent the person on behalf of the union in dealing with management. (*Ibid.*) In 1994, Appellant was working as a relief man which required that he fill in for other employees when they were absent or on vacation. (RT 1208.)

George Camacho, deceased, worked as a loader on the night shift at Ross-Swiss Dairy where he helped to move and load trucks. (RT 1209.) He was killed in the early morning hours of December 16, 1994, shortly after arriving for his shift. (RT 1064.) Camacho had been fired in October for missing work due to drug use. (RT 1064, 1210, 2517.) As the relief man, Appellant had taken over his position when he was discharged. (RT 1211.) Camacho eventually succeeded in getting his job back. (RT 1210.) The night he was killed was his first occasion to be back at work in two months. (*Ibid.*)

When he returned to work on December 16, Camacho punched in his time card at about 1:25 am. (RT 1226-1227.) Shortly thereafter, he was shot nine times and died. (RT 1227, 1514.) The only witness to the shoot-

ing was Appellant. He identified Brian Skofield, a Culver City gang member, as the shooter, whom he recognized Skofield from the projects where they both lived. (RT 2567.) The gun used in the shooting was never recovered (RT 2176). Because there were no other witnesses, and no physical evidence which tied Appellant to the homicide, the prosecution's case rested entirely upon testimony from dairy co-workers who said that Appellant had admitted to killing Camacho.

Prosecution case

The prosecution presented three people, Dennis Martinez, Michael Fernandez, and Efrain Bermudez, who did not witness the shooting, but claimed to have seen people fleeing the scene. However, none could see the fleeing figures well enough to make positive identifications. (RT 1100-1104, 1121-1126, 1229-1233.) The testimony varied as to whether there were three or four people running away.[2] (*Ibid.*)

Several employees of the dairy claimed that Appellant had told them he would lose money if Camacho returned to his old shift because he would no longer be able to continue his auto body repair work, which he had been doing during the daytime. (RT 1153-1154 [Andrew Nunez,]; RT 1197 [Harry Holton]; RT 1313 [Anthony Morales].) This was disputed by Appellant who strongly asserted his innocence. (RT 2558.)

Three dairy employees testified, in contradicted testimony, that Appellant admitted to having killed Camacho as they we gong to a McDonalds to pick up lunch. (RT 1237-1238 [Efrain Bermudez], RT 1308-1309 [Anthony Morales], RT 1576-1578 [Greg Janson].) Another person on the trip recalled that they were all talking about what might have happened, Appellant never said he killed Camacho, and even he (Mario Baltazar) jokingly said he was the murderer. (RT 2302-2303 [Mario Baltazar].) Rumor and

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2. Appellant was the only suspect arrested or charged with the homicide.

speculation were rampant at the dairy as to how might have been responsible for the shooting. (*Ibid.*)

Another employee testified that three months Appellant had indirectly admitted to killing Camacho : "You can't get fired for shooting somebody." (RT 1955 [Steve Apodaca]) (RT 1958.) Shane Woodland, the co-defendant from the second homicide who made a deal with the prosecution (3300-3302), had no connection to the dairy. Yet, he claimed in testimony that Appellant had admitted to killing someone there. (RT 1975.)

Following the Camacho homicide, there were rumors as to who was responsible, and whether it was Appellant. (RT 1414.) Appellant was known to have a big mouth and tell a lot of stories of things he has done. (RT 1336.) Appellant was also known to carry a gun at work, which fueled the rumors that he was involved. (RT 1155, RT 1239.)

The key witness for the prosecution was Greg Janson, a supposed friend of Appellant whom Anthony Morales had implicated as an accomplice in the Camacho killing. According to Morales, on the night of the shooting Janson paged Appellant to let him know that Camacho had arrived at the dairy. (RT 1310.) Janson himself told a number of conflicting stories, first to the police, then to the grand jury, then at the preliminary hearing, and finally at the trial. Ultimately, a recording of the police interview was played for the jury. (RT 1561-1619.) In that discussion Janson said that Appellant trusted him as a friend, and for that reason had told him that he was responsible for both the Camacho and Friedman homicides. (RT 1565, 1581.) His alleged motive, according to Janson, for killing Camacho was that he did not want to lose his shift at the dairy. (RT 1579.) At trial, Janson gave conflicting testimony about whether or not what he told the police was the truth. (E.g. RT 1448-1449.)

The prosecution also presented Brian Skofield whom Appellant identified as Camacho's killer. Skofield was serving a prison sentence for

the sale of cocaine. (RT 2754.) He denied killing Camacho, saying that he had not been to the dairy. (RT 2756.) Skofield testified that he was good friends with Michael Carranza who was also implicated in the killing. (RT 2760.) Even though denying membership in the Culver City Gang, he has "CC" tattooed on an eyelid. (RT 2758.)

Defense case

An employee of the dairy, Albert Ramirez, testified that Janson was friendly with Appellant for whom he worked in his auto body shop. (RT 2278.) To support the assertion that Janson and Appellant were buddies, Ramirez testified that he got into a skirmish with co-worker Efrain Bermudez during an employee barbeque, and that someone who did not work at the dairy pulled out a gun and hit Appellant with it. Janson "tried to attack the guy that hit Bert (Appellant) with the gun in order to protect him." (RT 2277) Appellant's ex-wife, Eva Carrasco, also explained that he and Janson were close. (RT 2399.)

Mr. Ramirez testified that he had never seen Appellant brandish a gun. On the heel of rumors,, he pointedly asked Appellant if he had shot Camacho. Appellant answered no, and asked why he asked such a question. Mr. Ramirez responded: "Because everybody talked bout it. Everybody used to say—the word around work, you think Bert did it? If he had, that's kind of fucked up, for a job. That's about it. But nobody—nobody actually said, 'You know what, Bert shot him.'" (*Ibid.*)

Another dairy employee, Mario Baltazar, was in the car driving to McDonalds with Anthony Morales and Appellant the day after Camacho died. (RT 2302.) He completely contradicted Morales' testimony, saying that they had discussed the homicide during the drive, but that Appellant did not confess to anything:

Q. Did you discuss what happened to Mr. Camacho on that trip to Mc Donald's?
A. Yeah. We were talking about it.

Q. And did anyone in the car admit to shooting Mr. Camacho?
A. No.
Q. Did Bert Carrasco say during that trip to Mc Donald's that he shot George Camacho?
A. No, he didn't.
Q. When you went to Mc Donald's, did you eat at Mc Donald's?
A. No. we brought the food back to the plant.
Q. When you brought the food back to the plant, did Mr. Carrasco say at any time that he shot George Camacho?
A. No, he didn't.
Q. Did anyone tell you that day that they shot George Camacho?
A. Everybody was joking about it. Hearsay. Even like, even L said, "I did," but it was just playing around, joking around.
Q. When you said you did it, also, was that to a group of people or how did it happen?
A. Well, everybody was just—that was the talk of the day, you know.

(RT 2302-2303.)

The defense called Michael Carranza, a friend of Brian Skofield. Carranza refused to testify, citing the Fifth Amendment. (RT 2777-2797.) Mr. Beswick stated out of the presence of the jury that testify that Nancy Nevarrez would testify that Carranza and Skofield showed up at her apartment and threatened Appellant, but she was never called to testify. (RT 2780.)

The only other defense witness regarding the Camacho homicide was Appellant himself. He testified that he was upset that Camacho was coming back to work because, as the union representative, he thought it should be conditioned upon his entering a drug rehabilitation program. (RT 2560.) However, there was no concern about working different hours upon Camacho's return, because the new shift was better for him as far as doing his auto shop work on the side. (RT 2558.) It was explained that he never stated that he would lose money due to Camacho's return. (*Ibid.*) He was

at the dairy the night of the homicide because Janson was concerned that Camacho might not show up. Appellant had been asked to come in to cover the shift if needed. (RT 2562.)

Shortly after arriving at the dairy, Appellant heard shots and saw Brian Skofield standing over someone, shooting the person. (RT 2567.) Appellant had seen Skofield before around the projects in his neighborhood, and had once seen him talking to Camacho. (RT 2568.) Appellant did not threaten anyone, and denied having ever said that he shot Camacho. (RT 2571.) It was explained that the reason he did not tell the police about seeing Skofield was fear for his family, due to the murderer's gang connections. (RT 2621.) Appellant knew a friend of Skofield, Michael Carranza, who may also have been involved in the shooting. (RT 2620.) He testified that Janson may have falsely testified against him because Appellant fired him from working at the body shop, and because Janson was taking medication that seemed to effect his memory.[3]

Friedman homicide

Allan Friedman was shot and killed on October 24, 1995, at about 12:45 pm, while sitting in the driver's seat of his black jeep on Chicopee Road in Encino. He was shot eight times. (RT 1389.) A package of cocaine worth thousands of dollars was found in the back seat of the jeep. Nobody witnessed the shooting, but after hearing shots several neighbors observed two people driving away in a green Honda. One witness was able to get the car's license plate number. (RT 1841.) Later that day, while he was returning from having the windows on the car tinted in order to change its appearance, Shane Woodland was apprehended driving a green Honda

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3. "One day he could be talking to me about something, we would have a conversation, and the next day he wouldn't even remember nothing that we talked about. Nothing. And, then, the next day he would remember everything. It was—I used to think he was kidding around, but he was very upset. He was always on the edge. His nerves were very shaky." (RT 2633.)

with the license plate number reported by the witness. (RT 1978-1979.) Even though charged with murder, he was ultimately was allowed to settle for manslaughter and a six-year sentence in exchange for testifying against Appellant. (CT (Supplemental II-A) 159-161; RT 1994.)

Prosecution case

The prosecution's case against Appellant regarding the Friedman homicide rested almost entirely on the testimony of Shane Woodland, the co-defendant who made a deal in return for a charge reduction from murder to manslaughter. (*Ibid.*) Woodland worked at Perry's Auto Shop in Van Nuys, which was owned by a drug dealer, Javier Chacon. (RT 1963.) He was a friend of Chacon's son, and had begun living with the Chacons in 1993. (RT 1963.) Appellant was also a friend of Javier Chacon and had worked at his shop. (RT 1964.) According to the story of Woodland, on October 24, 1995, Chacon told Woodland to drive Appellant, in Chacon's green Honda Accord, to conduct a drug deal. (RT 1966.) Woodland claimed Appellant instructed him where to drive. They met a person known as Angel (Allan Friedman) at a gas station. (RT 1970-1971.) They then followed Angel's black jeep and pulled up behind him on Chicopee Road. (RT 1971.)

It was testified by Woodland that Appellant got out of the Honda and approached the driver's side of Friedman's jeep, where he stood and talked to the deceased. Woodland claimed he waited in the car, listening to the radio. After about 10 minutes he heard gun shots, looked up, and saw Appellant dashing back to the car carrying a bag. (RT 1973.) Appellant allegedly yelled at Woodland to drive away. As they pulled past the jeep, Appellant leaned out of the car and shot the victim several more times. (RT 1974.) According to Woodland, Appellant looked in the bag and started cursing, saying "it's not in here." He threw the bag out of the car. (RT 1975.)

They drove back to shop where Appellant allegedly told Chaco about the shooting. Chacon ordered Woodland to have the windows tinted to change the appearance of the car. (RT 1978.) After doing so, Woodland went to Chacon's house. After staying a short while, he left in the Honda to pick up a girlfriend, and that is when police spotted the car. Woodland led the police on a chase to the house of Julie Streb, his brother's friend. (RT 1376.) Streb testified that Woodland burst into her house and asked her to hide him and to get rid of his cell phone. (RT 1376, 1377.) She refused to do so; he threw the telephone in the bushes as he ran out. He was then apprehended by the police. (RT 1985.)

The prosecution's forensic print specialist, Charles Caudell, claimed to have found a print identified as Appellant's on a Rave hairspray can allegedly discovered in the glove compartment of the Honda. (RT 2109.) The can was lost, however, and never turned over to the defense during discovery. (RT 1188.) Javier Chacon's fingerprint was found on the roof of the Honda above the passenger side door. (RT 2121.) Five other prints were pulled off the car but could not be identified. (RT 2121.) No prints of Appellant were found on the car itself. (RT 2121.)[4] Nor did police find Appellant's prints on the victim's Jeep.

Greg Janson claimed that Appellant admitted to killing someone in the valley. (RT 1451.) According to him, Appellant asked to stay at his house and asked Janson to provide an alibi for the Friedman killing. (RT 1454.) Appellant stayed at Janson's house that night and was dropped off at his truck the next morning. (RT 1455.) Janson testified that Appellant told him the killing concerned "something about a drug deal or something they were doing." (RT 1451.) He said Appellant told him they used a blue Honda and that there was a young guy there with him. (RT 1452.) Janson further testified that Appellant told him the deceased was driving a black

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4. Woodland *did not* say at any time that Appellant was wearing gloves or that either of them wiped fingerprints off the Honda.

jeep. (RT 1456.) Janson understood that a "rip off" had been planned, and Appellant accidentally grabbed a bag instead of the cocaine. (RT 1457.) Although Janson could not recall when he was testifying whether Appellant had said the "kid" drove the car, when asked if he told the detectives that Janson answered, "Yes, I must have." He also said Appellant told him the young kid went to get the windows tinted after the killing. (RT 1458, 1465.) [Cf. Shawna Rider thought the windows were tinted at the time of the shooting.]

Two residents on Chicopee Road where the shooting occurred heard gun shots. Shawna Rider recalled a series of shots, a pause, and then more. She went out front with a phone in her hand and saw a blue Honda driving off. She called 911. (RT 1683.) Another neighbor, Hugo Saavedra, was in his car making a U-turn when he saw a small car going very fast down the road towards him. (1840-1841.) For a moment he was blocking their path, and he looked directly at the occupants for four or five seconds before pulling out of the way. (RT 1841, 1847.) As they drove off, he took down the license plate number of the car. (RT 1841.)

Mr. Saavedra identified the driver as white, young, and clean cut with short hair. (RT 1844.) He said the passenger was also clean cut with short hair, white but could have been Spanish.. (RT 1844.) While he had been unable to identify the Appellant from a photo line up, and the description he gave did not fit Appellant, Saavedra identified Appellant in court as the man he had seen in the passenger seat. When asked what he based the identification on, he said it was Appellant's "clean, very clean cut" hair. (RT 1845.) Saavedra was much less certain when asked whether he recognized Appellant's face. He admitted he was only 70% sure it was Appellant. (RT 1845.)

Defense case

Even without having conducted an adequate investigation, Mr. Beswick was able to marshal some facts by which to impeach Woodland's tes-

timony. First was the deal Woodland made with the prosecution. He was originally charged with first degree murder with a possible sentence of 25 years to life. (RT 1993.) After making the plea bargain with the prosecution to testify against Appellant, he was permitted to plead guilty to the reduced charge of manslaughter for which he received a prison sentence of only six years. (RT 1993-1994; CT (Supplemental II-A) 159-161.)

Additionally, Woodland's close relationship with Javier Chacon gave him a motive to protect Chacon by implicating Appellant. Chacon was the person who, Woodland testified, directed him to drive Appellant to a drug deal. Chacon also allegedly provided money to Appellant in order to conduct a drug transaction with Friedman. (RT 1999.) Chacon's son owned the Honda used in the shooting, and their father's fingerprint was found on the passenger side roof of the car. (RT 1999, 2121.) Chacon also ordered Woodland to get the windows on the car tinted (RT 2042.), and Chacon helped to pay for Woodland's attorney. (RT 2477.)

Woodland had lived with the Chacons for five years, since he was 11 years of age. (RT 2334.) Javier Chacon provided food, clothing, spending money, and was like a father to Woodland. (RT 2004.) Woodland ate dinner at Chacon's house the evening after the Friedman killing. (RT 2041.) Moreover, Chacon had a motive to use Woodland to incriminate Appellant because Appellant was having an affair with Chacon's wife. (RT 2062.)

Another piece of evidence against Woodland was in the bag that was taken from Friedman and thrown out the window of the Honda. A neighbor found the bag and turned it over to the police. (RT 2138.) Inside was a bill of sale for a Nissan sold to Friedman with Woodland's name on it. Woodland admitted to selling the car, but lied explaining he did not sell it to Friedman but to another person despite the fact that Friedman's name was on the receipt. (RT 2059.) He could not explain why the deceased's name

was on the receipt if he was not the buyer. Woodland testified he gave the money from the sale of the Nissan to Chacon. (RT 2059.)

Woodland was also in possession of a cell phone which had been used to make a number of calls to Friedman's cell phone the morning of the homicide (RT 2235). Woodland claimed the phone belonged to Appellant (RT 1979-1980, 1985).

The defense presented the testimony of Thomas Cousineau, who lived on Chicopee Street. (RT 2257.) He recalled hearing several shots fired on the day in question. He ran out of his house and saw two individuals standing on either side of a blue Honda parked in the street, next to a black Jeep. (RT 2258, 2259.) Cousineau was about 80 feet away. (RT 2261.) He mainly saw the passenger, and got a "vague" view of the driver. (RT 2261.) He described the driver as "White, Caucasian, early 20's. Looked like black hair." When asked the passenger, the witness responded, "Same thing." He further stated: "Early 20's, white, Caucasian, black hair, wearing I think a white t-shirt.")RT 2261.) Cousineau watched as the two men got into the blue Honda and drove past his driveway, increasing to a high speed after passing him. (RT 2262.) There was no shooting as claimed by Woodland. In response to the prosecutor's query about the length of the passenger's hair, Cousineau suggested it was about the same length as "that gentleman over there," and when the trial court identified him for the record as Appellant, the witness remarked, "Oh, is that the defendant?" (RT 2266.)

Another resident of Chicopee Street, Ronald Allen, testified that he looked out his front window after hearing shots and saw two white males in a blue Honda, parked next to a Jeep. (RT 2320, 2321). He was about 70 feet away. (RT 2329.) He did not see either of the two men in the courtroom. (RT 2323.) Contrary to Woodland's testimony, the Honda's windows were not tinted. (RT 2326.)

Delia Chacon was Javier Chacon's wife at the time of Friedman killing. She testified that at the time the homicide, she and Appellant were in Topanga Canyon spending the afternoon together. (RT 2365.) Because they were having an affair, she did not tell the police initially about being with Appellant since she was afraid that her husband would find out: "If you knew my husband, you would know why I said that." (RT 2380.)

Appellant also testified that he was with Delia at the time of Friedman's killing and that he spent that night at Greg Janson's house, but not because he needed an alibi. (RT 2585.) It was simply because "[w]e were friends. I used to always go out to this house." (RT 2634.)

Jail escape

On May 31, 1997, at about 5:30 pm, Appellant escaped from the North County Correctional Facility, Los Angeles. (RT 1788, 2603.) Three others also attempted but did not succeed. (RT 1936.) The facts of the escape were not contested. The four prisoners used a hacksaw to cut a window screen, which was then bent to allow room to climb through to the courtyard. They tied blankets and sheets together to climb down a 25 foot wall, and threw mattresses over the top of a metal fence in order to cover razor wire. They used more blankets and sheets to scale the fence. No violence of any type was used in the escape: "I planned on this escape without any harm coming to anybody, without any danger to anybody, without any contact coming into any deputies, to civilians. I planned it that way." (RT 7657.)

Appellant testified that after he escaped he went to the town of Castaic where he hid overnight in an abandoned boat. (RT 2661.) He then went to the house of a friend, Carlos he knew from high school. (RT 2658.) From there, his sister Francis picked him up in a gray sports utility vehicle. At that time, he was spotted by police and apprehended without offering any resistance. (RT 1930-1931.)

Appellant explained that there were numerous reasons for the escape:

> Q. (Mr. Beswick): Why did you escape?
>
> A. (Appellant): There's a lot of reasons. I mean, I was the—first of all, I was in jail, first of all, because someone said I committed a murder. They just said I committed a murder, next thing you know I'm in jail. I have a job, I have a family to support. My daughter's going through college and everything was just—went from good to nothing with just somebody's word saying I killed somebody.
>
> Then they said that they're holding me because of a fingerprint that was in the car. And I told them that was a shop car, that's not unusual for my fingerprint to be in that car. I'm surprised my fingerprints weren't all over that car. I was in that car a lot of times. I told them.
>
> And second of all, I was in two major riots, it was on TV. Major riots where your life is in danger, you're facing race riots, when I never believed in race riots.
>
> And one incident I stopped our dorm from having a riot in there. It was very dangerous. Your life is in danger. Two of those riots I was in.
>
> And then the most important thing, my wife told me one day that Javier had called, called her and came over, kind of like implicating, trying to tell me, "I know where your family is and your wife and your kids."
>
> And there's nothing I wouldn't do for my kids.

(RT 2659-2660.)

ARGUMENT

Jury Selection

I.

APPELLANT WAS TRIED BEFORE A JURY WHICH WAS NOT A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY BECAUSE THE COURT FAILED TO PROVIDE ADEQUATE COMPENSATION FOR THE JURORS RESULTING IN HARDSHIP EXCLUSIONS OF APPROXIMATELY 40 PERCENT OF THE JURY POOL

A. Introduction

The state's failure to provide adequate compensation to prospective jurors resulted in approximately 40 percent being excused due to financial hardship. That upset the demographic balance of the group from which the actual jurors were selected. Consequently Appellant was deprived of the right to a fair and impartial jury drawn from a representative cross-section of the community, a fair trial, and due process of law. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 16.)

B. Factual Background

Jury selection was conducted February 2-4, 11, 13, 17-19, 1998. (CT 304-313; RT 7-253, 274-1048.) Three jury pools of prospective jurors, 100 each, was brought in for voir dire. Each day the court explained to the potential jurors the three acceptable reasons for receiving an excusal for hardship. (E.g., RT 19, 98, 190.) The first reason allowed for excusal was economic hardship where the juror would not be paid by the employer for jury service, or he or she was unemployed. Both sides stipulated throughout that where an employer would pay for less than 25 days of jury service, the juror could still be excused. The other two allowable hardship excusals were for medical disability or prepaid vacation plans, which are not in issue here.

On the first day of jury selection, these rules resulted in the economic hardship exclusion of at least 41 out of 100 prospective jurors. (RT 19-88.) During the second day, a minimum of 36 out of 100 prospective jurors were excused for economic hardship. (RT 98-181.) On the third day, at least 48 jurors were excused for that reason. (RT 190-253.) In sum, approximately 125 out of 300 perspective jurors, or 40 percent, were excused on the basis of hardship because the court could not provide reasonable compensation for jury service.

The following are examples of prospective jurors excused for cause due to financial hardship because of lack of adequate jury service compensation:

February 2, 1998

Name and number	**Page**	**Financial hardship**
Maher,Timothy 969208185	RT 53	10 days of jury pay from CBS, disabled children
Reynolds, Joanne 971395537	RT 52	20 days of pay from Lockheed Martin
Sawa, Terry 970723552	RT 51	10 days pay from Von's supermarket
Steinhoff, George 968318853	RT 50	10 days pay at Blue Cross
Albin, Herbert 971040279	RT 49	10 days pay from Unilab
Grooms, Henry 970520722	RT 48	2 weeks pay from Boeing
Salvador, Leticia 970692236	RT 48	10 days pay from UCLA Hospital
Samuels, Lois 968132353	RT 47	10 days pay from Paychex
Horny, John 968698272	RT 46	20 days pay from Disney
O'Connor, Lumen 971327388	RT 47	10 days pay from 1st Federal Bank
Brandon, Kathleen 971889608	RT 45	10 days pay from LA USD
Duran, James 970542347	RT 44	5 days from KCAL

Li, Elliot 967152464	RT 44	10 days pay from UCLA
Torres-Toquero, Miriam 96889610	RT 42	10 days pay from Blue Cross
Elizondo, Carlos 970866453	RT 42	10 days pay from Blockbuster Video
Goodson, Marina 970135673	RT 41	10 days pay from Kaiser Permanente
Santiago, Piedad 971332948	RT 53	10 days pay from Great Western Bank
Mason, Stella 970524413	RT 27	Childcare issues
Wirz-Safranck, Debra 968684482	RT 27	Self-employed, no income if jury duty
Pickett, Tammy 970329353		10 days pay from Childcare Center
Valenzuela, Omar 970687801	RT 29	10 days pay from Coco's Restaurant
Mann, Kenneth 970280908	RT 29	6-8 weeks too long for his job search program
Kuhn, John 967966043	RT 30	Public school teacher, 20 days paid
Cefre, Asterio 965110889	RT 33	Unemployed, job search issues
Novak, Richard 971464039	RT 32	10 days pay from Marcel Armand Mfg.
Brackey, Thomas 970061746	RT 34	10 days pay from Hughes Electronics
Estrada, Maria 968235751	RT 34	Unemployment requirements
Weiss, Stephen 971392359	RT 35	10 days from Sanwa Bank
Cooper, Cynthia 965066705	RT 36	10 days pay from JPL
Testa, Mario 970414239	RT 37	10 days pay from Universal Studios
Estiandan, Gloria 970715569	RT 37	10 days pay from Kaiser Permanente
Whitaker, Allison 971606342	RT 38	10 days pay from Integrated Device Tech.

Hughes, Kristin 970583812	RT 39	5 days pay from Crate and Barrel
Davis, Deborah 968101040	RT 39	10 days pay from Sancor Intl.
Manganaro, Kathleen 970548244	RT 40	10 days of pay from UCLA
Ramirez, Oscar 966998409		10 days pay from Great Western Bank
McQuade, Mary Michelle 970418226	RT 56	10 days of pay from USC Med. School
Cross, Angela 970740699	RT 55	10 days of pay from Kaiser Permanente
Balint, Mary Jane 971110491	RT 54	5 days of pay from Columbia West Hills Hospital
Oquindo, Feheilani 971003575	RT 54	10 days pay from Northeast Valley Health Corp.
Gibb, William 970832268	RT 59	Rocketyne Co. will pay for 5 weeks
?		Sidley & Austin will pay for 10 days unlimited
Nichols, Jon 968765447	RT 33	
Reizes, Kenneth 970645203	RT 36	10 days pay from Kajima Urban Development
970319245	RT 64	25 days of jury leave from Boeing
Celestre, Stacey 971417603	RT 63	25 days from Boeing
Becht, David 970995130	RT 65	25 days from Boeing
Go, Lilia 968277900	RT 62	Only has car 3 days per week, ticketless vacation
Robinson, Janet 970677510	RT 51	Teradyne pays only 10 days

February 3, 1998

Name and number	**Page**	**Financial hardship**
Salazar, Miguel 971832501?	RT 119	Acapulco Rest. doesn't pay
Valles, Susan 971089485	RT 120	Spectro Lab pays 15 days
Wu, Shin Tson 971447958	RT 120	Hughes pays 10 days

Laolagi, Samuel 971162970	RT. 109	Hillside Rubbish pays only 3 days
Ceballos, Mario 971790201	RT 109	Worldcom pays for 10 days
Billings, David 971853746	RT 110	Santa Clarita Valley Health Care doesn't pay
Marcheschi, Michael 967924700	RT 111	Paid vacation & 5 days pay from Mar Cor Remediation
Cooper-Levine, Lori 97166572		10 days from Imperial Premium Finance
Rebuyon, Arlene 971561396		Unilab pays 10 days
Donlin, Jeff 970483775	RT 150	Pre-paid vacation
Sherman, Neal 071406267	RT 114	Sysco Foods pays 10 days
Rosten, Deborah 971705267	RT 115	Sony pays 2 weeks
Kaufman, Jeana 969065489	RT 115	Nestle pays 10 days
Avila, Sancira 970824192	RT 116	CHRLA pays for 10 days
Kay, Jessica 97161550	RT 117	Litton pays 10 days
Tollock, James 968810003	RT 118	Hughes pays 10 days
Pease, Leslie 971726884	RT 108	TRW pays 10 days
Goodman, Mark 971791763	RT 108	Lockheed Martin pays 20 days
Tucker, Mary 971675099	RT 132	Litton pays for 5 days
Tamarra, Norberto 971308422	RT 131	Hughes pays 10 days
Townsend, Diane 971691945	RT 133	Micro Age pays for 5 days
Walters, Travis 971800587	RT 131	20th C. Insurance does not pay, part-time student
Murrell, Anna 971302455	RT 130	20th C. Fox pays 10 days
Gilbertson, Vanita 970305027	RT 129	K.Permanente gives10 days

Aaronson, Shelli 971830760	RT 128	Hagenbaugh pays 10 days
Leung, Sauwan 971237451	RT 128	TRW pays 10 days
Mankin, Cheryl 971341157	RT 126	Blue Cross pays 10 days
Schnail, Jennifer 970711514	RT 125	Columbia W. Hills med. Pays 5 days
Burchards, Carole 971156938	RT 123	Teacher, Mary Immaculate gets 10 days.
Montes, Raymond 966211143	RT 121	Gen Tel pays 10 days
Maira, Christopher 971508128	RT 124	Paisano Publications doesn't pay for jury duty
Loveland, Gerald 971740951	RT 06	Disney pays 20 days
Steveson, Djard 971626851	RT 106	LA times pays 10 days
Webster, Byron 971341432	RT 135	Blue Cross pays for 10 days
Zavatsky, Grgory 968779396	RT 135	Kaiser Permanente pays for 10 days
Smith, Ethan 970791498	RT 34	Cal Arts pays for 15 days
Fellbaum, William 971517430	RT 144	Pre-paid vacation
____, Elias 961401065		Boeing pays 25 days
Ginn, Nancy 971822223	RT 143	Managed health Network pays 10 days
Hernandez, Greta 971718028	RT 143	Boeing pays 25 days
Matarazzo, John 971082788	RT 138, 162	Borders pays 20 days
McMillan, Beverly 967581490		Marshall's pays 2 weeks
Gonzalez, Rosa 971673375		La Opinion pays 10 days
Aguinaldo, Andres 971269806		JBL doesn't pay for jury service, poor hearing

February 4, 1998

Name and number	**Page**	**Financial hardship**
McMillan, Beverly	RT 226	Marshall's pays 2 weeks

967581490		
Gonzalez, Rosa 971673375	RT 221	La Opinion pays 10 days
Courter, Garland 968910597	RT 227	10 days pay
Brown Wallace 9712932270	RT 200	Westside Pavilion will not pay for jury time
Gusek, Jodi 970554262	RT 199	Company won't pay for jury service
Nuputi, Susan 968698045	RT 198	Vacation and employer pays 21 days,
Coumans, Minou 968154234	RT 196	Data Dimensions pays for 10 days
Skibba, Jill 971336117	RT 222	Carsey-Warner pays 10 days of jury service
Zenan, Chris 971244355	RT 222	Home Base pays for 5 days
Miller, Lois 9713222985	RT 222	Unemployed
Pereles, DD 971388444	RT 216	Transamerica pays for 10 days
Johaneson, William 968682202	RT 209	Farmer's Insurance pays for 10 days
Kwok, Audrey 971501879	RT 210	NH Ball Bearing pays 10 days
Perez, Roman 971359931	RT 211	Warner Bros pays 5 days
Frazier, Terry 97151510712	RT 210	Boeing pays 20 days
Taylor, Richard 970487528	RT 209	Pre-paid vacation
Lam, Alan 971486093	RT 209	Unemployed, must be available to begin working
Cole, Kathryn 97030856	RT 207	Blue Cross pays 10 days
Kiner, Henrietta 970285316	RT 230	Jewish Family Services pays 10 days
Robirds, Sheila 970596399	RT 228	Warner Bros pays 20 days
Gallagher, John 971732542	RT 229	Self employed, loses all income if serving on jury
Price, Kimberly 969134387	RT 228	Bel Air Presbyterian Church pays 10 days
Wells, Kevin	RT 228	Princess Cruises pays 10 days

970921471		
Guerrero, Randy 971054357	RT 227	City National Bank pays for 10 days
Martinez, Liliana 968641285	RT 225	LA County Regional Center pays 10 days
Hamadani, Ben 970178594	RT 225	Kaiser pays 10 days
Williams, Mary 970258928	RT 232	San Fernando Realtors pays 5 days
Ford, Leland 971782601	RT 236	Hughes markets pays 10 days
Snyder, Paula 970680451	RT 237	Jackson Lewis pays 10 days
Wild, Nancy 967783062	RT 236	GMAC-RFC pays 10 days
Tran, Hung 971828857	RT 235	Teradyne pays 10 days
Rukavina, Marta 970689843	RT 234	Young's Mkt. Pays 10 days
Van Le, Ly 970305149	RT 234	Teledyne pays for 10 days
Lim, Maria 969091386	RT 233	1st Colony Insurance pays 10 days
DiPalma, Chris 971337878	RT 240	Amgen pays 10 days
Stone, Sally 967920903	RT 241	Morgan Lewis-Bockius pays 10 days
Cronk, Timothy 971735854	RT 241	Toyota Credit Corp. pays for 10 days
French, David 971098182	RT 239	CA Microwave pays for 10 days
Field, Mitch 970663743	RT 239	Motion Picture Pension Plan pays for 10 days
Dapp, Margaret 968626671	RT 238	Ralph's pays for 10 days
Gavin, Joyce 970564877	RT 238	Lockheed Martin pays for 20 days of service
Zabaglo-Holl Sue 969019558	RT 232	Newhall Land & Farming pays for 10 days
Niksadat, Maniteh 968101461	RT 242	Home Savings pays 10 days
Orth, Barbara	RT 204	Too many business commitments

969335597		
McNamara, William	RT 202	Pre-paid business trip
970888593		
Name unknown	RT 201	Boeing pays 25 days
971885306		
Steil, Marcia	RT 224	Self employed, no income for service
970994533		

C. The Court Deprived Appellant of His Right to a Jury Drawn from a Representative Cross-section of the Community and His Right to Due Process

A criminal defendant is entitled to a jury drawn from a representative cross-section of the community under both the state and federal constitution . (*Duren v. Missouri (1979)* 439 U.S. 357, 358-367; *People v. Harris* (1984) 36 Cal.3d 36, 48-49.) The federal and state guarantees are co-extensive, and the analyses are identical. (*People v. Howard* (1992) 1 Cal.4th 1132, 1159.) In order to establish a *prima facie* violation of the fair-cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process. (*Duren, supra*, 439 U.S. at p. 364.)

This Court recognizes the importance of the requirement for juries to be chosen from a representative cross-section of the community:

> In a series of decisions beginning almost four decades ago the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from "a representative cross-section of the community." The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, *occupation, economic condition*, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, precon-

> ceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.
>
> (In *People v. Wheeler* (1978) 22 Cal.3d 258, 266-267 (footnotes omitted; emphasis added; 266-267.)

The need to assure a representative cross-section is at its greatest in a capital trial, where the jury not only determines the issue of guilt, but also determines whether the defendant will live or die. (See *People v. Armendariz* (1984) 37 Cal.3d 573, 583.) However, factors inherent in the case at hand and in almost every capital trial make such proceedings the *least* likely ones to have jurors chosen from a representative cross-section. "[I]n this state the right to a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution." (*Wheeler, supra*, 22 Cal.3d at p. 272.) A number of aspects of jury selection pose dangers to the implementation of this constitutional requirement. Among the potential problems are "excessive excuses on such grounds as sex, age, *job obligations, or inadequate jury fees*, can upset the demographic balance of the venire in essential respects." (*Id.* at p. 273.) A county cannot refuse to pay for expenses properly found by a court to be essential to the protection of fundamental constitutional rights of criminal defendants. (See *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 313, 323-326 [regarding the obligation of the county to pay the cost of court-ordered defense investigative services]; see also *People v. Johnson* (1980) 26 Cal.3d 557, 571 [the state's obligation to provide enough court rooms and personnel to assure that the right to a speedy trial will be honored].)

Another useful analogy is *People v. Aranda* (1965) 63 Cal. 2d 518, wherein this Court held that separate trials were required for co-defendants

if the prosecutor's use of statements made by one defendant would prejudice the other defendant. Recognizing the cost and potential inconvenience to witnesses who would have to attend two trials instead of one, this Court concluded, "These practical considerations of convenience must be subordinated when they run counter to the need to insure fair trials and to protect fundamental constitutional rights." (*Id.*, at p. 530, fn. 9.)

In the present case, it seems clear that granting hardship excuses to 40 percent of prospective jurors, a significant proportion of the jury panel, must have upset the demographic balance of the group from which the actual jurors were selected. The class of potential jurors who were either not in need of employment, or who had jobs that would provide continued full salary throughout a lengthy trial, cannot be considered a representative cross-section of the entire community. This type of under-representation is no mere occasional problem; it is "inherent in the particular jury-selection process utilized" and therefore constitutes *systematic* under representation of lower income groups in capital trials and other lengthy trials. (*Duren v. Missouri* (1979) 439 U.S. 357.)

Appellant need not establish that the lack of reasonable compensation was a product of bad faith or with any intent to cause under-representation:

> Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right.

(*Glasser v. United States* (1942) 315 U.S. 60, 86; see also *People v. White* (1954) 43 Cal.2d 740, 750.)

Thus, the problem recognized but not resolved in *Wheeler* was very real in the present case. This difficulty was a problem largely caused by the state through failing to amend the statutes governing jury fees to reflect cur-

rent economic realities. The state must, therefore, be expected to provide a better solution, either through increasing juror fees to a reasonable level or requiring employers to continue to pay the salary of jurors throughout entire trials, no matter how long they last.[5]

D. The Court Excluded from Appellant's Jury Groups Which Are "Distinctive" Under the First *Duren* Test

This Court should recognize poor people as a distinctive group which was systematically excluded from appellant's jury because the trial court could not or would not provide adequate compensation for jurors in this long trial. In *Lockhart v. McCree* (1986) 476 U.S. 162, it was noted that the concept of "distinctiveness" must be linked to the purposes of the fair cross-section requirement. The three such purposes the *Lockhart* court identified were (1) to safeguard against the arbitrary exercise of prosecutorial authority, (2) to preserve public confidence in the fairness of the criminal justice system and (3) to promote shared responsibility for the administration of justice as a phase of civic responsibility. (*Id.* at p. 174, citing *Taylor v. Louisiana* (1975) 419 U.S. 522, 530-531.) Following *Lockhart*, a group which is both identifiable and whose judicial recognition would advance the purposes of the fair cross-section requirement should be considered "distinctive." (*Comment* (1996) 84 CAL. LAW REV. 101, 134.) Under this test, poor people are a distinctive group, and certainly as distinctive as previously-recognized groups under the fair cross-section requirement. (*Id.* at pp. 1, 3, 4-146 ; compare, *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 220 (daily wage earners wrongfully excluded from jury).) This Court should therefore reconsider its past rejection of this issue (see e . g., *People v. DeSantis* (1992) 2 Cal . 4th 1198) in light of the concept of dis-

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5. In *Dean v. Gadsden Times Publishing Corp.* (1973) 412 U.S. 543, the court upheld the validity of a statute requiring payments from employers to employees on jury duty.

tinctiveness described in Lockhart, and acknowledge the poor as a distinctive group.

Finally, regardless of the *Duren* criteria, the high number of excusals for financial hardship constituted "excessive" excuses which upset the demographic balance of the venire in essential respects, within the meaning of *People v. Wheeler*, *supra*, 22 Cal.3d at p. 273. Appellant submits that the exclusion of forty two percent of the jury pool for economic hardship was "excessive" under *Wheeler*. (*See also, Note*, "Hardship Excuses and Occupational Exemptions: The Impairment of the 'Fair Cross-Section of the Community'" (1995) 69 So.Cal.L.Rev. 69 155 (selection procedures that result in large numbers of hardship excuses and exemptions undermine the fair cross-section requirement).) The low fees paid to jurors caused appellant's jury to be selected from a panel which did not represent a cross-section of the community. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human unknown and perhaps unknowable." (*Peters v. Kiff* (1972) 407 U.S. 493, 503 (plur. opn.) The judgment must therefore be reversed. (See *Duren v. Missouri*, *supra*; *People v. Wheeler*, *supra*.)

E. Conclusion

The simple fact is that when the state seeks the death penalty, an unusually long trial almost inevitably follows. The process of jury selection is always complicated by the necessity to consider the impact of each prospective juror's views on capital punishment. Ironically, the process of excluding a large proportion of the jury panel for hardship based on the likely length of the trial itself becomes time-consuming. Counsel on both sides are always going to attempt to produce every possible witness and raise a wide variety of legal issues because of the awesome decision that must be made. Not only is there a complicated guilt trial (and often a separate sanity trial), but there is also an additional penalty trial.

Lengthy trials are inevitable in capital cases. Under the present state of the law, capitally charged defendants must settle for juries drawn from panels restricted to persons who are in an economic situation that allows them to participate in a lengthy trial. While this problem is a matter that should be resolved by the legislature, this Court should take appropriate action where the legislature has failed to do so.

An analogy might be helpful in recognizing the seriousness of this problem. It is well recognized and accepted that the state is obligated to provide qualified counsel to indigent defendants. Suppose the state tried to satisfy this responsibility by providing for the payment of counsel for up to one month of trial time, with the defendant left to his own devices after that month. Such a procedure would surely be found invalid by this Court, despite any claims by governmental entities that the cost of counsel for trials longer than one month was too great a burden to place on limited public funds.

It is just as unrealistic for counties to pay grossly inadequate juror fees and then ignore the problem that arises when a substantial percentage of the prospective jurors must be excused for cause based on economic hardship. The present conviction should be reversed and provisions should be made so that the case can be retried by a jury that is truly drawn from a representative cross-section of the community.

In Appellant's case the demographic balance of the venire was upset by the court's refusal or inability to reasonably compensate jurors sitting through a lengthy trial. The effect of offering such a small amount as a jury fee was to exclude the poor, women, as well as African-Americans and Hispanics.

The failure to provide adequate compensation to jurors resulted in a 40 percent loss of prospective jurors due to financial hardship, thereby demographic balance of the group from which the jury was selected. As a

result, Appellant was deprived of the right to a fair and impartial jury drawn from a representative cross-section of the community, due process of law, and a fair trial, in contravention of the Sixth, Eighth and Fourteenth Amendments, and Article I, sections 7 and 16 of the California Constitution.)

II.

THE EXCLUSION OF EX-FELONS FROM JURY SERVICE RESULTED IN A DENIAL OF APPELLANT'S RIGHT TO A JURY SELECTED FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY, EQUAL PROTECTION OF THE LAW, DUE PROCESS OF LAW, AND A FAIR TRIAL, AND WAS A DENIAL OF THE JUROR'S RIGHT TO PARTICIPATE

A. Introduction

California law disqualifies those who have been convicted of a felony from jury service. (Code Civ. Proc. § 203(a)(5).) It is submitted that the exclusion of ex-felons from jury service runs afoul of Appellant's right to have a jury drawn from a fair cross section of the community, a fair trial, due process of law, and equal protection of the law, guaranteed by the Fifth, Sixth and Fourteenth Amendments, and by article I, section 16, of the California Constitution, and is thus unconstitutional. Also, it is contrary to the right of ex-felons to participate in the jury process.

During jury selection in Appellant's trial, the Court questioned a man who had twice accepted plea bargains, once for robbery and once for burglary, and served at least five years in prison. (RT 669-70.) After the Court looked up the applicable law and read it to counsel, both sides stipulated to his excusal. (RT 672.)

B. Federal Law

To date, the United States Supreme Court has not directly addressed the question of whether exclusion of ex-felons from jury service is constitutional. Over a century ago it was held that "the very idea of a jury is a body of men composed . . . of [a criminal defendant's] neighbors, fellows, asso-

ciates, persons having the same legal status in society as that which he holds." (*Strauder v. Virginia* (1880) 110 U.S. 303, 308.) Sixty years later the court upheld an equal protection challenge to a state law excluding blacks from jury service as a violation of equal protection by declaring: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." (*Smith v. Texas* (1940) 311 U.S. 128, 130.)

Shortly thereafter the court struck down a jury selection practice that discriminated against workers. This time the justices framed the right to a jury that is a representative "cross section of the community" as a mandate of the Sixth Amendment's right to an impartial jury. The entitlement was extended to the states through the Fourteenth Amendment. (*Thiel v. Southern Pacific Co.*, *supra*, 328 U.S. 217.) More recently the court created a test for determining whether the cross-section requirement has been met. Establishment of the prima facie case for a deprivation of the jury trial right requires a showing that (1) the group excluded is a "distinctive group" in the community; (2) the representation of the group in venires from which juries are selected is not fair and reasonable in relation to the number in the community; and (3) the under representation is due to systematic exclusion of the group in the jury selection process. (*Duren v. Missouri* (1979) 439 U.S. 357, 364.)

Since the court's decision in *Theil*, the reach of the cross-section principle has been restrained by its recognition of the competing states' right to "remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." (*Taylor v. Louisiana*, *supra*, 419 U.S. at p. 538.) Stepping further away from the cross-section requirement, in 1990 the court determined: "The requirement of a fair cross section on the venire is a means of assuring, not a representative jury, which the Constitution does not demand, but an impartial one, which

it does." (*Holland v. Illinois* (1990) 493 U.S. 474, 480-481.) As interpreted by the Sixth Circuit, "the right under the Equal Protection Clause of the Fourteenth Amendment to the Constitution from *Batson*,[6] that there cannot be a systematic exclusion of a particular race from the petit jury, was not extended to the right under the Sixth Amendment to trial by an impartial jury." (*Bell v. Baker* (6th Cir. 1992) 954 F.2d 400, 401.)

The Supreme Court has not provided any additional explanation of the meaning of "distinct group." (*Holland v. Illinois, supra*, 493 U.S. at pp. 478, 481, 483-484.) However, a number of federal courts, including the 9th Circuit, have adopted a test first annunciated by the 11th Circuit. A defendant must show that (1) the group is defined and limited by some factor; (2) a common thread or similarity in attitude, ideas, or experience runs through the group; and (3) there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process. (*Willis v. Zant* (11th Cir. 1983) 720 F.2d 1212, 1216; *U.S. v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782.) It is worth noting that the court assumes that whether a group is distinct is a question of fact and that it depends on the time and location of the trial. According to the court, "Latins" can be a distinct group in Miami, but not in Cleveland.

In order to apply the Supreme Court test to the exclusion of ex-felons from jury service, one must first determine whether they form a distinctive group under the 11th Circuit's analysis. First, ex-felons are those people who have been found guilty of committing a felony or felonies and been incarcerated as a result—a clearly defined and delineated group. Second, ex-felons share a common thread of experience that is likely to produce similar ideas: they have all been arrested, charged and convicted either through a plea or by trial. They share the common experience of hav-

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6. *Batson v. Kentucky* (1986) 476 U.S. 79.

ing been confined to prison where they are deprived of liberty, forced to live in an institutional environment, subject to a set of rules which they cannot control, and under the total authority of prison guards. Further, as ex-felons they are stigmatized by the community. They must disclose their status when applying for jobs, making it much more difficult to obtain work. These experiences can have a deep impact on a person's growth and personal development. While each person responds differently, they share an understanding that others who have not lived it cannot share.

Finally, ex-felons have sufficiently similar experiences that cannot be adequately represented by others. One could argue that the experiences of ex-felons make them uniquely qualified to serve on a jury since they themselves have been subject to the process of criminal justice of which juries are an important part. They certainly have an experience with the criminal justice system that cannot be provided by others. Excluding them from service removes a group with a distinctive and valid perspective from the jury pool, thereby fundamentally altering the pool's character. The alteration impacts upon the impartiality of the remaining group. Ex-felons would likely have a unique perspective on certain precepts of law that form the foundation of this country's justice system. For example, the principle that one is considered innocent until proved guilty. One who has been tried as a criminal defendant is more likely to honor and uphold the protections that the constitution affords to defendants than those who have not had to sit in the defendant's chair. On the other hand, those who do not have such experience might be less willing to look at the facts because they may have been prejudiced by their own experiences.

Those who remain are more likely to share the attitude that felons should be scorned. Many Americans dehumanize criminal defendants, seeing them as animals who should be locked away. There is also a prevalent attitude in the United States today that criminal defendants are given too many rights, and therefore are able to avoid punishment. Logically, ex-

felons are more likely to view defendants as human beings, whose rights should be protected.

Once ex-felons are determined to be distinct, the other two elements of the Supreme Court's test —under representation of the group and systematic exclusion from the jury—are easily met. Ex-felons are systematically excluded by law from jury service in California, resulting in under representation.

C. California Law

This Court has recognized that in state criminal prosecutions, the right to trial by a jury drawn from a representative cross section of the community is guaranteed equally and independently by the Sixth Amendment, and by article I, section 16, of the California Constitution. (*Wheeler* (1978) 22 Cal.3d 258.) Further, such a right is violated when a "cognizable group" within the community is systematically excluded from jury service. (*Id.* at p. 272.)

"Cognizable group" have been described as one in which there exists a "common thread running through the excluded group—a basic similarity of attitudes, ideas or experience among its members so that the exclusion prevents juries from reflecting a cross-section of the community." (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60.) Two requirements must be met to qualify as a cognizable group: (1) its members must share a common perspective arising from their life experience in the group; and (2) there are no other members of the community capable of adequately representing the perspective of the excluded group. (*Ibid.*)

The Court has considered the question of whether felons were a cognizable group that could not constitutionally be excluded from a jury. It found that ex-felons met the first requirement because its members share a common perspective arising from being "deprived of their personal liberty by the state, and, upon their return to the community, of being stigmatized both publicly and privately because of their former status." (*Rubio v. Supe-*

rior Court (1979) 24 Cal.3d 93, 98.) However, the Court concluded that the second requirement—the inability of the community to adequately represent the excluded group's perspective—was not satisfied. It was reasoned that those convicted of misdemeanors and confined in county jails, the mentally ill who had been involuntarily committed to state mental institutions, and youthful offenders confined by the Youth Authority, had also been deprived of their liberty and stigmatized by the community upon their release. (*Ibid.*)

In dissent, Justice Tobriner declared that the condition imposed by the majority—that there must be no other members of the community who are capable of adequately representing the excluded group—was one "fashioned by the majority out of whole cloth", and if applied consistently would "invalidate virtually all prior decisions of the United States and California Supreme Courts. . ." (*Id.* at p. 105.) Citing *Thiel v. Southern Pacific Co.*, in which the selection procedures which tended to exclude wage earners from the jury panel were invalidated, Justice Tobriner pointed out that some wage earners were left within the jury pool, as well as some who were former wage earners, who could vicariously represent those excluded, according to the majority's reasoning. (*Thiel,* 328 U.S. at p. 217, cited by the dissent in *Rubio v. Superior Court, supra*, at pp. 106-107.) He compared the majority's requirement to one in which the disenfranchisement of a particular group of citizens is tolerated because a similar group has the right to vote. *Id.* at 108. Justice Tobriner also pointed to the impossibility of determining whether one group can adequately represent the attitudes and viewpoints of an excluded group. The Court is not in a position, nor should it be, of attempting to evaluate "subtleties and complexities of human experiences" in order to ascertain who is capable of vicariously representing the views of another. (*Id.* at p. 110.)

Justice Tobriner exhibits particular insight in arguing that a fair "cross section" of the community also must take proportional representa-

tion into account. Even if one assumes that those who have been confined to jail and mental institutions can accurately stand in for ex-felons on juries, the proportion of those who have experienced loss of liberty, and been subject to stigma, will be underrepresented if the ex-felons are excluded. This Court has invalidated jury selection procedures in which certain classes of citizens were weighted more heavily, so that they were overly represented within the jury pool. (*People v. White*, *supra*, 43 Cal.2d at p. 750, cited by the dissent in *Id.* at 109. This latter argument is especially pertinent today in light of the massive expansion of the prison system which has occurred over the last decade and a half in California and other states, which as a matter of course, has increased the number of ex-felons in our communities who are excluded from jury service.

Much of the increase in the prison population in California and nationwide occurred during the 1990s. At the end of that decade there were 4.3 million U.S. residents (one in 37) who had served prison time. (Bureau of Justice Statistics, Special Report, Prevalence of Imprisonment in the U.S. Population, 2001; http://www.ojp.usdoj.-gov/bjs/pub/pdf/--piusp01.pdf.)

Various segments of the community are not represented equally within the prison system. Incredibly, 18.6% of African-Americans and 10% of Hispanics will serve prison time during their lifetimes. (*Ibid.*) When looking only at males, the difference between the races becomes even more stark: 32% of African-American males (one in three),17% of Hispanic males (one in six), versus 5.9% for white males (one in 17). (*Ibid.*) Since prison time results from commission of a felony, that means that fully one-third of black males are either currently in prison or are ex-felons who have served time and are now living outside the prison system. Because the vast majority of states exclude ex-felons from serving on juries, the result is that approximately one-third of blacks nationwide are unable to serve on juries either because they are currently in prison or because they were in prison and are now "ex-felons".

Minorities compose 64% of the national prison population. (*Ibid.*) The percentage of blacks and Hispanics that have served prison time has dramatically increased over the last 25 years: the number of Hispanics has increased 10-fold and the number of blacks tripled. Also the number of whites more than doubled. (*Ibi``d.*) Additionally, men are six times more likely than women to have been imprisoned. (*Ibid*).

Similarly, between 1985 and 2005, the prison population in California more than tripled from 47,082 to 184,179. In 2001, minorities made up 61.4% of those confined to California prisons. (California Department of Corrections and Rehabilitation, Prison Census Data, June, 2006, http://www.cya.ca.gov/ReportsResearch/OffenderInfoServices/Annual/Census/CENSUSd0606.pdf.) By 2005, the minority population had increased to 72.8% of the total. (California Prisoners & Parolees, California Department of Corrections and Rehabilitation, 2005, http://www.cya.-ca.gov/ReportRsearch/OffenderInfoServices/AnnualCalPris/CALPRISd2005.pdf.) In California today, adult African-American men are seven times as likely as adult white men to be incarcerated. (*Ibid.*)

The growth in the prison population the twenty five years since the *Rubio* decision was issued has ramifications for our jury system where ex-felons are deprived of the right to serve. The numbers of those excluded has increased, and some groups of citizens are disproportionately affected. As cited above, males are six times more likely than females to be imprisoned for felony convictions. African-Americans are particularly likely to be excluded due to their increased incarceration rate, as are Hispanics. Under these circumstances, the current "cross section of the community" which is being selected for jury service is not proportional and cannot be considered representative or fair.

Justice Thurgood Marshall observed:

> When any large and identifiable segment of the community is excluded from the jury service, the effect is to re-

> move from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable . . . [T]heir exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. (*Ballard v. U.S., supra,* 329 U.S. 187, 193-94.) Ultimately, the injury resulting from jury exclusion is inconsistent with our "democratic heritage" (*Id.* at 108) and "is not limited to the defendant, there is injury to the jury system, to the law as an institution, to the community at large, and the democratic ideal reflected in the processes of our courts.
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> (*Ballard v. U.S.* (1946) 329 U.S. 187, 197.)

Given the huge increase in the number of prisoners in the state, and the corresponding increase in ex-felons, excluding ex-felons has a disproportional and unjust impact on the jury "cross section;" this Court should invalidate *Rubio*. The holding there relied upon a requirement that can be neither fairly nor consistently applied. No court can accurately assess whether one group is competent to represent another. This unfortunate rule should be disposed of, and the Court should acknowledge the unconstitutionality of excluding ex-felons, a class of citizens who, through their common experience of incarceration, share an unquantifiable social and psychological outlook that must be represented within the jury selection system.

D. Conclusion

Because the California Constitution requires the exclusion of former felons in the jury selection process, Appellant was denied a fair and representative cross section of the community by the exclusion of a former felon from his jury pool. (Cal. Const., art. I, § 16.) Further, the exclusion of ex-felons from jury service violated Appellant's right to have a jury drawn from a fair cross section of the community, a fair trial, due process of law, and equal protection of the law, guaranteed by the Fifth, Sixth and Fourteenth Amendments. Appellant's conviction is thereby unconstitutional and should be invalidated.

Denial of Right To Be Present at Trial

III.

APPELLANT WAS DENIED THE RIGHT TO BE PRESENT AT CRITICAL STAGES OF THE TRIAL

Throughout the trial there were numerous hearings held out of the presence of the jury. Most were in a hallway outside of the courtroom. Appellant was in leg restraints attached to the floor as he sat at the counsel table. (RT A-182-183.) The trial judge did not make any arrangements so that he could be present at the hallway proceedings even though they were critical stages. (E.g., RT 163-171, 322, 337, 396, 462, 511-513, 532, 590, 622, 708, 753-756, 765-775, 781-786, 801, 816-822, 832-835, 860-865, 872-876, 909-911, 938-948, 972, 999-1005, 1027, 1335-1336, 1419-1421, 2010-2011, 2101-2103, 2516-2518, 2768-2772, 2779-2781, 2968-2969, 3096-3099, 3131.) Certainly the court had the means to arrange for Appellant's presences at all such hearings. For example, it could have excused the jurors from the courtroom as so often occurs in criminal trial, so that Appellant would not have to be unchained from the floor each time there was a hearing outside the presence of the jurors.

Appellant is absolutely entitled to be present at all case proceedings. The Fifth, Sixth and Fourteen Amendments provides that an accused is entitled to due process of law, to be present, to confrontation, and to equal protection of the law. Article 1, section 15 of the California Constitution mandates that a defendant has the right to be personally present and confront witnesses. Consequently, the conviction must be reversed.

Denial of Right To Be Present at Trial

IV.

THE SPECIAL CIRCUMSTANCE ALLEGATIONS THAT THE MURDERS WERE HEINOUS, ATROCIOUS AND CRUEL, MANIFESTING EXCEPTIONAL DEPRAVITY MUST BE STRICKEN

The prosecution alleged the heinous, atrocious and cruel special circumstance (Penal Code section 190.2(a)(14)) as to each murder with which Appellant was charged. (CT 256-257; RT 2955, 2957-2958.) The trial court instructed the jury on this point using the language of CALJIC 8.81.18:

> To find the special circumstance, referred to in this instructions [sic] as murder that was especially heinous, atrocious, or cruel, manifesting an exceptional depravity, the killing must be conscienceless or pitiless that was unnecessarily torturous to the victim.
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> As used in this instruction, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity," means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(CT 435; RT 2957.)

This Court found the heinous, atrocious and cruel special circumstance unconstitutional in *People v. Superior Court (Engert)* (1982) 31 Cal. 3d 797, and affirmed this holding in *People v. Wade* (1988) 44 Cal.3d 975. (*See also People v. Franc* (1990) 218 Cal.App.3d 588 [affirmed a Los Angeles County Superior Court ruling granted a defense motion to strike the special circumstance, citing *Engert* as binding precedent.].) The special circumstance is still in the Penal Code, but has remained unchanged (except for minor technical amendments) from the version this Court found unconstitutional. The Court should accordingly strike the heinous, atrocious and cruel special circumstance findings in Appellant's case. And while this error alone may not be prejudicial, it is illustrative of the haphazard, careless manner in which Appellant's case was charged and tried.

Destruction of Evidence

V.

THE PROSECUTION COMMITTED MISCONDUCT BY NOT PRESERVING THE AEROSOL CAN AND THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO EXCLUDE FROM EVIDENCE THE FINGERPRINT ALLEGEDLY REMOVED FROM THE MISSING CAN

A. Introduction

The only physical evidence tying Appellant to either of the homicides was a fingerprint which the prosecution claimed was lifted from a hairspray aerosol can the police claimed to have found in the glove compartment in the Honda Accord used during the Allan Friedman homicide. The prosecution presented the testimony of the forensic print specialist, Charles Caudell, who claimed to have lifted the print from the can. (RT 2104 et seq.) The prosecution also entered into evidence a photograph of the can, a print card and latent print supposedly claimed to have been lifted from the can. (People's Exhibits 34, 35 and 36.)

Appellant's attorney submitted a discovery motion seeking disclosure of evidence including all physical evidence in the possession of the prosecution. (CT (Supplemental II) 283.) Later he filed a discovery motion specifically requesting an examination of the can for the "purposes of investigating for the presence of fingerprints." (CT (Supplemental II) 293.) The prosecutor acknowledged the discovery request for the can and the latent print, stating "[i]t is available to my knowledge." (RT A-35.) However, the following week, he revealed that the hairspray can had not been preserved. "They photographed it, and I believe counsel has a copy of that photograph. They just left the can in the car. They never retrieved it." (RT A-37.) The prosecutor admitted that "it wasn't preserved." (RT A-37, 1055.) The vehicle was eventually released to the owner. (RT 1054.)

Subsequently, Appellant filed a motion to preclude the prosecutorial use and mention of the fingerprint lift and hairspray can at trial because the

prosecution a made misrepresentations to the defense and had lost the evidence. It was pointed out that "the prosecution all along has represented that the evidence was in its possession when in fact the evidence was lost." (CT (Supplemental II) 327 [Defendant Robert Carrasco's Motion for Preclusion Sanction, Feb. 10, 1997].) It was explained:

> Throughout this matter the prosecution has represented that they indeed had the spray can in its possession and that a finger print was found allegedly identified as belonging [to] the defendant Robert Carrasco. Despite repeated attempts at obtaining the can for investigation defense counsel was unable to do so. Yet he was repeatedly told that the can existed and that it was in the possession of the D.S.'s office. Last week defense counsel was informed by Deputy District Attorney Myers that the spray can had been lost and defense counsel would, therefore, be unable to examine it.

(*Id.* at p. 329.)

In support of the motion, Appellant cited *California v. Trombetta* (1984) 467 U.S. 479 and *People v. Hitch* (1974) 12 Cal.3d 641, quoting the latter's decision that "the core duty to preserve constitutionally material evidence under the due process clause of the Fourteenth Amendment" is imposed on the prosecution in a criminal case. (*Ibid.*)

The trial court delayed making a decision until the issue was raised again a year later, just as the trial was about to begin. At that time, defense counsel renewed his motion to preclude mention of the print lifted from the can because of "the fact we were deprived an opportunity to discover its authenticity and to take a look at the print." (RT 1054.) He further argued that "the best evidence would be—obviously be the can so the jury could view the can." (*Ibid.*) The prosecutor countered by saying that she would not have placed the can in evidence even if it had not been lost and that the photograph of the can in the car along with the latent print were in fact the best evidence. (RT 1054-1055.) Then the prosecutor made the incredible claim that the can was left in the car, which was returned to the owners. (RT 1054.) Again the court delayed making a decision. (RT 1055.)

After opening arguments and the start of testimony, the prosecutor again asked for a ruling as to the admissibility of the photograph of the can and the latent print. (RT 1188.) The defense once more objected: "I am objecting to the lift . . . I waited months and then eventually it was told to me it was not preserved and that it was not preserved long before I was waiting for it. So I was deprived an opportunity to do an analysis on the print." (*Ibid.*) The court ruled that loss of the can by the prosecution was an issue of weight rather than admissibility of evidence and that the jury could evaluate the issue themselves. (RT 1190.) Defense counsel objected to the print that the prosecution claims came from the missing spray can and thus the case being litigated without the can itself. (RT 1052-1055.)

Subsequently, the forensic fingerprint specialist testified for the prosecution that a print was lifted from a Rave hairspray can found in the glove compartment of the car allegedly used during the Friedman homicide. (RT 2109.) Prior to Mr. Caudell's testimony, the defense again objected: "I am objecting to evidence regarding the fingerprint because the can has not been preserved like they said it would." (RT 2101.) During Mr. Caudell's direct examination, he identified the print from the hairspray can as that of Appellant. (RT 2110.) The following exchange then occurred:

Q: What happened to the can?
A: I don't know. I was called in and asked to—to print the vehicle. I left the can as it was in the vehicle.
Q: And when you left the can as it was in the vehicle, did you—was the vehicle then locked to your knowledge?
A: I don't know. It was inside a secure room at the police impound garage there.
Q: Did you leave it in the same glove compartment position that you found it, sir?
A: Yes.

(RT 2111.)

Upon subsequent cross-examination of Caudell, he reiterated that he put the can back in the glove can as it was, without any sort of plastic bag or other protection. (RT 2118.) Further questioning went as follows:

Q: After you get done inspecting the Honda car, sir, did you then lock the car?
A: No, sir.
Q: You left it as you found it?
A: I would do that, just leave it open. Its [sic] in a security room, basically.
Q: If it was locked, you would leave it locked or you would lock it when you got finished?
A: No. If it was locked, I would leave it unlocked. There's no reason for me to lock it up.
Q: Even to preserve evidence?
A: Well preserving of the evidence is in that locked, secured room that you have to actually sign on a log sheet at the initial police impound to get into that room or to get keys to that room.

(RT 2126.)

Mr. Caudell testified upon re-direct examination that in order to get into the room with the car, he had to sign a log sheet with his name, serial number, and the time. He then went to a dispatcher of the police impound garage to get the key. (RT 2127.) Curiously, after testimony from another witness and dismissal of the jury for the day, the court asked that he be recalled to the courtroom. (RT 2149.) The judge sought to determine from Mr. Caudell whether or not it would have been possible to take another latent print off the can after the first one was taken. He was unable to answer definitively. (RT 2149-2151.) He testified that he has been able to take more than one latent from the same print on other occasions. (RT 2151.) "I am laying a layer of powder on top of [the print], and sometimes the adhesive may remove that lower layer that the dust adhered to. In that case that does remove the actual latent that I developed and sometimes it doesn't. It just takes the top layer and the residue may still be underneath." (RT 2151.) Mr. Caudell testified that usually the second latent is a "lighter impression." (RT 2150.) He concluded by stating that there was no way to tell from looking at the latent that was lifted to see whether or not another could have been lifted from the can. (RT 2152.) All of this conversation took place out of the presence of the jury.

B. Due Process Is Violated Where The State Fails To Preserve Material And Potentially Useful Evidence And Does So In Bad Faith

1. Federal law

The government's constitutional duty to gather, preserve, and disclose evidence to a defendant in a criminal prosecution is set forth in a trio of decisions by the United States Supreme Court: *Brady v. Maryland* (1963) 373 U.S. 83; *California v. Trombetta* (1984) 467 U.S. 479; *Arizona v. Youngblood* (1988) 488 U.S. 51. In *Brady* the high court held that a prosecutor must disclose all exculpatory evidence to the accused. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady,* 373 U.S. at p. 87.)

In *Trombetta* the court analyzed the question of the extent to which the Due Process clause compels the state to "preserve potentially exculpatory evidence on behalf of defendants." (*Trombetta,* 467 U.S. at p. 48.) In that case a drunk driving suspect's breath sample was analyzed for blood alcohol level, and then discarded, preventing retesting by the defense of the sample. The Court held that the state was responsible for preserving and granting the defendant access to evidence that "possess[ed] an exculpatory value that was apparent before the evidence was destroyed, and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at p. 49.) The Court then held that the state had no duty to preserve the breath samples because, *inter alia,* "the chances are extremely low that preserved samples would have been exculpatory." (*Ibid.*)

Next, in *Arizona v. Youngblood* the police had collected the clothes of the victim in a sexual assault case, but had not properly preserved them so that semen stains found later on the clothing could be analyzed for blood type. While the Court believed the lost evidence to be "potentially useful",

it held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58.)

Together, *Brady, Trombetta,* and *Youngblood* provide a framework for determining the government's duty to preserve and disclose evidence depending upon the strength of the exculpatory character of the evidence. According to *Brady,* if the evidence is known to the state to be materially exculpatory, failure to preserve and disclose it to the defense violates due process. *Trombetta* provides that a due process violation occurs when evidence possesses an exculpatory value that was apparent before the evidence was lost or destroyed, and when the defendant would be unable to obtain comparable evidence. Finally, where the lost or destroyed evidence was only potentially useful, bad faith must be shown in order to make out a due process violation.

2. State law

Like federal law, California demands that once the government has collected material evidence it has a duty to preserve it. (*In re Michael L.* (1985) 39 Cal.3d 81; *People v. Hogan* (1982) 31 Cal.3d 815; *People v. Cooper* (1991) 53 Cal.3d 771.) In order for the defense to prevail upon a motion that the government has failed to properly preserve evidence, it must first establish that the evidence was material, and that the prosecution acted in bad faith in destroying it. (*People v. Minrow* (1995) 11 Cal.4th 786.) Material evidence is evidence that might be expected to play a significant role in the suspect's defense. It must possess an exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence.

C. Appellant's Due Process Rights Were Violated Under Both The State And Federal Standards

The hairspray can was both material as defined by California law, and potentially useful to the defense, as described under federal law. As the only physical evidence in the case involving two homicides, it was clear that the defense would need to combat or undermine the evidence. Thus it could be expected to play a significant role to the defense. As Mr. Caudell testified, it was possible that another independent latent print could have been lifted off of the can. It may also have been possible for a defense expert to determine whether or not there was ever any print on the can to be lifted or if the print was lifted from somewhere else. Because it was the only physical evidence linking Appellant to the homicide, the print's importance was greatly heightened. For this reason, it was essential for the defense to have access to the can so that it could conduct independent testing.

The police or prosecution acted in bad faith in not preserving the can. In order to show that the state acted in bad faith in losing evidence, there need not be a finding that the loss was intentional. Bad faith may also be proven by a showing of reckless disregard for the preservation of the evidence by the police or prosecution. (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 553; *Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525, 534; *Benkert v. Medical Protective Co.* (6th Cir. 1988) 842 F.2d 144, 149.)

The actions of the police and the prosecution suggest either an intentional failure to preserve the hairspray can or, at the least, a reckless disregard for preservation of this evidence. Once the print was identified by the finger print expert, and the prosecution decided to use that print in support of its case, the police and prosecution would have been aware of the can's significance. Given that, they should have been aware that defense counsel would want access to the can to conduct independent testing. The finger

print expert for the state testified that he had 24 years of experience, he had attended advanced latent fingerprint school by the F.B.I, that he gone to over twelve thousand crime scenes to investigate for prints, and that he had testified in court over 600 times. (RT 2104.) Given his experience, Mr. Caudell certainly was aware of the necessity of preserving evidence in order to provide the due process proscribed by the United States Supreme Court. Further, it was the custom and standard procedure in police work to preserve evidence. Unquestionable there was a reckless disregard for the preservation of the evidence. It was tantamount to bad faith.

Certainly, the homicide detectives were well aware of the rules of discovery and preservation of evidence. Detective Coblentz, the lead investigator in the Friedman homicide, testified at the preliminary hearing that he had been a peace officer for 20 years. (CT 137, Reporter's Transcript of Preliminary Hearing, Supplement II, Vol. I.) Given the length of his career, one can assume that he was aware of the pertinent law on preservation of evidence.

The car in which the hairspray can was allegedly found was held in police custody in a well-secured room. Access to the room required logging in and showing identification. These procedures reflect an awareness of the need to preserve evidence with meticulous care so as to prevent its loss, destruction, or corruption. Indeed, under such conditions, loss or destruction of the stored evidence would require something more than mere negligence. Under such conditions, loss or destruction would require an affirmative action on the part of the police to "disappear" the item. The misbehavior by the prosecution was clearly deliberate. Remedies must be imposed to prevent future acts of "disappearing" evidence, especially where as here a life is at stake.

Similarly, if the police released the impounded vehicle to the owners without retrieving the can from the glove compartment, as the prosecutor claimed, the failure amounts to more than mere negligence. (RT 1054.)

By the time of the car's release from police custody, the detectives would have been aware that the fingerprint from the can was the only physical evidence allegedly supporting the state's case against Appellant. As the only physical evidence, they would have recognized its significance for the defense. It is difficult under such circumstances to imagine that the detectives simply forgot that the can was still in the car.

Further evidencing bad faith is the length of time taken to disclose that the hairspray can was not available. Beswick first submitted a motion for discovery on September 9, 2006. (CT (Supplemental II) 283.) On October 1, 1996, the prosecutor indicated that he had conferred with the investigating officer, and that they believed "that in approximately 40 days we can provide all the discovery . . ." (RT A-17.) At least by October 1, 1996, the police were on notice to provide discovery. At some point in time not evidenced in the record, Beswick became aware of the can and followed up with a specific discovery request for the can on December 29, 1997. (CT 293 (Supplemental II).) This was more than two and one half months after his original discovery motion, and well beyond the 40 days promised by the prosecutor. Still, it was not until February 10, 1997, that Beswick was advised that the can had not been preserved. (RT A-37.)

Beswick complained to the court repeatedly that he had been told the hairspray can was available and that it would be provided to the defense. (*see, e.g.* Motion for Preclusion Sanction, Feb. 10, 1997, CT (Supplemental II) 329. ["All along the Deputy D.A. James Bozajian stated that he had in his possession a can of hair spray which was found in the vehicle allegedly driven by co-defendant.]; RT 1188 ["I waited months and then eventually it was told to me it was not preserved and that it was not preserved long before I was waiting for it. So I was deprived an opportunity to do an analysis on the print."]; RT 2101 ["the can has not been preserved like they said it would. It was going to be"].) Why indeed would the prosecution repeatedly promise to provide the hairspray can if it was truly not available? The

elusiveness by the police and prosecutor inevitably leads to an inference of bad faith.

D. Conclusion

Because the hairspray can was material, potentially useful, and likely exculpatory to the defense case, and because the police acted in bad faith in failing to preserve the can for the defense, the Appellant's due process, fair trial, effective assistance of counsel and equal protection rights under the United State Constitution, Amendments Five, Six and Fourteen were violated. The trial court abused its discretion in failing to exclude the photograph of the can in the car, the print card, and the latent print that was allegedly lifted from the can. It also abused its discretion by allowing testimony from the prosecution about the fingerprint.

Prejudicial Trial Atmosphere

VI.

THE TRIAL COURT ERRED IN NOT DECLARING *SUA SPONTE* A MISTRIAL DUE TO THE REPEATED AUDIENCE "SNICKERING" IN THE PRESENCE AND HEARING OF THE JURY DURING CRUCIAL TESTIMONY WHICH PREJUDICED THE ACCUSED IN A WAY THAT COULD NOT BE CURED BY AN ADMONITION

A. Introduction

During the guilt phase of the trial, the mothers of George Camacho and Allan Friedman repeatedly "snickered" and made remarks in the presence of the jury that were harmful to Appellant in the eyes of the jury. The outbursts denied him the right to a fair and impartial trial and jury as guaranteed by the Sixth, Eighth, and Fourteenth Amendments, and article I, sections 7, 15, 16, & 17 of the California Constitution. As expressed long ago, the right to a fair trial is not a matter of "polite presumptions" for "any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere." (*Frank v. Magnum* (1915) 237 U.S. 349, 355 (dis. opn. of Holmes, J.).)

During an intermission of his cross-examination of Anthony Morales, a key prosecution witness, defense counsel reported to the court that one of the mothers made in the presence of the jury "snickers and has been snickering." This reflected an ongoing situation, rather than a single incident. (RT 1336.) He advised the court that he could hear her snickering, and he the jury could also. (*Ibid.*) In response to the objection, the court admonished the audience that the jury must not be exposed to "any emotional displays from either side." (RT 1338.) However, the judge did not admonish the jury to disregard the mother's outbursts even though request to do so by defense counsel. (RT 1336.) Even had the judge done so, the jury was already prejudiced to a degree that could not have been cured by an admonition.

Later the mother of an alleged victim, Camacho, began to laugh once again during the crucial and culminating moment in Appellant's testimony. The prosecutor asked him, "Did you shoot Allan Friedman?" "No, I never shot anybody in my life." The court interrupted he next question by the prosecutor due to a "snort" from the audience. (RT 2644.) The jurors were made to leave the courtroom while the judge determined who had made the noise.

> The Court: The record should reflect that during the course of the testimony of the defendant that there was a, I would call it, a snort or—
>
> Ms. Meyers: Snicker.
>
> The Court: Some sort of sound. I immediately stopped the proceedings when I saw two jurors look in that direction.

(RT 2646.)

All agreed it was Mrs. Camacho. (RT 2646-2649.) By laughing, she was communicating a clear message to the jury that the questions and testimony were so non-credible as to be worthy of mockery. She could not have communicated her meaning any more plainly. In fact, the laughter be-

littled the testimony more than any words could. And, at minimum, two jurors clearly heard and reacted to the laughter by turning to look at the audience.

The court once again admonished the audience and required Mrs. Friedman to leave for the remainder of the afternoon. Once again, the court did not admonish the jury to disregard the outbursts of the spectators.

B. The Spectator Misconduct Prejudiced the Jury

Defendant's constitutional right to a fair trial by an impartial jury was violated by continuing spectator misconduct that poisoned the trial atmosphere. "[M]isconduct on the part of a spectator constitutes ground for a mistrial if the misconduct is of such character as to prejudice the defendant or influence the verdict." (*People v. Slocum* (1975) 52 Cal.App. 3d 867, 884.) Further, where a spectator's comment is such that it reflects a belief in the defendant's guilt and the defendant is not allowed to test the comment through confrontation, his right to a fair trial is seriously infringed. (*Norris v. Riley* (9th Cir. 1990) 918 F.2d 828, 833) [in rape trial, jurors' exposure to spectators wearing Women Against Rape buttons inherently prejudicial.])

In *People v. Lucero* (1988) 44 Cal.3d 1006, 1024, this Court found that the defendant was not prejudiced despite jurors' exposure to an emotional outburst in court by the mothers of one of the victims. However, unlike the case at hand, in *Lucero* the trial judge admonished the jurors to ignore her statements and behavior. This Court upheld the conviction stating that the incident was "isolated" and the jury had been admonished. In contrast, here, the jury was not admonished and the snorting and snickering were continual.

The right to an unpolluted trial atmosphere is logically strongest in the context of a capital case, since so much is at stake. Jurors' exposure to such disruptions may engender arbitrary and capricious decision making that contradicts the rational process mandated by the Constitution. (*Zant v.*

Stephens, *supra*, 462 U.S. at p. 885.) Jurors must draw their own conclusions regarding the credibility of witnesses in the context of an impartial environment. The discrediting of Appellant's testimony through snickering by parties known to the jury as associated with the victims created a partisan environment that tainted the jury and destroyed Appellant's right to a fair trial.

The interruption during the testimony of Appellant was particularly damaging in light of the failure by defense counsel to conduct an investigation or employ experts on behalf of his client. (RT 3256-3257, 3354-3357, 3390-3392.) Because he failed to investigate the case, Appellant's testimony became, by necessity, the cornerstone of the defense made even more important due to the lack of physical evidence connecting him to the shootings. It was crucial that the Appellant demonstrate to the jury that he was truthful and credible. At a key moment when he testified that he had neither killed Friedman nor anyone else, at least two jurors, and most likely more, turned their eyes to Mrs. Friedman when she snorted. (RT 2646.) The message was sent—Appellant's testimony was so unbelievable as to cause an uncontrolled sarcastic laugh.

Under the Fifth, Sixth, and Fourteenth Amendments, a "criminal defendant has the right to be tried in an atmosphere undisturbed by public passion." (*Norris v. United States* (1989) 878 F.2d 1178, 1181). This right finds its source in the constitutional requirement that the criminally accused have "a fair trial by a panel of impartial, indifferent jurors." (*Turner v. Louisiana* (1965) 379 U.S. 466, 471.) In order for a trial to be fair, the "jury's verdict must be based upon the evidence developed at the trial." *Id.*, at pp. 471-472. "This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." (*Ibid.*) When a jury's verdict is influenced by information imparted to it by courtroom spectators, or by an emotional atmosphere created by such spectators, the defendant's Fifth, Sixth, and Fourteenth Amend-

ment rights to due process, to a trial before an impartial jury, and to be confronted with the witnesses against him.

Emotional outbursts and hostility towards the accused from friends and relatives of the victim in a criminal case has been held to constitute spectator misconduct. (*Rodriguez v. State* (Fla. App. 1983) 433 So.2d 1273, 1276 [victim's widow shouted hostile statements at the accused]; *State v. Stewart* (So. Car. 1982) 295 S.E.2d 627, 629-631 [trial court erred in failing to explore the prejudice that resulted from spectator who glared at jurors remarks about defendant's guilt. Similarly, the case at hand concerns snickering and laugher from the family of the deceased which was clear heard and noticed by members of the jury. A spectator's misconduct is grounds for a new trial when the misconduct is of such a character as to prejudice or influence the jury. (*People v. Slocum, supra,* 52 Cal.App.3d 867.)

The repeated "snickers" and "snorts" from the families of the deceased which caused at least two jurors to turn away from the defendant as he was testifying to look toward the family members is likely to have influenced the impartiality of the jury. It stands to reason that family members' emotional outbursts are likely to evince sympathy for the family from jurors. In the present case, it clearly redirected their attention from critical testimony to the audience. The jurors were likely tainted by the emotional atmosphere along with the implied statement about the defendant's guilt that was not subject to cross. (*See Norris v. Riley, supra,* 918 F.2d 828.) As a result, it cannot be said that their verdict was "impartial" and "indifferent". (*Turner v. Louisiana, supra,* 379 U.S. at p. 471.) Therefore, the state cannot demonstrate that the error was harmless beyond a reasonable doubt. The verdict must be reversed.

The continual outbursts by the mothers denied to Appellant the right to a fair and impartial trial and jury as guaranteed by the Sixth, Eighth, and

Fourteenth Amendments, and article I, sections 7, 15, 16, & 17 of the California Constitution.

Prejudicial Joinder

VII.

EVIDENCE CONCERNING APPELLANT'S ESCAPE WAS IMPROPERLY ADMITTED AT THE GUILT PHASE

A. Introduction

The prosecution presented evidence at the guilt phase that Appellant escaped from jail while awaiting trial. The purpose was to establish that he was guilty of the murder charges. Evidence of the escape, which was totally unrelated to the murder accusations, was so inflammatory and prejudicial that it contravened Appellant's right to due process of law, a fair trial, and equal protection of the laws under Amendments Five, Six and Fourteen.

B. Procedural History

On May 31, 1997, Appellant escaped from the North County Correctional Facility, a branch of the Los Angeles County Jail, where he had been held since being arrested on February 13, 1996. (CT (Supplemental IV) 1; RT 1788, 1890, 2603.) He was apprehended the following day while riding as a passenger in a car driven by a family member. (RT 1932.) The vehicle voluntarily stopped. Appellant, who wore no disguise, was unarmed, did not try to flee from the arresting officers, and offered no resistance. (RT 1946-1949.)

The defense submitted a Motion to Sever the escape count from the murder charges in order to have them tried separately. (CT (Supplemental II) 398-406 [Motion for Severance, Jan. 28, 1998.) It was contended that the escape was "unconnected with the murder allegations . . . highly inflammatory, will surely have a substantially prejudicial effect on the defendant." (*Id.* at 399.) On the same day the prosecutor submitted a motion to

present evidence of Appellant's escape during the murder trial to demonstrate a "consciousness of guilt," stating that "it is probable that only one who expects his guilt to be proved at trial will attempt to escape." (RT 9; CT (Supplemental IV) 155-157.) On February 2, 1998, the prosecutor indicated that she did not intend to seek to join the escape with the murder counts, but only sought to have evidence on the escape admitted. At the same time, the defense sought to prevent any mention of the escape from arising during the murder trial on the basis that it would be more prejudicial than probative pursuant to Penal Code section 352. Mr. Beswick (or defense counsel) stated that evidence regarding the escape would automatically put Appellant "behind the eight-ball before he has a chance to defend himself" causing a prejudicial inference of guilt that "is just too great in a case where my client is looking at the death penalty." (RT 9, 11.)

The court immediately ruled in favor of the prosecution, stating that the evidence was more material and relevant than it was prejudicial. No further explanation was given for the decision. (RT 11.) She began her opening statement by going into detail concerning the escape. (RT 1070-1071.) The prosecution then introduced evidence of the escape during the guilt phase as a major part of its case to persuade the jury that Appellant was guilty of the two murder charges. (*E.g.*, RT 1901-1949; 2068-2098; 2388-2395, 2420-2421.) Thus Appellant was thus compelled to testify regarding the escape to explain that there were numerous reasons for his actions: He was in jail for murder; he had a job and a family to support; his daughter was in college; and his "life went from good to nothing with just somebody's word saying [he] killed somebody." (RT 2595-2664.) Appellant witnessed two major riots in the county jail that were very dangerous and life threatening. Most importantly, his wife told him that Javier Chacon had been to his home, which was clearly a threat to her safety. (RT 2660.) The prosecutor then talked about the escape in her closing argument. (RT 2852.)

C. Admission of Evidence Related to the Escape was More Prejudicial than Probative

Admission of evidence against a criminal defendant that raises no permissible inferences, but is highly prejudicial, violates federal due process under the Fifth and Fourteenth Amendments. (*Estelle v. McGuire* (1991) 502 U.S. 62 [state law errors that render a trial fundamentally unfair violate federal due process]; *McKinney v. Rees* (9th Cir. 1994) 993 F.2d 1378 [admission of irrelevant and inflammatory evidence violated federal due process]; *Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 52 [constitutional error in admitting evidence whose inflammatory nature "plainly exceeds its evidentiary worth"].)

While courts have allowed juries to view an escape attempt as a consequence of a guilty conscience the determination of prejudice is necessarily dependant on the particular circumstances of each individual case. (E.g. *People v. Morris* (1991) 53 Cal.3d 152, 196.) In a capital case, where the defendant is on trial for his life, a court should carefully consider how a jury's inferences may overcome the assumption of the defendant's innocence, resulting in a denial of due process under the state and federal constitutions. A higher degree of scrutiny and care is required in a capital case than in a non capital case. However, here the judge immediately ruled for the prosecution, hearing only limited argument on the matter and providing no basis for his ruling—hardly an example of scrutiny or care.

The prosecutor then used the escape attempt on numerous occasions to suggest that Appellant had a guilty conscience, and to undermine the testimony of one who provided an alibi for the Appellant for the Friedman homicide, by implying that she had been involved in his escape. In her closing argument, the prosecutor stated "I am going to stress to you that [the facts and circumstances of the escape] establish each of the aspects or elements of escape as well as a consciousness of guilt with respect to Counts 1, 2, 3." (RT 2852.) She specifically asked the jury to consider the

escape as evidence in support of guilt on the counts of murder and robbery. Further, she read CALJIC 2.52 which states that an escape may be considered when deciding whether a defendant is guilty or not guilty. (*Ibid.*) Then she noted Delia Chacon's alibi testimony, seeking to undermine it by implying that she knew about and sought to help the Appellant escape. The prosecutor said that "when the defendant escaped, she took him well over four hundred dollars." She implied that someone who would provide money for an escapee would certainly have no problem inventing an alibi. (*See* RT 2854-2857.)

All references to the escape were prejudicial to Appellant without providing probative value. There are many possible reasons for an inmate to attempt an escape other than guilt, e.g., a distrust in the judicial system which lends to a belief that one may be unjustly convicted despite his innocence, fear of being railroaded, or the desire for freedom and release from the oppressive environment of the jail. Distrust in the system is especially likely for a member of a minority group (Appellant is Hispanic) who has grown up in poverty where the police are a constant presence, and jail time is commonplace for members of the community. For these reasons, it is clear that an escape may arise from many motives, and is not necessarily probative of guilt or innocence.

The trial court erred in allowing the escape evidence. Appellant was prejudiced by the trial court's denial of his motion to sever trial of the escape charge from that on the murder charges. The result was a denial of the right to due process of law, a fair trial, and equal protection of the law, guaranteed by Amendments Five, Six and Fourteen.

VIII.

THE COURT'S REFUSAL TO APPOINT COUNSEL FOR APPELLANT IN TWO DISTINCT MURDER CASES IN WHICH THE DEATH PENALTY WAS SOUGHT, OR RELEASE THE TRIAL ATTORNEY WHO WAS NOT BEING PAID AND APPOINT SUBSTITUTE COUNSEL, WARRANTS A PRESUMPTION OF PREJUDICE DUE TO STATE INTERFERENCE WITH THE RIGHT TO COUNSEL AND MANDATES A NEW TRIAL

A. Introduction

Appellant is unique in that he is certainly the only inmate on California's death row who was represented in a double-murder case by an attorney who was neither appointed by the court nor paid for representing Appellant at trial. That dubious distinction resulted in a trial that was unfair under any reasonable standard. The lawyer, Robert H. Beswick, warned that if he was not appointed, or permitted to withdraw and replaced through the appointment of other counsel, he would be prejudicially ineffective because, as a solo practitioner, he could not afford to represent Appellant without being paid. More importantly, the court's refusal to appoint counsel warrants a presumption of prejudice due to state interference with the right to counsel and mandates a new trial. Consequently, as detailed below, Appellant was deprived of the right to counsel, a fair trial, effective representation, a reliable and fair penalty phase process, due process of law, and equal protection of the law, guaranteed by Fifth, Sixth, Eighth and Fourteenth Amendments.

A brief overview of the situation in which Mr. Beswick was thrust, to the prejudice of his client, will be helpful. Appellant was charged with committing two separate homicides that occurred over 10 months apart under entirely distinct circumstances. The prosecution added four special circumstance allegations. The death penalty was sought in each case. Additionally, Appellant was charged with escaping from the county jail.

Mr. Beswick was retained on behalf of Appellant regarding the first homicide, but was not paid beyond a down payment. The family ran out of what little funds they had, and the incarcerated client was indigent. Not only was Mr. Beswick not paid, he received no money for expenses. Mr. Beswick was neither hired nor appointed regarding the later second murder charge or the escape. He repeatedly moved for his own appointment on all the charges. Mr. Beswick candidly explained that defending Appellant required simultaneously preparing separate defenses in three separate cases. Each case was extremely complex; moreover, the prosecution was seeking the death penalty, requiring separate preparation for the penalty phase. Mr. Beswick explained repeatedly to the trial court that he would be overwhelmed without being either appointed or released, and his law practice would be financially destroyed.

B. Proceedings Below

On February 12, 1996, Appellant was charged with murdering Allan Friedman. (CT (Supplemental II) 1-4 [Probable Cause Determination], 15-16 [Amended Felony Complaint], 209-210 [Information].) Mr. Beswick was substituted in as counsel for Appellant on July 17, 1996, replacing Tom Kontos who had represented him in the Municipal Court. (CT (Supplemental II) 228; RT A11-14.) Thirteen months later a second murder and robbery charge was added that was unrelated to the first, with four special circumstance allegations: financial gain, multiple murder, robbery, and that the killings were especially heinous, atrocious, and cruel manifesting exceptional depravity. (CT 255-257 [Indictment, Mar. 12, 1997].) A separate escape charge was then added. (CT (Supplemental IV) 1-2 [Felony Complaint], 130-131 [Information].) Subsequently the prosecution gave notice that it was seeking the death penalty. (CT 267; Ct (Supplemental II) 357.)

Mr. Beswick was never hired to represent Appellant in the second murder or escape charges, and was not being paid on the first murder case. Nevertheless, the court refused to appoint him. Neither the client nor his

family had any funds to pay the attorney on the first murder charge beyond an initial retainer, much less for the additional murder case and the separate escape accusation. Thus began a series of motions in which Mr. Beswick sought to be appointed on behalf of his indigent client, or in the alternative, that he be released from the case and other counsel appointed. By that time the lawyer had not been paid in over two years. Thus he moved "to be both appointed as counsel for the defense," and also for the appointment of a second attorney due to the complexity of the case. (CT 376 (Supplemental II).) Mr. Beswick described his dire circumstances in his Memorandum of Points and Authorities supporting his motion for reconsideration of the trial court's denial to appoint him:

> In the instant case counsel is not only faced with the formidable task of representing the defendant in one murder case, but *he is also faced with representing the defendant in a second murder case. Each incident is in itself a "mammoth" undertaking.* If that wasn't enough counsel has been charged with the task of representing the defendant in an escape charge.
>
> *Each of the incidents for which the defendant is charged is an independent and distinct fact pattern with its own set of players, facts and circumstances. Essentially counsel will have to prepare for two murder trials as well as two sentencing hearings as well as defending against the escape charge.*
>
> *A firm of multiple attorneys would have their resources taxed by representing the defendant.* As noted in the underlying motion *counsel is a sole practitioner and as such is the sole financial resource for the firm.* Despite his being privately retained *he has not been paid for this representation.* The court must be made aware of the fact that counsel was originally retained in the first murder charge. *Counsel was unaware at the time of his initial retention that he would have to represent the defendant in another murder case. Somehow, because of the District Attorney's method of filing the second murder charge, counsel has been given the responsibility of representing the defendant in two separate murder charges in a death penalty case.*
>
> Funds should be made available in order to retain addi-

tional counsel in addition to *appointing present counsel* as *he is not receiving compensation from either the defendant or his family. In the alternative counsel should be allowed to withdraw from the case and the appropriate public defender be charged with the duty of representing the defendant.*

(CT (Supplemental II) 378-379 [Memorandum of Points and Authorities In Support of Motion for Reconsideration, *supra*], emphasis added.)

Mr. Beswick filed a declaration in support of his motion for reconsideration that went into greater detail:

Declaration of Robert H. Beswick

1. . . . The defendant is indigent.

2. The above-entitled case is one in which funds may be requested *for appointment of myself* and additional counsel[7] under *Penal Code* §§ 987 and 987.9, in that defendant has been charged with committing two murders which the District Attorney's office has combined into one trial and for which the defendant faces the death penalty. Defending against one murder charge is a mammoth undertaking in and of itself. Representing defendant in two murder charges is problematic. . . . *Additionally, there is a factual need for appointment of counsel.*

3. The majority of my practice is devoted to the practice of criminal law, however, *I have never had to represent a defendant in a death penalty case.* I have never represented an individual who has been charged with committing two murders, both of which have been combined into one trial. . . .

4. As stated previously, I am a sole practitioner. I estimate that I will have to interview and or caused to be interviewed approximately 60 witnesses. I will have to review everyone's statement and more than likely re-interview those individuals who statements prove to benefit the defendant. I will additionally hire a forensic expert and investigator to aid me in the preparation of the defense. I will have to monitor and supervise these individuals as to their respective roles. In

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7. Appellant argues separately herein that the trial court's refusal to appoint second counsel is also a denial of the right to counsel. (Argument IX, *post*, pp. 88-154.)

addition I will have to prepare what is essentially two different defenses against two separate and distinct incidents of murder. *There is nothing connecting the two murders. Consequently, each investigation and defense is in effect a separate trial. Additionally, I will have to prepare for two separate sentencing hearings as both murders will have distinct mitigating factors which will have to be presented. . . .*

5. As noted I will have to prepare for essentially two separate penalty phases each one with its own set of mitigating circumstances. The difficulty of preparation is compounded by the inherent problem present in any capital case of simultaneous preparation for a guilt and penalty phase of the trial. The issues of evidence to be developed in order to support mitigation of the possible death sentence is substantially different from those likely to be considered during the guilt phase. . . .

6. *I anticipate that the trial will last from four to six weeks. I intend to make numerous pre-trial motions. . . .*

7. *Despite being retained as private counsel defendant does not have the funds to pay my fees. I received a small retainer fee at the outset of this case. At the time I was retained, however. I was neither aware of the second murder nor was I aware that the District Attorney's office would be filing a second murder charge and allege special circumstances. The defendant is indigent as he has no resources with which to pay me. His family does not have any money to pay me. Consequently, I have not been paid and will not be paid. . . .*

8. As noted above *the murder charges are two separate and distinct incidents both in time and in factual circumstance. I will be essentially representing the defendant in two separate trials with two separate hearings.* As an added and unforeseen problem, *the defendant has been charged with escape from a detention* facility against which I will have to provide a defense. Any one of these elements would make the case complex. *Combining all of the circumstances transforms the case into an undertaking that I neither anticipated nor am prepared for. The case simply is rather complex both factually and legally.* Given the complexity of the case and the indigence of the defendant I feel that it is appropriate that not only should additional counsel be appointed but also that *I should be appointed.* The burden of representing the defendant who is indigent in this matter without additional counsel

and without appointment will be overwhelming. *There is a genuine need . . . for the court to appoint me.*

9. Should the court not feel that there is a need for additional counsel and *for appointment of myself, then I respectfully request that the court allow me to withdraw and that a public defender take over representation.*

(CT (Supplemental II) 380-382 [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Declaration of Robert H. Beswick, Nov. 20, 1997], emphasis added.)[8]

The motion was denied the same day. (*Id.* at p. 375.) The judge clearly misread the motion, for he inserted "[Second]" in referring to the Motion for Appointment of Counsel in the title of the motion, and treated it as only a request for second counsel. In fact Mr. Beswick stated in the second sentence of the motion: "*[C]ounsel moves that the court appoint him as counsel for the defense.*" (*Id.* at p. 376, emphasis added.) Further, the Memorandum of Points and Authorities specifically described the necessity for his appointment (*Id.* at pp. 377-379), and the concluding paragraph of his declaration could not have been more clear, for it referred to seeking the "*appointment of myself*" with the request that if denied, Mr. Beswick be permitted to withdraw and other counsel appointed in his stead. (*Id.* at p. 382.)

Following the trial court's refusal to appoint him, Mr. Beswick filed another motion seeking to be appointed. (CT (Supplemental II) 385-390 [Application To Be Appointed As Counsel, Jan. 8, 1998].) His supporting declaration reveals his increasing desperation:

Declaration of Robert H. Beswick

3. *I was originally retained to defend Mr. Carrasco against one charge of murder.*

4. Defendant entered into a fee agreement which

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8. Pursuant to the motion of Appellant, the confidential portions of the record referenced herein have been unsealed. (Order, Aug. 15, 2007; Motion To Unseal Record, July 25, 2007.)

required that in addition to the retainer fee paid at the time of retention defendant would make periodic payments once the retainer fee had been exhausted. *Defendant has not made any payments as called for in the retainer agreement. I have not been compensated for my services for almost two years. The defendant does not have the financial resources to compensate me for the legal services rendered. I have attempted to have his family contribute towards the fee. However, they too do not have the financial resources.*

5. *Since the initial retention defendant has been charged with a second murder with special circumstance allegations. The District Attorney's office is pursuing the death penalty on this matter. Additionally, defendant was charge with escaping from a correctional facility.* I will have to provide a defense against this charge also.

6. The District Attorney's office has estimated that this trial could last well over two months. I anticipate that I will have to review and question approximately 30-40 witnesses. Clearly this case will involve numerous motions. I have never represented a defendant charged with two murders in a death penalty case. To provide the type of representation guaranteed by the U. S. and state constitutions I will undoubtedly have to spend a considerable amount of time preparing and reviewing all of the facts and circumstances surrounding this matter in addition to trying a matter for over two months. Essentially I [have] to remove myself from my practice of which I am the sole practitioner. *To work for the period of time required without compensation would prove disastrous to my practice and my employee. I have already expended considerable time in the preparation of the defense without compensation. I cannot continue to represent Mr. Carrasco for the duration of the trial without compensation. I feel that to do so would not only cause me great financial hardship but that it would also impact the defendant in that I would be very hard pressed to provide the representation needed while at the same time trying to save my practice.*

7. Given the type of charges filed against the defendant and the length of time required to try the case, *I respectfully request that I be appointed in order that I may continue representation while not having to compromise my practice in order to do so.*

(CT (Supplemental II) 388-389 [Declaration of Robert H. Beswick, Jan. 8, 1998], emphasis added.)

Mr. Beswick candidly advised the court being compelled to represent Appellant without compensation "would also impact the defendant in that I would be very hard pressed to provide the representation needed . . ." (*Id.* at p. 388.)

A week later, Mr. Beswick filed an even more detailed, and even more desperate, sworn statement concerning his dire financial circumstance caused by representing Appellant:

> Supplemental Declaration of Robert H. Beswick In Support of Motion To Be Appointed As Counsel
>
> 3. In the middle of 1996 I was approached by a secretary in my suite who I knew for many years. She indicated that her brother, Mr. Carrasco, was charged with murder and although he was represented by counsel, [] her family were very interested in retaining my office to represent Mr. Carrasco.
>
> 4. I met with Mr. Carrasco's family and discussed the case. Initially the case was rather straight forward with witness statements which at best were inconclusive. The family was at this point desperate and persuaded me to represent Mr. Carrasco. Given my familiarity with the family and the nature other case I agreed to represent Mr. Carrasco for [a] reduced fee. Neither Mr. Carrasco nor his family had the financial resources to pay the type of fees attendant to representation in a murder case. The family signed a retainer indicating they would pay my fees and any costs as they were incurred. I entered into the agreement based on that representation.
>
> 5. I was retained on July 15, 1996, for the purpose of representing Mr. Carrasco against a charge of murder. I was paid $15,000.00 as a retainer fee which was billed against at a rate of $300.00 per hour. The file was already quite substantial as Mr. Carrasco was represented by prior counsel. In light of the amount of work which needed to be done and the severity of the charge filed it was imperative that I immediately formulate my defense.
>
> 6. After this agreement was signed several things subsequently happened which prevented that family from fulfilling their obligation to pay my fees. *The family suffered from financial hardship and were thus unable to make any*

further payments towards my fee. Mr. Carrasco then informed me that other friends of his were going to contribute towards the fee. After many months and telephone calls *it soon became apparent that no one was going to help in paying the attorneys fees.*

7. The co-defendant in the first murder case has now implicated Mr. Carrasco as the individual who shot the victim. As a result the case increased in both complexity as well as difficulty. Shortly thereafter, *the District Attorney's office filed an additional murder charge against Mr. Carrasco stemming from an entirely different set of facts and circumstances.* This incident was totally independent from the first murder case. *Thereafter, an escape charge was filed against Mr. Carrasco* who attempted to escape nom Peter Pitches Honor Ranch. Consequently, *the case went from having to defend against a single murder case where there were problems with identification to now having to defend against two murder cases one of which the co-defendant has identified my client as the shooter and where the D.A.'s office is now seeking the death penalty.* Not only will I have to conduct effectively two murder trials but I will have to also conduct a detailed and complex sentencing phase. If this were not enough, the D.A.'s office is still pursuing the escape case against Mr. Carrasco. *These turn of events were not foreseeable at the time I entered into the fee agreement.*

8. It must be noted that the co-defendant in the first murder case is represented by a public defender.[9] Therefore, court appointed counsel would be needed to defend Mr. Carrasco in the event I was not involved in this case. The Deputy District Attorney, Danette Myers, and myself have estimated that the case will last over two months. It is likely the case will last over three months. As noted in my pervious declaration, I am a sole practitioner. I will surely have to pay other counsel to make scheduled appearances on my other case. This means that money will be going out of my office without any coming back to support these cases. Because of this I can honestly say that *I will be unable to maintain my practice if I am not appointed to represent Mr. Carrasco. Two to three months without income for a sole practitioner*

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9. The co-defendant who was also charged with murder, eventually negotiated a very favorable plea agreement in which he was sentenced to six years for manslaughter. (CT (Supplemental II-A) 159-161; RT 3299-3300, 3705.)

like myself means death to my practice.

9. Since receiving the initial retainer *I have received no additional monies* to pay even the hard money costs of defending Mr. Carrasco. In addition to the number of man hours expended without compensation, I have also expended cost monies in the form of facsimile costs, photocopying, telephone, parking and postage. During the trial I will continue to incur these costs.

10. I have attempted to have additional counsel appointed to aid in the preparation of the cases, however, my motion was denied. My motion for reconsideration was likewise denied.

11. I am extremely concerned that *my involvement in this case will have a devastating impact on my practice. Getting appointed will allow me to continue my practice and continue representing Mr. Carrasco without the unnecessary pressure of worrying how my practice is going to survive.*

12. In light of the above *I respectfully request that the court appoint me as counsel.*

(CT (Supplemental II) 392-394 [Declaration of Robert H. Beswick, Jan. 8, 1998], emphasis added.)

Despite the obvious need, the trial court still refused to appoint Mr. Beswick. Thus, Mr. Beswick went into trial without being appointed to represent Appellant and without receiving any compensation from any other source. His plea to be relieved and replaced by substitute counsel was also disregarded, putting Mr. Beswick in an impossible situation, requiring that he sacrifice either his practice or Appellant's defense (or possibly both). Compounding the problem was the court's refusal to appoint counsel to assist Mr. Beswick. (CT (Supplemental II) 343-352, 361-366 [In Camera Motion for Appointment of Additional Counsel in Capital Case, Aug. 13, 1997].) Mr. Beswick explained during a September 9, 1997 hearing that he was initially retained on one murder case concerning, then his client was charged with a "second homicide filed on Camacho and then the escape case. . . . [S]o we actually have three cases, and *he [the client] has no money.*" (RT A-112, emphasis added) The motion was denied. (CT

(Supplemental II) 367, 370 [Order Denying Application for Second Counsel, Oct. 21, 1997].)

Mr. Beswick continued attempting to mitigate the looming catastrophe facing his client. The lawyer again sought assistance in addition to his own appointment. (CT (Supplemental II) 376-382A [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Nov. 20, 1997].) To avoid such a "disastrous" outcome Mr. Beswick asked that if second counsel were not appointed, that he be allowed to withdraw from the case. Both requests were denied. (CT 367 [Order Denying Application for Second Counsel, Oct. 21, 1997]; CT 375 [Second Order Denying Application for Second Counsel, Nov. 20, 1997].)[10]

Rather than forfeit his solo law practice and financial stability, Mr. Beswick was compelled to effectively surrender his client to the prosecution by doing almost nothing other than showing up in court. Clearly Mr. Beswick was entirely overwhelmed by the situation. But for the state court turning a deaf ear to the lawyer's pleas, such a constitutional disaster would not have occurred.

As noted above, in addition to the lack of time and resources that Mr. Beswick had available to devote to Appellant's case because he was not appointed, it was also his first death penalty case.

> I have never had to represent a defendant in a death penalty case. I have never represented an individual who has been charged with committing two murders, both of which have been combined into one trial.
>
> (CT (Supplemental II) 380[Declaration of Robert Mr. Beswick, *supra*, ¶ 3].)

The combination of an attorney lacking in capital experience *and* lacking reasonable remuneration led to the predicted disaster at trial.

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10. The trial court's refusal to appoint second counsel is addressed in greater detail separately in Argument IX, *post*, at pp. 88-154.

C. Legal Standards

The assumption that truth is best discovered by powerful advocacy on both sides of a question is basic to our legal system: it is presumed that an adequately informed, competent, funded, and compensated counsel promotes the objectives of fairness and reliability. (*United States v. Cronic* (1984) 466 U.S. 648, 655.) The adversary system is so central to the system of justice that the basic constitutional guarantees governing the fairness of proceedings and representation are violated if a criminal proceeding loses its character as a confrontation between adversaries. (*Id.* at p. 656.) Generally, the character of the proceedings is secured—and consequently so is the constitutional guarantee of effective assistance of counsel—through the two-pronged test that counsel must err and the error must prejudice the defendant such that there is reasonable probability that the result would have been different but for the error. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 693-696.)

There is, however, a category of cases in which certain circumstances are so likely to prejudice a defendant that the costs of litigating their effect in a particular case are unjustified. (*United States v. Cronic*, *supra*, 466 U.S. at p. 658. The *Strickland* court, citing *Cronic*, explained:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

(*Strickland v. Washington*, *supra*, 466 U.S. at p. 692 (citations omitted).)

Courts will presume prejudice if there is an actual or constructive denial of counsel at a critical stage of the proceedings. (*United States v.*

Cronic, *supra*, 466 U.S. at p. 659.) The denial of counsel, actual or constructive, so obviously undermines a defendant's ability to effectively advance potentially meritorious defenses that the court need not engage in an individualized prejudice inquiry.

Counsel's failure to subject the prosecution's case to meaningful adversarial testing is a constructive denial of counsel. (*Ibid.*) A defendant is also constructively denied counsel when the state interferes with counsel's ability to provide effective representation. (*See, e.g., Herring v. New York* (1975) 422 U.S. 853 (bar on summation at bench trial).) Additionally, courts should presume prejudice when the circumstances of the proceedings make it the case that even if counsel is available to assist the accused, the likelihood that any lawyer—even a fully competent one—could provide effective assistance is so very small as to justify a presumption. (*United States v. Cronic*, *supra*, 466 U.S. at p. 659.)

In the case at hand, prejudice should be presumed because the circumstances were such that even a competent attorney could not have effectively represented Appellant due to the failure of the trial court to appoint him or permit him to withdraw and appoint substitute counsel. Mr. Beswick unequivocally warned the court that without an appointment, he could not competently represent Appellant. "The burden of representing the defendant who is indigent in this matter without additional counsel and without appointment will be overwhelming. There is a genuine need for additional counsel as well as a genuine need for the court to appoint me." (CT 381-382 (Supplemental II) [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Declaration of Robert H. Beswick, Nov. 20, 1997].) He was neither appointed nor being paid and did not have the resources to provide effective assistance to his client.

The effect of the trial court's action was to deprive Appellant of counsel. The right to counsel is absolute. This fundamental right was ex-

pressed long ago:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and *that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.*

(*Powell v. Alabama* (1932) 287 U.S. 45, 71, emphasis added.)

No right of a criminally accused has been found to be more sacrosanct than the right to counsel. It is an absolute right under both the federal and state constitutions. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defense." Similarly, article I, section 15 of the California Constitution states that "[T]he defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense . . ."

California courts have been strict in their enforcement of the right to counsel and have frowned upon any interference of the full right to the effective assistance of counsel. In *Boulas* v. *Superior Court* (1986) 188 Cal.App.3d 422, the defendant attempted to negotiate a plea agreement, and the prosecutor refused to do so unless appellant discharged his current attorney and retained new counsel. In finding that dismissal of the charges against appellant was the only adequate remedy, the court held:

> The intentional undermining of an individual's right to counsel of his own choosing cannot be countenanced under any rational standard of justice. (*Barber* v. *Municipal Court*, *supra*, 24 Cal.3d at pp. 759-760; *Commonwealth* v. *Manning* (1977) 373 Mass. 438; *People* v. *Mason* (1978) 97 Misc.2d 706.) It is the duty of the judiciary to insure that an accused's constitutional rights be protected in every case. (*Johnson* v. *Zerbst* (1938) 304 U.S. 458; *In re Moss* (1985) 175 Cal.App.3d 913, 926; *In re Newbern* (1959) 169 Cal.App.2d 472, 476-477.)

(*Boulas v. Superior Court*, *supra*, 188 Cal.App.3d at p. 434.)

Boulas concerned choice of counsel, but the directive to protect an accused's constitutional rights applies broadly. The judges who reviewed and rejected Mr. Beswick's motions to be appointed, however, were more concerned with the county budget than with Appellant's constitutional rights. , The judges "failed to adequately balance [Appellant's] Sixth Amendment rights against any inconvenience and delay from granting the continuance." (*United States v. Nguyen* (9th Cir. 2001) 262 F.3d 998, 1004, citing *United States v. Moore* (9th Cir. 1998) 159 F.3d 1154, 1160; see also *Lee v. Kemna* (2002) 534 U.S. 362.) Add in here the dismissive language of the judges.

Finally, this Court should bear in mind that cases involving the death penalty are different. The Constitution has been interpreted to require extra safeguards to ensure the fairness of the proceedings. (See *Ford v. Wainwright* (1986) 477 U.S. 399 411 (plurality opinion) ("This especial concern [for reliability in capital proceedings] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Gardner v. Florida* (1977) 430 U.S. 349 (plurality opinion); *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opinion); *Furman Georgia* (1972) 408 U.S. 238, 289 (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.").) No safeguard is more central to fair trial rights than the right to counsel.

The consequence of the actions of the trial court in refusing to appoint counsel was a deprivation of Appellant's right to counsel, a fair trial, reasonable access to the courts, a defense, effective assistance of counsel, a fair penalty determination, due process of law, and equal protection of the laws, guaranteed by Amendments Five, Six, Eight and Fourteen.

D. The Refusal To Appoint Counsel To Represent Appellant In Two Unrelated Capital Cases Was State Interference That Mandates Reversal

The constitutional right to counsel exists in order to protect the fundamental right to a fair trial, which is defined by the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample \opportunity to meet the case of the prosecution. *(Strickland* v. *Washington, supra,* 466 U.S. at pp. 684-685; *Powell* v. *Alabama, supra,* 287 U.S. 45; *Johnson* v. *Zerbst, supra,* 304 U.S. 458; *Gideon* v. *Wainwright* (1963) 372 U.S. 335.) The Sixth Amendment further recognizes that the right to counsel is more than simply the presence of an attorney, but includes the right to the effective assistance of counsel. (*McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14; *Strickland v. Washington, supra,* 466 U.S. at p. 686; *United States v. Gouveia* (1984) 467 U. S. 180, 187; *Coleman v. Alabama* (1970) 399 U. S. 1, 9-10; *Reece* v. *Georgia* (1955) 350 U.S. 85.)

There are two distinct ways in which a defendant can be deprived of the effective assistance. First, counsel can perform in an ineffective manner by failing to render adequate legal assistance. (*Strickland v. Washington, supra,* 466 U.S. at p. 686.) Alternatively, state interference can itself violate a defendant's right to the effective assistance of counsel by rulings which interfere with the ability of counsel to respond to the state's case or

conduct a defense. (*Ibid;* see also, *Geders v. United States* (1976) 425 U. S. 80 [defendant denied right to effective counsel where trial court precluded him from consulting with counsel during an overnight recess in trial]; *Herring New York, supra*, 422 U.S. 853 [defendant denied right to effective counsel where trial court refused to allow his counsel to make closing argument in bench trial]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-613 [ruling requiring that defendant be the first defense witness ("The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense."]; *Ferguson v. Georgia* (1961) 365 U.S. 570, 593-596 [state rule barring questioning of a defendant on direct examination by his attorney during an unsworn statement].) While generally a defendant who represents himself at trial forfeits a claim that their own actions were deficient, even a *pro se* defendant cannot forfeit a claim of ineffective assistance of counsel that was the result of state interference. (*Faretta v. California* (1975) 422 U.S. 806, 834-835, fn. 46; *People v. Bloom* (1989) 48 Cal.3d 1194, 1226.)

Here the state interference by the state through the trial judge was startling. The court denied the request for the appointment of counsel concluding that Mr. Beswick had failed to justify why his indigent client deserved the appointment of counsel. (CT (Supplemental II) 375.) Yet, the lawyer had provided in detail the complexity of the two murder and escape cases, the amount of work involved, that it concerned two separate murder cases, he had not been paid for years, and that the client and his family were poor. (CT (Supplemental II) 385-390 [Application To Be Appointed As Counsel, Jan. 8, 1998].)

Mr. Beswick then moved, with greater detail, for the appointment of counsel. (CT (Supplemental II) 376-382A [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Nov. 14, 1997].) He even asked to be relieved if the motion were not granted. (*Id.* at p. 382.) Then he submitted without success an additional declaration

justifying the appointment of counsel. (CT (Supplemental II) 392-394 [Declaration of Robert H. Beswick, Jan. 8, 1998].) There was simply nothing Mr. Beswick could reasonably do to persuade the court that counsel should be appointed on behalf of the indigent defendant.

There are two different standards of prejudice for assessing ineffective assistance of counsel claims. In cases of "actual ineffectiveness where defense counsel has performed in a negligent manner, the defendant generally must show "that the deficient performance prejudiced the defense." (*Strickland v. Washington, supra,* 466 U.S. at p. 687; accord *Perry v. Leeke* (1989) 488 U.S. 272, 279.) This requires the defendant to show that but for counsel's errors, there is a "reasonable probability" that the result of the .proceeding would have been different. *(Strickland v. Washington, supra,* 466 U.S. at pp. 688, 693.) The ''reasonable probability" standard merely requires defendants to show "a probability sufficient to undermine confidence in the outcome." *(Id.* at p. 694.)

However, the standard applied in cases directly involving "state interference" with counsel's performance, as here, is "a different matter." *(Perry v. Leeke, supra,* 488 U.S. at p. 279.) State interference with counsel's ability to represent a criminal defendant "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." *(Id.* at p. 280.)

Appellant was in an impossible situation caused by state interference. The state court had refused to appoint Mr. Beswick or any attorney in either murder case even though there was no money to pay anyone. He had informed the judge that he was not being paid, and was overwhelmed by the complexity of the situation. (CT 378-382 (Supplemental II).) In another motion he again, with great specificity, pointed out that he could not competently represent Appellant without being appointed. (*Id.* at pp. 385-390 [Application To Be Appointed As Counsel, *supra*]; *Id.* at pp. 392-396

[Supplemental Declaration of Robert H. Beswick In Support of Motion To Be Appointed As Counsel, *supra*].) Mr. Beswick explained that the continued denial of an appointment "*would also impact the defendant in that I would be very hard pressed to provide the representation needed while at the same time trying to save my practice.*" (*Id.* at p. 388, emphasis added.) The appointment of counsel was constitutionally mandatory and would have alleviated the pending disaster which occurred because of Appellant being deprived of any semblance of effective counsel under the Sixth Amendment.

In a case involving state interference, a harmless error test has generally not been applied. (See, e.g., *Geders* v. *United States, supra,* 425 U.S. 80; *Herring v. New York, supra,* 422 U.S. 853.) "[V]arious kinds of state interference with counsel's assistance" can warrant a presumption of prejudice. *(Strickland v. Washington, supra,* 466 U.S. at p. 692; *Smith v. Robbins* (2000) 528 U.S. 259, 286.) As the Eleventh Circuit has concluded, the *Strickland* harmless error standard does not "apply to situations where the state, the court, or the criminal justice system denies a defendant the effective assistance of counsel." *(Crutchfield v. Wainwright* (11 Cir. 1986) 803 F.2d 1103, 1108.)

The critical factor rendering violations of the right to effective assistance of counsel under these circumstances inappropriate for harmless error analysis is the reviewing court's inability to determine whether such violations were in fact harmless beyond a reasonable doubt. (See, e.g., *Gideon* v. *Wainwright, supra,* 372 U.S. 335 [complete denial of right to counsel]; *Payne v. Arkansas* (1958) 356 U.S. 560 [introduction of coerced confession]; *Tumey* v. *Ohio* (1927) 73 U.S. 510 [adjudication by biased judge]; *Waller v. Georgia* (1984) 467 U.S. 39,49 & fn. 9 [public trial]; *Holloway v. Arkansas* (1978) 435 U.S. 475 [conflict of interest in representation throughout entire proceeding]; *Faretta v. California* (1975) 422 U.S. 806 [self-representation].) Errors that either "abort[] the basic trial process. . .

or den[y] it altogether," *(Rose v. Clark* (1986) 478 U.S. 570 at p. 578 fn. 6), have an effect on the composition of the record so pervasive that it cannot be determined by the reviewing court. (See also *Satterwhite v. Texas* (1988) 486 U.S. 249, 256 [errors that "pervade the entire proceeding" and whose scope "cannot be discerned from the record" require *per se* reversal); *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [suggesting that efforts having a pervasive effect on the factfinding process are not susceptible to harmless error analysis]). To apply harmless error analysis under such circumstances would require the reviewing court to engage in an inquiry that was "purely speculative." *(Satterwhite,* 486 U.S. at p. 256.)

Although these cases adopt a standard of reversal *per se* for state--induced ineffective assistance of counsel claims, the record here provides ample grounds to show that the failure to appoint counsel for Appellant denied him the adversarial testing of the charges contemplated required by the Sixth and Fourteenth Amendments. Mr. Beswick was simply overwhelmed by the situation, and was able to do little on behalf of his client. By the court not only denying to Appellant the appointment of counsel, Mr. Beswick was thrust into a situation of ineffectiveness.

E. As A Result of State Interference With Appellant's Right To Counsel, The Trial Attorney Was Prejudicially Ineffective

As discussed in the preceding, there is a reversal *per se* standard for state-induced ineffective assistance of counsel claims. Nevertheless, there are more than enough grounds demonstrating that the failure to appoint Mr. Beswick or release him from the case and appoint another attorney, resulted in Appellant being deprived of the right to counsel, due process of law, effective assistance of counsel, a fair and accurate penalty determination, and equal protection of the law, required under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Appellant had an absolute right to the appointment of counsel. Further, Mr. Beswick warned the court prior to trial that he was unprepared for

both the guilt and penalty phase. It was explained that he was overwhelmed, without being paid, by the magnitude and complexity of having to defend against two separate murder cases in which the prosecution was seeking the death penalty. Yet, the court refused to make an appointment.

Under the circumstances Mr. Beswick was unable to adequately represent a defendant in a capital murder trial, particularly one involving two murder charges and an escape. He never reasonably engaged in conversations with the client about the case, interviewed no prosecution witnesses, had no investigator, utilized no expert witnesses, confused witness names during closing argument, conducted the most cursory preparation or none at all for the defense's own witnesses, failed to use and lost important discovery evidence for impeachment, and needlessly disclosed harmful information to the jury. There was not even a background investigation. These failures individually and cumulatively damaged Appellant's case and prejudiced the outcome. Simply put, Mr. Beswick was so beleaguered by the enormity of the task before him coupled with the demands of his need to make money through other clients, and he could not function at an acceptable level.

The evidence of Mr. Beswick's failings due to the court refusing to appoint him, or allow co-counsel, was clearly documented in a motion for a new trial presented by a replacement attorney, William Pitman, who came in following the death verdict, and in subsequent proceedings. (CT 546-592 [Notice of Motion and Partial Motion for New Trial, June 19, 1998]; CT 624-659 [Notice of Motion and Motion for New Trial, Aug. 3, 1998]; RT 3240-3918.)

A wealth of evidence was presented demonstrating that the state interference by refusing to appoint counsel caused Appellant to be denied the right to any semblance of a fair trial. As predicted by Mr. Beswick, he was unable to properly represent Appellant.

Mr. Beswick's failings, which are detailed with far greater specific-

ity in the next argument involving the refusal of the court to appoint co-counsel to help Mr. Beswick, included:

- Not being prepared for trial.
- Failure to conduct any investigation and thus no strategic basis for any decisions.
- Failure to present any defense at the guilt phase, even though Appellant consistently maintained his innocence and there was little credible evidence against him.
- Raised a drug dealing theory in opening statement, but never presented any supporting.
- No investigator retained for preparation of the guilt or penalty phase.
- Had on two brief meetings with the client prior to trial, totaling 10 minutes.
- Failed to follow any of the leads that his client provided.
- Counsel was not being paid and thus requested to be appointed in order to receive needed resources, explaining that he was not getting paid and could not continue to run a solo practice without compensation.
- Requested the appointment of co-counsel as the case expanded beyond his experience.
- Moved to be dismissed from the case since court refused to grant motions for appointment and for co-counsel.
- Did not interview family members in preparation for the guilt phase.
- At the behest of a sister, met with family members briefly at a hotdog stand shortly before their appearance at the penalty phase.
- Interviewed no witnesses other than a few family members just before their penalty phase testimony.
- Neither retained nor consulted with any forensic experts.
- No investigation of the actual killers, Greg Janson and Shane Woodland.
- Failure to investigate prosecution witnesses.
- Neither interviewed nor subpoenaed impeaching witnesses.

- Agreeing to have an unrelated escape charge tried with the two murder accusations.
- Failed to object to the playing of a police video tape that contained prejudicially inadmissible statements.
- Failed to utilize evidence of a video tape containing two police interviews of a pivotal witness, Shane Woodland, in which his statements were materially different from his trial testimony.
- Introduction of an unsubstantiated defense theory in the opening statement that was neither investigated nor corroborated, with no related evidence produced during the trial.
- Caused irreparable harm to the client by informing the jury of inadmissible anonymous calls to the police which identified Appellant as the murderer of Allan Friedman.
- Failed to retain a fingerprint expert to advise and analyze both a print and the surface from which it was allegedly lifted from a missing hairspray can, the only physical evidence linking appellant to the car used in the Friedman homicide.
- Confused names of prosecution witnesses during closing statement.
- Failed to investigate and present mental health and social background evidence at penalty phase.
- Failed to investigate and present evidence at penalty phase of Appellant's long-term drug use, multiple head injuries, death of his father, presence of an abusive step-father, and growing up in a violent environment.
- Failed to investigate or interview damaging penalty phase prosecution witness, Richard Morrison.
- Opened the door to inadmissible evidence of Appellant's history of arrests and an incident in which he allegedly threatened someone 18 years earlier.
- Deficient penalty phase closing argument which reflected that counsel did not understand the law regarding mitigating evidence, supporting the prosecutor's argument concerning a aggravating factor, and referring to evidence that he had neither investigated nor presented, and made arguments.

By the court refusing to appoint Mr. Beswick or release him from the case and appointment other counsel, Appellant was deprived of the right

to a fair trial, effective assistance of counsel, a fair and reliable penalty phase, due process of law, and equal protection of the law, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. But for the state's interference with Appellant's most fundamental rights, such constitutional deprivations with the resulting prejudice would not have occurred.

The ineffectiveness of Mr. Beswick is provided in detail elsewhere in this brief. However, a review of examples of his failings is submitted in the following:

F. Conclusion

Defense counsel warned the state trial judge that if he or another lawyer were not appointed, that the indigent Appellant would be prejudicially deprived of the right to a fair trial and competent representation. More importantly, the court's refusal to appoint counsel warrants a presumption of prejudice due to state interference with the right to counsel and mandates a new trial. Consequently, as detailed below, Appellant was deprived of the right to counsel, a fair trial, effective representation, a reliable and fair penalty phase process, due process of law, and equal protection of the law, guaranteed by Fifth, Sixth, Eighth and Fourteenth Amendments.

IX.

BY DENYING DEFENSE MOTIONS FOR SECOND COUNSEL WHERE APPELLANT WAS CHARGED IN TWO UNRELATED MURDER CASES AND THE DEATH PENALTY WAS SOUGHT IN EACH, THE TRIAL COURT ABUSED ITS DISCRETION, RESULTING IN STATE INTERFERENCE WITH THE RIGHT TO COUNSEL, EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR TRIAL, DUE PROCESS OF LAW, A FAIR PENALTY ADJUDICATION, AND EQUAL PROTECTION OF THE LAW

A. Introduction

As noted above, Appellant was represented at trial by a solo practitioner who had never previously tried a capital case. Counsel Robert H. Beswick's several motions for appointment and/or for appointment of second counsel were summarily denied, with the trial court inexplicably find-

ing that this double homicide capital case, and an escape charge, was *not* sufficiently complicated to warrant appointment of second counsel, overlooking Mr. Beswick's representations that he was being forced into a situation in which he could not provide adequate representation and was facing financial ruin by being required to represent Appellant without being appointed. Mr. Beswick was initially retained on behalf of Appellant on the first homicide charge. Ultimately he was forced to represent Appellant on both murder charges, the special circumstance allegations, and in the ensuing penalty phase trial, even though he was not paid in the case beyond a down payment years earlier for the first—at that time non-capital—homicide charge. He was neither hired nor appointed regarding the second murder charge or the escape, or to defend Appellant against the death penalty. Mr. Beswick repeatedly moved for the court to appoint second counsel, in addition to moving for his own appointment on all the charges. He explained that defending Appellant was an overwhelming task for any single attorney since it was akin to simultaneously mounting a defense in three separate trials, the cases were incredibly complex, and the prosecution was seeking the death penalty requiring separate preparation for the penalty phase. Further, Mr. Beswick informed the court that this was his first death penalty case.

Without the assistance of a second lawyer as requested, particularly one with capital experience, Mr. Beswick made clear to the trial court that it would be forcing him into a situation where he would be ineffective under the Sixth and Fourteenth Amendments, resulting in prejudice to the client. The motions were denied. Consequently, as borne out by the record, Appellant was deprived of any semblance of a defense or competent representation.

B. Proceedings Below

Appellant was charged with a single murder on February 12, 1996. It concerned the death of Allan Friedman on October 24, 1995. (CT (Sup-

plemental II) 1-4 [Probable Cause Determination], 15-16 [Amended Felony Complaint, Feb. 14, 1996], 209-210 [Information, Apr. 24, 1996].) In July, 1996, Appellant's family retained Mr. Beswick to defend him on the initial charge, but early on the family ran out of funds to pay him. (CT (Supplemental II) 228.)

Thirteen months after being arrested on the initial charge, Appellant was indicted on a second murder charge and robbery unrelated to the first, pertaining to the death of George Camacho on December 16, 1994. (CT 255-257 [Indictment, Mar. 12, 1997].) A separate escape charge was subsequently added. (CT (Supplemental IV) 1-2 [Felony Complaint, June 4, 1997], 130-131 [Information, June 11, 1997].) There were also four special circumstance allegations: (1) that the killing of Mr. Camacho was for financial gain (Pen. Code § 190.2(a)(1)), (2) that the death of Mr. Friedman was committed during the commission of a robbery (§ 190.2(a)(17)), (3) that both were "especially heinous, atrocious, and cruel, manifesting exceptional depravity" (§ 190.2(a)(14)), and (4) an allegation of multiple murder (§ 190.2(a)(3)). The prosecution then gave notice that it was seeking the death penalty. (CT 267; RT A-57.)

In addition to seeking appointment to represent Appellant because he was never hired to represent the indigent Appellant in the new cases and because Appellant's family had no funds to even continue paying him on the initial charge, Mr. Beswick aggressively sought the appointment of second counsel. (CT (Supplemental II) 343-352, 361-366 [In Camera Motion for Appointment of Additional Counsel in Capital Case, Aug. 13, 1997].) It was explained in a supporting declaration that not only was second counsel essential due to the multiple murder accusations, but because the prosecution had elected to seek the death penalty in each case:

Declaration of Robert H. Beswick In Support of
In Camera Motion for Appointment of Co-counsel

2. . . . *The defendant is indigent.*

3. The above entitled capital case is one in which *appointment of co-counsel is appropriate and necessary under Penal Code §987, in that the case is a consolidation of two separate charges of murder of two separate and distinct individuals. Each case involves separate facts and circumstances all of which has to be thoroughly investigated and analyzed. In addition there is now an escape charge filed against the defendant.*

4. A review of the reports and documents associated with this case indicates that defense of this matter will involve extensive investigation, forensic work, and the use of experts.

5. The investigation will require the questioning of various witnesses and persons who could provide evidence which would be favorable to the defense. Additionally, inspection of the vehicle which was allegedly used by the defendants needs to be analyzed as well as certain items taken from the vehicle.

6. Counsel was privately retained, however, the fee was substantially less than would be necessary to defend against a capital charge involving two separate murders. *Counsel is a sole practitioner and as such cannot devote the necessary time needed to question and investigate the facts and circumstances surrounding this case without compromising and prejudicing the remaining practice.* Moreover, because of the seriousness of the charge and the penalty it is imperative that every aspect of the case be analyzed legally to insure that the defendant is given the full protection of the California and United States Constitutions.

. . . .

9. It is respectfully requested that the court appoint co-counsel at this time to aid and assist in the defense of this capital charge.

(CT (Supplemental II) 345-346, 363-364 [Declaration of Robert H. Beswick In Support of In Camera Motion for Appointment of Co-counsel, Aug. 13, 1997], emphasis added.]

During a September 9, 1997 hearing, Mr. Beswick took another opportunity to explain that he was initially retained on just one murder case. Well over a year after he had agreed to represent Appellant, his client was charged with a "second homicide filed on Camacho and then the escape case. . . . *[S]o we actually have three cases, and he [the client] has no money.*" (RT A-112 (emphasis added).) The court responded that it was "going to take under advisement your request for additional counsel." (*Ibid.*) Six weeks later the motion was denied with the court commenting: "The application fails to provide any specific or compelling reasons requiring the assistance of additional counsel." (CT (Supplemental II) 367, 370 [Order Denying Application for Second Counsel, Oct. 21, 1997].)

A month later Mr. Beswick renewed his quest for appointment of second counsel on Appellant's behalf. He again explained that it was impossible to competently represent Appellant without the participation of a second attorney. The crisis was so dire that Mr. Beswick asked to be relieved unless the motion was granted:

> Part of counsel's responsibility to a client is to become thoroughly familiar with the factual and legal circumstances of the case prior to trial. *People v. Frierson,* 25 Cal.3d 142 (1979). Representation of an accused murderer is a mammoth responsibility. *In re Hall,* 30 Cal.3d 408 (1981). In a murder prosecution that is factually and legally complex, the task of effectively preparing for trial places a substantial burden on the defense attorney. This is particularly true of a capital case, since the possibility of a death penalty raises additional factual and legal issues. In assessing the need for another attorney the court must focus on the complexity of the issues involved, keeping in mind the critical role that pretrial preparation may play in the eventual outcome of the prosecution. It is the legislative intent that the court be guided by a capital defendant's need for a "complete and full defense". That intent together with the constitutionality mandated distinction between death and other penalties requires that the trial court apply a higher standard than bare adequacy to a defendant's request for additional counsel. If it appears that a second attorney may lend important assistance in preparing

for trial or presenting the case, the court should rule favorably on the request.

In the instant case *counsel is not only faced with the formidable task of representing the defendant in one murder case, but he is also faced with representing the defendant in a second murder case. Each incident is in itself a "mammoth" undertaking. If that wasn't enough counsel has been charged with the task of representing the defendant in an escape charge.*

Each of the incidents for which the defendant is charged is an independent and distinct fact pattern with its own set of players, facts and circumstances. Essentially counsel will have to prepare for two murder trials as well as two sentencing hearings as well as defending against the escape charge.

A firm of multiple attorneys would have their resources taxed by representing the defendant. As noted in the underlying motion *counsel is a sole practitioner and as such is the sole financial resource for the firm. Despite his being privately retained he has not been paid for this representation.* The court must be made aware of the fact that counsel was originally retained in the first murder charge. Counsel was unaware at the time of his initial retention that he would have to represent the defendant in another murder case. Somehow, because of the District Attorney's method of filing the second murder charge, counsel has been given the responsibility of representing the defendant in two separate murder charges in a death penalty case.

Funds should be made available in order to retain additional counsel in addition to appointing present counsel as he is not receiving compensation from either the defendant or his family. In the alternative *counsel should be allowed to withdraw from the case and the appropriate public defender be charged with the duty of representing the defendant.*

(CT (Supplemental II) 377-379 [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Declaration of Robert H. Beswick, Nov. 20, 1997] (emphasis added).)

The supporting declaration provided additional factual justification for the appointment of second counsel, including the need for a different at-

torney to focus on the presentation of the penalty phase, even though a compelling basis had been presented to the court three months earlier:

> Declaration of Robert H. Beswick
>
> 2. *[D]efendant has been charged with committing two murders which the District Attorney's office has combined into one trial and for which the defendant faces the death penalty. Defending against one murder charge is a mammoth undertaking in and of itself. Representing defendant in two murder charges is problematic. I have a genuine need for appointment of counsel to aid me in this capital case.* Additionally, there is a factual need for appointment of counsel.
>
> 3. The majority of my practice is devoted to the practice of criminal law, however, *I have never had to represent a defendant in a death penalty case. I have never represented an individual who has been charged with committing two murders, both of which have been combined into one trial. I request additional counsel to insure that every possible defense is presented to the court in order to insure that defendant receives a complete and full defense.*
>
> 4. As stated previously, I am a sole practitioner. I estimate that I will have to interview and or cause to be interviewed approximately 60 witnesses. I will have to review everyone's statement and more than likely re-interview those individuals who statements prove to benefit the defendant. I will additionally hire a forensic expert and investigator to aid me in the preparation of the defense. I will have to monitor and supervise these individuals as to their respective roles. In addition *I will have to prepare what is essentially two different defenses against two separate and distinct incidents of murder. There is nothing connecting the two murders. Consequently, each investigation and defense is in effect a separate trail. Additionally, I will have to prepare for two separate sentencing hearings as both murders will have distinct mitigating factors which will have to be presented.* It is clear that additional counsel would be useful in the organizing of the information which these various witnesses, investigator and forensic expert will produce.
>
> 5. As noted *I will have to prepare for essentially two separate penalty phases each one with its own set of mitigating circumstances. The difficulty of preparation is com-*

pounded by the inherent problem present in any capital case of simultaneous preparation for a guilt and penalty phase of the trial. The issues of evidence to be developed in order to support mitigation of the possible death sentence is substantially different from those likely to be considered during the guilt phase. *Moreover, should the guilt phase be against the defendant I will have lost valuable credibility in the eyes of the jury. This would be highly prejudicial to the defendant.*

6. I anticipate that the trial will last from four to six weeks. I intend to make numerous pre-trial motions. Additional counsel would be useful in preparation and argument of the motions in addition to interviewing witnesses, sorting out and reviewing statements and aiding in the preparation for the trial and sentencing phase.

7. Despite being retained as private counsel defendant does not have the funds to pay my fees. I received a small retainer fee at the outset of this case. At the time I was retained, however, I was neither aware of the second murder nor was I aware that the District Attorney's office would be filing a second murder charge and allege special circumstances. *The defendant is indigent as he has no resources with which to pay me. His family does not have any money to pay me. Consequently, I have not been paid and will not be paid.* To continue representing the defendant on my own will be ruinous to my practice in that I will not be able to devote my time to my other clients and I will not be able to produce income for my firm. *Additional counsel will allow me to continue my practice as well as insure that the defendant is well represented.*

8. As noted above *the murder charges are two separate and distinct incidents both in time and in factual circumstance. I will be essentially representing the defendant in two separate trials* with two separate hearings. As an added and unforeseen problem, *the defendant has been charged with escape from a detention facility against which I will have to provide a defense.* Any one of these elements would make the case complex. Combining all of the circumstances transforms the case into an undertaking that I neither anticipated nor am prepared for. The case simply is rather complex both factually and legally. Given the complexity of the case and the indigence of the defendant I feel that it is appropriate that not only should additional counsel be appointed but also that I should be appointed. *The burden of representing the defen-*

dant who is indigent in this matter without additional counsel and without appointment will be overwhelming. There is a genuine need for additional counsel as well as a genuine need for the court to appoint me.

(CT (Supplemental II) 381-382 [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Declaration of Robert H. Beswick, Nov. 20, 1997] (emphasis added).)

The motion was denied, with the court displaying a stunning lack of appreciation for the enormous task of preparing a capital defense:

> This case is not a complex one. Counsel's contentions that there are two murders, counsel is a sole practitioner, he has not been fully paid, he has not represented a defendant in a death penalty case and that "a second attorney may lend important assistance with preparing for trial or presenting the case" are not sufficient grounds for appointment of second counsel.

(CT (Supplemental II) 375 [Second Order Denying Application for Second Counsel, Nov. 20, 1997].)

The trial court did not question the truth of Mr. Beswick's representations that the trial would involve two murders, that Mr. Beswick was a solo practitioner who was not getting paid and had no previous capital case experience. Despite acknowledging these facts, the trial court irrationally declared that the case was not complex, and that Mr. Beswick had not demonstrated sufficient need for appointment of second counsel.[11] Consequently Mr. Beswick was without the crucial assistance of second counsel. Thereafter he essentially surrendered Appellant to the prosecution by doing nothing other than showing up in court. The record, especially that of a post-trial hearing on Appellant's Motion for a New Trial, reflects that Mr. Beswick was overwhelmed by trying, alone, to defend against two unrelated murder charges, and by dealing with the responsibility of preparing for the guilt and penalty phases for each. Representing Appellant in these

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11. It is worth noting that the trial court did *not* find that Mr. Beswick's motion was untimely or that appointing second counsel would delay the trial.

circumstances would have been a crushing load even for an experienced capital trial attorney who was adequately compensated; Mr. Beswick admitted that he was *not* experienced and the trial court was informed that he was *not* being paid. Yet, the trial court *still* did not appoint second counsel.

The result was predictable. Mr. Beswick was unable to prepare for the trial in any meaningful way, made numerous errors during the proceedings, was unable to provide evidence to support the defense theory offered in his opening statement, and presented little mitigating evidence at the penalty phase. Appellant was effectively denied counsel at all critical stages of his trial. Without a second attorney appointed to help prepare for and present this enormously complex case, as Mr. Beswick continually requested, Appellant was denied effective assistance of counsel, a fair trial, due process of the law, a fair penalty adjudication, and equal protection of the law. The denial of second counsel alone warrants reversal and a new trial; the denial of second counsel where trial counsel was unpaid, not appointed, and inexperienced in capital defense as a cumulative error surely warrants reversal.

C. Standard of Review

Cases involving the death penalty are different and thus require safeguards to ensure the fairness of the proceedings. (See *Ford v. Wainwright*, supra, 477 U.S. 399 411 (plurality opinion) ("This especial concern [for reliability in capital proceedings] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Gardner v. Florida, supra*, 430 U.S. 349 (plurality opinion); *Woodson v. North Carolina, supra*, 428 U.S. 280, 305 (plurality opinion); *Furman Georgia, supra*, 408 U.S. 238, 289 (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.").) Due to this heightened concern for reliability, as well as because death penalty cases are typically more complex than non-capital cases and always in-

volve two trials in one—a guilt phase and then a penalty phase—the American Bar Association recommends that "two qualified trial attorneys should be assigned to represent the defendant." (ABA Guidelines Appointment and Performance of Counsel in Death Penalty Cases Guideline 2. 1 (1990).) Indeed, the right to have co-counsel in a capital case has existed since the earliest codification of California statutes and appears to be based upon pre-existing federal law. The federal provisions for appointment of second counsel in capital cases have existed since 1970. They exist not just because capital cases are necessarily more complex, but because of the irreversible nature of the penalty. (*U.S. v. Shepherd* (6th Cir. 1978) 576 F.2d 719, 729; *U.S. v. Watson* (4th Cir. 1973) 496 2d 1125, 1130 [Murray J. dissenting].)

The legislative intent evinced in Penal Code section 987.9—that a court be guided by the defendant's need for a complete and full defense—requires that the trial court apply a higher standard than bare adequacy to a defendant's request for additional counsel. If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. This is especially true in capital cases:

> The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime.

(*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434 (cites omitted).)

This Court has held that the trial court is vested with discretionary power to appoint additional attorneys in a capital case when a defendant shows that more than one counsel is necessary to provide a defendant with

effective representation. (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430-431; see also *People v. Jackson* (1980) 28 Cal.3d 264, 287 ("equal protection demands are satisfied by permitting the trial court, in its discretion, to appoint additional counsel at public expense if the circumstances in a particular case appear to require such an appointment").) The *Keenan* Court recognized that a capital case "raises additional factual and legal issues" not present in a non-capital criminal action. The Court further noted that, in its exercise of its discretion to appoint multiple counsel in a capital case, a trial court must keep in mind that the defendant has his life at stake in the proceedings, must consider the importance attached to pretrial preparation in providing the defendant with effective legal assistance, and must focus on the complexity of the issues involved in the case: "In a murder prosecution that is factually and legally complex, the task of effectively preparing for trial places a substantial burden on the defense attorney." (*Id.* at pp. 431-433; see also *In re Hall, supra,* 30 Cal.3d at p. 434 ("Representation of an accused murderer is a mammoth undertaking").)

The American Bar Association has also acknowledged the unique demands placed on defense counsel in capital cases: "Because many of the duties of defense counsel in capital cases are definably different from those performed by counsel in criminal cases generally, because there are many rapid developments in the complex body of law affecting death penalty cases, and especially because of the harsh and irrevocable nature of the potential penalty, the responsibilities of trial counsel are sufficiently onerous to require the appointment of two attorneys as trial counsel in order to ensure that the capital defendant receives the best possible representation. The appointment of co-counsel at trial is not only meant to provide lead counsel with assistance in the preparation of both trial and penalty phases of the case, but also to provide lead counsel with different perspectives on the issues inherent in each stage of the proceedings." (American Bar Association,

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, p. 42 (1989).)

Although the California legislature has not yet joined other states in mandating that two defense attorneys be appointed in capital cases, Penal Code section 987, subdivision (d), enacted in 1984, provides:

> In a capital case, the court may appoint an additional attorney as a co-counsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth in detail the reasons why a second attorney should be appointed. Any affidavit filed with the court shall be confidential and privileged. The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. If the request is denied, the court shall state on the record its reasons for denial of the request.

In Appellant's case, the trial court unreasonably found no reason to appoint second counsel, despite knowing that Mr. Beswick was not an experienced capital defense counsel, was not being paid, and had been refused appointment by the trial court.

D. The Court Erred In Denying The *Keenan* Motion

In *Keenan*, the defendant's attorney was appointed seven weeks prior to the scheduled trial date. A defense motion for a continuance was denied. In the declarations accompanying his motion for additional counsel, the defense attorney stated that he needed to interview 120 witnesses, that he anticipated extensive scientific and psychiatric testimony, and that his client was charged in five other pending criminal cases the evidence of which the prosecution intended to offer at the murder trial. Counsel said he intended to make numerous pretrial motions as part of the defense effort and thought that appellate review of some of these motions might be necessary. He asserted that only the assistance of another qualified attorney would be useful in this aspect of preparation. (*Id.* at pp. 432-433.) This Court held that under those facts, the superior court abused its discretion in

denying the request for second counsel. The circumstances cited by Mr. Beswick in support of his motion for appointment of second counsel are at least comparable, if not more extreme, than the circumstances found by this Court to warrant appointment of second counsel. Mr. Beswick appeared to have more time before trial to prepare,[12] but as he explained to the trial court repeatedly, because he was not being paid by Appellant and was not appointed, he was not able to devote himself to preparing for Appellant's defense. (Cite) The attorney in *Keenan* had only one homicide to defend against; Mr. Beswick was faced with investigating two separate and unrelated murder charges. Mr. Beswick also faced defending Appellant on a separate and improperly joined escape charge,[13] on which the prosecutor relied heavily as proof of consciousness of guilt. The defendant in *Keenan* faced only one murder charge with two special circumstances, that the killing occurred during the commission of a burglary and robbery. Appellant was charged in two distinct murder cases and faced four special circumstance allegations, i.e., financial gain, multiple murder, "especially heinous, atrocious, and cruel", and robbery, and the prosecution sought the death penalty in each. (CT 256.)

Like counsel in *Keenan*, Mr. Beswick stated that many witnesses needed to be interviewed: He estimated at various times the need to interview between 30 and 60 witnesses, and that he would have to retain and work with expert witnesses. (Cites) While this is a smaller number of witnesses than identified by the *Keenan* attorney, it is certainly substantial and was likely a low estimate, especially considering Mr. Beswick's unfamiliarity with preparing for a penalty phase. Mr. Beswick also predicted there

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12. In *Keenan* counsel had only a short time to prepare for trial, seven weeks. Here the trial was 13 weeks away when the court first denied the second counsel motion, and nine weeks when it entered another order refusing to permit co-counsel. (CT (Supplemental II) 367, 370, 375.)
13. Argument VII, *ante*, pp. 61-64.

would be numerous pre-trial motions,[14] appellate review would likely be needed, the defense had only a short time to prepare for trial, and there was a separate escape charge which needed to be defended. (CT (Supplemental II) 343-352, 361-366, 377-382.) The superior court had discretion in deciding whether to appoint second counsel. However, that "discretion, of course, must be 'guided by legal principles and policies appropriate to the particular matter at issue.'" (*Keenan v. Superior Court, supra,* 31 Cal.3d at p. 430 (quoting *People v. Russel* (1968) 69 Cal.2d 187, 195, and *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815).) In assessing the need for second counsel, the court must focus on the complexity of the issues involved keeping in mind the critical role that pretrial preparation may play in the eventual outcome of the prosecution. (*Keenan v. Superior Court, supra*, 31 Cal.3d at p. 432.) And, one might add, in ruling on a motion for second counsel, the court should look to *Keenan* itself.

Unquestionably there was a genuine need for second counsel, for the court was on notice that the trial would be a constitutional disaster unless Mr. Beswick had help. He specifically alerted the court that the failure to appoint a second attorney was impairing his client's fundamental right to counsel and was essentially forcing the lawyer to provide unacceptably inadequate representation in contravention of the Sixth and Fourteenth Amendments. In view of the complexity of the two murder cases being jointly litigated, the severity of the consequences for the accused, and the mounting evidence of counsel's inability to competently represent his client, the trial court abused its discretion by (a) failing to investigate the need for second counsel, and (b) failing to appoint second counsel.

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14. Even in his dire circumstances, as detailed herein Mr. Beswick filed pretrial motions, including those seeking appointment as counsel and appointment of second counsel.

E. The Trial Court's Refusal To Appoint Second Counsel Resulted In A Fundamental Violation Of Appellant's Due Process Rights As Well As His Sixth Amendment Right To The Effective Assistance Of Counsel

The Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clause of the Fifth and Fourteenth Amendments, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution. *(Strickland* v. *Washington, supra*, 466 U.S. at pp. 684-685; *Powell* v. *Alabama, supra*, 287 U.S. 45; *Johnson* v. *Zerbst, supra*, 304 U.S. 458; *Gideon* v. *Wainwright, supra*, 372 U.S. 335.) The Sixth Amendment further recognizes that the right to counsel is more than simply the presence of an attorney, but includes the right to the effective assistance of counsel. (*McMann v. Richardson, supra,* 397 U.S. 759, 771, fn. 14; *Strickland v. Washington, supra,* 466 U.S. at p. 686; *United States v. Gouveia, supra,* 467 U. S. at p. 187; *Coleman v. Alabama, supra*, 399 U. S. 1, 9-10; *Reece* v. *Georgia, supra,* 350 U.S. 85.)

By statute the court may appoint second counsel. Such an appointment is mandatory if the additional attorney is necessary, as here, to ensure

that the accused is effectively represented:

> In a capital case, the court may appoint an additional attorney as cocounsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth in detail the reasons why a second attorney should be appointed. . . . The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. . . .

(Penal Code, § 987, subd. (d).)

A trial court's denial of a request for appointment of second counsel is reviewed for abuse of discretion. "Judicial discretion is that power of decision exercised to the necessary end of awarding justice based upon reason and law but for which decision there is no special governing statute or rule. Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice.... The term implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason." (*Harris v. Superior Court*, (1977) 19 Cal.3d 786, 796.) Reason, equity and justice did not guide the trial court in denying Appellant the critically needed assistance of second counsel.

Requests for second counsel in capital cases are usually granted due to the complexity of capital cases, the Eighth Amendment guarantee of heightened reliability and due process in such cases, and practical considerations such as the impact of conviction upon the credibility of guilt phase counsel and the need for skilled penalty phase investigation and representation. *(Keenan v. Superior Court, supra;* California Criminal Law and Practice *(Continuing Education of the Bar,* 5th ed. 2000) §55.9, pp. 1541-1542.) That is particularly true in cases such as that at hand, where the defendant is charged with having committed multiple murders and the prosecution is seeking the death penalty.

Here the court initially denied the request for second counsel concluding that Mr. Beswick had failed "to provide any specific or compelling reasons requiring the assistance of additional counsel. (CT 367, 370 [Order Denying Application for Second Counsel, Oct. 21, 1997.].) Yet, the lawyer had provided in detail the complexity of the two *unrelated* murder and escape cases, and the amount of work involved. (CT (Supplemental II) 343-347 [In Camera Motion for Appointment of Additional Counsel in Capital Case, Aug. 13, 1997].)

Then the attorney moved again for the appointment of second counsel, with an even more detailed description of the need. (CT (Supplemental II) 376-382A [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Nov. 14, 1997].) Mr. Beswick recited not only the amount of work that should be done to prepare for trial, and the need for second counsel in case Appellant were to be convicted, but also detailed his lack of experience in capital trials and the fact that he was not being paid. Mr. Beswick even asked to be relieved if a second lawyer was not permitted. In denying relief on this matter involving two distinct murder cases in which the prosecution was seeking the death penalty, one wonders what would be required for the particular judge to appoint second counsel in any case:

> For the reasons states in the Courts order of October 21, 1997, counsel for defendant has failed to demonstrate good cause for appointment of second counsel. The case is not a complex one. Counsel's contentions that there are two murders, counsel is a sole practitioner, he has not been fully paid, he has not represented a defendant in a death penalty case and that "a second attorney may lend important assistance with preparing for trial or presenting the case" are not sufficient grounds for appointment of second counsel.
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> (CT (Supplemental II) 375 [Second Order Denying Application for Second Counsel, Nov. 20, 2007].)

Where the state's actions result in denial of the right to counsel, the standard applied is "a different matter." *(Perry v. Leeke, supra,* 488 U.S. at

p. 279.) State interference with counsel's ability to represent a criminal defendant "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." *(Id.* at p. 280.)

Appellant was in a hopeless situation caused by state interference. The court had refused to appoint Mr. Beswick or any attorney in either murder case , even though Mr. Beswick had clearly informed the judge that he was overwhelmed by the complexity of the situation. (CT (Supplemental II) 378-382.) In a third motion he again, with great specificity, pointed out that he could not competently represent Appellant without being appointed. (CT 3(Supplemental II) 85-390 [Application To Be Appointed As Counsel, Jan. 6, 1998]; CT (Supplemental II) 392-396 [Supplemental Declaration of Robert H. Beswick In Support of Motion To Be Appointed As Counsel, Jan. 16, 1998].) Mr. Beswick explained that the continued denial of an appointment "would also impact the defendant in that I would be very hard pressed to provide the representation needed while at the same time trying to save my practice." (CT (Supplemental II) 388.) Still seeking to obtain adequate representation for Appellant, Mr. Beswick requested that the trial court appoint second counsel; at least one attorney on the case would be paid. The appointment of second counsel was mandatory in order to ensure that Appellant was effectively represented, and would have helped alleviate the looming disaster, which occurred because of Appellant being deprived of any semblance of effective counsel under the Sixth Amendment.

In a case involving state interference, a harmless error test has generally not been applied. (See, e.g., *Geders* v. *United States, supra,* 425 U.S. 80; *Herring v. New York, supra,* 422 U.S. 853.) "[V]arious kinds of state interference with counsel's assistance" can warrant a presumption of prejudice. *(Strickland v. Washington, supra,* 466 U.S. at p. 692; *Smith v. Robbins, supra,* 528 U.S. at p. 286.) As the Eleventh Circuit has concluded, the

Strickland harmless error standard does not "apply to situations where the state, the court, or the criminal justice system denies a defendant the effective assistance of counsel." *(Crutchfield v. Wainwright, supra,* 803 F.2d at p. 1108.)

The critical factor rendering violations of the right to effective assistance of counsel under these circumstances inappropriate for harmless error analysis is the reviewing court's inability to determine whether such violations were in fact harmless beyond a reasonable doubt. (See, e.g., . *Gideon* v. *Wainwright, supra,* 372 U.S. 335 [complete denial of right to counsel]; *Payne v. Arkansas* (1958) 356 U.S. 560 [introduction of coerced confession]; *Tumey* v. *Ohiom supra,* 73 U.S. 510 [adjudication by biased judge]; *Waller v. Georgia, supra,* 467 U.S. at p. 49 & fn. 9 [public trial]; *Holloway v. Arkansas, supra,* 435 U.S. 475 [conflict of interest in representation throughout entire proceeding]; *Faretta v. California, supra,* 422 U.S. 806 [self-representation].) Errors that either "abort[] the basic trial process. . . or den[y] it altogether," *(Rose v. Clark, supra,* 478 U.S. at p. 578 fn. 6), have an effect on the composition of the record so pervasive that it cannot be determined by the reviewing court. (See also *Satterwhite v. Texas, supra,* 486 U.S. at p. 256 [errors that "pervade the entire proceeding" and whose scope "cannot be discerned from the record" require *per se* reversal); *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [suggesting that efforts having a pervasive effect on the factfinding process are not susceptible to harmless error analysis].) To apply harmless error analysis under such circumstances would require the reviewing court to engage in an inquiry that was ''purely speculative." (*Satterwhite,* 486 U.S. at p. 256.)

Although these cases adopt a standard of reversal *per se* for state-induced ineffective assistance of counsel claims, the record here provides ample grounds to show that the failure to appoint co-counsel for Appellant actually denied him the adversarial testing of the charges contemplated required by the Sixth and Fourteenth Amendments. Mr. Beswick was simply

overwhelmed by the situation, and was able to do little on behalf of his client. By the court not only denying to Appellant the appointment of counsel, but also second counsel, Mr. Beswick was thrust into a situation of ineffectiveness.

Mr. Beswick recognized that he was not capable of doing the wealth of work required in order for Appellant to have a fair trial, without the participation of second counsel. It was just too much for him, and he drowning. That the court turned a deaf ear to the plight of Mr. Beswick and his defenseless client, was constitutionally intolerable. Mr. Beswick was fully candid in repeatedly asking the court for assistance in an effort to avoid a disaster. Because of the judge refusing to afford the needed assistance, Mr. Beswick's prediction sadly became true, as detailed hereafter. That interference by the state in Appellant's right to a fair trial and due process of law reduced the trial to a farce. At a minimum, the court should have granted Mr. Beswick's plea to be released from the case—which was certainly in the best interest of the client.

- Mr. Beswick did not have the support necessary to conduct a full investigation into the facts underlying the two unrelated murders and the escape charge, and thus did not have a sufficient basis for strategic decisions, e.g., agreeing to try the escape charge along with the homicide charges.
- Mr. Beswick did not conduct an investigation into the facts of the homicides, despite Appellant's consistent assertion that he is innocent; Mr. Beswick was unable to present a coherent defense or even corroboration for his client's testimony.
- In his opening statement, Mr. Beswick declared that he would present evidence that the victim of one homicide was involved in drug-dealing; because he was unable to conduct a thorough investigation, Mr. Beswick failed to present the promised evidence.
- Mr. Beswick claimed, during the post-trial hearing on the motion for a new trial, that he had consulted with an investigator, but he admitted having never received a report or an invoice from the investigator.

- Appellant maintained his innocence, but Mr. Beswick did not conduct any follow-up investigation.[15]
- Appellant's family members testified at the post-trial hearing on the new trial motion that Mr. Beswick did not contact them or interview them prior to trial in preparation for the guilt phase.
- Interviewed no witnesses other than a few family members just before their penalty phase testimony.
- Even though fingerprint evidence and ballistic evidence was important to the prosecution's case, and despite pre-trial declarations regarding the need to consult with forensic experts, Mr. Beswick did not retain any experts to testify in the guilt phase of Appellant's trial.
- Mr. Beswick conducted no investigation into the backgrounds or credibility of prosecution witnesses Greg Janson and Shane Woodland, even though Appellant communicated his belief that they were the actual killers of Camacho and Friedman, respectively.
- Mr. Beswick did not conduct an investigation to discover evidence by which to impeach key prosecution witnesses, failing to obtain even work or criminal histories.
- Failed to object to the playing of a police video tape that contained prejudicially inadmissible statements.
- Failed to utilize evidence of a video tape containing two police interviews of a pivotal witness, Shane Woodland, in which his statements were materially different from his trial testimony.
- Caused irreparable harm to the client by informing the jury of inadmissible anonymous calls to the police which identified Appellant as the murderer of Allan Friedman.
- Mr. Beswick did not obtain any of Appellant's education, work, mental health or other readily available records for use in presenting a penalty phase defense.
- Failed to investigate and present evidence at penalty phase of Appellant's long-term drug use, multiple head injuries, death of his father, presence of an abusive step-father, and growing up in a violent environment.

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15. Declaration of Robert Carrasco In Support of Partial Motion for New Trial, Sept. 17, 1998. (CT 721-723.)

- Failed to investigate or interview damaging penalty phase prosecution witness, Richard Morrison.

The overview of deficiencies identified above are offered to illustrate how Appellant was denied his right to a fair trial, effective assistance of counsel, a fair penalty phase, due process and equal protection of the law as a result of the trial court's refusal to appoint second counsel or even Mr. Beswick. The trial court's orders constituted a prejudicial abuse of discretion given Mr. Beswick's undisputed declarations and representations to the trial court regarding his lack of remuneration and desperate financial circumstances, and the incontrovertible complexity of the case which was inexplicably controverted by the trial judge. As Mr. Beswick declared, even a law firm with several attorneys and support staff would have had difficulty representing Appellant. As a sole practitioner with no death penalty trial experience, Mr. Beswick was poorly equipped to defend Appellant; without appointment and its concomitant financial resources, Mr. Beswick was rendered utterly incapable of providing constitutionally adequate representation. The trial court's rulings violated Appellant's rights protected under the Fifth, Sixth, Eighth and Fourteenth Amendments.

F. Trial Counsel Was Unable to Provide Effective Assistance Due to State Interference

1. Introduction

This case is unusual in that there is so much evidence available in the record on direct appeal as to the effect of the trial court's refusal to appoint second counsel because of the Appellant's motion for a new trial. Attorney .William Pitman, who replaced Mr. Beswick, presented extensive evidence of the investigation *not* undertaken by following the death verdict. (CT 546-592 [Notice of Motion and Partial Motion for New Trial, *supra*, June 19, 1998]; CT 624-659 [Notice of Motion and Motion for New Trial, *supra*]; RT 3240-3918.)

The foregoing cases adopt a standard of reversal *per se* for state-induced ineffective assistance of counsel claims. Nevertheless, the record

here provides ample grounds to show that the failure to appoint second counsel actually denied Appellant the adversarial testing of the charges required under the Sixth, Eighth and Fourteenth Amendments. Investigative steps regarded as mandatory (and agreed upon by both the prosecution and defense experts on effective assistance of counsel presented at the hearing on the motion for new trial (RT 3389, 3748) in capital cases, and known to Mr. Beswick, were not accomplished.

Mr. Beswick repeatedly warned the court prior to trial that he was unprepared for both the guilt and penalty phase. He was simply overwhelmed by the magnitude and complexity of having to defend, with no help, two separate murder cases in which the prosecution was seeking the death penalty.

Defense counsel was unable to perform the most basic functions necessary to represent a defendant in a capital murder trial, particularly one involving two murder charges and an escape. He never reasonably engaged in conversations with the client about the case, interviewed no prosecution witnesses, had no investigator, utilized no expert witnesses, confused witness names during closing argument, conducted the most cursory preparation or none at all for the defense's own witnesses, failed to use and lost important discovery evidence for impeachment, and needlessly disclosed harmful information to the jury. There was not even a background investigation of Appellant, let alone into the histories of key prosecution witnesses. These failures individually and cumulatively damaged Appellant's case. Simply put, Mr. Beswick was so beleaguered by the enormity of the task before him, and he could not function at an acceptable level.

The evidence of Mr. Beswick's failings was clearly documented for the trial court in a motion for a new trial presented by a replacement attorney who came in following the death verdict. That lawyer, William S. Pitman, presented evidence sufficient to demonstrate Mr. Beswick's constitutional ineffectiveness.

It was abundantly clear that Mr. Beswick was not adequately prepared, and he did not conduct the investigation in order to be able to make informed choices about what witnesses to call or even a defense. Consequently Appellant was deprived of the right to a fair trial, effective assistance of counsel, a fair penalty phase, due process, and equal protection of the law in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. But for the state's interference with Appellant's most fundamental rights, such constitutional deprivations with the resulting prejudice would not have occurred.

"[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'" (*Wiggins v. Smith* (2003) 539 U.S. 510, 524 (quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 688).) The ABA Standards are usually cited regarding trial counsel's duties, but they also address what is reasonable in the appointment and compensation of counsel. "In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant." (Guideline 2.1, American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Feb., 1989).)

Additionally, Guideline 10.1 provides: "Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation." (*Ibid.*) And finally: "Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, should not be adopted as sufficient for death penalty cases." (Guideline 11.2, 1989 ABA Guidelines. The trial court did not abide by these "guides to determin[e] what is reasonable," thereby making it impossible for trial counsel to represent Appellant adequately.

2. Lack of investigation at guilt phase

Despite Mr. Beswick's pre-trial declarations detailing the enormous amount of work required to prepare Appellant's case for trial, a post-trial motion for a new trial in which Mr. Pitman represented Appellant, revealed that the trial attorney completed almost no investigation for either the guilt or penalty phases of Appellant's trial. He simply could not deal with the immensity of representing Appellant who was facing tow unrelated murder charges in which the death penalty was sought. It was just too much without the requested support and assistance.

a. Counsel Did Not Meet With Client Or His Family

Mr. Beswick failed to consult with Appellant and family members. This affected both the guilt and penalty phases. Prior to trial he met with Appellant no more than a few times. (RT 3276.). In fact Mr. Beswick only visited with Appellant two times in the jail, and then only for five minutes each. (CT 722 [Declaration of Robert Carrasco, ¶ 3, Sep. 17, 1998]; CT 547-592 [Motion for a New Trial, *supra*].) He had no investigator or employee of his office ever meet with the client. (*Ibid.*) It appeared that he was so overwhelmed with the enormity of representing Appellant in the two murder cases he could not deal with the more basic tasks.

The expert witness for the defense on ineffective assistance of counsel, Carl Jones, testified regarding the vital nature of client and family interviews: "The investigation uses the client's interview as a starting point. It must proceed beyond the client to family and relatives and co-workers and neighbors and fellow students and it—it is never finished. You stop it because the trial has started." (RT 3389.) Even the prosecution expert, Bruce C. Hill,[16] testified as to the importance of developing a relationship with the client. (RT 3748-3749.) Mr. Beswick was so overwhelmed that he also failed to meet with family members of Appellant as part of the guilt

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16. Bruce C. Hill (former Calif. Bar No. 43427), was disbarred March 3, 2003 after having been declared ineligible to practice on February 26, 2000.

phase investigation. Several testified that Mr. Beswick never contacted them before the trial or during the guilt phase to ask questions and gather information. Appellant's wife of 18 years and mother of their three children, Eva Carrasco, tried unsuccessfully to discuss the case with Mr. Beswick. (RT 3621.) She came to court during jury selection and sought out the lawyer and asked if he needed to speak with her. Clearly being inundated by the case, he explained that he was too busy to meet; he promised to contact her but he never did. (RT 3624.) Once the trial began, she attended two to three times per week. Mr. Beswick finally found 10 minutes (RT 3628) to speak with her before she testified briefly in the guilt phase. (RT 2398-2409.) The essence of the testimony was the length of the marriage of Mrs. Carrasco and Appellant, that Greg Janson helped in her husband's body shop business, that she never saw him with a gun, but he kept a gun on a shelf in a home closet for many years. (RT 2398-2400.)

Mrs. Carrasco testified at the hearing on the new trial motion about a short conversation with Mr. Beswick in the courthouse hallway:

Q. The day that you testified in the guilt phase, you were recalled by Robert's sister, Leandra?
A. Yes.
Q. What did she say to you?
A. That Mr. Beswick would probably need me to be here, and to—if I could come and I said, "Yeah, I'll go."

. . . .

Q. When you arrived in the court that day, did you then speak with Mr. Beswick?
A. Yes.
Q. And how long?
A. Briefly.
Q. How long before you testified did you talk to Mr. Beswick?
A. I talked to him out in the hall, and maybe ten minutes or something before I came out.
Q. So ten minutes before you went on the stand you spoke with Mr. Beswick?
A. Yeah, it was really fast.

(RT 3626-3628.)

Mr. Beswick did not seek records relating to key prosecution witnesses. Greg Janson, a principle witness as to both murders, had worked at the Ross Dairy. Records and other employees were available to demonstrate Janson's mental problems and possible involvement in the Camacho homicide. As admitted by Mr. Beswick in the post-trial hearing, he never sought medical or other records regarding Appellant or anyone else. (E.g., RT 3300-3303.) He just could not cope with what was required in the case without the requested assistance.

Mr. Beswick did not conduct any investigation as to Anthony Morales' hostility towards Appellant which might have motivated him to falsely testify concerning an admission to the Camacho killing. (CT 624 [Notice of Motion and Motion for New Trial, Memorandum of Points and Authorities, Aug. 3, 1998, p. 21].) Mr. Beswick did not investigate Appellant's leads. It was Appellant's belief that the true conspirators who killed Allan Friedman and then successfully framed him for it were Shane Woodland, who testified against Appellant, and drug dealer Javier Chacon, Sr., with whom Woodland lived and worked (RT 2002.) When Chacon discovered that Appellant was having an affair with his wife, he arranged for Woodland to blame Friedman's murder on him. (RT 1849, 2129.)

Mr. Beswick warned the court prior to trial that he could not effectively represent Appellant without assistance from the appointment of co-counsel, as he reaffirmed in the post-trial hearing. (RT 3294-3297.) By his own admission, he was forced into a position of being ineffective. The obligations of counsel concerning client interviews are well established. (*ABA Guidelines*, 11.4.1(C)(2), Feb. 1998.) The ABA standards are recognized as "guides to determining what is reasonable" when evaluating an attorney's performance. (*See Strickland v. Washington, supra,* 466 U.S. at p. 688; *Williams v. Taylor* (2000) 529 U.S. 362, 396.)

b. Trial Counsel did not Interview Witnesses, Hire Experts, or Conduct Any Investigation

Overwhelmed by the responsibility of trying his first death penalty case without pay and without the assistance of second counsel, Mr. Beswick did not interview witnesses, retain experts, or conduct an investigation, all basic requirements in order to present a defense, particularly in a difficult, two-homicide and escape charge case.

Mr. Beswick was aware that a capital case should be thoroughly investigated. In declarations filed in support of a section 987.9 request for funds three months before trial, Mr. Beswick declared it would be necessary to interview approximately 60 witnesses as part of his investigation of the case. (CT 380 (Supplemental II) [Declaration of Robert H. Mr. Beswick, ¶ 4, Nov. 14, 1997]; CT (Supplemental II) 388 [Declaration of Robert H. Beswick, ¶ 6, Jan. 8, 1998]; RT 3252, 3255.) He noted that he would have to retain experts and investigators, and that he anticipated needing to interview many witnesses prior to trial. (*Ibid.*) Arguing to suppress evidence of the latent fingerprint lifted from a hairspray can that had disappeared[17], Mr. Beswick spoke of the need to have the can examined by a defense expert, demonstrating again that he had planned to call experts. (RT cite.)

Another indication that Mr. Beswick had an investigation plan that he abandoned when the court denied him funds and assistance was his assertion at the beginning of trial, in his opening statement, that he would demonstrate that Mr. Camacho's homicide was linked to the deceased's drug dealing. (RT cite.) In a sidebar discussion, Mr. Beswick represented that he would be prepared to present this evidence in the defense case in chief. (RT cite.) Prior to trial, he named two witnesses he intended to call, Brian Skofield and Michael Carranza (RT 258-260.), who were presumably

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17. Argument V, *ante*, pp. 47-56.

connected to the Camacho murder.[18] At the close of the defense case, Skofield had not been called and Carranza, who had not been interviewed before he took the stand (RT 3247-3249, 3251.), refused to testify, claiming his Fifth Amendment privilege to remain silent. (RT 2777, 2789, 2794.).

Under questioning by Mr. Pitman during the hearing on the new trial motion, Mr. Beswick acknowledged having done almost none of the investigation normally associated with a capital case. (*See* ABA Guidelines, etc.) He located the two named witnesses long before trial, but never interviewed them. (RT 3247, 3249, 3251.) [no paragraph break]He never sought any background records on his client, e.g., medical, employment, school, drug treatment, or any other type of record. Nor did he attempt to gather records from Ross Swiss Dairy, where Appellant, the victim of one homicide, and the prosecution's key witnesses regarding that crime had all been employed. (RT 3269-3271.)

Further, Mr. Beswick hired no investigators or experts for the guilt phase of the trial. (RT 3257.) He made oblique references to an investigator, but when asked directly, admitted that he received neither a report nor a bill from this elusive investigator. (RT 3248-3249.)

Mr. Beswick hired no experts. This, despite the significance of the single fingerprint taken from the missing hairspray container taken from the vehicle used in the Friedman murder. A fingerprint expert could have opined regarding the reliability of the match, discussed the method of making the match, and addressed why Appellant's presentation of a defense was damaged by the state's disposal of the container. Additionally, the prosecution presented the testimony of criminalists and a forensic pathologists (RT 1385, 2165, 2176), but Mr. Beswick did not even consult with experts to check their testimony (RT 3256, 3292).

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18. These were the *only* witnesses Mr. Beswick identified in discovery; no witnesses were identified in relation to the Friedman homicide.

Despite promising in the opening statement that he would demonstrate that the deceased, George Camacho, was a drug dealer (RT 1080), the defense attorney did not corroborate the assertion. He never obtained or attempted to obtain the deceased's employee records, union representative's records, medical or drug treatment records, and failed to conduct any investigation into Camacho's background in order to prove the claims made during the opening statement.

The reason for Mr. Beswick's inaction was clearly set out in his unsuccessful requests for appointment of additional counsel, it was just too heavy a burden for a single lawyer. (CT 378 [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, *supra*, at pp. 3].) To avoid such a "disastrous" outcome, he unsuccessfully asked that he be allowed to withdraw from the case if second counsel were not appointed. Both requests were denied. (CT 367 [Order Denying Application for Second Counsel, Oct. 21, 1997]; CT 375 [Second Order Denying Application for Second Counsel, Nov. 20, 1997].) As a result, rather than forfeit his solo practice, his financial stability, and responsibility to his referenced employee, he effectively surrendered Appellant to the prosecution. Mr. Beswick was presented with a Hobson's choice, prepare adequately for Appellant's trial, or fulfill his duties to other clients and employee.

> To provide the type of representation guaranteed by the U.S. and state constitutions I will undoubtedly have to spend a considerable amount of time preparing and reviewing all of the facts and circumstances surrounding this matter in addition to trying a matter for over two months. Essentially I [have had] to remove myself from my practice of which I am the sole practitioner. To work for the period of time required without compensation would prove disastrous to my practice and my employee . . . I would be very hard pressed to provide the representation needed while at the same time trying to save my practice.

(CT 388 [Declaration of Robert H. Mr. Beswick, Jan. 8, 1998, ¶ 6].)

In addition to the lack of time and resources that Mr. Beswick had available to devote to Appellant's case, it was also his first death penalty case. (CT 380 [Declaration of Robert Mr. Beswick, *supra*, ¶ 3].) That lack of experience further dramatized the need for second counsel in the case.[19] (RT 3355.)

The lack of preparedness at trial was evidenced by an incoherent strategy which the prosecution capitalized upon to the prejudice of Appellant. With a dearth of information, Mr. Beswick ineptly presented testimony meant to show that Appellant was being set up, and was not the perpetrator of the crimes for which he was accused. The information was primarily presented through the unprepared testimony of Appellant with no corroboration. (RT 2491-2602.) Because the lawyer had not prepared a defense strategy, the testimony of the client became the centerpiece of the defense presentation. Appellant's testimony was provided without evidentiary support of any kind, and the jury was able to easily dismiss it as not credible.[20] That led to a successful attack upon him by the prosecutor. (RT 2605-2659, 2674-2685.)

The trial court's refusal to provide appropriate support in the form of second counsel, as well as the refusal to appoint Mr. Beswick or substitute the Public Defender put Mr. Beswick in a position where he was forced to

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19. It is an accepted standard of practice that a lead attorney in a capital trial have "prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought." (*ABA Guideline* 5.1.1(A)(3), Feb. 1998.)

20. In a case in which a new trial was granted due to the ineffectiveness of counsel, this Court referred to relied on the testimony of an expert who explained that "if the defendant is testifying as the sole alibi, as far as I'm concerned, that's practically not an alibi. I've avoided using alibi defenses over my career, because I think if the alibi doesn't fly, the jury then gets quickly to the point that the client is guilty, because he's presented a defense that is not believable . . . I think that's the quickest way to have your client convicted." (*People v. Ledesma* (1987) 43 Cal.3d 171, 204.)

offer Appellant's testimony without corroborative evidence. Mr. Beswick was not even able to prepare his client to testify. (CT 723 [Declaration of Robert Carrasco, Sep. 17, 1998].)

c. Failure To Investigate Prosecution Witnesses

Mr. Beswick was unable to conduct any meaningful investigation. Help was needed. He did not pursue a probe aimed towards attacking the credibility of key prosecution witnesses who had motives to lie. Given that the prosecution had virtually no physical evidence and relied upon questionable witness testimony, the lack of investigation negatively impacted Appellant's defense. For example, Efran Bermudez and Tony Morales testified that Appellant admitted killing Camacho the day after the homicide while they drove to lunch. (RT 1238, 1380.) Mr. Beswick had no contact with the damaging witnesses and no subpoenas were issued to obtain employment or other records to investigate their background and possible motives for lying. (See RT 3356.) In fact Mr. Beswick was so overwhelmed that he was compelled to rely upon Appellant's sister, Leandra Carrasco, who worked as a legal secretary in a law firm, to prepare and serve subpoenas. (RT 3604.) This failing is dramatized by the situation of two key prosecution witnesses:

(1) No Investigation of Greg Janson

There was no investigation of the key prosecution witness Greg Janson who, after much resistance and the need to repeatedly refresh his recollection, claimed that Appellant had admitted committing both murders. (RT 1443, 1451.) This lack of investigation left an enormous gap in the defense case because there were indications that the witness had been involved in the Camacho murder himself. Thus he had a motive to provide false testimony against Appellant. Anthony Morales claimed that Janson, Appellant's supervisor at work, and another work supervisor, Harry Holton, were accomplices to the murder of Camacho. (RT 1310, 1329.) Once

again, Mr. Beswick pursued no investigation into this allegation: (RT 3286-3287.)

Further, Mr. Beswick was unable to investigate Janson's history of mental problems despite clear indications that the witness took psychiatric medication. The lawyer failed to investigate how the medication affected Janson's memory and ability to testify competently. He never attempted to obtain by subpoena any medical or employment records on the witness. (RT 3287-3288.)

Both Janson's mental instability and involvement in the Camacho murder help to explain his fear while testifying. It was repeatedly implied that Janson's fear was a result of threats from the Appellant. However, evidence of his involvement in the murder would have provided a valid alternate explanation, that is, he was scared because of his own culpability which forced him to give perjured testimony in order to escape punishment.

Had Mr. Beswick been able to investigate Janson's background, associations, and motive for wanting Camacho dead, he could have effectively impeached his testimony and sown reasonable doubt in the mind of the jury as to the credibility of the witness. Without Janson, the prosecution's case would have been weak. He was especially damaging to Appellant for several reasons. Janson claimed to have been a friend who had known him for some time. He provided testimony that supported the prosecution's theory of the case which included tying Appellant to both homicides, alleged motives for each, and, his alleged admissions about the crimes and their reasons.

Janson also provided the only substantiation of Shane Woodland's testimony, the co-defendant in the Friedman homicide who had motive to falsely implicate Appellant. Woodland's testimony was particularly shaky because, as detailed in the following section, witnesses identified only Woodland, not Appellant, among the assailants fleeing after Friedman was killed. Without the corroboration of Janson, Woodland's testimony could

have been dismissed as self-serving and non credible. As also discussed below, the jury's questions during deliberations indicated a concern about the truth of Woodland's testimony even with Janson's support.

Without testimony from Janson, the evidence connecting Appellant to the Camacho homicide is reduced to several people who testified that Appellant was upset to lose Camacho's work shift; testimony that he often carried a gun at work; and testimony from two individuals—Efrain Bermudez and Anthony Morales—who claimed that Appellant admitted to them that he killed Camacho. Morales alleged that Appellant admitted his guilt during a car ride on the way to McDonald's for lunch, and further alleged that he said that Janson had helped with the killing by alerting Appellant when Camacho arrived for work. (RT 1308-1310.) However, another occupant of the car during the ride—Mario Baltazar—testified that Appellant never said any such thing about the murder. (RT 2302-2303.) Appellant testified that Bermudez was angry at him because he was the union representative at the dairy, and blamed Appellant when he lost his job, thus giving him a motive to lie. (RT 2652.) Given the crucial role that Janson's testimony played in the prosecution's case against Appellant for the Camacho homicide, the failure to investigate Janson was harmful to the defense.

(2) No Investigation of Shane Woodland

There was also no investigation regarding Shane Woodland, the likely principal perpetrator in the murder of Allan Friedman, despite a wealth of circumstances implicating him. The lawyer never sought to obtain juvenile court records, school records, employment records or any other records related to Woodland. (RT 3300-3301.) Nor did he attempt to interview neighbors, acquaintances, or any individuals who might shed doubt on Woodland's credibility or trustworthiness. (RT 3301.) Woodland was the only eyewitness who identified Appellant in connection with Friedman killing. As such, undermining his credibility was essential to the

defense, but Mr. Beswick acknowledged the following in post-trial testimony. (RT 3300-3301.)

The prosecution's case against Appellant concerning the Friedman murder was based almost exclusively on Woodland's testimony, with some support from Janson. Yet, in return for agreeing to testify against Appellant, Woodland was allowed to plead guilty to manslaughter.[21] (RT 3300-3302.) His fingerprint was found on the victim's jeep although he claimed that he never left the car at the time of the homicide. (RT 2129.) He was identified by several witnesses who observed suspects fleeing the scene of the crime while no one unequivocally identified Appellant.

Only one witness at the scene, aside from Woodland, ever identified Appellant, and that identification was undercut by earlier materially contradictory descriptions and testimony. Hugo Saavedra had not picked Woodland out of a photographic line-up,[22] but identified him in court as the passenger in the car that fled from the scene, based on his "clean, very clean" haircut. (RT 1845.) Earlier, though he had described the second person as looking like a brother to Woodland, whom he described as a "clean-cut person, an American-looking person,[23] and a young guy." (RT 1849; RT 33 [Preliminary Hearing, Apr. 9-10, 1996].) He also told the police that they both "looked like pretty boys." (RT 33.) In reality, Appellant and Woodland looked nothing alike: Woodland is fair skinned, tall, thin, and was only 18 at the time. Appellant is Hispanic with darker skin, stockier, and many years older; he was not someone who would be identified as "American-looking" or looking like a "pretty boy." In fact, Appellant is so unlike this

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21. Shane Woodland was initially charged with first degree murder and faced 25 years to life in prison. His guilty plea and agreement to testify against Appellant reduced his prison sentence to six years. (RT 1993-1995; CT (Supplemental II-A) 159-161.)

22. In fact, Saavedra picked a photo of Shane Woodland's brother out of a photo six-pack. (RT 2210.) Woodland had two brothers.

23. Appellant is Mexican-American, with strong Hispanic features.

description that when asked at the preliminary hearing if Appellant looked like a pretty boy, Saavedra "sighed and sort of laughed after looking at [Appellant]" and then said: "No, doesn't look like that." (RT 33-34.) No other witnesses identified Appellant as one of the two people in the get-away car.

Other evidence tied Woodland to the killing. A receipt was found in a bag taken from the victim's jeep which indicated that Woodland's brother had sold a car to Friedman. During testimony Woodland admitted it was he, not his brother, who sold the car, but denied that the man he sold it to was Friedman even though his name was on the receipt. (RT 2012.) Additionally, Woodland was driving the car used in the homicide when arrested on the same day as the killing. He had taken the car to have the windows tinted in order to change its appearance following the shooting, at the behest of Javier Chacon, Sr.. (RT 1979.) Prior to the arrest, he fled from the police in that same car when he became aware that the police were following him. (RT 1984.)

Further, Woodland was caught trying to dispose of a cell phone that was used to call Friedman the day before the homicide, minutes before it occurred. In testimony he claimed the phone belonged to Appellant. (RT 1985.) However, it was found in his possession, and there were multiple calls from the phone to Woodland's father and his girlfriend, making it clear the phone truly did belong to Woodland. (Defense Exhibit F, Hearing on Motion for a New Trial, Los Angeles Police Department Murder Book re: Allan Friedman Homicide.)

While all of this physical evidence linked Woodland to the homicide of Friedman, the police had virtually no physical evidence tying Appellant to it. However, they offered Woodland a lesser sentence in exchange for testimony against Appellant. Woodland's testimony then became the most important evidence against Appellant.

The only other evidence against Appellant was an alleged matching fingerprint on a hairspray bottle in the glove compartment of the car used during the homicide. The bottle was subsequently lost by the police.[24] Given the nature of the case against Appellant, which relied almost exclusively on Woodland to link Appellant to the Friedman homicide, a diligent investigation of his background and associations was essential.

It became apparent during deliberations that the jury was concerned about the credibility and accuracy of Woodland's testimony, particularly in light of conflicting information given by other witnesses. The jury asked for a read back of his testimony. (RT 2971.) They also asked for the height of Appellant, reflecting a concern that witness testimony describing the shooter did not fit the accused. (RT 2977.) The jury also asked when Woodland had begun negotiating with the police, and about a previous transaction between Woodland and the deceased. (*Ibid.*) The jury's concern suggests doubt about whether to believe his testimony.

d. Failure To Interview or Subpoena Potential Impeachment Witness, Sasson

Bruce Hill, Woodland's attorney, had interviewed a witness identified as Sasson and told Mr. Beswick about him. (RT 3726.) "It was the account of Mr. Sasson, albeit indirectly, that Mr. Friedman had made arrangements to meet with Shane Woodland on the day of the fatal events and that these arrangements had been made the previous day." (RT 3726). Sasson might be able to provide additional evidence that Woodland was attempting to exculpate himself and place all the blame on Appellant. There is no indication in the record that Mr. Beswick ever sought to contact Mr. Sasson.

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24. Argument IV, *ante*, pp. 47-56.

e. Defense Counsel Prejudiced Appellant By Joining The Escape With The Murder Trial

The prosecutor did not seek to have the escape case tried with the murder charges. (RT 9.) Nevertheless, Mr. Beswick agreed to have them tried together. The court questioned him about the decision. (RT 267.) The prosecutor then asked Appellant if he waived his right to have a separate jury hear and decide his guilt in the escape case. (RT 268.) Without any advisement from counsel or the court, he agreed with his lawyer's suggestions to the waiver, which Mr. Beswick joined. (*Ibid.*) There could be no strategic reason for the defense to try the escape with the murder counts. Having the jury learn the details of the escape would unquestionably lead it to draw negative inferences about Appellant's character and future dangerousness. More importantly, they would view it is a strong indication of guilt as to the murder charges. Mr. Beswick made his decision to have the escape charge tried with the two homicides hastily, without considering the consequences. When the judge cautioned him to think about this decision, he responded, "I think since we already have it out there, I go the responses back, rather than wasting the court's time, certainly wouldn't hurt Mr. Carrasco's case, I don't believe." (RT 267.)

The sudden and inexplicable manner in which Mr. Beswick suddenly changed his position from wanting the escape tried after the murder trial, to asking that they be tried together, reflects the pressure on Mr. Beswick to move the case along. He had told the court earlier of his concern that Appellant's case would destroy his solo law practice. Under the circumstances, his client would not be effectively represented. "To work for the period of time required without compensation would prove disastrous to my practice . . . I would be very hard pressed to provide the representation needed while at the same time trying to save my practice." (CT 385-390.)

Mr. Beswick's change of mind over combining the escape trial with that of the homicides reflects that the was facing financial reality. In order

to try to save his practice, he had to combine the cases so that he could shorten the time devoted to defending Appellant and move on to revenue producing clients. No reason was offered for trying the escape with the other charges except his alleged concern for the court's time. (RT 267.)

f. Failing To Object To The Playing Of A Taped Police Interview Which Contained Prejudicially Inadmissible Statements

Mr. Beswick agreed to allowing the jury to view in its entirety a video tape of an interview of the principal prosecution witness, Greg Janson, even though it contained hearsay, speculation, non-expert opinions, and conclusory remarks. (RT 1509.) Janson was employed at Ross Swiss Dairy where the Appellant and George Camacho, deceased, worked. He was interviewed by detectives concerning both homicides. In the interview, Janson alleged that Appellant had talked about killing Camacho before the homicide, and afterwards confessed. (RT 1575-1576, 1601.) He claimed that Appellant had asked him to also provide an alibi for the day of the Friedman homicide, and that, in response, he took Appellant to his house in Green Valley. (RT 1582-1583.) He also claimed that Appellant had told him of killing someone else and explained some of the circumstances, e.g., a younger man was driving the car the Friedman killers used, it involved a drug deal and an intention to rob the deceased of cocaine, Friedman drove a jeep, Appellant took a book instead of the cocaine by mistake, the driver had the windows tinted after the killing, a .380 to used to kill Friedman and a 9mm to shoot Camacho, and that Appellant had told a friend that he knew Janson had talked about what had occurred and he would "take care of him." (RT 1581, 1584-15856, 1591, 1602-1603, 1610.) Later in grand jury and preliminary hearing testimony, Janson repeatedly stated that he did not recall making such statements to the police. (CT 51-79, 161-177.)

At trial the prosecutor sought to introduce a tape of Janson's interview with the police to "refresh" his memory and for impeachment pur-

poses. (RT 1402.) Mr. Beswick requested that the tape be withheld until Janson began his testimony in order to lay the foundation for introducing it. (*Ibid.*) The court agreed. (RT 1403.) Under direct examination, Janson again indicated that he could not remember what he told the police detectives during the interview. (RT 1417.) In response, the prosecutor sought to introduce the. (RT 1419-1420.) The court then permitted Janson to review a transcript of the interview, but refused to allow it to be played. (RT 1419.)

After Janson read the transcript of his police interview, he began to answer:

> Q. Did the defendant tell you the kid was the driver of the car?
> A. I can't remember.
> Q. Did you tell detectives that the defendant told you that the kid was the driver of the car, sir?
> A. Yes, I must have, yeah.

(RT 1458.)

And then:

> Q. Now, did the defendant, also, tell you anything about a chase involving the kid who is the driver of that car?
> A. Yes.
> Q. What did the defendant tell you about a chase?
> A. He said—I guess, the kid went to get the windows tinted or something and they went to do a routine traffic stop or something.

(RT 1464-1465.)

On cross-examination, it was elicited that at the time of the police interview Janson had been taking medication—Prozac and Clonopin—because he was "depressed and stressed out and used to get anxiety attacks." (RT 1471.) Mr. Beswick then used the preliminary hearing and grand jury testimony to impeach his present testimony on direct examination. He read a number of questions from the prior hearings to Janson in order to refresh his memory. (RT 1486-1504.) At a break in questioning,

the prosecutor again asked to introduce the tape based upon Evidence Code section 791. (RT 1508.) She argued that "[a]fter Mr. Beswick's cross-examination where he brought in all of the prior inconsistent statements of the witness, I now have the opportunity to bring in the prior consistent statements, which is why I had no objection to Mr. Beswick asking all of the questions which the witness gave inconsistent statements." (RT 1508.) Thus cornered, Mr. Beswick agreed to it being heard in its entirety: "Play the tape, your honor." (RT 1509.)

Due to the defense waiver, the tape of Janson's police interview was played in its entirety for the jury. It went far beyond the scope of prior consistent statements. The following are examples of prejudicially inadmissible statements that should have been excluded, with the statute from the Evidence Code providing the basis for exclusion listed in parentheses:

"[Bert]'s getting a little crazy. . ." (RT 1567.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"He always carries a gun. . ." (RT 1568.)

(Evid. Code, § 702 [Personal knowledge of a witness]; *Id.* at § 787 [specific instances of conduct relevant only as tending to prove a trait].)

> "We had an incident. . . after work one night where someone . . . [Bert] always carries a gun . . . and someone ended up pulling a gun on him, or pulling his gun out of his back as we were all pretty tipsy out there, and he started a fight with some guys, and his brother came up behind them. . . this one guy he started a fight with came up behind him . . . took the gun out . . . slapped him in the head with it, and then started firing it . . ." (RT 1568.)

(Evid. Code, § 787 [Specific instances of conduct relevant only as tending to prove a trait].)

> "The guy's made me so nervous at work, and everybody else. I was getting sick and tired of everybody being scared of Bert, because they know he packs a gun all the time. . ." (RT 1569.)

(Evid. Code, § 702 [Personal knowledge of a witness]; *Id.* at § 1200 [hearsay].)

> "[I]t might be common knowledge to people that work around him that he is probably the prime suspect in this particular thing." (RT 1570.)

(*Ibid.*)

> ". . . It has gotten to the point where everyone's scared of him at work. . ." (RT 1571.)

(*Ibid.*)

> ". . . I mean, he's told a lot of different people everything at work so, I mean, I'm just one of the ones that's coming forward about it." (RT 1572.)

(*Ibid.*)

> ". . . Cause I know who he's involved with. I, like I said, I've hung out with him before, and I've went. . . a . . . places with him, and you know, he's told me about these people, and these people being, you know, how terrible they are, and what they do, so . . ." (RT 1575.)

(Evid. Code, § 702 [Personal knowledge of a witness].)

> "Anything that gets in his way he says he'll take care of, you know. You don't know how far he'll go." (RT 1577.)

(Evid. Code, § 702 [Personal knowledge of witness]; *Id.* at §§ 800, 803 [Opinion of a lay witness].)

> ". . . because I know for a fact that he did it . . . I can just see. . . expressions in him . . .the way he was . . . after doing something like that I guess, you know, maybe it hit him in the head, and I could just tell . . ." (RT 1577-1578.)

(Evid. Code, §702 [Personal knowledge of witness]; *Id.* at §§ 800, 80 [Opinion of a lay witness].)

> "Cause Bert has no conscience." (RT 1578.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

> "[H]e picks to hang out with the younger crowd . . . so, I think he can manipulize [sic] them to do whatever he wants to do, you know." (RT 1580.)

(Evid. Code, § 702 [Personal knowledge of witness]; *Id.* at §§ 800, 803 [opinion of a lay witness].)

"He's not all there, I'm telling you." (RT 1592.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"Detective: Did he say how he got involved with this particular incident?
Janson: They needed someone to . . . to do this or whatever . . .
Detective: If he told you.
Janson: No. He didn't tell me . . ." (RT 1596.)

(Evid. Code, § 702 [Personal knowledge of witness].)

"Once he started getting a little crazy, you know . . ." (RT 1597.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"Everybody's leery of, you know, what he might do." (RT 1598.)

(Evid. Code, § 702; hearsay, §1200 [Personal knowledge of witness].)

"[T]he whole thing that scares me is cause he'll say . . . tell my friends that he knows, I don't know, he knows to talk to me, you know, all . . . I think he ratted on me for this or whatever, and I'll take care of him, you." (RT 1610.)

(Evid. Code, § 1200 [Hearsay].)

"Detective: In your opinion, do you think Robert did this?
Janson: In my opinion, yea.
Detective: And why would you say that?
Janson: Why would I say that? . . . Cause I don't think he has a conscience. I think he could do something like that." (RT 1610.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"Cause Bert's talked crazy ever since I knew him." (RT 1612-13.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"That's why I say, I think he, you know, I'm pretty sure he did that one too." (RT 1613.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"Maybe Bert was lying, you know, I don't know, but just the expression on Bert's face made me believe he did something again, cause I could see . . . see it in his face." (RT 1614.)

(Opinion of a lay witness, Evid. Code, §§ 800, 803.)

In addition to the listed reasons for exclusion, these portions of the tape should also have been excluded based on the court's discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice. (Evid. Code, § 352 [Discretion of court to exclude evidence].) Janson's statements were not given under circumstances which would tend to indicate reliability or truthfulness. He was apparently emotionally distraught. He indicated during trial testimony that he had been under a lot of stress due to a divorce and that he was taking medication that he felt were affecting him. Further, he asked the police that the statement not be recorded. Under such circumstances, his comments were more prejudicial than probative and Mr. Beswick should certainly have objected on that basis.

Mr. Beswick also failed to object to the statements on the tape by the police interviewer about anonymous calls he received that implicated Appellant. When the detective testified later, he referred to the same anonymous phone calls. Mr. Beswick objected on grounds of hearsay, and moved to strike, which was sustained and the testimony stricken. (RT 2238.) On the tape, the detective discusses the same calls. Since Mr. Beswick had opened the door—there was no defense objection. (RT 1599.)

g. Failing To Utilize Crucial Evidence Of A Videotape Containing Two Police Interviews Of A Pivotal Witness, Shane Woodland, In Which His Statements Were Materially Different From His Trial Testimony

Mr. Beswick was so overwhelmed by having to defend Appellant that he overlooked using crucial evidence which would have destroyed the credibility of the key prosecution witness, Shane Woodland. The prosecutor and detectives twice interviewed Woodland as part of negotiations for a plea agreement. He was charged along with Appellant. Both interviews were videotaped. Woodland provided versions of the murder of Allan Friedman during each interview that were materially different from his testimony before the grand jury and at trial. However, Mr. Beswick failed to use them to impeach Woodland. Thus the jury was unaware that the witness was lying.

Throughout the first interview, the prosecution used suggestive questioning and pressured Woodland with statements, e.g., "we don't believe you", "the jury's gonna know something's missing", "what are you gonna think when Bert walks and you're behind bars", "I can't believe you didn't see Carrasco with a bag", and, "you need to remember what he had with him when he got in the car." (CT 754.) Nevertheless, Woodland stated throughout the first interview that he did not see Appellant take a bag from Mr. Friedman. The bag was critical to the prosecution's theory that the killing occurred during a drug deal in order to steal the victim's cocaine. Appellant was alleged to have taken the bag, believing it contained cocaine. He then allegedly threw it out the window when he discovered that there was none. There was no physical evidence linking him to the bag. In fact, a receipt found in the bag bore the names of both the deceased and Woodland.

Without physical evidence connecting the accused to the bag, the prosecutors needed Woodland to provide the link supporting the theory.

However, during the initial interview he repeatedly stated that he did not see Appellant with a bag. At the end of the first interview, the prosecutor expressed her dissatisfaction with Woodland's recollection of events, suggesting that she might not offer him a deal unless the information he provided changed.

The second interview began with a discussion of the potential terms of a plea agreement—that in return for testimony which satisfied the prosecutor, he could plead guilty to manslaughter. Then, Woodland materially altered his story from that provided during the first interview to include a mention of the bag allegedly taken by Appellant. This conformed to testimony that he gave at trial, and provided a basis for prosecuting Appellant As discussed, the prosecution case for the Friedman homicide was based almost exclusively on Woodland's testimony, which was provided in return for lenient treatment. Woodland was the only eyewitness who identified Appellant as Friedman's killer. Others gave descriptions that did not match Appellant. One picked Woodland's brother from a photo lineup as the other person at the scene. The only other evidence against Appellant was a fingerprint which allegedly matched him on a hairspray bottle in the glove compartment of the car used during the shooting. It was lost by the police and thus not produced at trial. The jurors demonstrated their concern about the credibility and accuracy of Woodland's testimony, when they asked for a reread of Woodland's testimony. (CT 459-460; RT 2978.) Impeaching Woodland with this inconsistency would have given the jury one more reason to disbelieve him, but Mr. Beswick failed to bring it to the jury's attention.

h. Defense Counsel Prejudiced His Client By Informing The Jury Of Inadmissible Anonymous Calls To The Police Which Identified Appellant As The Murderer of Allan Friedman

In his opening statement, Mr. Beswick informed the jury that two anonymous callers to the police had identified Appellant as the killer of

Allan Friedman. (RT 1078.) This evidence was inadmissible hearsay and bore no indicia of reliability. Moreover, there was no tactical reason to reveal the information to the jury. In fact, later in the trial when a detective revealed information about the anonymous calls, Mr. Beswick objected and made a motion to strike, which was granted! (RT 2238.) However, he had already let the cat out of the bag to the harm of the client. This sequence demonstrates a chaotic, unconsidered defense by an attorney who was overwhelmed and thus inattentive.

In the context of a weak case, Mr. Beswick's careless reference to the anonymous calls was harmful. It provided as evidence inculpatory information that was inherently unreliable, hearsay, and inadmissible.

3. Failings of Counsel – Penalty Phase

a. Introduction

The consequence of the court not permitting Mr. Beswick to have any assistance, much less to be appointed, was a failure to investigate. Under the circumstances of having to no help from another lawyer, as he had requested, he spent little time interviewing Appellant or his family (RT 3305-3306), collected no documents relating to social, psychological or medical history (RT 3302-3304), hired no experts such as social workers, psychologists, psychiatrists, or neurologists to examine the client (RT 3279-3280), and did not prepare any witnesses except at the court house one half hour before the penalty phase was to begin (RT 3305-3306). He also did not investigate or interview the damaging prosecution witness, Richard Morrison. (RT 1424.)

Mr. Beswick simply failed to do any meaningful preparation on behalf of his client for the penalty phase. Had the needed assistance been permitted in mounting defenses to two unrelated murder cases with the attendant penalty phase, it is probable that the outcome would have been different.

The court was presented with evidence during the hearing on the motion for a new trial of Mr. Beswick's inadequate penalty phase performance, but refused to overturn the death sentence and grant a new penalty phase trial. (RT 3914.) Mitigating evidence that could have been presented during the penalty phase but was neither investigated nor presented was detailed by replacement counsel in a 45-page new trial motion. (CT 546-591 [Notice of Motion and Partial Motion for New Trial, *supra*]; CT 624-659 [Notice of Motion and Motion for New Trial, *supra*]) The evidence was explained and expanded during the hearing on the motion. (RT 3240-3934 [Sept. 17-18, Dec. 9-10, 1998, Jan. 7, Feb. 5, 1999].) It included:

- At the age of eight, Appellant began using PCP and other drugs—a habit that lasted two decades. PCP causes neurological damage, brain atrophy, memory loss, psychosis and a host of other problems. (RT 3362-3371, 3380-3382, 3423.)
- His mother suffered from toxemia while pregnant with him, and experienced seizures during his birth which may have caused neurological damage. (RT 3567.)
- Appellant had fallen on his head at a young age with a force strong enough to break a vertebrae in his back and put him in traction. (RT 3572.) Such a drop could have caused organic brain damage—counsel should have hired a neurologist to pursue this inquiry. (RT 3384.)
- When Appellant was 10, he watched his father being taken away in an ambulance after a fatal heart attack, and never saw him again. (RT 3565-3566.) The psychological injury to Appellant should have been explored and presented to the jury.
- His step father was physically abusive with his mother and Appellant; as a result Appellant avoided home and spent more time hanging out on the streets as a result. (RT 3570.)
- Mr. Beswick failed to investigate the influence of Appellant's Hispanic background on his upbringing or the impact of the notorious gang activity in and around the Mar Vista projects.
- While at work as a driver for the Ross-Swiss Dairy, Appellant was in a crash that resulted in serious head injuries and unconsciousness. (RT 3383-3385) Defense counsel should have investigated the effect of the accident, and the cumulative effects of the car accident, the childhood fall, and 20 years of drug use on the Appellant's brain. (RT 3384, 3381.)

- Appellant began working at the age of 13 to help support his family. Later he hired local teens at his car repair business in order to provide them with alternatives to gang activity. It was an effort to overcome what he had experienced growing up. Appellant was never violent towards his family, his wife or his children.
- After two decades of drug use, he found the strength to successfully complete a drug treatment program in order to help his family. (RT 3638.)
- Records of Appellant's remarkable withdrawal from drug use were available from the program, Victory Outreach, but never obtained and presented at trial by Mr. Beswick. (RT 3636.) The attorney never spoke to Andy Valdez who could have testified about Appellant's admissions to Victory Outreach and Brotman Medical Center for Drug Abuse. (RT 3636-3637.)

Without the assistance of second counsel, Mr. Beswick was simply overwhelmed by the task of having to prepare for two distinct and unrelated murder cases in which the prosecution was asking for the death penalty. Having to also prepare for the penalty phase without any assistance was simply beyond him. To the prejudice of the client, the lawyer was drowning.

In the following are examples of the failings of Mr. Beswick that resulted in Appellant being deprived of fundamental constitutional rights. Under these unusual circumstances of this case, the denial of the motions for second counsel resulted in state interference with Appellant's right to counsel, effective assistance of counsel, due process of law, and equal protection of the law, under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

b. The Failure To Investigate And Present Mental Health And Social Background Evidence Was Far Below Professional Norms Of Representation In Death Penalty Cases

Trial counsel never investigated any possible prenatal injuries, birth complications, childhood illnesses and accidents, drugs, personality, behavioral disorders, interpersonal relationships, family, physical problems, be-

havioral problems, socio-cultural problems, or institutionalization, to be used for penalty phase mitigation. This type of evidence was routinely offered at the penalty phase of capital cases at the time of the Mr. Carrasco's 1998 trial. (See e.g., *People v. Deere* (1985) 41 Cal.3d 353, 366; *People v. Davenport* (1985) 41 Cal.3d 247, 276; see (ABA Guidelines Sec. 11.4.1 (C), 1989.)

The legal expert at the hearing on the motion for a new trial explained the need for a "cradle to arrest" investigation that includes the areas of "prenatal, birth complications, childhood illnesses and accidents, drugs, personality, behavioral disorders, interpersonal relationships, family, physical problems, behavioral problems, socio-cultural problems, institutionalization, and mitigation." (RT 3360.) Although such an investigation was common procedure in death penalty cases, Mr. Beswick failed to gather a single document relating to Appellant's social history. Mr. Beswick admitted that he essentially did nothing on behalf of his client in preparation for the penalty phase. (RT 3279-3280.) He did not obtain any records, such as those from school, of any type. Even the prosecution's expert, Bruce Hill, admitted to the importance of investigating the social history of one accused of a capital offense. (RT 3302-3303.) The defense expert concurred that interviewing family members is crucial to the penalty phase and must begin before the trial, not after a guilt verdict is rendered. (RT 3391.) In a situation as here, an attorney's representation is deficient where the investigation was abandoned after "having acquired only rudimentary knowledge of his history from a narrow set of sources." (*Wiggins v. Smith, supra,* 539 U.S. at p. 524.)

c. Counsel Failed To Investigate And Present Evidence Of Appellant's Long-Term Drug Use, Multiple Head Injuries, Death Of His Father, Presence Of An Abusive Step-Father, And Growing Up In A Violent Environment

(1) Failure To Investigate, Hire An Expert, Or Present Evidence Of Effects On Appellant Of The Use Of Mind-Altering Drugs From Childhood Until Age 30

Mr. Beswick conceded that he had been aware that Appellant "had used PCP" along with other drugs such as speed and marijuana. (RT 3528.) He knew that the drug problem was so severe that his client had been in drug rehabilitation programs. (RT 3530.) But Mr. Beswick did not gather records from the programs or interview anyone who treated Mr. Carrasco or present any evidence to the jury regarding the drug problem.

He spent no time interviewing the defendant's family, and did not hire a single mental health expert. He obtained no school records or documentation of Appellant's substance abuse, which were readily available. (RT 3530-3533, 3571-3572.) Competent, supported counsel would have recognized that the significant use of drugs such as PCP would require exploring its effect upon the client in relation to of mental illness. (RT 3138-3139, 3362.) Yet there was no evaluation of Appellant's history of drug abuse, which should have been known to defense counsel long before his client testified. It should have triggered an investigation into the short and long-term effects of the drugs and the treatment received, whether it was mandatory or voluntary, whether he was able to stay clean for any length of time, and other matters that would be significant to a jury deciding whether Mr. Carrasco would receive a death sentence or life without parole.

Appellant's family had personal knowledge of his drug use and its effects on his brain to which they testified at the evidentiary hearing on the motion for a new trial. (RT 3571.) His mother explained that while on drugs, he had headaches and believed that people were following him and,

at one point, unreasonably believed there was a man in a tree spying on him. (RT 3571.) The ex-wife reported that he used PCP, cocaine and crack which had led to hallucinations and paranoia. For example, when she and Appellant were in a hotel several stories up, he closed the drapes in reaction to "someone walking by" the window, an obvious impossibility. (RT 3633.) She reported another occasion in which, while under the influence of drugs, he came home, laid down, and began howling, causing his wife and daughter to leave the home hurriedly and to seek immediate treatment for her husband. (RT 3636.)

In order to determine the effects of PCP on a defendant and thereby assemble data to be used in evaluating the availability of mental-state information in mitigation, the defendant must be subjected to psychiatric and psychological evaluations, and his background investigated. (*Ibid.*) Mr. Beswick did none of this. The evidence, as presented herein, establishes that he had a history of head injuries and mind-altering drug use.

(2) Failure to investigate brain damage resulting from Appellant's multiple head injuries and the medical effects of his mother's toxemia while she was pregnant with him

Appellant had fallen on his head at a young age with a force strong enough to break a vertebrae in his back. He had to be in traction for two weeks. (RT 3572-3573.) As an adult he suffered injuries to the head, jaw, and skull in an automobile accident in 1987 which caused his entire head to swell. (RT 3356, 3383, 3415, 3547-3548, 3572-3574.) Further, Appellant may have had prenatal difficulties due to his mother's toxemia and injuries associated with her seizures during his birth. (RT 3567.) Yet, Mr. Beswick investigate the severe head injuries and likelihood of organic brain damage. Nor did he hire a medical expert to evaluate the effect of these events on Appellant's brain functioning and behavior. (RT 3279-3280.)

Probing a defendant's medical history is a routine part of death penalty investigation, particularly where there had been head injuries. (See

e.g., *Douglas v Woodford* (9th Cir. 2003) 316 F.3d 1079; *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148; *Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152; *Evans v. Lewis* (9th Cir. 1994) 855 F.2d 631.) This was explained to the trial court during the hearing on the motion for new trial. Head injuries are a "red flag" that "alert[] the attorney he or she has an absolute obligation to follow-up. To get more information. To seek expert assistance to determine whether or not that could be used as a factor in mitigation during the penalty phase." (RT 3384.) This was not even attempted by Mr. Beswick. (RT 3384-3385.)

(3) Failure to investigate impact on Appellant of his father's death as a ten year old and mother's remarriage to an abusive alcoholic man three years later

Mr. Beswick did not investigate the emotional and psychological impact on Appellant of his father's death when he was 10, or his mother's subsequent remarriage to a man who beat Mr. Carrasco. (RT 3565-3568.) He never investigated allegations of physical abuse in the household by the stepfather or the effect of the man's alcoholism. (RT 3696.)

Had counsel talked to Appellant's mother, he would have discovered, as the mother disclosed in the new trial proceedings, that he was significantly affected by his father's death. Appellant's mother and sisters testified that he had a close relationship with his dad. (RT 3679.) Then he went through the trauma of seeing his father carried out of the house on a stretcher after a heart attack, Appellant never saw him alive again. (RT 3565.) Appellant's sister testified that when their father died "all of us were really devastated . . . Bert, he was more so . . . because he was so close to my dad . . . afterwards he was sort of withdrawn and he actually went with his friends a lot more often than we did. He was always gone." (RT 3678.) After that, Appellant became withdrawn and depressed. (RT 3678.)

Appellant's mother remarried three years after her husband's death. (RT3568.) She testified at the post-trial hearing regarding her new hus-

band, who was "abusive verbally not as much physically but verbally. He was a little bit physical, but not to hitting—pushing and shoving and yelling and ranting and raving. . . . he was an alcoholic. . . . [H]e was very hard to live with. He was abusive and in his speech the things he used to say, and he tried to shove me around." (RT 3568-3569.) Consequently "the kids were always – they tried to hide from him, and I was going to get a divorce." (*Ibid.*) Appellant's sister testified that her stepfather hit her and that the police were called to the house on four or five occasions, and on one occasion he was taken to jail. (RT 3688-3689.)

As Appellant got older, he began spending more time away from home. (RT 3570.) Another sister testified briefly at the penalty phase about what happened following their father's death: "When she was growing up Bert took on some responsibilities of a father. He was always there for her and her sisters and would protect them all the time." (RT 3082) Another sister testified that "when our father passed away, that is when Bertie really did assume the father figure role because he felt that since our father was gone and he was a bigger guy, that he felt he had a need to protect all of us." (RT 3090.)

Counsel did not investigate his client's history of being abused and suffering head injuries. The lawyer did not even retain a psychologist to evaluate Appellant in order to develop and present evidence regarding the effects of losing a father at an early age and of subsequent exposure to an abusive stepfather and other mitigating facts. Mr. Beswick made no mention of these events, or any other testimony regarding the family even in his closing argument. (RT 3159-3163.)

(4) Failure to present mitigating evidence of poverty and gang activity in the projects in which Appellant grew up

Appellant grew up in a poor Hispanic family in the Mar Vista projects of Culver City where drugs, guns, violence, and gangs were rampant.

(RT 3063, 3072, 3073, 3084, 3568.) Because his father had died leaving five children, Appellant was forced to start working at McDonald's when just 13 years of age. (RT 3064.)

Mr. Beswick failed to investigate the influence of Appellant's poverty-ridden Hispanic background on his upbringing or the impact of the notorious gang activity in and around the projects. As a child and young adult, Appellant was exposed to the murderous activity of gangs in his neighborhood, where people he knew were often shot and killed. (RT 3140.) Because of the presence of an abusive stepfather, Appellant's home had ceased to provide a safe haven from the rampant violence of the community. (RT 3569.) As a result, Appellant spent more time on the street, increasing his exposure to drugs and gang activity. (RT 3570.)

(5) Defense Counsel Did Not Investigate Or Interview Damaging Prosecution Witness Richard Morrison, Therefore Prejudicing The Outcome Of The Penalty Phase

Well before the end of the guilt phase, the prosecutor requested the court's permission to introduce a witness to present possible Penal Code § 1101(b) evidence, i.e., character evidence. (RT 1424.) Richard Morrison was to testify to an incident that occurred 18 years earlier in 1980. (RT 1323.) Appellant allegedly threatened Mr. Morrison with a gun. Mr. Beswick began to object to the witness based on the number of years that had passed and because the testimony was more prejudicial than probative under Evidence Code § 352. (RT 1424.) However, the court interrupted him, continuing the discussion for the next day so it could review prosecution material related to the witness. (RT 1424.) However, there was no further discussion at any time regarding the witness, and Mr. Beswick did not renew his objection. Mr. Morrison testified at the penalty phase that Appellant had while they at the Edgemar Dairy. (RT 3123-3129.) The prosecutor relied on this in closing argument (RT 3154.)

Although Mr. Beswick had ample time to investigate and interview Mr. Morrison, he did not do so. He did nothing to prepare for his testimony and maintained no records in his file relating to prosecution discovery or to the witness. (RT 3379.) Because of the lack of preparation, the prosecutor was able to present, virtually without challenge, testimony by a former co-worker at a different dairy that, 20 years earlier and without any provocation, Mr. Carrasco pointed a gun and told him to leave. (RT 3123-25) And on the basis of this alleged unprovoked (and unreported) threat, Mr. Morrison simply walked away from his job without even giving two weeks notice. (RT 3125.) Mr. Beswick's cross-examination elicited only answers that solidified Mr. Morrison's testimony that he was terrified. (RT 3125-3129.)

A legal expert testified on the motion for a new trial that Mr. Beswick's failure to insist on discovery would "enhance" his opinion that the lawyer was incompetent. (RT 3379.) Because the lawyer did not interview or investigate Mr. Morrison, he was unable to present any impeaching evidence or otherwise counter the prosecution's evidence of prior acts of violence. Clearly the attorney was unprepared for Morrison. (RT 3379.)

Mr. Morrison's unchallenged testimony was devastating to Appellant's case. The testimony that Appellant had threatened his life many years earlier allowed the jury to conclude that Appellant's dangerous behavior was ingrained, long-lasting, and unlikely to change. That conclusion was certainly an important factor in the verdict of death. Mr. Beswick's failure to renew his objection to Morrison's testimony coupled with his failure to conduct any investigation, prejudiced Appellant.

(6) Mr. Beswick Opened The Door To Inadmissible Evidence Of Appellant's History Of Arrests And An Incident In Which He Allegedly Threatened Someone 18 Years Earlier

Mr. Beswick was unable to investigate the case due to the failure of the state to provide essential funds, second counsel, or even pay him. He

thus blindly opened the door for the prosecution to introduce extremely damaging evidence that was otherwise inadmissible. During penalty phase questioning of Appellant's sister, Barbara Gamboa-Carrasco, the lawyer asked if her brother had ever had "run-ins with the law." (RT 3094-3095.) The prosecutor then successfully moved to introduce evidence of arrests and prior acts of violence that had previously been found inadmissible. (RT 3096-3097.) By asking the question about arrests, Mr. Beswick opened the door for the prosecutor to bring to the attention of the jury both arrests and a prior incident of violence. (RT 3103-3104.) But for the questions of the attorney, such information was no admissible.

The trial was in recess in order for the prosecution to bring in a rebuttal witness whose testimony of alleged threats became admissible through the questions posed by Appellant's lawyer. Richard Morrison had worked with Appellant at the Edgemar Dairy in 1980, 18 years before the trial. Mr. Morrison recalled that he abruptly quit his job out of fear for Appellant, explaining it was because he "was threatened with a gun." (RT 3124.) "I was just out in the yard. I was on my way back to the plant area when he came up to me and just pulled a gun on me. . . . I think he said something to the effect of, 'get out of here.'" (*Ibid.*) Mr. Morrison claimed that called the dairy the next day and quit. (*Ibid.*)

It is not in the record whether the testimony of Mr. Morrison was accurate or even true. Due to the lack of compensation, second counsel, or adequate ancillary funds, was no investigation of the witness or any other aspect of the case. (RT 3256.)

Introduction of the arrests and threats put Appellant in a very bad light in the eyes of the jurors. His character had been irrevocably damaged. In particular, the arrest for assault with a deadly weapon was damaging due to the violence involved, as were the purported threats 18 years earlier. The similarity to the crimes for which he was convicted compounded the effect. Threatening someone with a pistol and putting the person in such fear that

he quit his job, caused enormous damage. Also, the arrests were prejudicial as they would create a negative impression in the minds of the jurors despite the fact that they did not lead to convictions. Appellant may have been innocent, but the harm was done.

Not only did the evidence regarding arrests and violence reflect poorly upon Appellant's character, but they also served to undercut the sister's testimony. She had testified that the family members were close (RT 3090), that Appellant had never joined a gang (RT 3092), she never saw him carrying a gun (RT 3092), and that he was a compassionate person (RT 3091). After reeling off the list of arrests to Ms. Gamboa-Carrasco, the prosecutor asked: "Is it still your testimony you were very close to your brother?" Ms. Gamboa-Carrasco attempted to explain how she could be close to her brother, but not know of the arrests. (RT 3104.) It was too late, for the prosecutor had discredited her.

Because of the Morrison testimony made possible through defense counsel's incompetence, the prosecutor was able to develop more harmful evidence in the cross-examination of Appellant. She asked him if he owned a pistol in 1980 at the time of the alleged threat. Appellant admitted he did. (RT 3145.) The prosecutor then brought out that it was a .38, and he "had a holster" for it. (RT 3145-3146.) Then Appellant was asked about an arrest for assault with a firearm. (RT 3147.) Even though Appellant did not recall, the damage was done. The was the essence of the cross-examination, for the prosecutor clearly utilized otherwise inadmissible evidence which took a terrible toll on the credibility of Appellant.

The damaging evidence was introduced because of Mr. Beswick's errors. The legal expert referred to it as "proof positive of his incompetence." (RT 3441.) A trial attorney should be expected to understand the rules of evidence in order to use them to the advantage of a client, and should know enough about his or her client and the case, to know where not

to venture in questioning witnesses. In a death penalty case in which the client's life is in the balance, such a careless mistake is indefensible.

Mr. Beswick's error in opening the door for the prosecutor to introduce the arrests and threats into evidence was yet another example of his lack of preparation and inattentiveness to Appellant's case. His performance was far below professional standards. The list of Appellant's arrests presented by the prosecutor was very damaging to his defense. As presented in the preceding, Mr. Beswick had not prepared the penalty phase and thus was dependent entirely upon the unrehearsed testimony of four family members and Appellant himself who showed up in court. As the only source of mitigating evidence, the family's testimony was crucial. Ms. Gamboa-Carrasco was close in age to Appellant—one year and a half separated them—and they had attended the same schools. (RT 3088-3089.) She was in a position to provide important mitigation on his behalf.

Since Mr. Beswick had not talked with her in advance about her relationship with Appellant and his background, the testimony was superficial lasting just eight pages. (RT 3088-3096.) But whatever mitigating value her testimony might have had, despite its inadequacy, was destroyed when the prosecution was afforded the opportunity to ask her about the arrests of her brother. An already weak penalty phase presentation by Mr. Beswick, was thus weakened even more by his error.

(7) Defense Counsel's Penalty Phase Closing Argument Demonstrated That he was Dispirited and Dejected, Unable to Mount a Real Challenge to the State's Case

Mr. Beswick's four-page argument was inadequate and totally lacking in substance. (RT 3159-3163.) Without any assistance or even being paid, it appears that the burden of representing Appellant caught up with him. It was as if he was making a last gasp. He made reference to lingering doubt, when virtually none had been presented for he had conducted no investigation of either the guilt or penalty phase and thus failed to present

evidence of Appellant's innocence. (RT 3161.) No credible evidence had been presented of innocence. Further, the lawyer did not speak of any evidence which might raise a doubt. (RT 3160.)

Mr. Beswick did not argue that there was any substantive mitigating evidence. Nothing of consequence was said to humanize Appellant. Instead of directing the jury's attention to mitigating testimony, he told them to consider "everything you've heard for the past two months," which had already brought him a guilty verdict for two murders with special circumstances. (RT 3163.)

To make matters worse, he focused on an aggravating factor in support of what had just been argued by the prosecutor: "In my estimation, one shot, *one shot that kills is overkill*; eight shots, nine shots, *one shot is overkill. There's no justification for a shooting like that.*" (RT 3161, emphasis added.) The legal expert later testified that Mr. Beswick's argument fell below a reasonable standard of reasonableness. (RT 3387.) Mr. Jones called Mr. Beswick's reference to lingering doubt as "a throw away line that included almost nothing in support of it." (RT 3387.) He also explained that the jury's questions during the guilt phase deliberations indicated a potential for doubt that should have led Mr. Beswick to articulate the concept during his argument and to ask for it as a jury instruction. The questions related to the testimony of Shane Woodland and Greg Janson, whom it was earlier established could have been impeached had Mr. Beswick functioned effectively. (RT 3388; CT 457-460 [Jury Requests, Mar. 24, 1998].) "It is an argument that invites the jury to examine the distinction between proof beyond a reasonable doubt and the level of proof sufficient to kill Mr. Carrasco." (RT 3387.) Moreover, "[T]hey sent out questions on evidence that defense counsel had not covered during the trial, that should have been a red flag that the absence of that evidence that led to those questions concerned those people . . . this is the type of information

that should be explored during argument at the penalty phase because there were holes and gaps and those questions were not answered." (RT 3388.) As it was, Mr. Beswick did nothing. In sum, Mr. Beswick's penalty phase closing argument was disorganized, obviously given off the cuff without preparation, and failed to provide any sympathetic or humanizing information about Appellant.

During its penalty phase deliberations, the jury asked the court "[i]f there is a split decision, does it default to life without parole?" (CT 487; RT 3179.) The question reflects there was a difference of opinion among the jurors as to whether to vote for death. Had Mr. Beswick provided a more compelling closing argument, it is reasonable to believe that the hesitation to vote for death could have been strengthened into outright opposition for the ultimate penalty.

In combination with the many other inadequacies in Mr. Beswick's penalty phase representation, the closing argument was prejudicial. It is reasonably probable that had he properly prepared his argument, possessed a basic understanding of the law as it applied to the penalty phase, and presented a presentation which contained references to mitigating evidence and humanizing factors intended to provoke sympathy amongst the jurors, that the outcome would likely have been different.

(8) Trial Counsel's Inability to Investigate and Present a Viable Defense, Lacking Support and Assistance Due to the Trial Court's Denial of his Motions for Appointment and for Second Counsel, Was Revealed In The Motion-For-New-Trial Hearing

Mr. Beswick simply lack the funds to properly represent Appellant or investigate the case. Although Mr. Beswick introduced some of Appellant's background through the testimony of family members, he did so in a cursory manner and failed to even mention it in his closing argument. He just did not seem to understand what his responsibilities were at the penalty phase. Mr. Beswick's short examinations of family members failed to elicit

substantive evidence likely to elicit compassion amongst the jurors. Due to an absence of investigation and counsel's role at such a critical stage, Mr. Beswick simply did not know what to ask. Also, he did not appear to understand the importance of an investigation, since none was conducted. There was simply no investigation. Even a sister, independent of the lawyer, prepared subpoenas at the request of Appellant. "I got a call from Robert and he gave me the list of names of people that were to be subpoenaed." (RT 3603.) Mr. Beswick did not even help with serving the subpoenas. (RT 3604.)

Remarkably, after the guilt verdicts, and the penalty phase was scheduled for the afternoon that same day, Appellant's mother approached Mr. Beswick to ask him if he "wanted to know anything about her son, his background, what kind of a person he was, and he said, 'I'm going to put you on the stand in fifteen minutes' before we were scheduled to be in here." (RT 3561-3562.) She asked: "Don't you want to know anything about Robert.?" (RT 3563.) He had never before talked with her, two sisters, and his wife regarding the client's background. (RT 3560-3563, 3601-3603.) It was "[a]fter the guilt phase and the penalty [phase] started." (RT 3560.) There was no effort prior to trial to conduct the interviews. The mother was given 15 minutes warning that she was going to testify. (RT 3562.) The brief interviews occurred standing by a hot dog stand outside the courthouse and then in a hallway.

The preparation was done as a group, with no individual interviewing of family members. (RT 3602 [Leandra Kamba, Appellant's sister]; 3559-3960 [Martha Heredia, Appellant's mother].) Mr. Beswick did not even explain that she would be cross examined. (RT 3564.) A sister, Barbara Carrasco-Gamboa, said the only preparation she received was: "I think I'm going to call all of you, each of you up on the stand. I'm going to ask you questions of how Bert was as a brother and how close you were, and stuff like that, and that's about it." (RT 3673.)

Mr. Beswick seemed to confused and lost from the situation, that he advised the family members not to seek sympathy from the jurors, the very thing that the family of a defendant should do at penalty. "He told us not to get emotional and not to seek . . . sympathy from the jury." (RT 3464.) He advised: "Don't show any emotion and don't ask for sympathy from the jury." (RT 3578.) A sister recalled: "Mr. Beswick said: 'Please don't try to elicit any sympathy from the jury. Don't say anything that might do that.'" (RT 3680.) This direction reduced the power of family members' testimony because, as the court advised the jurors, at the penalty phase "pity and sympathy *must* be considered." (RT 3174, emphasis added.) Instructing family members to restrain their emotions undermined the presentation of mitigation and likely prejudiced the outcome.

Leandra Carrasco, a sister, asked Mr. Beswick if Appellant's oldest daughter,[25] who was a student at UCLA, should come testify: "He said, 'No, it would be too much for her.'" (RT 3602.)

Two weeks after the death verdict on March 27, 1998, six declarations from members of Appellant's family were filed to "revoke" the death penalty, without any accompanying motion or involvement of Mr. Beswick. (CT 504-506 [Declaration of Martha Heredia in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 507-509 [Declaration of Eva Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 510-512 [Declaration of Barbara Carrasco-Gamboa in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 513-516 [Declaration of Leandra Kamba in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 517-519 [Declaration of Frances Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 520-522 [Declaration of Ricardo Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15,

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25. Eva Leandra Carrasco, Appellant's daughter, graduated from UCLA and the Loyola School of Law. She was admitted to the State Bar of California on January 12, 2006 (State Bar No. 241442).

1998].) Mr. Beswick also did not prepare, review, or play any role in the preparation of the declarations. Rather, they were prepared by family members. A sister, Leandra Kamba, a legal secretary, even signed the Proof of Service for each. (CT 506, 509, 512, 516, 519, 522.) She worked with her family to prepare declarations without any assistance from trial counsel. Even though she knew nothing about such matters, Ms. Kamba felt that declarations from family members would be helpful in support of a motion for new trial, even though no such motion had yet been filed. (RT 3604-3605.)

Mitigating evidence that could have been presented during the penalty phase but was neither investigated nor presented was outlined by replacement counsel in a 45-page new trial motion. (CT 546-591 [Notice of Motion and Partial Motion for New Trial, *supra*]; CT 624-659 [Notice of Motion and Motion for New Trial, *supra*].) The evidence was explained and expanded during the hearing on the motion. (RT 3240-3934 [Sept. 17-18, Dec. 9-10, 1998, Jan. 7, Feb. 5, 1999].)

This evidence presented during the hearing on replacement counsel's motion for a new trial, serves to undermine confidence in the outcome of the penalty phase. The trial court should have determined that there was a reasonably probability that, but for counsel's ineffective representation at the penalty phase, the jury verdict would have been life instead of death

Aggravating factors presented to the jury by the prosecution included matters that could have been refuted with evidence of mental health issues and social history. The prosecution stressed such things as the absence of mental or emotional disturbance. Available mitigating evidence of mental disturbance and brain damage would have served to rebut or at least diminish the strength of the aggravating factors and humanized Appellant.

d. Conclusion

Mr. Beswick warned in advance of trial that he could not effectively represent Appellant unless second counsel was appointed, that defending

two murder cases in which the prosecution sought the death penalty was too much. (RT 3914; CT (Supplemental II) 377-379, 381-382.) He was completely overwhelmed by the responsibility of having to prepare and present defenses in two separate murders cases in which the prosecution sought the death penalty.

The lack of assistance led Mr. Beswick to commit a number of prejudicial blunders. He was lost and clearly desperate. On his own motion, the escape was tried together with the two murder charges, which allowed the jury to draw damaging inferences concerning Appellant. He failed to reiterate his objection to the introduction of the Greg Janson police interview which, played in its entirety, contained hearsay, opinion, and speculation as to Appellant's alleged guilt.

The attorney introduced theories with no supporting evidence, and had no defense. He informed the jury that the police had received anonymous phone calls which implicated Appellant as the murderer of Allan Friedman—hearsay that would not have been otherwise admissible. The lawyer's confusion of the names of prosecution witnesses in his closing argument damaged his credibility and thus that of the client in the eyes of the jury. In order to present an effective defense for a client, logically it is essential for a defense attorney to appear competent and knowledgeable in order to gain the trust of the jurors. Mr. Beswick failed to do so.

The purpose behind Penal Code section 987, subdivision (d), which specifically discusses the appointment of co-counsel, is "to provide the defendant with effective representation." Furthermore, section 987.9 is the common avenue for capital defendants to obtain ancillary services, including *Keenan* counsel, and that statute simply requires that a request be made by the defendant's counsel. Although the constitution may not require this state to provide second counsel for indigent capital defendants, "having provided such an avenue, however, a State may not 'bolt the door to equal justice' to indigent defendants." *(Halbert v. Michigan* (2005) 545 U.S.

605.)

Under these unusual circumstances of this case, the denial of the motions for second counsel resulted in state interference with Appellant's right to counsel, effective assistance of counsel, due process of law, and equal protection of the law, under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Reversal of the convictions and death sentences is thus required.

Ineffective Assistance of Counsel

Guilt Phase

X.

DEFENSE COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE, AND THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED UPON THE ATTORNEY'S FAILURE TO COMPETENTLY REPRESENT HIS CLIENT

Even though evidence of ineffectiveness is normally presented on habeas corpus, what is presently know is being presented herein due to the unusual nature of the case. This case is unique. Appellant's attorney, Robert Beswick, conducted essentially no investigation due to the lack of adequate funds. The court had granted incredibly limited funds, $1,500, even though it was explained that the client "has not money", so he did not retain an investigator. (RT A-112.) He was unable to retain forensic experts to inspect evidence and advise him. There was essentially no defense, even though Appellant consistently maintained his innocence and there was little credible evidence against him. By any standard, Mr. Beswick' representation of Appellant was incompetent due to state interference.

The lawyer was simply unable to be prepared for trial, and seemed overwhelmed by the situation. He told the jury of extraordinarily damaging inadmissible hearsay—anonymous calls telling the police that Appellant was the murderer of Allan Friedman. Mr. Beswick even agreed for a harmful escape charge to be tried with the murder accusations. Defense counsel

did nothing other than showing up physically in court. His failings were far below acceptable norms, as detailed in the following.

The Sixth Amendment and article I, section 15 of the California Constitution guarantee of the right to effective assistance of counsel. Because "[r]epresentation of an accused murderer is a mammoth responsibility, the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." (*In re Jones* (1996) 13 Cal.4th 552, 556, *citing In re Hall, supra,* 30 Cal.3d at p. 434; see also *Rompilla v. Beard* (2005) 545 U.S. 374; *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079; *Jackson v. Calderon*, *supra*, 211 F.3d 1148; *Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152; *Evans v. Lewis* (9th Cir. 1994) 855 F.2d 631.) In a death penalty case counsel must thus provide a high standard of representation, as measured by thoroughness, preparedness, and competence. (*People v. Ledesma* (1987) 43 Cal. 3d 171, 197-198.) By any standard, Mr. Beswick's performance was below established professional norms and prejudiced the outcome of the trial.

A. Appellant's Trial Attorney Was Prejudicially Ineffective At The Guilt Phase For Failing To Investigate The Case And Present Available Defenses, And The Court Erred By Not Granting The New Trial Motion Urged By Replacement Counsel Based Upon The Lawyer's Failings

1. Introduction

Mr. Beswick neither retained the services of an investigator not pursue any pretrial investigation on behalf of Appellant. Such failings are virtually unheard of in the modern era in California, but he had inadequate funds. Regardless of the shortcomings of counsel, in a death penalty case there is usually at least the involvement of an investigator. Due to the failings, no defense was developed. Thus, Mr. Beswick went into trial without any plan or strategy. Without reasonable preparation, he was ill equipped to make any informed choices on behalf of the client.

As presented in prior arguments, Mr. Beswick was clearly overwhelmed by the responsibility of trying to defend a client in two separate murder cases in which the death penalty was sought. He had unsuccessfully moved to be appointed or released from the case. Likewise, Mr. Beswick was unable to convince the court that second counsel should be allowed. It was his first death penalty case, and he was having to go it alone.

As a consequence of the incompetence of Mr. Beswick, Appellant was deprived of the right to counsel, a fair trial, effective representation, a reliable and fair penalty phase process, due process of law, and equal protection of the law, guaranteed by Fifth, Sixth, Eighth and Fourteenth Amendments.

2. Legal Standards

Mr. Beswick did not represent Appellant in even a minimally competent manner. There was no pretrial investigation in preparation of either the guilt or penalty phase. There was no investigator even working on the case. Counsel admitted on several occasions that he was not sufficiently experienced to try a double-murder death penalty case. Counsel tried to be relieved of his duty to represent Appellant (he was never appointed) but the request was denied, as was his request for appointment of second counsel. (CT (Supplemental II) 343-347, 361-382A, 385-396.) Clearly "[c]ounsel's representation fell below an objective standard of reasonableness," and but for the deficient performance there is more than a reasonable probability that the result of the proceedings would have been different. (*Strickland v. Washington, supra,* 466 U.S. at 687-688, 694.)

Defense counsel failed to perform the most basic functions necessary to represent a defendant in a capital murder trial, particularly a trial involving two murder charges and an escape from jail. He never engaged in comprehensive conversations with his client about the case, he interviewed no prosecution witnesses, he hired no investigator, utilized no expert witnesses, was even confused about the names of witnesses during closing ar-

gument, conducted the most cursory preparation or none at all for the defense's own witnesses, failed to prepare Appellant before testifying, failed to use and lost important discovery evidence for impeachment, and needlessly disclosed harmful information to the jury. These failures individually and cumulatively damaged Appellant's case and prejudiced the outcome.

Both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee a criminal defendant effective assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 686, 691-692; *People v. Ledesma*, supra, 43 Cal.3d at p. 215.) The right of a criminal defendant to counsel "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*In re Cordero* (1988) 46 Cal.3d 161, 180.) "Specifically, he is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate." (*Id.* at 180.) This means that "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*In re Marquez* (1992) 1 Cal.4th 584, 602; see also *People v. Ledesma*, *supra*, 43 Cal.3d at p. 215.)

While scrutiny of an attorney's conduct of the defense is deferential, that deference is limited. "[I]t must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance." *Id.* at p. 217.

In order to succeed on a claim of ineffective assistance of counsel, an appellant must demonstrate both that counsel was constitutionally ineffective, and that counsel's ineffectiveness prejudiced the outcome of the trial. He or she must demonstrate that it is reasonably probable that the outcome of the proceeding would have been different had counsel provided

effective representation. *Strickland, supra,* 466 U.S. 694.

The evidence of Mr. Beswick's ineptitude was clearly documented for the trial court in a motion for a new trial presented by another attorney hired by Appellant's family following the death verdict. The new trial attorney, William S. Pitman, presented the court with information sufficient to demonstrate Mr. Beswick's constitutional ineffectiveness. Despite Pitman's strong showing, the trial court—the same one that refused to appoint Mr. Beswick and rejected his request to appoint second counsel—made the astounding statement in support of his denial of the motion for new trial:

> Having heard the entire trial, I'm satisfied that presentation of Mr. Beswick was competent, that he was prepared for each witness. He thoroughly cross-examined each witness, he called the witnesses that he felt were appropriate. I did not find that his performance was below the standard that is required.

(RT 3914.)

Having found that Mr. Beswick's performance was competent, the court did not reach the question of prejudice. The summary denial of the motion was error as it was abundantly clear from the evidence presented at the new trial motion that Mr. Beswick had not prepared for either his own witnesses or the prosecution's witnesses, and did not conduct a sufficient investigation upon which to base informed choices about trial strategy. The court erred in denying the motion for a new trial based on ineffectiveness of counsel in violation of the Fifth, Sixth and Fourteenth Amendments. Due to the incompetence of his trial counsel and the resulting prejudice to the outcome, Appellant's guilty verdict should be overturned and Appellant granted a new trial.

3. Failure To Reasonably Interview Appellant or His Family

Not only did Mr. Beswick conduct no investigation, he failed to even reasonably consult with his client and family members. It is essential for trial counsel in a capital case to extensively interview a defendant, and when appropriate, his family in order to understand the circumstances and

context of the case, to develop a plan for further investigation, and to create a trial strategy. In-depth discussions with the accused must begin immediately upon the start of representation. The ABA Guidelines for death penalty investigations were in place prior to Appellant's 1998 trial. They provide:

> An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment.

(*ABA Guidelines*, 11.4.1(C)(2), Feb. 1998.)

The ABA standards are recognized as "guides to determining what is reasonable" when evaluating an attorney's performance. (*See Strickland, supra,* 466 U.S. at p. 688; and *Williams v. Taylor*, *supra*, 529 U.S. at p. 396; *Rompilla v. Beard* (2005) 545 U.S. 374; *Wiggins v. Smith* (2003) 539 U.S. 510.)

In the present case, before the trial started, Mr. Beswick visited with Appellant no more than on "a few" occasions and always for a brief time, as he admitted in testimony in support of the motion for a new trial.

> Q. And you state that because you were a sole practitioner, you only met with the defendant a few times prior to trial; is that correct?
> A. I believe so, yes.

(RT 3276).

Nor did any investigator or any other agent or employee of Mr. Beswick ever meet with Appellant.[26] *No* releases for securing confidential

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26. Q. By Mr. Pitman: Did the investigation company provide you with any sort of invoice or billing with respect to any work done on this case?
A. They didn't bill me, no.
Q. And did the investigation company provide you with an invoice of how many hours they put into the case or anything of that nature?
A. They did not invoice me, no.

records were ever obtained even though Mr. Beswick was aware that pertinent records existed that could easily have been obtained.[27] (See *ABA Guidelines* at 11.4.1(D).)

Q. How many times did you meet with Mr. Garrelts or someone from nationwide fugitive recovery with respect to the investigation of this case?
A. Five times maybe.

(RT 3276.)

Q. Were there any other investigators that you employed on this case?
A. I don't believe so.
Q. and that would be for both the guilt phase of the case and the death penalty phase of the case?
A. that's correct.
Q. did anyone on your behalf other than yourself interview Mr. Carrasco during the time that you represented him?
A. while he was incarcerated?
Q. during the time that you've represented him.
A. No.

(RT 3251.)

27. Q. Are you familiar—are you familiar with the term "release for personnel, medical or other records"?
A. Yes.
Q. And is that something you've utilized in the past as a lawyer?
A. Yes. I'm sorry. Yes.
Q. And at any point did you have Mr. Carrasco prepare a release so that you could use that to obtain confidential records with respect to his background?
A. No.
Q. Did anyone acting under your direction or supervision prepare a release for Mr. Carrasco with respect to confidential records?
A. No.
Q. Now, you were aware that Mr. Carrasco was employed at Ross Swiss Dairy; correct?
A. Yes.
Q. In fact, that's where one of the homicides in this case occurred; right?
A. Correct.
Q. And Mr. Carrasco was employed there at the time; right?

A. Yes.
Q. Did you obtain Mr. Carrasco's personnel file from Ross Swiss Dairy?
A. No.
Q. Did you ever request or seek the personnel file of Mr. Carrasco from the Ross Swiss Dairy?
A. No.
Q. Were you aware that Mr. Carrasco was placed in drug treatment program by Ross Swiss Dairy during the course of his employment there?
A. I believe, yes.
Q. And how did you become aware of that?
A. He told me.
Q. And when you say he, do you mean --
A. Robert Carrasco.
Q. That would be during a conversation that you had with him or did he prepare some document for you?
A. Conversation.
Q. And based on him telling you that, did you attempt to obtain any records with respect to the drug treatment program that Ross Swiss Dairy placed him in?
A. No.
Q. Did you contact anyone at Ross Swiss Dairy with respect to that program?
A. I don't recall.
Q. Did you find out where the program was and who administered the program?
A. I think Bert told me whoever that was.
Q. And did you obtain any records or attempt to obtain records from the program itself?
A. No.
Q. You were aware that Mr. Carrasco was placed in an inpatient drug treatment program; correct?
A. I don't remember what the program was.
Q. Did you know where—did you ever obtain any academic records with respect to Mr. Carrasco's background?
A. I don't remember.
Q. Do you know what school he went to?
A. I believe he went to—maybe—I want to say Venice High School but I'm not positive. No.
Q. Did you ever contact Venice High School or Los Angeles Unified School District with respect to obtaining records of Mr. Carrasco?

The expert witness for the defense on ineffective assistance of counsel, Carl Jones, testified regarding client and family interviews: "The investigation uses the client's interview as a starting point. It must proceed beyond the client to family and relatives and co-workers and neighbors and fellow students and it—it is never finished. You stop it because the trial has started." (RT 3389.)

A. No.

(RT 3270-3272.)

Compare the basic investigation described by co-defendant Woodland's counsel, Mr. Hill, in another capital case:

Q. And did you obtain records and documents relating to that defendant in that case?
A. Yes.
Q. Did you obtain psychiatric and psychological records pertaining to that defendant?
A. Yes.
Q. Did you obtain school records --
A. Yes.
Q. -- relating to that defendant?
A. Yes.
Q. Did you speak personally to counselors who had counseled that defendant?
A. I spoke to psychologists and psychiatrists who had been involved in preparing psychiatric profiles for the California youth authority as well as counselors in a private facility where he had been housed.
Q. Did you speak to teachers at that facility?
A. My recollection is that they were really not characterized as teachers. I think they were more in the nature of administrators or counselors.
Q. Did you speak to any medical doctors who had treated that individual in that case?
A. Yes.
Q. Did you obtain records from the mother?
A. I believe that I did.

(RT 3752.)

Likewise the prosecution expert, Bruce C. Hill, described the importance of developing a relationship with the client in response to questions by Appellant's new counsel, Mr. Pitman:

> Q. Is it important, in your view as an expert and someone who's handled many of these cases, to have several meetings with an accused in a death penalty case?
> A. Yes.
> Q. What types of – well, typically for you in the cases that you've handled, about how many times would you say you would meet with your client or the defendant in the jail?
> A. That will differ because of the personality of the individual involved and the nature of the case. But I would say 10 or 12 times with fairly extensive meetings.
> Q. When you say fairly extensive, in terms of hours or minutes, what would you estimate that to be?
> A. One to three hours.
> Q. Is it important to get to know the Defendant's background and social history?
> A. Yes.
> Q. And why is that?
> A. Again, it can present a focus for your later attention or the development of more information that can be beneficial, particularly in a death penalty case.

(RT 3748-3749.)

Mr. Beswick only visited with Appellant two times in the jail, and then only for five minutes each:

> We did not discuss the facts of the case, or my background or social history. This visit took place several months after he became counsel of record. The second visit was at the County Jail in downtown Los Angeles and again took about five minutes. Mr. Beswick dropped off papers and told me that he would be back to see me. He never came back to the jail to see me.[28]

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28. Under questioning during the hearing on the new trial motion, Mr. Beswick confirmed that his visits to Appellant in jail were short and few, and that other visits occurred when he had court appearances and then during trial. (RT 3275.)

(CT 722 [Declaration of Robert Carrasco, ¶ 3, Sep. 17, 1998].)

As described in the Motion for New Trial:

> During the entire time he was counsel of record, Beswick visited Carrasco in the jail only two times. Twice. At each visit, Beswick dropped off papers for Carrasco and spoke with him for less than five minutes. In other words, a lawyer, in a death penalty case, in Los Angeles, in 1998, met with his client in the jail for less than ten minutes throughout the entire period of his representation—in a capital case. Less than ten minutes to discuss the facts and circumstances of two homicides and an escape charge; less than ten minutes to develop a working relationship with the defendant . . .

(CT 547-592 [Motion for a New Trial, June 19, 1998, p. 3 (CT 548)].)

Mr. Beswick also failed to meet with Appellant's family members as part of the guilt phase investigation. Several testified that Mr. Beswick never contacted them before the trial or during the guilt phase to ask questions and gather information. Appellant's wife of 18 years and mother of three of Appellant's children, Eva Carrasco, tried unsuccessfully to discuss the case with Mr. Beswick after he failed to contact her.

> Q. And from the time that [Appellant] was arrested or that you found out about it, until the time that the trial began, did you ever come into contact with an attorney by the name of Robert Beswick?
> A. No.
> Q. Were you ever called on the telephone by Mr. Beswick?
> A. No.
> Q. Were you ever written a letter by Mr. Beswick?
> A. No.
> Q. Did you know who Mr. Beswick was?
> A. Only by name.

(RT 3621.)

The sister to no avail attempted to make contact with Mr. Beswick. She came to court during jury selection and sought out the lawyer out, introduced herself, and asked whether or not he needed to speak to her. He answered that he was too busy to meet at that time so she left him her busi-

ness card. He told her that he would contact her but he never did. (RT 3624.) Once the trial began, she attended two to three times per week. She saw Mr. Beswick in the courthouse hallway but did not discuss the case:

Q. Would you see him in the hallway or anything like that or outside the courtroom?
A. Yes. Yeah.
Q. Would you talk to him?
A. Not really. Just short talk, hi how are you, how are the kids, things like that.
Q. Did you ask him how the case was going or anything like that?
A. Yeah, I did. He didn't – he just said, 'It looks fine. It looks good.'

(RT 3626.)

Mrs. Carrasco testified at the guilt phase after a short conversation with Mr. Beswick in the courthouse hallway:

Q. Would you tell us, did you have a conversation with Mr. Beswick before you were called onto the witness stand?
A. No, no. [Appellant's] sister Leandra called me in, asked me if I could come that morning.
Q. The day that you testified in the guilt phase, you were recalled by Robert's sister, Leandra?
A. Yes.
Q. What did she say to you?
A. That Mr. Beswick would probably need me to be here, and to – if I could come and I said, 'Yeah, I'll go.'
Q. At that time did you know why Mr. Beswick was going to want you to be here?
A. No.
Q. Did Leandra tell you?
A. No.
Q. Did you ask her?
A. No.
Q. When you arrived in the court that day, did you then speak with Mr. Beswick?
A. Yes.
Q. And how long?
A. Briefly.
Q. How long before you testified did you talk to Mr. Beswick?

A. I talked to him out in the hall, and maybe ten minutes or something before I came out.
Q. So ten minutes before you went on the stand you spoke with Mr. Beswick?
A. Yeah, it was really fast.
Q. And what was the nature of that conversation or what was said during that conversation?
A. He just told me he was going to ask me about Greg Janson, if I knew him. And I said, 'Yeah, I do know him.'
He says, 'Okay. I'm just going to ask you about him, because he says he didn't know you or didn't know you guys.'
That was basically it.

(RT 3626-3628.)

Sadly, Mr. Beswick's failure to engage in discussion with Appellant and his family is symptomatic of his involvement in the case. He simply did nothing to investigate, to develop a trial strategy, or to prepare witnesses. He was in court in form only. A failure by trial counsel to engage in sufficient communication with his client is a hallmark of cases that are later overturned as to guilt phase on appeal. As in the present case, a lack of contact with the client is frequently coupled with an inadequate or non-existent investigation. This Court has granted relief where the attorney met with the client just three times for a total of somewhat over an hour. (*In re Cordero, Jr.*, *supra,* 46 Cal.3d at pp. 171-172.) The conversations were superficial and incomplete, as reflected in the attorney's sparse notes. Similarly, in another case, "four pretrial conversations, in the eighty-two-day period between arraignment and trial" which "lasted a total of three to four hours" were found to be a part of the "numerous insufficiencies in defense counsel's performance." (*In re Jones*, *supra*, 13 Cal.4th at pp. 562-563, 584.)

Given Mr. Beswick's minimal interaction with Appellant and the family before and during the trial, it cannot be properly said—as the trial court did in its denial of the motion for a new trial—that he conducted an

adequate investigation and adequately prepared his witnesses. (RT 3914) The trial court's assessment was an abuse of discretion.

Had Mr. Beswick interviewed his client and pursued the leads that Appellant could have provided, he would have been able to effectively impeach the prosecution witnesses who provided the only link between the accused and the offenses for which he was convicted. Other employees at the Ross Dairy were available to testify as to prosecution witness Janson's mental problems and involvement in the Camacho homicide. There were also the records available from his personnel file. (RT 3288.) Appellant also could have identified witnesses who would testify as to Anthony Morales' hostility towards him which motivated him to falsely testify concerning an admission to the Camacho killing. (CT 624 [Notice of Motion and Motion for New Trial, Memorandum of Points and Authorities, Aug. 3, 1998, p. 21].) Appellant could also have obviously provided names of witnesses to support the defense theory that the deceased in the Camacho case was a known drug dealer who was murdered by others in connection with his drug dealings. As it was, Mr. Beswick presented the theory as raw speculation, without support since there was no investigation.

Appellant also had information about the true conspirators who killed Allen Friedman and then successfully framed him. Shane Woodland, initially a co-defendant in the Friedman murder and who testified against Appellant, lived and worked with drug dealer Javier Chacon, Sr. (RT 2002.) When Chacon discovered that Appellant was having an affair with his wife, he arranged for Woodland to pin Friedman's murder on Appellant. (RT 2651.)

According to Woodland's testimony, Javier Chacon arranged the drug deal in which Friedman was killed (RT1966), and owned the car used during the killing (RT 1966). Furthermore, Woodland's palm print was found on the passenger door of Friedman's jeep, contradicting his testimony that he did not get out of the car during the killing, and suggesting

that he was the real killer. (RT 2129.) A witness at the scene identified the passenger of the Honda as looking very similar to Woodland, "they looked like brothers", implicating Woodland's brother, Ryan, while exculpating Appellant. (RT 1849.) Hugo Saavedra had picked Woodland out of a photographic line-up, but described the second person as looking like a brother to Woodland, whom he described as a "clean-cut person, an American-looking person, and a young guy." (RT 1849; RT 33 [Preliminary Hearing, Apr. 9-10, 1996].) Appellant is Mexican-American, with strong Hispanic features. The witness said they both "looked like pretty boys." (RT 33.) In fact, Appellant and Woodland looked nothing alike: Woodland is fair skinned, tall, thin, and was only 18 at the time; Appellant is Hispanic, is stockier, and many years older. Appellant is so unlike the description that when asked at the preliminary hearing if he looked like a pretty boy, Saavedra "sighed and sort of laughed after looking at [Appellant]" and then said: "No, doesn't look like that." (RT 33-34.) did not identify Appellant as one of the people in the getaway car. (RT 27.) No other witnesses identified Appellant as one of the two people in the getaway car.

Had Mr. Beswick talked to Appellant about the case and conducted an investigation based upon information from the client interviews, it is reasonable probable that it would have created reasonable doubt in the minds of the jury, since there was no physical evidence connecting Appellant to the crime. This is particularly true when viewed in terms of the cumulative errors made by Mr. Beswick during the guilt phase that were spelled out for the trial court in the motion for a new trial.

4. Failure To Interview Witnesses, Hire Experts, or Conduct Any Investigation Whatsoever for The Guilt Phase

Mr. Beswick's nonexistent investigation for the guilt phase was constitutionally deficient and prejudiced the outcome. He engaged in a pattern of inaction and ineptitude that fell far below the standard of a reasonably competent and diligent attorney. He did not subpoena or interview a single

prosecution witness and he interviewed his own witnesses very briefly only minutes before having them testify. The only discovery that he provided to the prosecution was the names of two witnesses. These lapses were particularly egregious in a case, such as Appellant's, involving two unrelated homicides and an escape.

The ABA Guidelines for death penalty counsel at the time of the trial recommended that counsel:

> A. seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights; B. explore the existence of other potential sources of information relating to the offense.... Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information....

(*ABA Guidelines*, 11.4.1(C)(2), Feb. 1998.)

Mr. Beswick knew what needed to be done to effectively defend Mr. Carrasco as evidenced by a declaration he submitted in support of a 987.9 application of funds. He wrote that it would be necessary to interview approximately 60 witnesses as part of his investigation of the case. (CT (Supplemental II) 380-382 [Declaration of Robert H. Mr. Beswick, ¶ 4, Nov. 14, 1997].) Two months later, as the trial approached, having neither met with his client nor conducted any other investigation, Mr. Beswick had changed his plans and lowered his expectations, submitting a subsequent declaration for funds in which he stated that he would need to interview at least "30-40 witnesses." (CT (Supplemental II) 388-389 [Declaration of Robert H. Beswick, ¶ 6, Jan. 8, 1998]; RT 3252.) He also said that he would need to inspect the vehicle that allegedly was used during the killing of Allan Friedman and to hire forensic experts to evaluate the evidence. Much later, after the jury issued a verdict of death, Mr. Beswick corroborated in testimony that at the time he submitted the second request, he truly did believe that 30 to 40 witnesses needed to be investigated to present or prepare Appellant's defense. (RT 3255.) In fact, Mr. Beswick followed

neither investigation plan. Despite what he stated in these requests, and the $1500 in funds that were allotted to him to conduct an investigation, Mr. Beswick failed to interview or investigate *any* witnesses.

The only discovery provided by Mr. Beswick to the prosecution were the names of two people, Brian Skofield and Michael Carranza, without any report, identifying information, or summary of expected testimony. (RT 257-258.) He never had them or anyone interviewed by an investigator since there was no investigator working on the case. (RT 3254.) Mr. Beswick falsely claimed Carranza would implicate Skofield in the Camacho killing. (RT 258-259.)[29] Mr. Beswick had no discovery relating to the Friedman killing. (RT 257-258.) Just prior to the start of jury selection, the following exchange took place between Mr. Beswick and the prosecutor, Ms. Meyers:

> Ms. Meyers: Other than those two witnesses, I haven't gotten any discovery with respect to any other witnesses other than last week. I might mention that Mr. Beswick indicated he was going to call Delia Chacon.
>
> Mr. Beswick: I have given my witness list long before this. I gave it to the previous D.A. and I don't know if you have it. I can certainly get another one of those for the People.
>
> Ms. Meyers: What prior D.A.? Mr. Bozajian?
>
> Mr. Beswick: Yes.
>
> Ms. Meyers: That was two years ago, year and a half.
>
> Mr. Beswick: Whenever I gave it to him, the witnesses haven't changed.

(RT 259-260.)

For a case involving two unrelated homicides that occurred in entirely different locations separated by many months, that involved different actors, different witnesses, and different police detectives, it is astonishing that a defense attorney would provide only two names in discovery, and

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29. In fact, Carranza refused to provide any information when called to testify, claiming a Fifth Amendment privilege. (RT 2777, 2789, 2794.) Skofield denied any involvement in the Camacho killing. (RT 2754-2763.)

that the witness list would not change over eighteen months during which trial counsel was duty-bound to be investigating the facts and preparing for a capital trial. Since the witnesses were connected only to the Camacho homicide, nothing was given in discovery to the prosecution for the Friedman homicide. As to the second crime, the attorney had nothing. This reflected a shocking lack of activity on the part of the defense attorney to prepare for the enormous undertaking that he faced: a trial involving two separate and independent alleged murders in which the prosecution was seeking the death penalty.

Mr. Beswick utilized no investigators except to locate the two witnesses.[30] He testified that years before the trial he hired an investigator, Mark Gerrelts of Nationwide Fugitive Recovery, who "located a couple of witnesses" for him but never interviewed anyone:

> Q. Did you prepare any sort of investigative memoranda or documents that you transmitted to National—or Nationwide Fugitive Recovery with respect to specific requests regarding the investigation in this case?
> A. Yes, I asked—I don't know if I gave documentation—
> Q. That's the question.
> Did you provide or did you prepare any memoranda or submit any memoranda to Mr. Garrelts or Nationwide Fugitive Recovery with respect to the investigation in this case?
> A. I may have.
> Q. And is there anything that would refresh your memory as to whether or not you did provide any memoranda to the investigator with respect to things that you wanted done?
> A. He located a couple witnesses for me.
> Q. That's not my question.
> A. I imagine that—either by telephone or by memo, I don't remember.
> . . . .

30. The fact that Nationwide Fugitive Recovery never billed for its services confirms that it did no work on behalf of Appellant, and no other investigator was employed. (RT 3248-3251.)

Q. Do you have any reports prepared by Mr. Garrelts or Nationwide Fugitive Recovery with respect to any work done on this case?
A. Reports, no.
Q. They prepared no reports?
A. I didn't receive any.
Q. When did you first contact Nationwide Fugitive Recovery with respect to the investigation of this case?
A. Sometime probably around the beginning of the trial which was in—could have been around January or February of '98.
Q. So the first time you contacted an investigator with respect to the preparation of this case was either at or near the time of the commencement of the jury trial; is that correct?
A. I believe that's correct.

(RT 3247-3249.)

No other investigative services were employed for the entire jury trial for either the guilt or penalty phase. (RT 3251, 3256.) Mr. Beswick was aware of the need for conducting interviews and hiring experts—he had requested funds to interview up to 60 witnesses. He received approval for just $1,500, even though it was explained that the client "has no money." (RT A-112; see CT (Supplemental II) 348-354.)

Q. And did the investigation company provide you with an invoice of how many hours they put into the case or anything of that nature?
A. They did not invoice me, no.

(RT 3249.)

Further, Mr. Beswick hired no experts for the guilt phase of the trial:

Q. Did you employ or utilize any criminalists with respect to the representation of Mr. Carrasco at either the guilt or penalty phase of this case?
A. No.
Q. Did you employ or utilize any medical doctors, including psychiatrists and/or neurologists with respect to the representation of Mr. Carrasco at either the guilt or penalty phase of this case.
A. No.

Q. Did you utilize or employ the services of any psychologists with respect to the representation of Mr. Carrasco at either the guilt or penalty phase of this case?

A. No.

(RT 3257.)

Despite promising in the opening statement that he would demonstrate that the deceased, George Camacho, was a drug dealer, the defense attorney never attempted to corroborate this assertion. (*See Ouber v. Guarino* (1st Cir. Mass. 2002) 293 F.3d 19) ("Petitioner's counsel was ineffective in deciding mid-trial not to call petitioner to testify after having repeatedly promised the jury in his opening statement that they would hear her version of the events from petitioner."); *People v. Patterson* (Ill. 2000) 735 N.E.2d 616 ("During opening statements, defendant's attorney told the jury that they would hear evidence that defendant confessed only because the police beat him up and tried to suffocate him with a plastic bag. Notwithstanding this promise, defense counsel chose to present no such evidence").) Mr. Beswick never obtained or attempted to obtain the deceased's employee records, union representative's records, medical or drug treatment records, and failed to conduct any investigation into Camacho's background in order to prove the claims made during the opening statement.

The reason for Mr. Beswick's inaction in this case is suggested in his requests for appointment and for appointment of additional counsel:

> The court must be made aware of the fact that counsel was originally retained in the first murder charge. Counsel was unaware at the time of his initial retention that he would have to represent the defendant in another murder case. Somehow, because of the District Attorney's method of filing the second murder charge, counsel has been given the responsibility of representing the defendant in two separate murder charges in a death penalty case.

(CT (Supplemental II) 378 [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, *supra*, at pp. 3.)

Mr. Beswick was aware of the difficulty he would have providing competent representation of counsel without assistance:

> To provide the type of representation guaranteed by the U.S. and state constitutions I will undoubtedly have to spend a considerable amount of time preparing and reviewing all of the facts and circumstances surrounding this matter in addition to trying a matter for over two months. Essentially I [have had] to remove myself from my practice of which I am the sole practitioner. To work for the period of time required without compensation would prove disastrous to my practice and my employee . . . I would be very hard pressed to provide the representation needed while at the same time trying to save my practice.

(CT (Supplemental II) 388 [Declaration of Robert H. Mr. Beswick, Jan. 8, 1998, ¶ 6.)

To avoid such a "disastrous" outcome Mr. Beswick asked that if second counsel were not appointed, that he be allowed to withdraw from the case. Both requests were denied. (CT (Supplemental II) 367 [Order Denying Application for Second Counsel, Oct. 21, 1997]; CT (Supplemental II) 375 [Second Order Denying Application for Second Counsel, Nov. 20, 1997].) As a result, rather than forfeit his solo practice, his financial stability, and responsibility to his referenced employee, he effectively surrendered Appellant to the prosecution by doing nothing other than showing up in court. Essentially Appellant had a lawyer in body only, whose performance fell far below the minimum acceptable for any advocate.

In addition to the lack of time and resources that Mr. Beswick had available to devote to Appellant's case, it was also his first death penalty case.

> I have never had to represent a defendant in a death penalty case. I have never represented an individual who has been charged with committing two murders, both of which have been combined into one trial.

(CT (Supplemental II) 380 [Declaration of Robert Beswick, *supra*, ¶ 3].)

Mr. Beswick's lack of experience was cited by Appellant's expert on ineffective assistance in a capital case, Carl Jones, as support for his opinion that Mr. Beswick's performance "fell below an objective standard of reasonableness." (RT 3355.) It is an accepted standard of practice that a lead attorney in a capital trial have "prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought." (*ABA Guideline* 5.1.1(A)(3), Feb. 1998.)

The lack of preparedness was evidenced at trial by an incoherent strategy upon which the prosecution capitalized, to the prejudice of Appellant. With a dearth of information, Mr. Beswick ineptly presented testimony meant to show that Appellant had been set up, and was not the perpetrator of the crimes for which he was accused. The information was primarily presented through the unprepared, virtually uncorroborated testimony of Appellant. Because his lawyer had not prepared a defense strategy, Appellant's testimony, by default, became the centerpiece of the defense presentation. Appellant's testimony was provided without evidentiary support of any kind, and the jury was able to easily dismiss it as biased and not credible.

In the case of *People v. Ledesma*, in which a new trial was granted due to failures of the defense attorney, the expert witness testified that

> if the defendant is testifying as the sole alibi, as far as I'm concerned, that's practically not an alibi. I've avoided using alibi defenses over my career, because I think if the alibi doesn't fly, the jury then gets quickly to the point that the client is guilty, because he's presented a defense that is not believable . . . I think that's the quickest way to have your client convicted.

(*People v. Ledesma, supra,* 43 Cal.3d at p. 204.)

It was a result of lack of preparation and poor judgment that led Mr. Beswick to offer Appellant's testimony without providing support. Re-

markably, the attorney did not even prepare Appellant to testify. According to Appellant: "Mr. Beswick did not go over with or discuss with me my testimony at either the guilt or penalty phases of the trial before testifying. I did not know in advance what questions he was going to ask and what areas were important to tell the jury about." (CT 723 [Declaration of Robert Carrasco, Sep. 17, 1998].) Given Mr. Beswick's nearly complete failure to interview and consult with his own client, it seems incredible that the trial court could have determined that he was "prepared for each witness." (RT 3914.)

Without the corroboration that could have been provided by a thorough investigation, the jury had no reason to find Appellant to be a credible witness. The jury could easily discount Appellant's testimony as self-serving.

5. Failure To Investigate The Prosecution Witnesses Was Incompetent and Prejudicial To Appellant's Case

a. Introduction

Mr. Beswick essentially conducted no investigation. He did not even pursue a probe aimed towards attacking the credibility of key prosecution witnesses, an egregious error that prejudiced the outcome, given that the prosecution had little physical evidence and relied completely on witness testimony to prove its case. The prosecution relied heavily on an unlikely scenario testified to by two witnesses, Efran Bermudez and Tony Morales. They claimed that on the way to pick up food at a McDonald's near the dairy, Appellant admitted his responsibility for Camacho's murder. (RT 1238, 1380.) Because Mr. Beswick had failed to investigate the men, however, the jury never learned of facts from their histories suggesting bias against Appellant. Mr. Beswick did not confront them with their possible motives for lying No contact was made with these damaging witnesses and no subpoenas were issued to obtain employment or other records to investigate their background and possible motives for lying.

Mr. Beswick relied upon a sister of the client, Leandra, who worked as a legal secretary in a law firm, to prepare and serve subpoenas for the penalty phase. Incredibly, this occurred at Appellant's request in a call from the jail to the sister; the attorney was not even involved. (RT 3603.)

Q. At some point did you prepare subpoenas for this case?
A. Yes.
Q. And did you prepare them because your brother asked you to prepare them?
A. Yes. I got the call from Robert and he gave me the list of names of people that were to be subpoenaed. (RT 3603.)
Q. And after that conversation, did you prepare subpoenas?
A. Yes.
Q. Did you caused the subpoenas to be served?
A. Yes.
Q. And was that on your own or was that through Mr. Beswick's office?
A. That was on my own.
Q. And how did you cause the subpoenas to be served?
A. A friend of mine served some, my mother served one, and an attorney service served the rest.
Q. And did you afterwards do anything with the proofs of service?
A. I gave them to Robert Beswick.

(RT 3604.)

b. No Investigation of Greg Janson

Greg Janson, one of Appellant's co-workers at the time of the Camacho murder, proved to be one of the key witnesses for the prosecution, despite his reluctance to testify and needing to have his memory refreshed repeatedly. Though halting and disjointed, Mr. Janson testified that Appellant admitted committing both the Camacho and Friedman murders. (RT 1443, 1451.) Mr. Beswick could not, however, exploit Mr. Janson's lack of memory nor reveal possible (possibly exculpatory) reasons for his reluctance because he had conducted *no* investigation of Janson, other than to chat with him briefly at the courthouse. Mr. Beswick did not even take notes of the interview.

The failure to conduct any investigation regarding Janson was an enormous mistake because there were indications he was in fact involved in the Camacho murder. This would give him a clear motive to provide false testimony against Appellant. Anthony Morales testified that Janson, Appellant's supervisor at work, and another work supervisor, Harry Holton, were accomplices to the murder of Camacho. (RT 1310, 1329.) Once again, Mr. Beswick pursued no investigation into this allegation, despite the obvious exculpatory value:

Q. You testified this morning that an interview with a person by the name of Greg Janson took place in the Whittier courthouse; correct?
A. (Mr. Beswick) Yes.
Q. And during that interview that you told us about where only you and Mr. Janson were present and where no memorialization was made of the interview, what was the purpose of that interview?
A. To get the facts from Mr. Janson.
Q. Did you – had you talked to him before that interview?
A. I believe so, on the telephone.
Q. And you didn't have any investigator present; correct?
A. No.
Q. Nor did you take notes; right?
A. No.
Q. And you're familiar with the concept of impeaching a witness; correct?
A. Yes.
Q. And you understand that as a lawyer you can't impeach an eyewitness by your statement; right?
A. Yes.

(RT 3286-3287.)

Q. And Mr. Janson, in your view, was an important witness in this case; correct?
A. Yes.
Q. An important prosecution witness with respect to guilt; correct?
A. Yes.
Q. At any other time did you have an investigator conduct an interview with Mr. Janson other than this meeting just between you and Mr. Janson in Whittier?

A. No, I did not.

(RT 3287.)

Carl Jones, the defense expert on ineffective assistance, testified that "no lawyer should be interviewing witnesses alone without an investigator present in the first place."

Q. Why is that?
A. Because it is impossible if the lawyer is alone to ever attempt any kind of impeachment, number one; and number two, you run the risk of that witness claiming you are trying to suborn perjury. It is unwise. It is ill advised. It is the height of inexperience.

(RT 3392-93.)

Furthermore, Mr. Beswick never investigated Janson's background or mental health, despite clear indications that the witness took psychiatric medication. The lawyer failed to investigate how the medication may have affected Janson's memory and ability to testify competently. He never attempted to obtain by subpoena any medical or employment records on Janson.

Q. You had reason to believe that Mr. Janson had a history of psychiatric problems; correct?
A. He was on Prozac he said, yes.
Q. That's not my question. Did you have reason to believe or did you believe that he had a history of psychiatric problems?
A. Yes.

(RT 3287-3288.)

Both Janson's mental instability and involvement in the Camacho murder help to explain his fear while testifying. It was repeatedly implied that Janson's fear was a result of threats from the Appellant. However, evidence of his involvement in the murder provides a valid alternate explanation: he was scared because of his own culpability which forced him to give perjured testimony in order to escape punishment. Unfortunately, Mr. Beswick's failure to conduct even a minimal investigation left the prosecution's implication that Janson feared Appellant stand unchallenged.

c. No Investigation of Shane Woodland

Mr. Beswick neither interviewed nor investigated Shane Woodland, an accomplice and perhaps the principal perpetrator in the murder of Allan Friedman. In return for agreeing to testify against Appellant, the witness was allowed to plead guilty to manslaughter. (RT 3300.) Incredibly, Woodland was sentenced to six years. (CT (Supplemental II-A) 159-161.) Yet, while there was virtually no physical evidence linking Appellant to the killing of Friedman, there was an abundance of evidence connecting Woodland. He was identified by several witnesses who observed the suspects fleeing the scene of the crime while no witnesses positively identified Appellant for the police. (E.g., RT 1868.)

Only one witness at the scene, aside from Woodland, ever identified Appellant, and that identification was undercut by earlier contradicting descriptions and testimony. The witness, Hugo Saavedra, picked Woodland out of a photographic line-up, but had previously described the second person as looking like a brother to Woodland,[31] who he described as a "clean-cut person, an American-looking person,[32] and a young guy." (RT 1849, 1868; CT (Supplemental II) 87 [Preliminary Hearing, Apr. 9-10, 1996].) He also told the police that they both "looked like pretty boys." (RT 33.) In reality, Appellant and Woodland look nothing alike: Woodland is fair skinned, tall, thin, and was only eighteen at the time. Appellant, an Hispanic, has much darker skin, is stockier, and is many years older; he is not someone who would be identified as either "American-looking" or a "pretty boy." In fact, Appellant looks so unlike this description that when asked at the preliminary hearing if Appellant looked like a pretty boy, Saavedra "sighed and sort of laughed after looking at [Appellant]" and then said "No, doesn't look like that." (CT (Supplemental II) 87-88.)

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31. Woodland has two brothers, Ryan and Brandon.

In court Mr. Saavedra was unable to identify Appellant as one of the people in the getaway car, even though Appellant was prominently seated at counsel table.

Q. I want to ask you, sir, you indicated that there were two people inside the car that you saw driving away.
A. Correct.
Q. Do you see either of those two people in court today?
A. Yes.
Q. And can you identify either one of them for the record, or both of them?
A. I recognize one of them.
Q. Okay. Which one do you recognize, the driver or the passenger.
A. The driver.
Q. Okay. And can you point to where he is sitting in court today, and tell us what he is wearing today?
A. Is the gentleman in the corner with orange clothes.
Court: Indicating Mr. Woodland.

(CT (Supplemental II) 81-82 [Preliminary Hearing, Apr. 9-10, 1996].)

No other witnesses identified Appellant as one of the two people in the get-away car.

Other evidence tied Woodland and one of his brothers to the Friedman killing. A receipt was found in a bag taken from the victim's Jeep indicating that Woodland's brother had sold a car to Friedman. During testimony, Woodland admitted it was he, and not his brother, who sold the car, but denied that the man he sold it to was Friedman even though his name was on the receipt. (RT 2012.) Since he had admitted to seeing Friedman on a couple of occasions before the homicide—and therefore knew what Friedman looked like—it does not make sense that he could sell a car to him but then claim that it was not Friedman to whom he sold it.

Additional evidence implicating Woodland included that he was driving the car used in the homicide when arrested by the police on the same day as the killing. He had taken the car to have the windows tinted in

order to change its appearance following the shooting. (RT 1979.) And he fled the police later in the day in the same car when he became aware that they were following him. (RT 1984.)

Further, he was caught trying to dispose of a cell phone that was used on multiple occasions to call Friedman. Phone records indicated that there had been calls to Friedman from the phone the day before and the day of the homicide, just minutes before it occurred. In testimony, he claimed the phone belonged to Appellant. (RT 1985.) However, it was found in his possession, and there were multiple calls from the phone to Woodland's father and to his girlfriend, making it clear the phone truly did belong to Woodland. (Defense Exhibit F, Hearing on Motion for a New Trial, Los Angeles Police Department Murder Book re: Allan Friedman Homicide.) If it was Woodland's phone, the obvious conclusion is that it was Woodland making calls to arrange a meeting with Friedman, despite his claim that he did not know Friedman, that he did not know who he was driving to meet, or for what purpose. (RT 1997-1998.)

Besides avoiding a conviction for murder, Woodland had an additional reason to testify against Appellant. Woodland, an 18 year old teenager, lived and worked with drug dealer Javier Chacon, Sr. (RT 2002.) Woodland had not lived with his parents for years; lacking a close relationship with his own parents, he had developed a close father-son relationship with Chacon Sr. (RT 2004.) He was good friends with Chacon's son, Javier Chacon Jr. (RT 2003.) When Chacon discovered that Appellant was having an affair with his wife, he had reason to urge Woodland to pin Friedman's murder on Appellant. That way, he not only helped his close friend Shane Woodland escape a murder conviction, but also got his revenge on Appellant for sleeping with Chacon's wife.

While all of this physical evidence linked Woodland to the homicide of Friedman, the police had next to no physical evidence tying Appellant to it. However, they offered Woodland a lesser sentence in exchange for tes-

timony against Appellant. Woodland's testimony then became the most important evidence against Appellant, and because it went virtually unchallenged due to Mr. Beswick's ineffective representation. (RT 3300-3302.) It was devastating.

Mr. Beswick conducted no investigation of Woodland's background. (*Ibid.*) He never sought to obtain his juvenile court records, school records, employment records or any other records. (RT 3300-3301.) Nor did he attempt to interview neighbors, acquaintances, or any individuals who might offer an opinion as to Woodland's reputation for credibility or trustworthiness. (RT 3301.) Woodland was the only eyewitness who positively identified Appellant in connection with Friedman killing. As such, undermining his credibility was essential to the defense, but Mr. Beswick acknowledged the following in testimony:

> Q. And with that knowledge in mind, did you have an investigator look into Mr. Shane Woodland's background?
> A. I don't believe so.
> Q. When you say you don't believe so, does that mean no?
> A. No.
> Q. You did not have anyone look into Mr. Shane Woodland's background; correct?
> A. Correct.
> Q. You were aware that Mr. Shane Woodland had a juvenile record; correct?
> A. Right.
> Q. Did you petition the juvenile court to obtain his juvenile files with respect to your investigation in this case?
> A. I don't – No, I did not.
> Q. Did anyone on your behalf or at your behest do that?
> A. No.
> Q. Did you instruct anybody to do that?
> A. No.
> Q. Did you have an investigator or did you ask an investigator to go into – to try and/or attempt to interview witnesses who knew and were familiar with Shane

Woodland such as school teachers, people who knew him in other capacities, anything like that?

A. Did I send an investigator in?

Q. Yes.

A. No.

Q. Did you do it yourself?

A. Yes.

Q. Did you get school records for Mr. Woodland?

A. No.

Q. Do you know what schools he attended?

A. I don't recall right now.

Q. Did you go to those schools?

A. No.

Q. Did you contact anyone from those schools in an effort to obtain records with respect to Mr. Woodland?

A. No.

(RT 3300-3301.)

The record demonstrates that defense counsel's pretrial investigation in preparation for cross-examining Shane Woodland was at best perfunctory, marked by a few conversations with Appellant and little else. The trial court incorrectly described the lawyer as "prepared for each witness." (RT 3914.) He may have been prepared to use what little information he had about Woodland to cross-examine him, but without the evidence that a thorough investigation might have uncovered, he could not be viewed as prepared.

6. Failure To Interview or Subpoena Impeaching Witness

Bruce Hill, Woodland's attorney, located and interviewed a witness identified as Mr. Sasson, and told Mr. Beswick about him. (RT 3726.)[33] Hill testified: "It was the account of Mr. Sasson, albeit indirectly, that Mr. Friedman had made arrangements to meet with Shane Woodland on the day of the fatal events and that these arrangements had been made the previous

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33. Q. (Pitman): And did you discuss that information with Mr. Beswick?

A (Hill): I'm sure that I did, although I can't, in my own mind, come up with a particular event at which it was discussed. But I'm sure it was.

day." (RT 3726). Woodland repeatedly claimed ignorance about plans to meet Freidman for a drug deal. He claimed that he did not know who he was meeting that day, or for what purpose. (RT 2007, 2018.) Mr. Sasson's testimony would have impeached Woodland, by showing that he was lying about what he knew that day, and pointed to Woodland's culpability. Incredibly, the jury never heard this crucial evidence because Mr. Beswick never even spoke to Mr. Sasson.

7. Failure To Investigate Two Key Witnesses, Shane Woodland and Greg Janson, Was Prejudicial To Appellant

a. Greg Janson

Had Mr. Beswick investigated Janson's background, associations, and motive for wanting Camacho dead, he could have effectively impeached Janson's testimony. Janson was especially damaging to Appellant for several reasons: he claimed to have been Appellant's friend and to have known him for some time. He provided narrative testimony that supported the prosecution's theory of the case, which included Appellant's alleged motives for both homicides and his alleged repeated admissions to Janson about the crimes and the reasons for them.

Mr. Beswick could have sown reasonable doubt in the minds of the jurors as to the credibility of the witness had he pursued Janson's own involvement in the Camacho homicide. Without testimony from Janson, the prosecution's case was significantly weak. He provided the only substantiation of testimony given by Shane Woodland, the co-defendant in the Friedman homicide. Woodland clearly had motive to falsely implicate Appellant. By making a deal with the prosecution and testifying against Appellant, he escaped a murder conviction, winding up with a plea bargain for manslaughter. (CT (Supplemental II-A) 159-161.) Woodland's testimony was particularly dubious because witnesses who saw assailants fleeing after Friedman was killed identified only Woodland, not Appellant. Without the corroboration of Janson, Woodland's testimony could have been dismissed

as self-serving and non-credible. As discussed below, the jury's questions during deliberations indicated a concern about the truth of Woodland's testimony even with Janson's support; had Mr. Beswick prepared adequately, he would have been able to undermine Janson's testimony *and* demonstrate that Woodland's testimony was expedient and unreliable.

Without testimony from Janson, the evidence connecting Appellant to the Camacho homicide is reduced to testimony from Efrain Bermudez and Anthony Morales who claimed that he admitted to them that he killed Camacho during a car ride on the way to McDonald's to pick up lunch. Morales testified that Appellant said Janson had helped with the killing by alerting Appellant when Camacho arrived for work. (RT 1308-1310.) However, Mario Baltazar, another occupant of the car during the ride to McDonald's, testified that Appellant did not implicate Janson. (RT 2302-2303.) Appellant testified that Bermudez was angry at him because he was the union representative at the dairy, and blamed Appellant when he lost his job there. (RT 2652.)

With no physical evidence to link Appellant to the murder, such weak testimony would not have amounted to proof beyond a reasonable doubt and nevertheless was open for attack if the case had been investigated.. Janson's testimony was the linchpin the prosecution needed to convict Appellant of the Camacho homicide. There was no informed tactical reason not to investigate Janson's background, associations, and involvement in the killing of Camacho. Had Mr. Beswick investigated Janson's involvement, he could have impeached him, thereby undermining his testimony enough to create significant doubt in the minds of jurors. That he did not do so was prejudicial to Appellant and therefore amounts to constitutionally incompetent representation under the Sixth Amendment.

Given the crucial role that Janson's testimony played in the prosecution's case against Appellant for the Camacho homicide, the failure to investigate Janson was quite harmful to the defense. Without strong testi-

mony from Janson, Appellant would not have been convicted for the murder of Camacho. The rumors and admissions that he allegedly made were not strong enough to reach the difficult reasonable-doubt standard. Given the important role that Janson played in the trial, the lack of investigation was inexcusable and prejudicial. With weakened testimony from Janson, there would have been no conviction on Count 1, violation of Penal Code section 187, and no conviction for the alleged special circumstances of commission of the offense with a firearm, murder for financial gain, murder that was especially heinous, and double murder.

b. Shane Woodland

The prosecution's case against Appellant concerning the Friedman murder was even weaker than evidence of Appellant's involvement in the Camacho murder. It was based almost exclusively on Woodland's testimony, with some support from Janson. Woodland testified in return for lenient treatment by the prosecution, trading down from first-degree murder to manslaughter with a recommended six-year sentence. (CT (Supplemental II-A) 159-161.) Woodland was the only alleged eyewitness who identified Appellant as Friedman's killer. Other witnesses gave descriptions that did not match Appellant. One witness picked Shane Woodland's brother out of a photo lineup as the other person leaving the scene with Woodland. (RT 1849; RT 33 [Preliminary Hearing, Apr. 9-10, 1996].) The only other evidence against Appellant was a fingerprint which allegedly matched his, on a hairspray bottle in the glove compartment of the car used during commission of the murder; the hairspray bottle was subsequently lost by the police. Given the nature of the case against Appellant, which relied almost exclusively on Woodland to link Appellant to the Friedman homicide, a diligent investigation of his background and associations was essential.

It became apparent during deliberations that the jury was concerned about the credibility and accuracy of Woodland's testimony, particularly in light of conflicting information given by other witnesses. The jury asked

for a reread of Woodland's testimony. (CT 459-460.) They also asked for Appellant's height, reflecting a concern that witness testimony describing the shooter did not fit the accused. (RT 2977.) However, the court was unable to provide the information since there was no testimony regarding his size. (*Ibid.*) The jury also asked when Woodland had begun negotiating with the police, and about a previous transaction between Woodland and Friedman. (*Ibid.*) The jury's concern suggests doubt about whether to believe his testimony; had Woodland's testimony been impeached through evidence turned up by an adequate investigation, they were likely to be swayed that he lacked credibility. Because Mr. Beswick failed to investigate Woodland and failed to challenge his testimony against Appellant, the jury ultimately accepted his testimony as truthful.

If Mr. Beswick had investigated Woodland adequately, and cross-examined him effectively, he would have undermined Woodland's credibility in the eyes of the jury. Then all that would have been left in the prosecution's case to connect Appellant to the Friedman homicide was a hair-spray can that may have been put in the car at any time, and Janson's testimony. If Janson wanted to exculpate himself by blaming the Camacho murder on Appellant, it would have strengthened his story by attributing another homicide to Appellant.

Janson had spent time at the car detailing shop where Appellant, Woodland, and Chacon all worked. He could have obtained information about the Friedman crime from those two. Further, the story of the spray can found in the glove compartment is bizarre, as detailed earlier. First the police claimed it contained just one print, which makes little sense. Then the lift that was claimed to have come from the can that then disappeared while in police custody.

The remaining evidence against Appellant did not rise to the level of proof beyond a reasonable doubt. With weakened Woodland testimony, it is reasonably probable that he would not have been convicted of murder

under Count 2 with the accompanying special circumstances of use of a firearm during the commission of the offense, especially heinous depravity, murder during the commission of the crime of robbery, and double murder.

8. Conclusion

The failure by defense counsel to conduct any investigation resulted in a deprivation of the right to effective assistance of counsel, due process of law, equal protection of the law, and a fair trial, guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

B. Defense Counsel Was Constitutionally Ineffective Because His Successful Motion To Join The Escape With The Murder Trial Was Prejudicially Damaging To Appellant And Had No Strategic Basis

1. Introduction

While the prosecutor wanted the record to reflect the consciousness of guilt she argued was indicated by the escape, which the defense attorney, Robert Beswick, initially objected to, she did not seek to have the actual escape charge tried together with the murder case. (RT 9.) Despite that, Mr. Beswick himself decided to have them tried together. The court questioned him about the decision:

> The Court: Is that something you want to do as a tactical matter?
>
> Mr. Beswick: I think since we already have it out there, I got the responses back, rather than wasting the court's time, certainly wouldn't hurt Mr. Carrasco's case, I don't believe.
>
> The Court: I don't want you to feel—have you make any decision based on wasting the court's time. I want you to consult with your client and make what you feel is the best professional and tactical decision for your case.
>
> If that's accurate, however, and you do want me to try them all together, I'm going to have to read some new charges to the jury.

(RT 267.)

Despite the court's concern, Mr. Beswick had no further comments. (*Ibid.*) The prosecutor then asked Appellant if he waived his right to have a separate jury hear and decide his guilt in the escape case. (RT 268.) Without any advisement from counsel or the court, he agreed with his lawyer's suggestions to the waiver, which Mr. Beswick joined. (*Ibid.*)

2. Defense Counsel's Decision To Try The Escape With The Murder Charges Was Constitutionally Ineffective Assistance of Counsel and Prejudicial

There could be no valid strategic reason for the defense to want to try the escape with the murder counts. Having the jury learn the details of the escape would unquestionably lead jurors to draw negative inferences about Appellant's character and future dangerousness. More importantly, they would view it is a strong indication of guilt as to the murder charges.

Mr. Beswick had indicated to the court prior to trial that he was overwhelmed by the possibility of trying two murders and an escape. He was also concerned about the damage the case would cause his solo practice. For that reason, he twice unsuccessfully asked for appointment of second counsel and, that if second counsel was not appointed, that he be allowed to withdraw from the case. (CT 343-347 (Supplemental II) [In Camera Motion for Appointment of Additional Counsel In Capital Case, Oct. 15, 1997]; CT 370 (Supplemental II) [Order Denying Application for Second Counsel, Oct. 21, 1997]; CT 376-382A (Supplemental II) [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Nov. 20, 1997]; CT 375 (Supplemental II) [Second Order Denying Application for Second Counsel, Nov. 20, 1997].)

The sudden and inexplicable manner in which Mr. Beswick suddenly changed his position from wanting the escape tried after the murder trial, to wanting them tried together, reflects that he simply wanted Appellant's cases over with as soon as possible. He had told the court earlier of his concern that Appellant's case would destroy his solo law practice:

> To work for the period of time required without compensation would prove disastrous to my practice and my employee. . . . I would be very hard pressed to provide the representation needed while at the same time trying to save my practice.
>
> (CT 385-390 (Supplemental II) [Application To Be Appointed as Counsel, Declaration of Robert H. Beswick at ¶ 6 (CT 388), Jan. 8. 1998.)

Mr. Beswick's change of mind over combining the escape trial with that of the homicides reflects that the was facing financial reality. In order to save his practice, he obviously decided to combine the cases so that he could shorten the time devoted to defending Appellant and move on to re-venue producing clients. He provided no reason for trying the escape with the other charges except his alleged concern for the court's time, which the judge said should not be part of his consideration, and the negative reasoning that Appellant's case would not be hurt because the jury had already learned of the escape attempt from the jury questionnaire. (RT 267.) He gave no tactical reason for his decision, nor did he try to suggest that it could help Appellant's case to try them together.

3. Trying The Escape Charge With The Murder Counts Was Prejudicial To Appellant

Trying the escape with the murder charges gave a basis for the jury to draw extremely negative inferences regarding Appellant's character, as well as his present and future dangerousness, which was prejudicial to both the guilt and penalty phases. The escape served as a "former bad act" that would inappropriately influence the jury's decision on the murder counts based on assessments of his character or propensity for engaging in antiso-cial behavior. Moe importantly, the admission of such evidence served as a basis for the prosecutor to argue that it served as evidence of guilt as to the homicide allegations, since the escape reflected a consciousness of guilt. The detailed account of the escape certainly influenced the jury's decision in the penalty phase because of inferences about his future dangerousness.

Admission of evidence against a criminal defendant that raises no permissible inferences, but which is highly prejudicial, violates federal due process. (*Estelle v. McGuire* (1991) 502 U.S. 62 [state law errors that render a trial fundamentally unfair violate federal due process].) Actually trying the escape in front of the same jurors who were considering the murder charges was worse than simply having the record reflect the existence of the escape, because it demonstrated Appellant's capacity for patience and care in the implementation of a plan. The jury was likely to use such information to make inferences about his ability to commit other antisocial acts, such as murder, with equal care and skill. Moreover, a jury that was undecided as to penalty during penalty phase deliberations might consider the escape, and its manner of implementation, as reason to vote for death in order to prevent a possibility of successful future escapes.

Incredibly, Mr. Beswick used the carefulness of Appellant's escape plan in his guilt phase closing argument to point out "how [Appellant's] mind works." (RT 2883.) He described the client "getting a blade and sawing the grate and tying up sheets and scaling that wall. It took him months. It was well thought out. That is how his mind works whether you like it or not. That is what he did." (RT 2883.) This argument served to embed for the jurors the notion which had been sown earlier: that Appellant was clever and devious, the type of danger that should be put to death to protect society.

4. Conclusion

By the defense attorney permitting the escape charge to be joined in the trial of the murder allegations, he deprived his client of a meaningful defense, fostered the presentation of evidence against him, and essentially destroyed any chance of an acquittal as to the more serious counts. Consequently Appellant was deprived of the right to effective assistance of counsel, due process of law, equal protection of the law, and a fair trial, guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

C. Defense Counsel Was Prejudicially Ineffective In Failing To Object To The Playing Of The Taped Police Interview Of Greg Janson Since It Contained Inadmissible Statements, And The Trial Court Erred In Permitting The Tape To Be Viewed By The Jury

Mr. Beswick agreed to the jury viewing in its entirety a video tape of an interview of the principal prosecution witness, Greg Janson, even though it contained hearsay, speculation, non-expert opinions, and conclusory remarks. The effort was compounded by the court allowing the tape to be viewed, even if portions were admissible to refresh the memory of the witness. As a consequence, Appellant was denied the right to effective assistance of counsel, the right to confrontation, due process of law, and a fair trial, guaranteed by Amendments Five, Six and Fourteen.

1. Background

Greg Janson was employed at Ross Swiss Dairy where the Appellant and George Camacho, deceased, also worked. He was interviewed by Detectives Coblentz and Lopez concerning both the homicides. In the interview, Janson alleged that Appellant had talked about killing Camacho before the homicide, and afterwards confessed to having committed the killing. (RT 1575-1576, 1601.) He claimed that Appellant had asked him to provide an alibi for the day of the Friedman homicide, and that, in response, he took Appellant to his house in Green Valley. (RT 1582-1583.) He also claimed that Appellant had told him of killing someone and explained some of the circumstances, e.g., a younger man was driving the car the Friedman killers used (RT 1581), it involved a drug deal and an intention to rob the deceased of cocaine (RT 1584-1585), Friedman drove a jeep (RT 1584), Appellant took a book instead of the cocaine by mistake (RT 1586), the driver had the windows tinted after the killing (RT 1591), a .380 to used to kill Friedman (RT 1602) and a 9mm to shoot Camacho (RT 1603), and that Appellant had told a friend that he knew Janson had talked about what had occurred and he would "take care of him" (RT 1610).

Later, in grand jury and preliminary hearing testimony, Janson repeatedly stated that he did not recall making these statements to the police. (CT 51-79 [Grand Jury Testimony of Greg Janson]; CT 161-177 (Supplemental II) [Preliminary Hearing Testimony of Greg Janson].) For instance, at the preliminary hearing, Janson was asked if he recalled anything about the conversation he had with the police and he replied, "Well, it's really vague. I mean, it's been awhile, and I'm going through a lot of stress and everything else. I really don't recall a whole lot." (*Id.* at p. 162 (Supplemental II).) Similarly at the grand jury, the following exchange occurred:

> Q. Do you recall anything about the conversation that you had with the police about Robert Carrasco's statements about killing the man in the valley?
>
> A. Like I said, it's been such a long time. I have tried to think about it and, like I stated at the other court hearing, I was on medication, strong medication, and I was going through a lot of stuff.

(CT 61.)

At trial the prosecutor sought to introduce a tape of Janson's interview with the police to "refresh" his memory and for impeachment purposes. (RT 1402.) Mr. Beswick requested that the tape be withheld until Janson began his testimony in order to lay the foundation for introducing it. (*Ibid.*) The court agreed. (RT 1403.)

Under direct examination, Janson again indicated that he could not remember what he told the police detectives during the interview: "Like I said, it's been so long, I don't remember what I said the day I was there talking to the police." (RT 1417.) In response, the prosecutor sought to introduce the tape in evidence in order to refresh the witness's memory. (RT 1419-1420.) The court then permitted Janson to review a transcript of the interview, but properly refused to allow the tape to be played: "My concern was more if the jury doesn't need to hear it, then they don't have to." (RT 1419.)

After Janson read the transcript of his police interview, he began to answer:

Q. Did the defendant tell you the kid was the driver of the car?
A. I can't remember.
Q. Did you tell detectives that the defendant told you that the kid was the driver of the car, sir?
A. Yes, I must have, yeah.

(RT 1458.)

And then:

Q. Now, did the defendant, also, tell you anything about a chase involving the kid who is the driver of that car?
A. Yes.
Q. What did the defendant tell you about a chase?
A. He said—I guess, the kid went to get the windows tinted or something and they went to do a routine traffic stop or something.

(RT 1464-1465.)

On cross-examination, it was elicited that at the time of the police interview Janson had been taking medication—Prozac and Clonopin—because he was "depressed and stressed out and used to get anxiety attacks." (RT 1471.) Mr. Beswick then used the preliminary hearing and grand jury testimony to impeach his present testimony on direct examination. He read a number of questions from the prior hearings to Janson in order to refresh his memory. (RT 1486-1504.) At a break in questioning, the prosecutor again asked to introduce the tape based upon Evidence Code section 791. "After Mr. Beswick's cross-examination where he brought in all of the prior inconsistent statements of the witness, I now have the opportunity to bring in the prior consistent statements. . ." (RT 1508.) At that point the court agreed with the prosecutor and, incredibly, Mr. Beswick had no objection and agreed to it being heard in its entirety: "Play the tape, your honor." (RT 1509.)

2. The Tape Contained Hearsay, Opinion, and Speculation, Along With Testimony of Prior Bad Acts, and Was More Prejudicial Than Probative

Due to the waiver by defense counsel, the tape of Janson's police interview was played in its entirety for the jury. It went far beyond the scope of prior consistent statements. The following are examples of prejudicially inadmissible statements that should have been excluded, with the statute from the Evidence Code providing the basis for exclusion listed in parentheses:

"[Bert]'s getting a little crazy. . ." (RT 1567.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"He always carries a gun. . ." (RT 1568.)

(Evid. Code, § 702 [Personal knowledge of a witness]; *Id.* at § 787 [specific instances of conduct relevant only as tending to prove a trait].)

> "We had an incident. . . after work one night where someone . . . [Bert] always carries a gun . . . and someone ended up pulling a gun on him, or pulling his gun out of his back as we were all pretty tipsy out there, and he started a fight with some guys, and his brother came up behind them. . . this one guy he started a fight with came up behind him . . . took the gun out . . . slapped him in the head with it, and then started firing it . . ." (RT 1568.)

(Evid. Code, § 787 [Specific instances of conduct relevant only as tending to prove a trait].)

> "The guy's made me so nervous at work, and everybody else. I was getting sick and tired of everybody being scared of Bert, because they know he packs a gun all the time. . ." (RT 1569.)

(Evid. Code, § 702 [Personal knowledge of a witness]; *Id.* at § 1200 [hearsay].)

> "[I]t might be common knowledge to people that work around him that he is probably the prime suspect in this particular thing." (RT 1570.)

(*Ibid.*)

". . . It has gotten to the point where everyone's scared of him at work. . ." (RT 1571.)

(*Ibid.*)

". . . I mean, he's told a lot of different people everything at work so, I mean, I'm just one of the ones that's coming forward about it." (RT 1572.)

(*Ibid.*)

". . . Cause I know who he's involved with. I, like I said, I've hung out with him before, and I've went. . . a . . . places with him, and you know, he's told me about these people, and these people being, you know, how terrible they are, and what they do, so . . ." (RT 1575.)

(Evid. Code, § 702 [Personal knowledge of a witness].)

"Anything that gets in his way he says he'll take care of, you know. You don't know how far he'll go." (RT 1577.)

(Evid. Code, § 702 [Personal knowledge of witness]; *Id.* at §§ 800, 803 [Opinion of a lay witness].)

". . . because I know for a fact that he did it . . . I can just see. . . expressions in him . . .the way he was . . . after doing something like that I guess, you know, maybe it him in the head, and I could just tell . . ." (RT 1577-1578.)

(Evid. Code, §702 [Personal knowledge of witness]; *Id.* at §§ 800, 80 [Opinion of a lay witness].)

"Cause Bert has no conscience." (RT 1578.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"[H]e picks to hang out with the younger crowd . . . so, I think he can manipulize [sic] them to do whatever he wants to do, you know." (RT 1580.)

(Evid. Code, § 702 [Personal knowledge of witness]; *Id.* at §§ 800, 803 [opinion of a lay witness].)

"He's not all there, I'm telling you." (RT 1592.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"Detective: Did he say how he got involved with this particular incident?
Janson: They needed someone to . . . to do this or whatever . . .
Detective: If he told you.
Janson: No. He didn't tell me . . ." (RT 1596.)

(Evid. Code, § 702 [Personal knowledge of witness].)

"Once he started getting a little crazy, you know . . ." (RT 1597.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"Everybody's leery of, you know, what he might do." (RT 1598.)

(Evid. Code, § 702; hearsay, §1200 [Personal knowledge of witness].)

"[T]he whole thing that scares me is cause he'll say . . . tell my friends that he knows, I don't know, he knows to talk to me, you know, all . . . I think he ratted on me for this or whatever, and I'll take care of him, you." (RT 1610.)

(Evid. Code, § 1200 [Hearsay].)

"Detective: In your opinion, do you think Robert did this?
Janson: In my opinion, yea.
Detective: And why would you say that?
Janson: Why would I say that?
Detective: Umhum.
Janson: Cause I don't think he has a conscience. I think he could do something like that." (RT 1610.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"Cause Bert's talked crazy ever since I knew him." (RT 1612-13.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"That's why I say, I think he, you know, I'm pretty sure he did that one too." (RT 1613.)

(Evid. Code, §§ 800, 803 [Opinion of a lay witness].)

"Maybe Bert was lying, you know, I don't know, but just the expression on Bert's face made me believe he did something again, cause I could see . . . see it in his face." (RT 1614.)

(Opinion of a lay witness, Evid. Code, §§ 800, 803.)

In addition to the listed reasons for exclusion, these portions of the tape should also have been excluded based on the court's discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice. (Evid. Code, § 352 [Discretion of court to exclude evidence].) Janson's statements were not given under circumstances which would tend to indicate reliability or truthfulness. He was apparently emotionally distraught. He indicated during trial testimony that he had been under a lot of stress due to a divorce and that he was taking medication that he felt were affecting him. Further, he asked the police that the statement not be recorded. Under such circumstances, his comments were more prejudicial than probative and Mr. Beswick should certainly have objected on that basis.

Mr. Beswick also failed to object to the statements on the tape by the police interviewer, Detective Coblentz, about anonymous calls he received that implicated Appellant. When the detective testified later in the trial, he referred to the same anonymous phone calls. Mr. Beswick objected on grounds of hearsay, and moved to strike, which was sustained and the testimony stricken. (RT 2238.) On the tape, Detective Coblentz discusses the same calls without objection from Mr. Beswick:

Detective:	Does Bert have a girl friend he would share this with that might . . . might want to call?
Janson:	Haha. . .
Detective:	I mean, I'll be straight up with you . . . your truck's come into the conversation . . .
Janson:	Yea.
Detective:	[A]nd most everything you've told me has been in part of the conversation . . .

(RT 1599.)

Mr. Beswick's failure to renew his objection to the tape constituted representation that fell below professional norms. It contained multiple instances of damaging conjecture including speculation about the beliefs of others regarding Appellant's culpability; their alleged fear of Appellant; inadmissible opinion testimony by Janson regarding his own beliefs as to Appellant's culpability; prejudicial description of a prior incident which implied that Appellant had a bad character; and, Janson's opinion as to Appellant's mental state and conscience. These claims were unreliable, prejudicial, and went well beyond the scope of prior inconsistent statements.

At a minimum, Mr. Beswick should have objected to having the tape played in its entirety. When evidence is admissible as to one part or for one purpose, but not as to another part or for another purpose, the court is required to restrict it to its proper scope upon request. (Evid. Code, § 355 [Limited admissibility].) Mr. Beswick's failure to ask for the recording to be edited so that unsupported opinion, speculation, and hearsay would be excluded was inexcusable and cannot be explained as a tactic or strategy. Further, his failure to object to the detective's statements about anonymous phone calls was unjustifiable given that he objected to the same testimony later in the trial.

3. The Taped Interview of Janson Was Prejudicial To Appellant

Janson's allegations on the tape were damaging to Appellant's case. As already discussed, there was neither physical evidence linking the accused to the homicides nor were there any witnesses who saw Appellant at the scene of either homicide, except for the co-defendant Shane Woodland who had every reason to give false testimony. To strengthen its case, the prosecution was heavily dependent upon Janson's claims that Appellant made admissions to him. By failing to renew his objection to admission of the tape, Mr. Beswick passively allowed wild, unsupported allegations and speculation to be received as evidence.

Admission of evidence against a criminal defendant that raises no permissible inferences, but which is highly prejudicial, violates federal due process and the Fifth and Fourteenth Amendments. (*Estelle v. McGuire* (1991) 502 U.S. 62 [state law errors that render a trial fundamentally unfair violate federal due process]; *McKinney v. Rees*, *supra*, 993 F.2d 1378 [admission of irrelevant and inflammatory evidence violated federal due process]; *Lesko v. Owens*, *supra*, 881 F.2d 44, 52 [constitutional error in admitting evidence whose inflammatory nature "plainly exceeds its evidentiary worth"].)

Many of Janson's statements included his views about what other people at work believed and felt about Appellant, were clearly improper and inadmissible. These allegations were unsubstantiated, but had a dangerously unfair and prejudicial impact upon the trial. The admission of the statements about his co-workers beliefs was, in effect, similar to having all of the co-workers in the courtroom stating their opinions about Appellant's culpability, without providing any opportunity for cross examination or assessment of credibility by the jurors. Second-hand witness testimony violates the confrontation clause of the Sixth Amendment; exactly what the hearsay rule was designed to prevent. Moreover, the opinion of Janson and others is not rationally based on perception as required by state statute. (Evid. Code, §§ 800, 803.)

4. Conclusion

Mr. Beswick's failure to renew his objection to the playing of the taped Janson interview was constitutionally ineffective representation. He Mr. Beswick should have been prepared for a renewed attempt by the prosecutor to introduce the tape. A competent attorney would have been aware of the possible opening provided for the introduction of prior consistent statements after cross examining Janson about prior inconsistent statements. However, when the prosecutor used this strategy, Mr. Beswick simply folded: "Play the tape, your honor." (RT 1509.) The trial court

made no effort to address this failure of trial counsel in his ruling, and its failure to prevent the tape in its entirety being played to jury was error. (RT 3914.)

The failings of the defense attorney and the trial court resulted in a contravention of the right to confrontation, effective assistance of counsel, due process of law guaranteed by the Fifth, Sixth and Fourteenth Amendments.

D. Defense Counsel Was Prejudicially Ineffective For Failing To Utilize Crucial Evidence Of A Videotape Containing Two Police Interviews Of Shane Woodland In Which His Statements Were Materially Different From His Trial Testimony

1. Introduction

Not only did Mr. Beswick fail to investigate Shane Woodland, but he also misplaced, discarded or ignored crucial evidence provided through discovery which would have raised doubt about the credibility of this key prosecution witness.

On January 30 and February 10, 1997, the prosecutor, with Detectives Coblentz and Lopez of the Los Angeles Police Department, interviewed Woodland as part of negotiations for a plea agreement. He was charged along with Appellant. Both interviews were videotaped. Woodland provided versions of the murder of Allan Friedman during each interview that were quite different from his testimony before the grand jury and at Appellant's trial. However, Mr. Beswick either lost or ignored the videotapes, and failed to use them to impeach Woodland.

2. Videotapes of Police Interviews With Woodland

Throughout the first interview, Detective Coblentz and the prosecutor used suggestive questioning and pressured Woodland with statements, e.g., "we don't believe you", "the jury's gonna know something's missing", "what are you gonna think when Bert walks and you're behind bars", "I can't believe you didn't see Carrasco with a bag", and, "you need to re-

member what he had with him when he got in the car." (CT 754 [Declaration of William B. Pitman, 1/24/99, ¶ 4].)

Despite extensive coaching, Woodland stated throughout the first interview, as many as four times, that he did not see Appellant take a bag from Mr. Friedman. The bag was critical to the prosecution's theory that the killing occurred during a drug deal in order to steal the victim's cocaine. Appellant was alleged to have taken the bag, believing it contained cocaine. He then allegedly threw it out the window when he discovered that there was none. There was no physical evidence linking Appellant to the bag. In fact, a receipt found in the bag bore the names of both the deceased and Woodland, but not that of the Appellant.

Without physical evidence connecting the accused to the bag, the prosecutors needed Woodland to provide the link supporting the theory. However, during the initial interview he repeatedly stated that he did not see Appellant with a bag. At the end of the first interview, the prosecutor expressed her dissatisfaction with Woodland's recollection of events, suggesting that she might not offer him a deal unless the information he provided changed.

The second interview began with a discussion of the potential terms of a plea agreement—that in return for testimony which satisfied the prosecutor, he could plead guilty to manslaughter. Then, Woodland altered his story from that provided during the first interview to include a mention of the bag allegedly taken by Appellant. This conformed to testimony that he gave at trial, and gave the prosecution a case against Appellant.

There was varying testimony during the motion for a new trial hearing by Mr. Beswick as to whether he had received the videotape of the Woodland interviews from prosecution through discovery. The attorney representing Appellant during the new trial proceedings, William Pitman, was informed by Mr. Beswick that he had not received or viewed the video tape. Mr. Pitman advised the court: "I had been previously informed by

Mr. Beswick that he had not received this tape. I told him—I called him the day I came in here to review the tape . . . what was on the tape and he told me he never seen [sic] that and had he had that, he would have used it, and that he never seen [sic] a proffer session with Mr. Woodland." (RT 3898.)

Relying upon Mr. Beswick, Mr. Pitman submitted a brief in which he alleged a *Brady* violation by the prosecution. (CT 743-757.) The prosecutor insisted that she had provided the tape: "Mr. Beswick handed me a blank tape, Your Honor. . . I personally gave him the tape." (RT 3884.) The video was then presented to Mr. Beswick for viewing and he finally admitted to having seen it before.

Q. Did you receive a copy of that videotape from Miss Meyers?
A. I received it from the District Attorneys office. I don't know who I got it from.
Q. And did you review that tape?
A. Yes.
Q. When did you review it?
A. I don't remember. Sometime after receiving it.
Q. Did you have a transcript prepared?
A. No, I did not.

(RT 3896.)

Mr. Beswick either lied to Appellant's second attorney when he told him that he had not received the videotape from the prosecutor, or he was so sloppy and inattentive that he forgot that he had received it. In either case, the damage to Appellant was substantial. Once on the stand, Mr. Beswick admitted that he had seen the tape. (RT 3895.) But he failed to keep a copy or a transcript in his file of the case. (RT 3896-3897.) And he did not use it as vital impeachment evidence against Woodland. Mr. Pitman was not aware of the tape until the prosecution called Woodland's attorney, Bruce Hill, who disclosed that two interviews between Woodland and the police were videotaped. (RT 3736, 3767.) This information came after Mr. Pitman had already questioned his last witness in support of the

motion for a new trial. In fact, Mr. Beswick's admission that he had seen the tape was taken after final. (RT 3871.)

Given his knowledge of the videotape with varying accounts of the homicide and its surrounding circumstances, Mr. Beswick could not be considered "prepared" for Woodland's testimony, nor could he said to have thoroughly "cross-examined" him. The trial court's ruling to this effect was clear error. Mr. Beswick's failure to use the information from the interviews to impeach Woodland and undermine his testimony was careless in the extreme and prejudicial to Appellant.

3. Prejudice

As already discussed, the prosecution's case against Appellant for the Friedman homicide was based almost exclusively on Woodland's testimony. This was provided in return for lenient treatment by the prosecution. Woodland was the only eyewitness who identified Appellant as Friedman's killer. Other witnesses gave descriptions that did not match Appellant. One picked Shane Woodland's brother out of a photo lineup as the other person at the scene. The only other evidence against Appellant was a fingerprint which allegedly matched him on a hairspray bottle in the glove compartment of the car used during shooting. It was subsequently lost and thus not produced at trial. Given the nature of the case against Appellant, which relied almost exclusively on Woodland to link Appellant to the Friedman homicide, there could be no possible strategic reason not to use the tapes to impeach him. His prior contradictory statements would have rendered his trial testimony of no value to the prosecution.

The jurors demonstrated their concern about the credibility and accuracy of Woodland's testimony, when they asked for a reread of Woodland's testimony. (CT 459-460; RT 2978.) Had Mr. Beswick used the prior interviews to reveal how his testimony had materially changed during the course of negotiations with prosecution, it is likely that the verdict on the Friedman homicide would have been different. Instead, the jury ultimately ac-

cepted his testimony and convicted Appellant, not knowing about the prior contradictions.

4. Conclusion

The failure of defense counsel to challenge the Woodland testimony through the material contradictions in the video taped interviews, resulted in a denial of Appellant's right to confrontation, effective assistance of counsel, due process of law, and a fair trial, guaranteed by the Fifth, Sixth and Fourteenth Amendments.

E. Defense Counsel's Introduction Of An Unsubstantiated Defense Theory In The Opening Statement That Was Neither Investigated Nor Corroborated, Caused Irreparably Damage To Appellant In The Eyes Of The Jurors And Was Prejudicially Ineffective

At the outset of trial Mr. Beswick expressed an intention to introduce a theory that Camacho was killed due to his drug activities. (RT 1080.) However, the lawyer failed to conduct an investigation in order to corroborate or develop the hypothesis. Nonetheless he carelessly introduced the conjecture in his opening statement to the jury. (RT 1079.) When the prosecutor objected because she had received no discovery from Mr. Beswick related to the allegation, he admitted that he was relying on a statement by Appellant and that he hoped to get other witnesses to support it. (RT 1080.) Not only did this make the lawyer look foolish in the eyes of the jurors, but it also had an extremely damaging effect upon the credibility of his client and the defense.

Incredibly, Mr. Beswick never interviewed any witnesses who could have testified to the drug use of the deceased, or verified it through any other means such as a record search. "While an attorney is not obligated to interview every prospective witness (*People v. Floyd* (1970) 1 Cal.3d 694, 710), it is patently incompetent for him to interview none regarding the crux of the anticipated defense." (*In re Cordero* (1988) 46 Cal.3d 161, 184.)

To make matters worse, the prosecutor presented two witnesses, Camacho's supervisor and his union representative, who denied awareness of his drug dealing and use. Mr. Beswick elicited the supervisor's denial himself during cross-examination. He asked the Harry Holton, a prosecution witness, if Camacho had a drug problem. The response was 'no", thereby serving to undermine the only defense theory presented to the jury. (RT 1217.)

In view of the astounding fact that Mr. Beswick had never interviewed Mr. Holton, he had no way of knowing what response he would receive to such a question. It was a blind shot in the dark that backfired. Mr. Beswick's assertion about unverified information during the opening statement, followed by inept cross examination, undermined his own credibility and that of his client and the defense with the jury.

Mr. Beswick also told the jury during his opening statement that he would undermine the prosecution theory that Appellant killed Camacho because he did not want him returning to work and taking his job. The lawyer asserted that Appellant, as a union representative for the employees at the dairy, was involved in getting Camacho his job back. (RT 1085.) He then failed to introduce evidence supporting the statement even though it was, in fact, true.

Again, Mr. Beswick made his assertion without conducting an investigation in order to provide evidentiary support. The prosecutor capitalized on this lack of preparation by bringing the jury's attention to it:

> And Mr. Beswick's opening statement to you, ladies and gentlemen, he said, "I'm going to establish that the defendant helped get George Camacho his job back. He would have absolutely no reason to kill George Camacho."
>
> Did you hear that? Did you hear any evidence of that? Didn't hear that at all. As a matter of fact, you heard quite the contrary . . . The defendant had nothing to do with getting the victim his job back.

(RT 2819.)

The prosecutor also underscored Mr. Beswick's failure to prove that Camacho was killed due to his drug dealings: "Remember Mr. Beswick's opening argument to you, 'I'm going to prove this guy is a cocaine abuser and cocaine dealer.' Did you hear any evidence to that?" (RT 2827.) As pointed out by Carl Jones, the defense's expert on the standards of representation in capital cases, "[T]he sole and exclusive purpose of [the prosecutor's] argument and the result is you have now *tarnished the credibility of this defense lawyer* who in a couple of days is going to stand here and need credibility to argue it to save the man's life." (RT 3405, emphasis added.) Mr. Beswick's failure to prove events or theories brought forward during his opening argument, which was then highlighted by the prosecutor, gave an impression that the defense was grasping at straws because it had no plausible alternative theory, that there was no defense and thus accused must be guilty.

The failure of defense counsel unsubstantiated statements to the jury without any evidence through his failure to investigate, resulted in the prejudicial denial of Appellant's right to effective assistance of counsel, due process of law, and a fair trial, guaranteed by the Fifth, Sixth and Fourteenth Amendments.

F. Defense Counsel Caused Irreparable Harm And Was Prejudicially Ineffective By Informing The Jury Of Otherwise Inadmissible Anonymous Calls To The Police Which Identified Appellant As The Murderer of Allan Friedman

In his opening statement, Mr. Beswick informed the jury that two anonymous callers to the police had identified Appellant as the killer of Allan Friedman. (RT 1078.) This evidence was inadmissible hearsay and bore no indicia of reliability. Moreover, there was no tactical reason to reveal the information to the jury. In fact, later in the trial when Detective Coblentz revealed information about the anonymous calls, Mr. Beswick objected, and made a motion to strike, which was granted! (RT 2238.) However, the cat was already out of the bag and the damage done to the client.

If he had meant to use the anonymous calls for some tactical reason, he undoubtedly would not have objected to Coblentz's testimony later. This sequence demonstrates a chaotic, unconsidered defense by an attorney who was inattentive to the trial.

Mr. Beswick's disclosure was prejudicial to Appellant. As discussed above, the prosecution's case against Appellant for the Friedman murder was weak. It was dependent upon Shane Woodland because he was the only claimed eyewitness who positively identified Appellant as the shooter. Other witnesses gave descriptions that did not match Appellant. One, as stated, even picked Shane Woodland's brother out of a photo lineup as the other person at the scene. The only physical evidence against Appellant was a fingerprint which allegedly matched him on a lost hairspray bottle allegedly in the glove compartment of the car used during commission of the murder. Yet, as stated, the alleged bottle "disappeared" before trial and was never seen in court. Given the weakness of the evidence against his client, Mr. Beswick's disclosure of the anonymous callers was particularly harmful.

In the context of a weak case, Mr. Beswick's admission about the anonymous calls was likely to have prejudiced the outcome of the case. It provided as evidence inculpatory information that was inherently unreliable, hearsay, and inadmissible. The Jury's knowledge of the anonymous phone calls provided extra corroboration to Woodland's testimony despite the unreliable and highly prejudicial nature of such evidence.

The admission by the defense of the anonymous calls implicating his client resulted in the prejudicial denial of Appellant's right to effective assistance of counsel, the right to confrontation, due process of law, and a fair trial, guaranteed by the Fifth, Sixth and Fourteenth Amendments.

G. Defense Counsel's Failure To Retain A Fingerprint Expert To Advice and Analyze Both A Print And The Surface From Which It Was Allegedly Lifted From A Missing Hairspray Can, The Only Physical Evidence Linking Appellant To The Car Used In The Friedman Homicide, Was Prejudicially Ineffective

Mr. Beswick never retained the services of a fingerprint expert even though crucial fingerprint evidence was introduced by the prosecution. Incredibly, the court allocated funds for him to both investigate the case and retain the services of experts. (RT A-112, 120; see CT (Supplemental II) 348-352.) Clearly there was not enough money to adequately prepare the case. The lawyer never sought to corroborate, rule out, or expand upon the conclusions of the prosecution's expert. Indeed, he eventually stipulated, without any expert advice or analysis of the lift, that the latent print from the hairspray belonged to Appellant. (RT 2109.) Under the circumstances it was inexplicable to make such a concession without expert advice.

The prosecution called its forensic fingerprint expert, Charles Caudell, Los Angeles Police Department, to testify. He had examined the Honda used in the Friedman homicide for prints. (RT 2104-2105.) Mr. Caudell checked for the presence of latent fingerprints on the car itself, and also on a can of hairspray found in the glove compartment of the car. (RT 2109.) Prior to trial and before the defense had access thereto, the hairspray can was lost by the police. (RT A-37, 39.) Consequently the defense strongly objected to any reference to the missing discarded can or the print allegedly lifted there from, since the accused was denied access to the evidence. (CT (Supplemental II) 327-333 [Defendant Robert Carrasco's Motion for Preclusion Sanction, Feb. 10, 1997].)[34] It is astounding that with

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34. "Throughout this matter the prosecution has represented that they indeed had the spray can in its possession and that a print allegedly identified as belonging [to] the defendant Robert Carrasco. Despite repeated attempts at obtaining the can for investigation defense counsel was unable to do so. Yet he was repeatedly told that the can existed and that it was in the possession of the D.S.'s office. Last week defense

the recognized importance of the hairspray can and the lift allegedly from it, that Mr. Beswick never bothered to secure the services of a fingerprint expert.

According to the testimony of Mr. Caudell, he dusted the whole vehicle where possible and obtained seven latent prints. He personally identified just one print of the seven, which was located on the hairspray can. He identified this print as belonging to Appellant. (RT 2110.) However, he did not identify the other six prints. He testified that another person in the department by the name of Wendy Cleveland analyzed the other six prints and that none of them belonged to Appellant or Shane Woodland. (RT 2112.) One of the prints did belong to Javier Chacon Sr., the owner of the car detailing shop, who allegedly instructed Woodland to drive to meet Friedman. Chacon's print was on the roof above the passenger side door. (RT 2112-2113.) Wendy Cleveland, who identified the print, was not called to testify. (RT, Master Index.)

Because Woodland had testified that Appellant had stood on the driver's side door of Friedman's Jeep for "ten to twelve minutes" before the shooting (RT 1973; 2021), Mr. Beswick asked Caudell during cross-examination about fingerprints found on the Jeep. He replied that another expert in his office, Michael Ames, had dusted the Jeep for fingerprints. (RT 2122.)

> Q. Do you know what areas he inspected?
> A. I don't know what areas he inspected. I know what area he lifted that latent fingerprint from.
> Q. Where was that?
> A. The outside passenger door.
> Q. Were any of those prints matched up with Mr. Carrasco?

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counsel was informed by Deputy District Attorney Myers that the spray can had been lost and that defense counsel would, therefore, be unable to examine it."

(*Id.* at p. 329.)

A. No, sir.
Q. Do you know if Mr. Ames inspected the driver's side door handle?
A. I do not know. I did not actually work with him when he worked on the jeep.

(RT 2123.)

Ames presumably did dust the driver's side and found no print belonging to Appellant. If he had, the prosecution would have introduced it into evidence. The absence of a print tended to undermine Woodland's testimony that Appellant had leaned against the door for several minutes. Testimony from Ames affirmatively showing that Ames had dusted that side of the Jeep would have been exculpating for Appellant, and impeaching of Woodland. Yet Mr. Beswick never called Ames to testify. There was no strategic reason not to call Ames, and his testimony would have more powerfully made the point that, while Woodland alleged that Appellant leaned against Friedman's driver side door for several minutes, his fingerprints were not there.

Almost as an after thought, during his Re-cross examination, Mr. Beswick asked Caudell if any prints were found on the Jeep. (RT 2128.) Caudell testified that a latent print was found on the passenger side door of the black jeep.

Q. Who did that match up to?
A. Matched up to Chacon, Javier.

(RT 2128.)

However, after several other questions by Mr. Beswick, Caudell interrupted himself.

A. Yes, sir, it was outside—I may take something back here. I mixed up the one for the others. Excuse me. It was not Mr. Chacon, it was Shane Woodland that was made on the jeep. I correct myself, and that was outside the passenger door.

(RT 2129.)

This sequence highlights Mr. Beswick's ineffectiveness and sloppiness as an advocate in a number of ways. First, he almost forgot to ask the witness about this crucial information. He had already completed his original cross-examination of Caudell. (RT 2113-2126.) Had the prosecutor not conducted a re-direct examination, it is probable that Mr. Beswick would not have elicited this piece of evidence. This highlights his disorganization and once again, lack of attention to the case. Woodland's fingerprint on the Jeep was significant because it contradicted his testimony again. The witness had asserted that he never got out of the car during the incident, that he simply sat in the car, listening to the radio, until the shooting occurred. (RT 1973.)

Secondly, it appeared from his failure to correct Caudell that Mr. Beswick did not know about the fingerprint on the Jeep, suggesting that he either did not receive it in discovery or he received it but forgot about it. It is inconceivable that anyone under the circumstances would fail to inquire about fingerprints on the Jeep—an obvious source for evidence.

Moreover, the confusion in Caudell's testimony about whose fingerprint it was diminished its power. The expert had not done the examination himself. He was apparently reading from a file.[35] This vital information would have been more powerful coming from the person with first hand knowledge—Michael Ames.

Additionally, there were a number of questions asked on cross-examination that Caudell was unable to answer, such as whether or not other prints were found on the black Jeep, whether he had dusted the steering wheel, the shift knob, or the inside of the door handles of the Honda,

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35. This is implied by pauses in his testimony after questions from Mr. Beswick followed by his answers. For example: "Q. And were you able to determine whose prints those were? A. If I may take a moment here? Q. Sure. A. I did not. . ." (RT 2122.)

and who the other latent prints found in the Honda belonged to. (RT 2113-2129.)

A defense expert certainly would have been able to answer the unanswered questions and draw valuable conclusions from the presence of certain prints and absence of others. For instance, how usual is it that both the alleged driver and passenger of the Honda during the homicide left no prints inside or outside of the car itself, but only on a hairspray can in the glove compartment? Could any other prints have been collected and identified on Friedman's jeep? If Appellant was leaning on the driver's door of the jeep, as alleged, how unlikely is it that he left no prints there? Such questions remained unanswered due to Mr. Beswick's inaction.

The absence of a defense fingerprint expert was prejudicial to Appellant, both independently and cumulatively with his other errors. Appellant's fingerprint was the only physical evidence tying Appellant to the Friedman shooting. Woodland's fingerprint tied him to Friedman and directly contradicted his story. The trial court erred in calling Mr. Beswick prepared for witnesses. He did not have the expertise himself to properly examine the prosecution expert, which left him hopelessly unprepared.

H. Defense Counsel Confusing Names Of Prosecution Witnesses During Closing Statement Reflects Ineffectiveness

During closing argument, Mr. Beswick repeatedly mistook the name of a prosecution witness, Andrew Nunez, and referred to him by the name of another witness, Anthony Morales. (RT 2889.) This not only made the lawyer appear bumbling and foolish in the eyes of the jurors, but was a poor refection upon the accused. During her rebuttal, the prosecutor made pointed reference to the attorney's confusion, stating: "He kept interchanging Morales and Nunez. He talked about, and I believe he meant Andrew Nunez, he kept talking about Mr. Morales." (RT 2915.) The error was not surprising in light of Mr. Beswick's inattentiveness to the case. By spot-

lighting the errors the expert witness, Carl Jones, pointed out that the prosecution's

> inference there is that this man is confused. He can't keep the witnesses straight. He doesn't know who said what. You can't trust him. You can't rely on anything he says and he lacks credibility . . . Don't pay any attention to him. That is the reason for making that argument.

(RT 3408.)

Such sloppy errors were prejudicial both independently and cumulatively. It is reasonably probable that Mr. Beswick's carelessness, manifest throughout the trial's guilt phase, changed the outcome of the trial.

I. Defense Counsel Prevented His Client From Reading The Extensive Police Investigative Reports On The Case, Even Though Appellant Had A Right To Have Access To The Material

The discovery provided by the prosecution to defense counsel included voluminous police reports, referred to as the Los Angeles Police Murder Book. This consisted of four volumes covering both charged homicides. (RT 3442-3444; CT 732 [Exhibit F, four murder books].) However, Appellant's attorney took them from him and deprived the client of the right to review the material in an overreaction to a complaint by the prosecutor and comments by the judge. (RT 207-208.)

The problem began during jury selection when the prosecutor noticed that Appellant was looking at jury questionnaires which were lying on the counsel table. There was concern regarding the confidentiality of juror addresses. (RT 203.) The court stated to defense counsel: "Mr. Beswick, I'm very distressed you even left those anywhere he could see them." (*Ibid.*) The attorney replied that the client has only "seen two." (*Ibid.*)

Later in the day the judge observed that Appellant had been reading discovery material, resulting in Mr. Beswick depriving Appellant of all case investigative material:

> The Court: Mr. Beswick, I have noticed before, but in light of what Miss. Meyers brought to my attention, I have been watching your client. It

appears now he's going through the Murder Book, is that right?

Mr. Beswick: *He's reading his file.*

The Court: I understand that. But I just want to make sure there are no names and addresses or phone numbers of any witnesses or relatives of victims or anything like that in it.

So if you're giving him access to something, I want to make sure you excise appropriate portions if you're going to let him look at it.

Mr. Beswick: *I'll take everything from him.* I don't want to get into that. I'm sure I have, but just to make sure, *I'll take the book away from him.*

(RT 208, emphasis added.)

A defendant has the right to view the evidence against him or her. (Penal Code, § 1054.1.) The due process clause of the Fifth and Fourteen Amendments require no less. (See *Brady v. Maryland* (1963) 373 U.S. 83.) Certainly the addresses and telephone numbers of witnesses and victims may not be show (§ 1054.2), and a court may for "good cause" impose further restrictions which are limited to "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement" (§ 1054.7). Mr. Beswick made the decision to deny his client any access to discovery, although the prosecution had made no attempt to show that there was any need for a "denied, restricted, or deferred" disclosure. (*ibid.*)

It is stunning that Appellant's own attorney violated his right to review evidence by taking the police Murder Book from him, instead of simply blocking out addresses or phone numbers as required by section 1054.2. Without access to the police investigation reports, Appellant was rendered unable to assist his attorney in critiquing and challenging that evidence, and participate in any meaningful way in his own defense.

The deprivation of his client's right to review discovery material is another example of Mr. Beswick's incompetent representation. Rather than

go through the file to black out addresses and phone numbers, as any attorney would be expected to do, he simply took the voluminous police investigation report away from Appellant—the baby was thrown out with the bathwater. Appellant was entitled to have access to the discovery documents during the course of trial when it was critical to have evidence available with which to assist his attorney.

Certainly the withholding of address and telephone numbers to a defendant is not essential to a fair trial. (*People v. Benjamin* (1975) 52 Cal.App.3d 62.) However, that is not the issue here. The discovery material was snatched from Appellant by his very own attorney. (*Chapman v. California* (1967) 386 U.S. 18.)

Defense counsel's refusal to permit Appellant access to discovery material resulted in a prejudicial deprivation of the right to effective assistance of counsel, a fair trial, reasonable access to the courts, a defense, and equal protection of the law, and due process of law, guaranteed by Amendments Five, Six, and Fourteen.

J. Conclusion

In his ruling on the motion for a new trial, the trial court failed to acknowledge Mr. Beswick's complete lack of preparation for Appellant's trial. Contrary to the facts, the judge stated that he found the attorney to be prepared for each prosecution witness and to have thoroughly cross-examined each. (RT 3914.) Without having conducted any investigation, it was impossible for him to have obtained evidence favorable to the defense. And he failed to adequately use the evidence that was readily available to him. As discussed above, the videotape of Shane Woodland's interviews with the police should have been used to impeach this crucial witness. A fingerprint expert should have been retained to examine the hairspray bottle for fingerprints, and advise the defense lawyer.

Further, as presented in the preceding, Mr. Beswick's lack of preparation led him to commit a number of incredibly prejudicial blunders that

had no strategic purpose. On his own motion, the escape was tried together with the two murder charges, which allowed the jury to draw damaging inferences concerning Appellant. He failed to reiterate his objection to the introduction of the Greg Janson police interview which, played in its entirety, contained hearsay, opinion, and speculation as to Appellant's alleged guilt.

Mr. Beswick introduced theories with absolutely no supporting evidence, leading the jury to conclude that Appellant had no defense. He betrayed the client by informing the jury that the police had received anonymous phone calls which implicated Appellant as the murderer of Allan Friedman—hearsay that would not have been otherwise admissible and that led the jury to draw improper inferences. The lawyer's confusion of the names of prosecution witnesses in his closing argument damaged his own credibility, and thus that of the client, in the eyes of the jury just before they began their deliberations. In order to present an effective defense for a client, logically it is essential for a defense attorney to appear competent and knowledgeable in order to gain the trust of the jurors. Mr. Beswick failed to do so.

During the hearing on the new trial motion, the court should have acknowledged Mr. Beswick's incompetence and its prejudicial effect on the outcome of the trial. Each of the lawyer's mistakes were damaging to Appellant. Cumulatively, they were devastating. As a result, Appellant was denied the right to a fair trial, reasonable access to the court, the right to a defense, effective assistance of counsel, due process, and equal protection of law, guaranteed by the Fifth, Sixth and Fourteenth Amendments. The judgment must therefore be overruled and Appellant granted a new guilt-phase trial.

Penalty Phase

XI.

DEFENSE COUSNEL WAS INEFFECTIVE AT THE PENALTY PHASE, AND THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON THE ATTORNEY'S FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE

A. Introduction

Unquestionably Mr. Beswick was overwhelmed by having to represent Appellant without an appointment and thus being paid, and without the assistance of a second attorney. The court's denial of the motions for counsel, and co-counsel, set in motion a situation in which Mr. Beswick could not function at a minimally acceptable level in such a complicated case which concerned separate murders and the death penalty. This is what he predicted in asking either for the appointments or to released and the public defender appointed. There are many example in the following of the ensuing problems during the penalty phase.

One that dramatically illustrates the problems Mr. Beswick encountered occurred just after the death verdict. On March 27, 1998, six declarations from members of Appellant's family were filed to "revoke" the death penalty, without any accompanying motion or involvement of Mr. Beswick. (CT 504-506 [Declaration of Martha Heredia in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 507-509 [Declaration of Eva Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 510-512 [Declaration of Barbara Carrasco-Gamboa in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 513-516 [Declaration of Leandra Kamba in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT517-519 [Declaration of Frances Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15, 1998]; CT 520-522 [Declaration of Ricardo Carrasco in Support of Motion to Revoke Death Penalty, Apr. 15, 1998].) Mr. Beswick also did not prepare, review, or play any role in the

preparation of the declarations. Rather, they were prepared by family members. A sister, Leandra Kamba, a legal secretary, even signed the Proof of Service for each. (CT 506, 509, 512, 516, 519, 522.)

Ms. Kamba worked with her family to prepare at home declarations for three siblings, his mother and Appellant's wife without any assistance from trial counsel. Even though she knew nothing about such matter, Ms. Kamba felt that declarations from family members would be helpful in support of a motion for new trial, even though no such motion had yet been filed. (RT 3604-3605.) She did not know what else to do.

> Q. Did you assist family members in preparing declarations?
> A. Yes, we did it all together.
> Q. And who were the family members?
> A. My brother, Ricardo, my sisters Barbara and Francis, my mother and Eva, Robert's wife....
> Q. Would you tell us the circumstances of how they got filed?
> A. I came down to the court, picked up some blue backs, blue backed them, prepared a proof of service, mailed the copies out and my mother took them up to this department and had them filed, stamped.
> Q. Mr. Mr. Beswick didn't prepare those declarations from yourself and your mother and those various people?
> A. Not at all, no.

(RT 3605-3606.)

Mr. Beswick's representation of Appellant at the penalty phase was far below acceptable norms. As with the guilt phase, there was no investigation. In fact, there was no investigator even working on the case. Evidence that would have made a difference to the jury in deciding whether Appellant should receive the ultimate penalty was never discovered, let alone presented, even though readily available had there been an investigation. For example, jurors were unaware that Appellant has suffered serious head injuries since childhood. As it was, the little evidence presented was thrust upon the lawyer by family members shortly before the penalty trial

began. He was eating lunch just outside the courthouse at a hotdog stand when they approached asking to be permitted to testify. With little discussion, they were put on the witness stand shortly thereafter.

The incompetence of defense counsel was reflected in stunningly brief arguments, and his inability to articulate mitigating factors on behalf of the client. Maybe for the only time in California history, Mr. Beswick argued that age was a mitigating factor since Appellant was 41 years of age. It was almost as if the lawyer was in a mental daze. He even opened the door for the prosecutor to introduce otherwise inadmissible evidence of mere arrests. Mr. Beswick also opened the gate for the prosecutor to bring in evidence of an alleged threat made by Appellant 18 years before the trial.

The Sixth Amendment and article I, section 15 of the California Constitution guarantee of the right to effective assistance of counsel, certainly applies to the penalty phase of a capital trial. Because "[r]epresentation of an accused murderer is a mammoth responsibility, the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." (*In re Jones* (1996) 13 Cal.4th 552, 556, *citing In re Hal, supra,* 30 Cal.3d at 434; see also *Rompilla v. Beard* (2005) 545 U.S. 374; *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079; *Jackson v. Calderon*, *supra*, 211 F.3d 1148; *Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152; *Evans v. Lewis* (9th Cir. 1994) 855 F.2d 631.) Counsel in a death penalty case must therefore provide a high standard of representation, as measured by thoroughness, preparedness, and competence. (*People v. Ledesma*, supra, 43 Cal. 3d at pp. 197-198.) By any standard, Mr. Beswick's performance in the penalty phase was well below established professional norms.

As presented previously herein, this matter falls within the category of cases in which prejudice is presumed due to the actual or constructive denial of counsel at a critical stage of the proceedings.. (*United States v. Cronic*, *supra*, 466 U.S. at pp. 658-659.)

> Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

(*Strickland v. Washington*, *supra*, 466 U.S. at p. 692 (citations omitted).)

Mr. Beswick's failure to subject the prosecution case to meaningful adversarial testing is a constructive denial of counsel. (*Ibid.*) Further, as detailed previously, the court denied the lawyer's motions to be appoint, for second counsel, or in the alternative, to be relieved from the case and other counsel appointed. (CT (Supplemental II) 343-347, 361-368, 370, 375-382A, 385-390, 392-396.) This is a situation in which the court constructively denied counsel resulting in state interference with counsel's ability to provide effective representation. (*See, e.g., Herring v. New York*, *supra*, 422 U.S. 853 (bar on summation at bench trial).) Additionally, courts should presume prejudice when the circumstances of the proceedings make it the case that even if counsel is available to assist the accused, the likelihood that any lawyer—even a fully competent one—could provide effective assistance is so very small as to justify a presumption. (*United States v. Cronic*, *supra*, 466 U.S. at p. 659.)

Here prejudice should be presumed because the circumstances were such that even a competent attorney could not have effectively represented Appellant due to the failure of the trial court to appoint him or to even allow second counsel. Mr. Beswick warned the court that without an appointment and assistance, he could not competently represent Appellant. "The burden of representing the defendant who is indigent in this matter without additional counsel and without appointment will be overwhelming. There is a genuine need for additional for additional counsel as well as a

genuine need for the court to appoint me." (CT (Supplemental II) 381-382 [In Camera Motion for Reconsideration of Court's Denial of Motion for Appointment of Counsel, Declaration of Robert H. Beswick, Nov. 20, 1997].) He was neither appointed nor being paid, deprived of the assistance of another attorney, and did not have the resources to provide effective assistance to his client.

The complex trial of Appellant concerned two unrelated murder charges plus a separate escape accusation. Mr. Beswick was essentially having to simultaneously defend in three different criminal trials. The trial of Appellant under the circumstances resulted in a mockery of justice. The trial court's actions deprived Appellant of the right to representation. Even though counsel would have made a material difference in the case and its outcome, it matters not whether one believes he would have benefited from the assistance of counsel. (*Reynolds v. Cochran* (1961) 365 U.S. 525, 531; *Chandler v. Fretag* (1954) 348 U.S. 3, 9-10.) The right to counsel is absolute. "[T]hat duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." (*Powell v. Alabama, supra* 287 U.S. at p. 71.)

This Court has been strict in its enforcement of the right to counsel and has frowned upon any interference of the full right to the effective assistance of counsel. (See *Boulas v. Superior Court*, *supra*, 188 Cal.App.3d at p. 434.) Had Mr. Beswick's motions for counsel been granted, a reasonable delay of the trial would have been allowed in order to properly prepare. However, the trial judge "failed to adequately balance [Appellant's] Sixth Amendment rights against any inconvenience and delay from granting the continuance." (*United States v. Nguyen*, *supra*, 262 F.3d at p. 1004, citing *United States v. Moore*, *supra*, 159 F.3d at p. 1160; see also *Lee v. Kemna*, *supra*, 534 U.S. 362.) Cases involving the death penalty are different. They thus require safeguards to ensure the fairness of the proceedings.

(See *Ford v. Wainwrigh, supra,* 477 U.S. at p. 411; *Gardner v. Florida, supra,* 430 U.S. 349; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *Furman Georgia, supra,* 408 U.S. at p. 289.)

The consequence of the actions of the trial court in refusing to appoint counsel was a deprivation of Appellant's right to counsel, a fair trial, reasonable access to the courts, a defense, effective assistance of counsel, a fair penalty determination, due process of law, and equal protection of the laws, guaranteed by Amendments Five, Six, Eight and Fourteen.

B. Defense Counsel Failed To (1) Conduct An Investigation, (2) Retain An Investigator, (3) Reasonably Interview Appellant, His Family, And Other Prospective Witnesses, (4) Investigate And Present Mental-State Evidence, (5) Develop And Present Social Background Evidence, And (6) Secure The Services Of Essential Experts

1. Overview

As previously established, Mr. Beswick failed to perform any preparation or investigation for the trial. The consequence was damaging to Appellant in the penalty phase of trial, just as it was in the guilt phase. The lawyer spent little time interviewing Appellant or his family (RT 3305-3306), collected no documents relating to Appellant's social, psychological or medical history (RT 3302-3304), hired no experts such as social workers, psychologists, psychiatrists, or neurologists to examine Appellant (RT 3279-3280), and did not prepare any witnesses for penalty phase testimony except at the court house one half hour before the penalty phase was to begin (RT 3305-3306). He also did not investigate or interview the damaging prosecution witness, Richard Morrison, although the prosecution gave ample notice of its intention to call him. (RT 1424.)

This Court has ruled that "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) "[W]hile acknowledging the wide latitude

and discretion necessarily vested in trial counsel in the area of tactics and strategy, we stress that the exercise of that discretion must be a reasonable and informed one in the light of the facts and options reasonably apparent to counsel at the time of trial, and founded upon reasonable investigation and preparation." (*People v. Frierson* (1979) 25 Cal.3d 142, 166.)

Mr. Beswick simply failed to do any investigation or preparation on behalf of his client for the penalty phase. There was no rationale for this inaction and no degree of deference to counsel's judgment can justify it. Had a reasonably attentive and competent attorney represented Mr. Carrasco, it is probable that the outcome of the proceeding would have been different. There certainly would not have been a death judgment.

In the hearing on Mr. Carrasco's motion for a new trial, the trial court was presented with ample evidence of Mr. Beswick's inadequate performance during the penalty phase, but refused to overturn the death sentence and to grant a new penalty phase trial. (RT 3914.) This was error. At the very least the death judgment should be overturned and a new penalty phase trial granted.

2. The Failure To Investigate And Present Mental Health And Social Background Evidence Was Far Below Professional Norms Of Representation In Death Penalty Cases

Trial counsel never investigated any possible prenatal injuries, birth complications, childhood illnesses and accidents, drugs, personality, behavioral disorders, interpersonal relationships, family, physical problems, behavioral problems, socio-cultural problems, or institutionalization, to be used for penalty phase mitigation. This type of evidence was routinely offered at the penalty phase of capital cases at the time of Appellant's 1998 trial. (See e.g., *People v. Deere*, *supra*, 41 Cal.3d 353, 366; *People v. Davenport*, *supra*, 41 Cal.3d at p. 276.)

The ABA Guidelines that were in effect at the time recommended that trial counsel take the following steps:

> Collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and Juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and religious and cultural influences.

(ABA Guidelines Sec. 11.4.1 (C), 1989.)

Carl Jones testified as a legal expert at the hearing on the motion for a new trial. He explained that capital defense seminars for defense attorneys in California have routinely emphasized the need for a "cradle to arrest" investigation that includes the areas of "prenatal, birth complications, childhood illnesses and accidents, drugs, personality, behavioral disorders, interpersonal relationships, family, physical problems, behavioral problems, sociocultural problems, institutionalization, and mitigation." (RT 3360.)

Although such an investigation was common procedure in death penalty cases, Mr. Beswick failed to gather a single document relating to Appellant's social history. During the motion for a new trial, Mr. Beswick testified. He admitted that he essentially did nothing on behalf of his client in preparation for the penalty phase.

> Q. Did you ever have Mr. Carrasco examined by any psychiatrist or psychologist with respect to this case?
> A. No.
> Q. Did you ever request the court to appoint any sort of psychiatrist or psychologist to examine Mr. Carrasco with respect to this case?
> A. No.
> Q. Did you ever discover whether or not Mr. Carrasco had received any sort of psychiatric or psychological treatment in the past?

A. He said he had not, I believe. I don't know if he had for sure or not.
Q. Did you have an investigator conduct interviews with Mr. Carrasco's family?
A. No.
Q. Did you have an investigator obtain medical records with respect to Mr. Carrasco?
A. No.

(RT 3279-3280.)

Later in his testimony:

Q. Did you obtain birth records for Mr. Carrasco?
A. I don't know if I did or not from the family. I don't recall.
Q. You didn't go to the hospital where he was born; right?
A. No.
Q. Did you determine what hospital he was born in?
A. I don't remember which hospital it was.
Q. You knew he was born in Los Angeles; right?
A. Saint John's. I'm not positive.
Q. Did you attempt to obtain his mother's chart at Saint John's?
A. No, I did not. No, I did not.
Q. Okay. Did you – during the course of your representation, did you obtain any materials, documents or other information concerning social service records or reports relating to Mr. Carrasco?
A. No.
Q. Any school records of any type?
A. I don't recall. Perhaps a diploma from his family, but I'm not – I think that was given to me from the family.
Q. Did you present that diploma during the trial of this matter?
A. I don't know if the diploma was given or if Bert testified he graduated from high school.
Q. So the answer is you don't know?
A. I don't recall.

RT 3302-3303.)

Even the prosecution's expert, Bruce Hill, admitted to the importance of investigating the social history of one accused of a capital offense:

A. . . . The jury is instructed that they can consider any factor that would have a bearing in their mind to mitigate the circumstances.
And so therefore one has a rather open panorama. A lot of things can be presented during that phase which would not be technically admissible in an ordinary trial, as it were.

Q. And once you've talked to the Defendant, do you try and take a history from that specific defendant, find out where they went to school, prior criminal record, whether they've been treated by psychiatrists, psychologists, those sort of thing?

A. From someone – from the accused person, the defendant or from a family member or family members.

Q. In your opinion is it important to try and develop as much of that type of information as possible?

A. Yes.

Q. Now, when you develop that information, do you believe it is your opinion that a lawyer has a duty to attempt to develop that information early on and to take steps to do that?

A. I think the attorney has a duty to develop that information. There are circumstances in which it is difficult to do that and there are certain circumstances in which information comes to you late.

Q. But that would be the goal, right?

A. I think so.

Q. And for example, if the family is available and in Los Angeles or something, in your opinion, would it be important for the lawyer handling a death penalty case to meet with those people early on in preparation for the penalty phase?

A. I think it's helpful and advisable.

(RT 3749-3750.)

The defense expert concurred that interviewing family members is crucial to the penalty phase and must begin before the trial, not after a guilt verdict is rendered:

Q. Do you have an opinion as to whether a lawyer can present a case in mitigation at a penalty phase without interviewing any witnesses except for a mother, a sister, two sisters, and an ex-wife after the guilty verdicts are rendered with respect to a penalty phase?

A. I do. I think that is ineffective assistance.
Q. And why is that?
A. Because the interviewing of all witnesses, defense and prosecution, those who'll be called and those who will not be called must start at the beginning of the case.

(RT 3391.)

It is well established that an attorney's representation is deficient where the investigation was abandoned after "having acquired only rudimentary knowledge of his history from a narrow set of sources." (*Wiggins v. Smith* (2003) 539 U.S. 510, 524.)

3. Counsel Was Prejudicially Ineffective For Not Presenting Evidence Of Appellant's Long-Term Drug Use, Multiple Head Injuries, Death Of His Father, Presence Of An Abusive Step-Father, And Growing Up In An Environment Surrounded By Violence

a. Failure To Investigate, Hire An Expert, Or Present Evidence Of Effects On Appellant Of The Use Of PCP And Other Mind-Altering Drugs From Childhood Until Age 30

Initially Mr. Beswick testified that he did not know of Appellant's use of PCP, before conceding that in fact he had been aware of the problem:

Q. His sisters informed you that he received treatment for substance abuse problems, correct?
A. I don't recall for sure.
Q. Did you take notes when you spoke with his sisters?
A. I don't believe so.
Q. After speaking with his sisters and his family and learning of the substance abuse problems, did you take any further action in that regard with respect to the mitigation aspect of this case?
A. I don't know exactly what his sisters and mother said about it, if it was a substance abuse problem or if there was history somewhere of drug abuse.
Q. When you learned that information, that there was either a substance abuse problem or a history of substance abuse with Mr. Carrasco, did you take any further action with respect to the penalty phase investigation or investigation of mitigating factors?
A. No.

Q. Were you aware or did they tell you that Mr. Carrasco was involved in the heavy use of Phencyclidine or PCP?

A. No.

(RT 3281-3282.)

Later, Mr. Beswick changed his testimony and admitted that he was aware that Appellant "had used PCP" along with other drugs such as speed and marijuana. (RT 3528.) In fact, the lawyer knew that the drug problem had been so severe that his client had been in drug rehabilitation programs. (RT 3530.) But Mr. Beswick did not gather records from the programs or interview anyone who treated Mr. Carrasco or present any evidence to the jury regarding Mr. Carrasco's drug problem. Mr. Beswick could not have made an informed tactical decision as to whether to present evidence of the drug use because he failed to gather sufficient evidence on which to base a decision.

Mr. Jones, the attorney who appeared as an expert on ineffective assistance of counsel in the post-trial hearing, explained in response to defense questioning that it is not possible to make a tactical decision without an investigation and preparation. Otherwise, it cannot be informed:

Q. You were asked by the prosecutor some questions regarding whether in your opinion certain either failures or lack of the production of evidence by Mr. Beswick or the lack if investigation many have been tactical decisions.

In your opinion, when a lawyer has no investigator for the penalty phase, conducts no penalty phase investigation prior to the penalty phase beginning, could his failure to produce any evidence be considered a tactical decision?

A. *It cannot because it is uninformed and based on ignorance. Any decision has to be based on adequate investigation and preparation. It would be tantamount to trying to perform brain surgery without going to medical school.*

(RT 3439, emphasis added.)

This position is amply supported by case law. Certainly where counsel has a legitimate strategic reason for not presenting evidence, there is no constitutional violation. Attorneys have "considerable latitude to make strategic decisions . . . *once they have gathered sufficient evidence upon which to base their tactical choices.*" (*Jennings v. Woodford*, (9th Cir. 2002) 290 F.3d 1006, 1014 (emphasis in original).) However, "[c]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." (*Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1456-57.)

While counsel must be careful to consider a client's desires during representation, it is inappropriate to acquiesce to the client's demands if the he or she has not made an "informed and knowing" decision. (*Jeffries v. Bodgett* (9th Cir. 1993) 5 F.3d 1180, 1193.) An attorney cannot properly advise a client on the consequences of failing to present mitigating evidence when it is unknown that such evidence exists. (*See Landrigan v. Stewart* (9th Cir. 2001) 272 F.3d 1221, 1228 ("[I]f the investigation had been more thorough, [defendant] would have had more information from which he could make an intelligent decision about whether he wanted some mitigating evidence presented."); *Agan v. Singletary* (11th Cir. 1994) 12 F.3d 1012, 1018 ("An attorney cannot blindly follow a client's demand that his [mental state] not be challenged...and end[ ] further inquiry regarding [the defendant's] mental fitness . . .").)

Mr. Beswick, the trial attorney, testified during the hearing on the motion for a new trial regarding Appellant's position on not presenting evidence of his drug use:

> Q. And it is your testimony that because Mr. Carrasco didn't want you to explore that, you didn't?
> A. Well, he instructed me not to. It was past and he instructed me not to.
> Q. You acceded to his instructions?
> A. The strategy was not to do that. . . . Well, it was a strategy. The meeting of the minds. It was instruction, but

it was interaction back and forth. Conversations as to what was the best way for Bert to proceed.

(RT 3529.)

The questioning of Mr. Beswick continued:

Q. Did you contact Brotman Hospital to attempt to obtain drug records regarding Bert Carrasco?
A. No.
Q. Did you have Mr. Carrasco examined by any medical professional with respect to his history of substance abuse?
A. No.
Q. Did you consult with any substance abuse expert or medical professional with respect to the impact that these drugs could have had on him?
A. No.
Q. And was that based upon the most part on [Appellant's] instructions not to pursue this?
A. Yes. Strategically he didn't want that brought up at the penalty phase.
Q Strategically Mr. Carrasco didn't want that brought up at the penalty phase?
A He thought it would impeach his credibility of his testimony during the *guilt phase.*

(RT 3533, emphasis added.)

The latter part of the exchange, of course, makes no sense. If true, it reflects that Appellant did not understand that the penalty phase occurs *after* the guilt phase is completed. So testimony at that stage would have no effect on the believability of his guilt phase testimony.

In any case, defense counsel has an obligation to pursue an phase investigation even where the client opposes it. The duty to investigate exists, not only when a defendant is opposed to presenting penalty phase evidence, but also where the defendant is actively obstructive. (*Rompilla v. Beard, supra,* 545 U.S. 374.) *Rompilla* was not a case in which trial counsel, as here, "simply ignored their obligation to find mitigating evidence." (*Id.* at 381.) Indeed, Rompilla's attorney had attempted to gain mitigating information for the penalty phase by interviewing the defendant and five mem-

bers of his family in some detail. He had also hired three mental health professionals whose work might have been beneficial for the penalty phase, to evaluate the accused for the guilt phase. Despite the efforts made by counsel, including following false leads intentionally provided by the defendant, the Court found counsel's efforts fell below professional standards. In support of the determination, the majority cited the lawyer's failure to obtain school records, the defendant's juvenile criminal history, and documentation of his history of alcohol abuse. (*Id.* at 382.) The Court was particularly disturbed that counsel never viewed the criminal file of the defendant's prior felony conviction, even though the prosecution indicated it would be used as aggravating evidence. (*Id.* at 383.)

Mr. Beswick's performance in the present case fell well below that of Rompilla's attorney. He spent *no* time interviewing the defendant's family, *nor* did he hire a single mental health expert. Further, he obtained *no* school records or documentation of Appellant's substance abuse, which were readily available. (RT 3530-3533, 3571-3572.) Competent counsel would have recognized that Appellant's significant use of hard drugs such as PCP should an attorney to explore its effect upon the client in relation to of mental illness. (RT 3362.) Mr. Jones, the defense legal expert for the new trial motion, explained that learning of such drug use "should jump up like a red flag." (*Ibid.*) Appellant explained in testimony during the penalty phase that he had started using "drugs and reds and PCP" when he was eight and continued taking such mind-altering drugs until he was 30, a period of 22 years! (RT 3138-3139). Yet Mr. Beswick did not explore whether his client suffered ill-effects from such long-term abuse. There was no evaluation of the client's mental state. Mr. Carrasco's self-confessed history of drug abuse, which ideally would have been known to defense counsel long before his client took the stand, should have triggered an investigation into the short and long-term effects of the drugs and the treatment Mr. Carrasco received, whether it was mandatory or voluntary,

whether he was able to stay clean for any length of time, and other matters that would be significant to a jury deciding whether Mr. Carrasco would receive a death sentence or life without parole.

"Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." (*Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1085.) However, Mr. Beswick never hired an expert to develop, prepare, and present evidence in order to demonstrate that drug use, begun during childhood and continued through the formative years over two decades, can have extreme and permanent effects on brain development. The head injuries mentioned earlier & later could be blended in here, b/c drug use by someone who has had head injuries is a more complicated situation, requiring the assistance of an expert, but also presenting a stronger case in mitigation.]

Appellant's family had personal experience with his drug use and its effects on his brain to which they testified at the evidentiary hearing on the motion for a new trial. (RT 3571.) His mother testified that, while on drugs, he had headaches and believed that people were following him and, at one point, unreasonably believed there was a man in a tree, spying on him. (RT 3571.) Appellant's ex-wife, Eva Carrasco, reported that he used PCP, cocaine, and crack, which had led to hallucinations and paranoia. For example, on one occasion when she and Appellant were in a hotel several stories up, he closed the drapes in reaction to "someone walking by" the window, an obvious impossibility. (RT 3633.) She reported another occasion in which, while under the influence of drugs, he came home, laid down, and began howling, causing his wife and daughter to leave the home hurriedly and to seek immediate treatment for her husband. (RT 3636.)

Case law supports the presentation of drug use as a possible mitigating factor. It is well recognized that the influence of drugs may provide a reason for a jury not to sentence a defendant to death. (*See e.g. Bell v. Ohio* (1978) 438 U.S. 637, 641-42 (Ohio statute unconstitutional because it did

not permit consideration of defendant's drug problems, and emotional and mental instability); *Roberts v. Louisiana* (1977) 431 U.S. 633, 637 (mandatory death penalty statute unconstitutional because it fails to permit consideration of mitigation such as the influence of drugs, alcohol, and other factors).)

Similarly, this Court has repeatedly recognized that alcohol or drug use constitutes mitigation evidence. (*See e.g., People v. Lanphear II* (1984) 36 Cal.3d 163, 168-69; and *People v. Marsh* (1984) 36 Cal.3d 134, 145 n.8.) In *People v. Ledesma, supra,* 43 Cal. 3d at pp. 197-198, it was determined to be constitutional ineffectiveness where counsel failed to present evidence of PCP use which impairs "brain function . . . and ability to respond to something new or a crisis, or to participate in more abstract, complicated thinking." *Ledesma* is particularly pertinent to the case at hand, since it too concerned both a defendant with a long-term use of PCP and a defense lawyer who pursed no investigation. It was established that PCP is a highly destructive and mind-altering drug. Where there is evidence that a defendant has seriously abused the drug, as here, mental defenses are generally available and may indeed be meritorious, and therefore must be investigated. As the Court explained:

> Fred Rosenthal, M.D., a psychiatrist, was of the opinion that when, as here, there is evidence that a defendant has long and seriously abused PCP, a defense of diminished capacity[36] is generally available and may indeed be meritorious, and therefore should be investigated. He testified that PCP is a highly destructive and mind-altering drug: "It produces almost every psychological, psychiatric symptom you can name. . . . [¶] And it goes all the way to producing the most serious psychiatric condition, which is psychosis. It can produce a complete break with reality. . . . [¶] In addition to the psychiatric problems, PCP can produce neurological problems. . . . [¶] [Users] can have intellectual defects. They can

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36. Even though diminished capacity is no longer available as a defense, the thrust and significance of the observations of Dr. Fred Rosenthal remains unchanged. (See *People v. Saille* (1991) 54 Cal.3d 1103.)

have problems with memory. . . . [¶] In addition to that, PCP seems to have a property that some drugs don't have. And that is it can produce chronic effects which extend beyond the time that the drug is taken."

Dr. Rosenthal further testified that in order to determine the effects of PCP on a criminal defendant and thereby assemble data to be used in evaluating the availability of a diminished capacity defense, the defendant should be subjected to extensive psychiatric, neurological, and physical examinations, and his family, friends, and acquaintances should be interviewed to verify the information he furnishes. Independent verification is required not only because the defendant may have an interest in not telling the truth, but also because his memory may have been weakened or destroyed by use of PCP and his mind may have restructured from various materials a version of the relevant events that corresponds little, if at all, with what actually happened.

. . . .

Turning to the question of the strength of a diminished capacity defense in defendant's case, Dr. Rosenthal stated: "I think that given the history and the amount of drugs that Mr. Ledesma took, it would be almost inconceivable to me that he would be in the normal state of mind during that period of time. [¶] Nobody taking the amount of drugs that he took could maintain a normal, rational, calm state of mind with that kind of drug abuse." In response to appellate counsel's question, "In your opinion, is it possible, probable, that with this amount of drugs, that he was in a state of diminished capacity at the time of the crimes?," Dr. Rosenthal answered, "I would think that that would be a reasonable consideration."

(*Id.* at pp. 197-199.)

In order to determine the effects of PCP on a defendant and thereby assemble data to be used in evaluating the availability of mental-state information in mitigation, the defendant must be subjected to psychiatric and psychological evaluations, and his background investigated. (*Ibid.*) Mr. Beswick did none of this. The evidence, as presented herein, establishes that he had a history of head injuries and mind-altering drug use.

b. Failure to investigate brain damage resulting from Appellant's multiple head injuries and the medical effects of his mother's toxemia while she was pregnant with him

(1) Introduction

Appellant had fallen on his head at a young age with a force strong enough to break a vertebrae in his back. He had to be in traction for two weeks. (RT 3572-3573.) As an adult he suffered injuries to the head, jaw, and skull in a 1967 automobile accident in which caused his entire head to swell. (RT 3356, 3383, 3415, 3547-3548, 3572-3574.) Further, Appellant may have had prenatal difficulties due to his mother's toxemia and injuries associated with her seizures during his birth. (RT 3567.)

Mr. Beswick made no effort to investigate the severe head injuries and likelihood of organic brain damage. Nor did he hire a medical expert to evaluate the effect of these events on Appellant's brain functioning and behavior. (RT 3279-3280.)

(2) Mr. Beswick's failure to explore Appellant's medical history or to hire a medical expert for further examination was below professional norms of competence in a death penalty case

Probing a defendant's medical history is a routine part of death penalty investigation, particularly when a superficial investigation uncovers evidence of head injuries. (See e.g., *Douglas v Woodford* (9th Cir. 2003) 316 F.3d 1079; *Jackson v. Calderon*, *supra*, 211 F.3d 1148; *Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152; *Evans v. Lewis* (9th Cir. 1994) 855 F.2d 631.) This was explained to the trial court during the hearing on the motion for new trial. According to Carl Jones, the prominent legal expert called by the defense, head injuries are a "red flag" that "alert[] the attorney he or she has an absolute obligation to follow-up. To get more information. To seek expert assistance to determine whether or not that could be used as

a factor in mitigation during the penalty phase." (RT 3384.) This was not even attempted by Mr. Beswick.

Further testimony on this issue went as follows:

> Q. (Mr. Pitman) So it is your opinion that a lawyer representing someone, a reasonably competent lawyer not say a great lawyer but a minimally competent lawyer should have been alerted if his client had suffered a head injury to further pursue that and obtain expert assistance.
>
> . . . .
>
> A. Yes.
>
> Q. Based on your experience and in your opinion what sort of expert testimony do you believe should have been sought out with respect to this head injury?
>
> . . . .
>
> A. A neurologist at a minimum.
>
> Q. And in your opinion and based upon your experience, why would a serious head injury—how could a serious head injury be considered a factor in mitigation or how would a reasonably competent attorney utilize or employ facts such as that?
>
> . . . .
>
> A. At the penalty phase evidence of such an injury, and its impact would put the jury in a position to better determine whether Mr. Carrasco should live or die.
>
> The purpose of the penalty phase is to provide all the information available on Mr. Carrasco so that they can make a determination as to whether he is the worst of the worst or whether he has factors which in mitigation which would elicit either sympathy or pity or mercy.

(RT 3384-3385.)

The circumstances of Appellant's case are similar to that of the Appellant in *Douglas* in which the trial counsel was put "on notice" through his abbreviated investigation that the defendant had had long term exposure to toxic solvents, and that he had a major head injury resulting from an automobile accident. Representation for Douglas was determined by the

Ninth Circuit to be inadequate for "failing to dig deeper" in its investigation. (*Douglas v Woodford, supra,* 316 F.3d at 1088, 1089.)

(3) Mr. Beswick's failure to investigate Appellant's medical history caused great harm

Appellant was denied a fair trial because of state interference. That is, the court refused to appoint counsel or co-counsel. (*United States v. Cronic*, *supra*, 466 U.S. at pp. 658-659; *Strickland v. Washington*, *supra*, 466 U.S. at 692.) The Ninth Circuit has repeatedly found failure to adequately investigate medical history for the penalty phase of trial prejudicial to the defendant. (See e.g. *Ibid; Jackson v. Calderon, supra,* 211 F.3d 1148; *Deutscher v. Whitley*, *supra*, 884 F.2d 1152; *Evans v. Lewis, supra,* 855 F.2d 631 *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032; *Sanders v. Ratelle*, *supra*, 21 F.3d 1446; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825; *Bloom v. Calderon*, 132 F.3d 1267; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073; *Ainsworth v. Woodford* (9th Cir. 2001) 268 F.3d 868.) For instance, in *Bean* (a case involving double homicide as here) prejudice was found despite the fact that counsel had hired two mental health experts, because there was a failure to prepare and furnish necessary information to them. (*Bean v. Calderon, supra,* 163 F.3d 1073) As a result, the experts were unable to draw definitive conclusions as to whether Bean suffered from brain damage. (*Id.* at 1080-1081.) The performance of the attorney was significantly better than that in Appellant's case, as at least the former did present the testimony of two experienced expert witnesses. (*Id.* at 1078.) Here there was nothing.

Many of the cited cases involved crimes that were as horrific, if not significantly more so, than the crimes at issue in Appellant's case. (See e.g. *Bloom, supra,* 132 F.3d 1267.) Further, the types of medical conditions found to be important for a jury to consider in many of the cases are similar to the ones presented to the trial judge at the hearing on the motion for a

new trial: multiple head injuries, prenatal problems, and prolonged drug use, particularly PCP. (See e.g. *Bean, supra*, at 1073; *Jackson, supra,* 211 F.3d 1148)

c. Failure to investigate impact on Appellant of father's death as a 10-year-old and mother's remarriage to an abusive alcoholic man three years later

Mr. Beswick did not investigate the emotional and psychological impact on Appellant of his father's death when he was 10, or his mother's subsequent remarriage to a man who beat Mr. Carrasco. (RT 3565-3568.) He never investigated allegations of physical abuse in the household by the stepfather or the effect of the man's alcoholism. (RT 3696.)

Had counsel merely talked to Appellant's mother in more than a cursory manner, he would have discovered, as the mother disclosed in the new trial proceedings, that he was significantly affected by his father's death. Appellant's mother and sisters testified that he had a close relationship with his dad. (RT 3679.) Then he went through the trauma of seeing his father carried out of the house on a stretcher after a heart attack, Appellant never saw him alive again. (RT 3565.) Appellant's sister testified that when their father died "all of us were really devastated . . . Bert, he was more so . . . because he was so close to my dad . . . afterwards he was sort of withdrawn and he actually went with his friends a lot more often than we did. He was always gone." (RT 3678.) After that, Appellant became withdrawn and depressed. (RT 3678.)

Appellant's mother remarried three years after her husband's death. (RT3568.) She testified at the post-trial hearing regarding her new husband, who was "abusive verbally not as much physically but verbally. He was a little bit physical, but not to hitting—pushing and shoving and yelling and ranting and raving. . . . he was an alcoholic. . . . [H]e was very hard to live with. He was abusive and in his speech the things he used to say, and he tried to shove me around." (RT 3568-3569.) Consequently "the kids

were always—they tried to hide from him, and I was going to get a divorce." (*Ibid.*) Appellant's sister testified that her stepfather hit her and that the police were called to the house on four or five occasions, and on one occasion he was taken to jail. (RT 3688-3689.)

This information about the loss of Appellant's father and the abuse inflicted by his alcoholic step-father should have been explored by Mr. Beswick and presented to the jury at the penalty phase. As with all other aspects of the case, he did nothing.

As Appellant got older, he began spending more time away from home. (RT 3570.) Another sister testified briefly at the penalty phase about what happened following their father's death: "When she was growing up Bert took on some responsibilities of a father. He was always there for her and her sisters and would protect them all the time." (RT 3082) Another sister testified that "when our father passed away, that is when Bertie really did assume the father figure role because he felt that since our father was gone and he was a bigger guy, that he felt he had a need to protect all of us." (RT 3090.)

During direct examination in the motion-for-new-trial hearing, Mr. Beswick testified as follows regarding his limited contact with the family and lack of investigation:

Q. My question is do you have any documents or memoranda setting forth the dates and times of your interviews with Mr. Carrasco's family with respect to your preparation of the penalty phase in this case?
A. I don't know.
Q. If you did, they would be in your file; correct?
A. Yes.
Q. What members of the family did you speak with?
A. His mother, step-father, three sisters, and his wife Eva. Strike that. I don't think I spoke with Francis, the other two sisters Barbara and Leandra.
Q. And based on these interviews, did you conduct any additional follow-up investigation?
A. No.

Q. When was it that you spoke with them in preparation for the penalty phase?
A. Sometime after the verdict.
Q. After the verdict in the guilt phase?
A. In the guilt phase, yes.
Q. And after the verdict in the guilt phase was rendered, the penalty phase started almost immediately; correct?
A. Yes.
Q. There was no break of a day even?
A. No.

(RT 3305-3306.)

Because trial counsel never interviewed the family members in advance of trial and failed to prepare them to testify, he was not able to use their testimony effectively to humanize Appellant for the jury. Nor did he investigate his client's history of being abused and suffering head injuries. The lawyer did not even retain a psychologist to evaluate Appellant in order to develop and present evidence regarding the effects of losing a father at an early age and of subsequent exposure to an abusive stepfather and other mitigating facts. The attorney made no mention of these events, or any other testimony regarding the family even in his closing argument. (See RT 3159-3163.)

d. Failure to present evidence of the staggering poverty and notorious gang activity in the projects in which Appellant grew up

Appellant grew up in a poor Hispanic family in the Mar Vista projects of Culver City where drugs, guns, violence, and gangs were rampant. (RT 3063, 3072, 3073, 3084, 3568.) Because his father had died leaving five children, Appellant was forced to start working at McDonald's when just 13 years of age. (RT 3064.)

The law is well established that such failings by counsel at the penalty phase require reversal. For example, the Ninth Circuit has found counsel deficient where an initial investigation revealed that the defendant had a particularly difficult childhood, "yet there was no attempt to contact persons who might have had more detailed information about Douglas' past."

(*Douglas v Woodford, supra,* 316 F.3d at p. 1088.) Evidence regarding social background is "significant . . . as there is a 'belief long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" (*Id.* at p. 1090, *quoting Boyde v. California*, (1990) 494 U.S. 370, 382.)

Like the attorney in *Douglas*, Mr. Beswick failed to investigate the influence of Appellant's poverty-ridden Hispanic background on his upbringing or the impact of the notorious gang activity in and around the Mar Vista projects. As a child and young adult, Appellant was exposed to the murderous activity of gangs in his neighborhood, where people he knew were often shot and killed. (RT 3140.) Because of the presence of an abusive stepfather, Appellant's home had ceased to provide a safe haven from the rampant violence of the community. (RT 3569.) As a result, Appellant spent more time on the street, increasing his exposure to drugs and gang activity. (RT 3570.)

e. Conclusion

In sum, Mr. Beswick's efforts to investigate and otherwise prepare for the penalty phase of the trial fell far short of professional norms. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . . . a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances . . ...." *Wiggins v. Smith, supra,* 539 U.S. at p. 521, quoting *Strickland, supra*, 466 U.S. at pp. 690-691. Citing the ABA Guidelines, the Court stated that counsel must attempt to discover all "reasonably available mitigating evidence" and that abandoning an investigation after acquiring "rudimentary knowledge" from a "narrow set of sources" is not sufficient. *Wiggins, supra,* at p. 524.

Furthermore, when initial information reveals potential for mitigation, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among defenses." *Id.* at p. 525. Here, Mr. Beswick had available information that would have led a competent attorney to further his investigation. Family members indicated their willingness to discuss Appellant's background with him, but he spent no time with them except for a few minutes over lunch before their penalty phase testimony.

C. Defense Counsel Did Not Investigate Or Interview Damaging Prosecution Witness Richard Morrison, Therefore Prejudicing The Outcome Of The Penalty Phase

1. Introduction

On February 25, 1998, well before the end of the guilt phase, the prosecutor requested the court's permission to introduce a witness to present possible Penal Code § 1101(b) evidence, i.e., character evidence. (RT 1424.) Richard Morrison was to testify to an incident many years earlier, in 1979 or 1980, in which Appellant allegedly threatened him with a gun. Mr. Beswick began to object to the witness based on the number of years that had passed since the incident, and also because the testimony would be more prejudicial than probative under Evidence Code § 352. (RT 1424.) However, the court interrupted him, continuing the discussion for the next day so it could review prosecution material related to the witness. (RT 1424.) However, there was no further discussion regarding the witness. Mr. Beswick never renewed his objection to the witness or demanded a ruling from the court on the issue. Mr. Morrison testified at the penalty phase. (RT 3123-3129.)

2. Mr. Beswick's performance at the penalty phase was deficient because he failed to prepare for the testimony of Richard Morrison

Although Mr. Beswick was given ample time to investigate and interview Richard Morrison, he did not do so. Appellant's attorney for the

post-trial hearing was under the belief that Mr. Beswick knew nothing of the witness because the prosecution failed to provide discovery: "There is nothing in the file of any nature or type that would indicate either in writing or verbally or in any other way that [§] 190.3 discovery was in fact provided" and that "Mr. Beswick appeared to be surprised by that evidence and unaware." (RT 3379.)

In fact, Mr. Beswick did know of Mr. Morrison,[37] but he did nothing to prepare for his testimony and maintained no records in his file relating to prosecution discovery or to the witness. (RT 3379.) Because of Mr. Beswick's lack of preparation, the prosecutor was able to present, virtually without challenge, testimony by a former co-worker at a different dairy that, twenty years earlier and without any provocation, Mr. Carrasco pointed a gun at him and told him, "Get out of here." (RT 3123-25) And on the basis of this unprovoked (and unreported) threat, Mr. Morrison quit his job without even giving two weeks notice. (RT 3125.) Mr. Beswick questioned the witness regarding his failure to report the incident, but elicited only answers that solidified Mr. Morrison's testimony that he was terrified. RT 3125-3129.)

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37. Ms. Meyers: I think he brought it up yesterday. About the information I provided to him about the witness on the possible 1101(b) evidence, which I think this would be a good time since we have about five minutes left to discuss. I have that witness. That witness is a available to come in. It is information I just found out about.
Mr. Beswick: What is the witness' name?
Ms. Meyers: I gave you that report yesterday.
The Court: Have you had an opportunity to do any investigation on it?
Mr. Beswick: No, I really have not, judge. I did read his statement. Actually, I haven't received this. If there is a tape, I haven't received that and I haven't received a copy of the transcript of the tape if there was that. All I have is the officers' police report as to what transpired. If it is taped I would like that.
Ms. Meyers: There is no tape.

(RT 1424.)

Carl Jones, the legal expert on minimal standards in defending capital cases, testified on the motion for a new trial that Mr. Beswick's failure to insist on discovery would "enhance" his opinion that the lawyer was incompetent. (RT 3379.) He had received discovery, but his cross-examination of this witness was so poor that Appellant's subsequent attorney and expert witness concluded, after reviewing the transcript, that the prosecutor had not provided adequate discovery, and that Mr. Beswick did not even know about the witness beforehand.

Because Mr. Beswick did not interview or investigate Mr. Morrison, he was unable to present any impeaching evidence or otherwise counter the prosecution's evidence of prior acts of violence. Despite the trial court's ruling on the claim of ineffective assistance of counsel that Mr. Beswick was "prepared for each witness" (RT 3914), it is clear from the record that the lawyer was altogether unprepared for Morrison. (RT 3379.)

This Court has ruled that "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (*In re Fields, supra,* 51 Cal.3d at p. 1069.) This is of course true in all criminal trials, but as the Court in *Fields* emphasized, it is even more imperative. This is in a death penalty case.

In the case at hand, Mr. Beswick's advocacy was so deficient across the board that it amounted to a breakdown in the adversarial process. He did nothing at the penalty phase to combat the prosecution's case. Ultimately, the process lost "its character as a confrontation between adversaries," resulting in a violation of the Sixth Amendment. (*United States v. Cronic, supra,* 466 U.S. at p. 657.)

3. Mr. Beswick's failure to investigate Mr. Morrison was prejudicial to the outcome of the penalty phase

Morrison's unchallenged testimony was devastating to Appellant's case. It was particularly damaging because it was presented out of order,

after Mr. Beswick had presented the testimony of Appellant's family members and just before Mr. Carrasco took the stand: Mr. Carrasco denied Mr. Morrison's allegations, but it is likely that the jury that had found him guilty of two murders would find Mr. Morrison more credible—even though he had not reported it to the police or his employer, and claimed to have had no negative interactions with Mr. Carrasco previously, and claimed to have been so frightened he quit his job on the spot—especially when they were compared virtually side by side. Morrison's testimony that Appellant had threatened his life many years earlier allowed the jury to conclude that his dangerous behavior was ingrained, long lasting, and unlikely to change. That conclusion was certainly an important factor in the verdict of death. Mr. Beswick's failure to renew his objection to Morrison's testimony based on section 352 coupled with his failure to conduct any investigation, prejudiced Appellant. Because of Mr. Beswick's incompetence at this crucial phase of the trial, the penalty phase verdict should be invalidated.

D. Defense Counsel Opened The Door To Otherwise Inadmissible Evidence Concerning Appellant's History Of Arrests And An Incident In Which He Allegedly Threatened Someone 18 Years Earlier

Mr. Beswick opened the door for the prosecution to introduce damaging evidence that was otherwise inadmissible. During penalty phase questioning of Appellant's sister, Barbara Gamboa-Carrasco, the attorney unnecessarily asked if her brother had ever been arrested or had "run-ins with the law" or convicted of any felonies. The lawyer also asked her about acts of violence. Either the attorney did not know enough about his client to know that these were not safe questions to ask, or he did not understand the basic law that such questioning opens up the door to otherwise inadmissible evidence of arrests. To read the examination is appalling:

> Q. Let me ask you this: When, as you were growing up, did you ever see Bert in a fit of rage doing physical

harm, having any sort of confrontation with anyone the whole time you were growing up?

A. I never personally seen that.

. . . .

Q. Any run-ins with the law at all?

A. Not that I am aware of.

Q. Any arrests by police that you know of?

A. No, not that I know of.

(RT 3094-3095.)

In a hearing out of the presence of the jury the prosecutor then successfully moved to introduce evidence of both arrests and prior acts of violence that had previously been found inadmissible. (RT 3096-3097.) The court ruled that Mr. Beswick had opened the door:

Ms. Myers: [B]ut with this witness he pretty much opened the door to the defendant's arrest(s).
The defendant has been arrested, your honor. As a matter of fact, he was arrested for assault, for several drug related offenses, and he has also opened the door with respect to the defendant's violent conduct.

. . . .

The Court: I am satisfied the door has now been opened to that. The court previously ruled against allowing that in; however, these questions have put that into issue.

(RT 3096-3097.)

By asking the question about arrests, Mr. Beswick opened the door for the prosecutor to bring to the attention of the jury both arrests and a prior incident of violence. But for the questions of the attorney, such information was no admissible. Mr. Beswick asked the sister:

Q. In 1975, did you know your brother was arrested for petty theft?

A. No, I did not.

Q. Did you know that in 1977 your brother was *arrested for possession of a controlled substance*?

A. No, I did not.

Q. Did you know that in 1984 your brother was *arrested for carrying a concealed weapon in a vehicle*?

A. No, I did not.

Q. Did you know that in 1986 your brother was *arrested for possession of PCP for sale*? Did you know that?
A. No, I did not.
Q. Did you know that in 1990 your brother was *arrested for ADW (assault with a deadly weapon), 245(A)(1) of the Penal Code*? Did you know that?
A. No, I did not.

(RT 3103-3104, emphasis added.)

The trial was in recess for a day in order for the prosecution to bring in a rebuttal witness whose testimony of alleged threats became admissible through the questions posed by Appellant's lawyer. Richard Leroy Morrison had worked with Appellant at the Edgemar Dairy in 1980, 18 years before the trial. Mr. Morrison recalled that he abruptly quit his job out of fear for Appellant, explaining it was because he "was threatened with a gun." (RT 3124.) "I was just out in the yard. I was on my way back to the plant area when he came up to me and just pulled a gun on me. . . . I think he said something to the effect of, 'get out of here.'" (*Ibid.*) Mr. Morrison called the dairy the next day and quit. (*Ibid.*)

It is not in the record whether the testimony of Mr. Morrison was accurate or even true. Due to the incredibly deficient representation provided by Mr. Beswick, there was no investigation of the witness or any other aspect of the case. (RT 3256.)

Unquestionably introduction of the arrests and threats put Appellant in a very bad light in the eyes of the jurors. His character had been irrevocably damaged. In particular, the arrest for assault with a deadly weapon was damaging due to the violence involved, as were the purported threats 18 years earlier. The similarity to the crimes for which he was convicted compounded the effect. It goes without saying that threatening someone with a pistol, and putting the person in such fear that he quit his job, caused enormous damage. Also, the arrests were prejudicial as they would create a negative impression in the minds of the jurors despite the fact that they did

not lead to convictions. Appellant may have been innocent, but the harm was dome thanks to Mr. Beswick.

Not only did the evidence regarding arrests and violence reflect poorly upon Appellant's character, but they also served to undercut the sister's testimony. She had testified that the family were very close (RT 3090), that Appellant had never joined a gang (RT 3092), she never saw him carrying a gun (RT 3092), and that he was a compassionate person (RT 3091). After reeling off the list of arrests to Ms. Gamboa-Carrasco, the prosecutor asked: "Is it still your testimony you were very close to your brother?" Ms. Gamboa-Carrasco attempted to explain how she could be close to her brother, but not know of the arrests. (RT 3104.) It was too late, for the prosecutor had successfully discredited her.

Because of the Morrison testimony made possible through defense counsel's incompetence, the prosecutor was able to develop more harmful evidence in the cross-examination of Appellant. She asked him if he owned a pistol in 1980 at the time of the alleged threat. Appellant admitted he did. (RT 3145.) The prosecutor then brought out that it was a .38, and he "had a holster" for it. (RT 3145-3146.) Then Appellant was asked about being arrest for assault with a firearm. (RT 3147.) Even though Appellant did not recall, the damage was done. The was the essence of the cross-examination, for the prosecutor clearly realized that the otherwise inadmissible evidence, took a terrible toll on the credibility of Appellant..

The damaging evidence was introduced because of Mr. Beswick's own careless errors. Carl Jones referred to as "proof positive of his incompetence." (RT 3441.) Certainly a trial attorney should be expected to understand the rules of evidence in order to use them to the advantage of a client, and should know enough about his or her client and the case, to know not where to venture in questioning witnesses. In a death penalty case, in which the client's life is literally hanging in the balance, such a careless mistake is indefensible.

Mr. Beswick's error in opening the door for the prosecutor to introduce the arrests and threats into evidence was yet another example of his lack of preparation and lack of attentiveness to Appellant's case. It is possible that Mr. Beswick felt he could safely ask Appellant's sister about prior arrests because he believed his client had never been arrested. If so, it demonstrates the incredible vacuum in which he was operating. The level of incompetence was incredible, and his performance was far below professional standards, that trial counsel in a capital case could know so little about a client's history.

The errors of counsel were prejudicial. The list of Appellant's arrests presented by the prosecutor was very damaging to his defense. As presented in the preceding, Mr. Beswick had not prepared the penalty phase and thus was dependent entirely upon the unrehearsed testimony of four family members and Appellant himself. As the only source of mitigating evidence, the family's testimony was crucial. Ms. Gamboa-Carrasco was close in age to Appellant—one year and a half separated them—and they had attended the same schools. (RT 3088-3089.) She was in a position to provide important mitigation on his behalf.

Since Mr. Beswick had not talked with her in advance about her relationship with Appellant and his background, the testimony was superficial at best, lasting just eight pages. (RT 3088-3096.) But whatever mitigating value her testimony might have had, despite its inadequacy, was discredited and essentially destroyed when the prosecution was afforded the opportunity to ask her about the arrests of her brother. She knew nothing about these. When the jury began its deliberations shortly thereafter, and thought back upon the sister's testimony, it is likely that what they remembered was the questions about the arrests. An already weak penalty phase presentation by Mr. Beswick, was thus weakened even more by his error.

The errors of Mr. Beswick deprived Appellant of effective assistance of counsel, a fair trial, equal protection of the law, and subjected his client

to an unfair penalty phase hearing, in violation of Amendments Five, Six, Eight and Fourteen.

E. Trial Counsel's Ineffectiveness Was Prejudicial

The key aspect of the penalty trial is to individualize the defendant, focusing on the particularized characteristics of the individual. This Court has recognized that presentation of social history and mental health is crucial for a penalty phase defense because there is a "long held belief by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (*Boyde v. California* (1990) 494 U.S. 370, 382.) Here the jurors were given no information to aid them in making an individualized determination.

The information that was readily available to defense counsel was precisely the type of evidence that is critical for a jury to consider when deciding whether to impose the death sentence. Although Mr. Beswick introduced some of Appellant's background through the testimony of family members, he did so in a cursory manner and failed to even mention it in his closing argument. He just did not seem to understand what his responsibilities were at the penalty phase. Mr. Beswick's short examinations of family members, while touching on general areas of mitigation, failed to elicit substantive evidence likely to elicit compassion amongst the jurors. Due to an absence of investigation and counsel's role at such a critical stage, Mr. Beswick simply did not know what to ask. Also, he did not appear to understand the importance of an investigation, since none was conducted. There was simply no investigation. Even a sister, independent of the lawyer, prepared subpoenas at the request of Appellant. "I got a call from Robert and he gave me the list of names of people that were to be subpoenaed." (RT 3603.) Mr. Beswick was not involved in the process, and they were issues at the request of Appellant. (RT 3604.)

Remarkably, after the guilt verdicts, and the penalty phase was scheduled for the afternoon that same day, Appellant's mother approached Mr. Beswick to ask him if he "wanted to know anything about her son, his background, what kind of a person he was, and he said, 'I'm going to put you on the stand in fifteen minutes' before we were scheduled to be in here." (RT 3561-3562.)

> Q. And at that point did he ask you any questions about Robert?
> A. Yes. After I brought it up. I asked him, "Don't you want to know anything about Robert.?"

(RT 3563.)

It was not until after the guilt verdicts that Mr. Beswick talked for the first time to Appellant's mother, two of his sisters, and his wife regarding the client's background. (RT 3560-3563, 3601-3603.) That was "[a]fter the guilt phase and the penalty [phase] started." (RT 3560.) The penalty phase began the same day as the guilty verdicts. (RT 2983-3009.) There was no effort prior to trial to conduct the interviews. The lawyer gave the mother 15 minutes warning that he was going to have her testify. (RT 3562.) The brief interviews occurred standing by a hot dog stand outside the courthouse and then in a hallway were the only times Mr. Beswick spent preparing the mother and siblings for testimony meant to persuade the jury to spare Appellant's life.

The preparation was done as a group. There was no individual interviewing of family members. (RT 3602 [Testimony of Leandra Kamba, Appellant's sister].) Martha Heredia, Appellant's mother testified:

> Q. Were you ever contacted by any investigator or any person from Mr. Beswick's office with respect to providing information about your son, Robert?
> A. No.
> Q. And did you ever meet with Mr. Beswick at his office or at your home or anyplace else?
> A. No.

Q. Now, when was the first time you had a conversation with Mr. Beswick about the case?
A. An extensive conversation? After the guilt phase and the penalty started.
Q. Did you ever talk to Mr. Beswick during the guilt phase portion of the case?
A. Just in passing out in the hallway.... 'Hello. How is the case going?' He never gave me any specifics about it at all.

(RT 3559-3960.)

She recalled that Mr. Beswick did not even explain that she would be cross examined. (RT 3564.) A sister, Barbara Carrasco-Gamboa, said that the only preparation she received from the lawyer was: "I think I'm going to call all of you, each of you up on the stand. I'm going to ask you questions of how Bert was as a brother and how close you were, and stuff like that, and that's about it." (RT 3673.)

Mr. Beswick advised the family members not to seek sympathy from the jurors, the very thing that the family of a defendant should do at penalty phase with his or her life on the line. Appellant's mother recalled: "He told us not to get emotional and not to seek . . . sympathy from the jury." (RT 3464.) Also, she stated that when testifying: "I was trying to keep my emotions under control, because Mr. Beswick told us, 'Don't show any emotion and don't ask for sympathy from the jury.'" (RT 3578.) Appellant's sister testified: "Mr. Beswick said: 'Please don't try to elicit any sympathy from the jury. Don't say anything that might do that.'" (RT 3680.) This direction reduced the power of family members' testimony because, as the court advised the jurors, at the penalty phase "pity and sympathy *must* be considered." (RT 3174, emphasis added.) Instructing family members to restrain their emotions undermined the presentation of mitigation and likely prejudiced the outcome.

Leandra Carrasco, a sister, asked Mr. Beswick if Appellant's oldest daughter, than a student at UCLA, should come testify: "He said, 'No, it

would be too much for her,' something like that. And I didn't understand that, but I thought he knew what he was doing." (RT 3602.) Logically the uniquely helpful and humanizing information from the perspective only a daughter could provide was of significant importance. It would have been the type of testimony that could sway the jury away from voting death.

Mr. Beswick had the material available upon which to build a convincing case in mitigation, but did not use it. Some of the information was alluded to at the trial but in a disorganized manner that failed to present a coherent portrait of the Appellant. That family members had to prepare on their own declarations in mitigation, weeks after the verdict when they could do no good, is shocking.

Mitigating evidence that could have been presented during the penalty phase but was neither investigated nor presented by Mr. Beswick, was outlined by replacement counsel in motions seeking a new trial. (CT 546-591 [Notice of Motion and Partial Motion for New Trial, June 19, 1998]; CT 624-659 [Notice of Motion and Motion for New Trial, Aug. 3, 1998].) The evidence was explained and expanded during the hearing on the motion, September 17-18, December 9-10, 1998, January 7, February 5, 1999. (RT 3240-3934.)

At the age of eight, Appellant began using PCP and other drugs—a habit that lasted two decades. PCP causes neurological damage, brain atrophy, memory loss, psychosis and a host of other problems. (RT 3362-3371, 3380-3382, 3423.)

His mother suffered from toxemia while pregnant with him, and experienced seizures during his birth which may have caused neurological damage. (RT 3567.) Further, Appellant had fallen on his head at a young age with a force strong enough to break a vertebrae in his back and put him in traction. (RT 3572.) Such a drop could have caused organic brain damage—counsel should have hired a neurologist to pursue this inquiry. (RT 3384.)

When Appellant was 10, he watched his father being taken away in an ambulance after a fatal heart attack, and never saw him again. (RT 3565-3566.) The psychological injury to Appellant should have been explored and presented to the jury. His step father was physically abusive with his mother and Appellant; as a result Appellant avoided home and spent more time hanging out on the streets as a result. (RT 3570.) Mr. Beswick failed to investigate the influence of Appellant's Hispanic background on his upbringing or the impact of the notorious gang activity in and around the Mar Vista projects.

While at work as a driver for the Ross-Swiss Dairy, Appellant was in a crash that resulted in serious head injuries. (RT 3383-3385) Defense counsel should have investigated the effect of the accident, and the cumulative effects of the car accident, the childhood fall, and 20 years of drug use on the Appellant's brain. (RT 3384, 3381.)

Appellant began working at the age of 13 to help support his family. Later he hired local teens at his car repair business in order to provide them with alternatives to gang activity. It was an effort to overcome what he had experienced growing up. Appellant was never violent towards his family, his wife or his children. For the sake of his marriage and his children, after two decades of drug use, he found the strength to quit by successfully completing a drug treatment program. (RT 3638.) Records from the program, Victory Outreach, were available but never obtained and presented at trial by Mr. Beswick. (RT 3636.) The attorney never spoke to Andy Padilla, a drug counselor who could have testified that he arranged for Appellant's admission to the Victory and Brotman Medical Center for Drug Abuse. (RT 3636-3637.)

This evidence presented to trial court during the hearing on replacement counsel's motion for a new trial, serves to undermine confidence in the outcome of the penalty phase. The trial court should have determined that there was a reasonably probability that, but for counsel's ineffective

representation at the penalty phase, the jury verdict would have been life instead of death. In support of the motion, Appellant's post-trial counsel brought to the trial court's attention a number of federal cases in which constitutional error and prejudice was found under similar circumstances: *Hendricks v. Calderon*, *supra*, 70 F.3d at p. 1043 ("In light of the whole record, and despite the substantial evidence of aggravation, we conclude that the failure of Berman to present mitigating evidence rendered the sentencing hearing neither fair nor reliable."); *Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152, 1161 ("we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing."); *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, 1270 ("counsel's performance was constitutionally deficient because counsel inexcusably delayed hiring [the expert] until shortly before trial, and then did not provide [him] with necessary and available data which...would have assisted him in his evaluation of Bloom and in his trial testimony."); *Smith v. Steward* (9th Cir. 1998) 140 F. 3d 1263, 1271 ("Smith's long use of drugs is a factor that could have had a mitigating effect... but the issue was neither developed by evidence nor argued."); *Correll v. Steward* (9th Cir. 1998) 137 F.3d 1404 ("the almost complete absence of effort on the part of Correll's counsel to investigate, develop, and present mitigating evidence...constitutes deficient performance.") (RT 3786, 3792, 3793, 3803.)

Aggravating factors presented to the jury by the prosecution included matters that could have been refuted with evidence of mental health issues and social history. The prosecution stressed such things as the absence of mental or emotional disturbance. Mr. Beswick knew or should have been aware, had he conducted a minimal investigation, that such contentions were not true. Yet, the jury knew no differently because of the failings and incompetence of the defense lawyer. Easily available mitigating evidence of mental disturbance and brain damage would have served to

rebut or at least diminish the strength of the aggravating factors and humanized Appellant.

F. Conclusion

The failings of Mr. Beswick were underscored by an observation by Carl Jones, the attorney who testified in the post-trial hearing:

> Unless you can tell me that out of the twelve jurors there is nobody up there who would be receptive to it. Yes, I would use it. You need twelve votes to get death. I only need one vote to get LWOP. . . I only need one vote. So the answer is I would absolutely, positively have used it to seek professional assistance, in and of itself . . .

(RT 3419-3420.)

Consequently Appellant was deprived of the right to effective assistance of counsel, a fair trial, due process of law, reasonable access to the courts, a fair and reliable penalty determination, not to be subjected to cruel and unusual punishment, and equal protection of the law, guaranteed by Amendments Five, Six, Eight and Fourteen.

Instructional Error

XII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT DUE TO FLIGHT

The court an instruction pursuant to CALJIC No. 2.52 (Flight After Crime), related to flight after the commission of a crime:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(CT 400.)

The instruction was unnecessary and argumentative, and permitted the jury to draw irrational inferences against appellant. As a consequence, Appellant was deprived of his right to due process, a fair trial, a jury trial,

equal protection and reliable jury determinations on guilt, the special circumstance and penalty, guaranteed by Amendments Six, Eight and Fourteen, and California Constitution, art. I, §§ 7, 15, 16, & 17.) Accordingly, the murder and robbery convictions, special circumstance findings, and death judgments under Counts 1-3, should be reversed. (CT 255-257.)

Even though defense counsel did not specifically object to the instruction given, Penal Code section 1127c and case law mandate that the trial court instruct on flight when it believes the evidence warrants such an instruction, and this Court has held that under these circumstances error is preserved even in the absence of an objection. (*See People v. Bradford*(1997) 14 Cal.4th 1005, 1055; *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Moreover, instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (PEN. CODE, §§ 1259 and 1469; *see People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998)17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196,207, fn. 20.)

A. The Consciousness-Of-Guilt Instructions Improperly Duplicated the Circumstantial Evidence Instruction

The instruction under CALJIC No. 2.52 was unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterates a general principle upon which the jury already has been instructed should not be given. (*See People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on another ground, *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01, and 2.02. (CT 384-386.) These instructions informed

the jurors that they may draw inferences from the circumstantial evidence, *i.e.* that they could infer facts tending to show Appellant's guilt from the circumstances of the alleged crimes. There was no need to repeat this general principle under the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection].)

B. The Consciousness-Of-Guilt Instruction Was Unfairly Partisan and Argumentative

The consciousness-of-guilt instruction was not just unnecessary, it also was impermissibly argumentative. The trial court must not give any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (*See People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence"

(*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, CALJIC No. 2.52, the consciousness-of-guilt instruction given here, is impermissibly argumentative. (*People v. Mincey*, *supra*, 2 Cal.4th 408.) The instruction tells the jury, "[i]f you find" certain facts (flight in this case and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and it also should hold CALJIC No. 2.52 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the state People and defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; *accord*, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon*, *supra,* 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay*

v. Normet, *supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instructions given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefited by the instructions, there is no discernable difference between the instructions this Court has upheld (*see, e.g.*, *People v. Nakahara*, *supra*, 30 Cal.4th at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

The alternate rationale employed in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532, and a number of subsequent cases (*e.g.*, *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefited the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the allegedly protective aspect of the instructions is weak at best and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, per-

haps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; *see also State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].) Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (*See, e.g., State v. Stilling* (Or. 1979) 590 P.2d 1223,1230.)

The reasoning of two of these cases is particularly instructive. In *Dill v. State, supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily em-

> phasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748), and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745, holding that the reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements.)

In this case, the argumentative consciousness-of-guilt instruction invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's *imprimatur* on the prosecution's theory of the case, and lessening the prosecution's burden of proof. It therefore violated Appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. CONST., 14th Amend.; CAL. CONST., art. I, §§ 7 & 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. CONST., 6th & 14th Amends.; CAL. CONST., art. I, § 16), and his right to a fair and reliable capital trial (U.S. CONST., 8th & 14th Amends.; CAL. CONST., art. I, § 17).

C. The Consciousness-Of-Guilt Instruction Permitted The Jury To Draw Two Irrational Permissive Inferences About Appellant's Guilt

The consciousness-of-guilt instruction suffers from an additional constitutional defect – they embody improper permissive inferences. It

permits the jury to infer one fact, such as Appellant's consciousness of guilt, from other facts, *i.e* flight (CALJIC No. 2.52). (*See People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (*See United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; *see also id.*, at p. 900 (conc. opn. of RYMER, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury"].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions—be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; *see also Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved

fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

The first irrational inference concerned Appellant's mental state at the time the charged crimes allegedly were committed. The improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer, not only that Appellant committed two unrelated homicides which he strongly denied committing, but also that he had done so while harboring the intent or mental state required for conviction of first degree murder and robbery. Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the homicide. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) This Court has explained that "evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime." (*People v. Anderson*, *supra*, 70 Cal.2d. at p. 33.) Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.
>
> (LaFave, SUBSTANTIVE CRIMINAL LAW (2nd ed. 2003), vol. 2, § 14.7(a), pp.481-482, original italics, fn. omitted.)

Therefore, Appellant's actions after the escape upon which the consciousness-of-guilt inferences was based, simply were not probative of whether he harbored the mental states for first degree premeditated murder or first degree felony-murder at the time of the shooting, or had committed the two homicides and robbery. There was no rational connection—much less a link more likely than not—between appellant's alleged flight and consciousness by him of having committed the homicides at all, much less

with (1) premeditation; (2) deliberation, (3) malice aforethought, (4) a specific intent to kill, or (5) a specific intent to rob. Appellant's escape cannot reasonably be deemed to support an inference that he had the requisite mental state for first degree murder, as opposed to second degree murder or manslaughter, or was in fact innocent.

This Court has previously rejected the claim that consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (*See, e.g.*, *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) However, Appellant respectfully asks this Court to reconsider and overrule these holdings and to determine that in this case delivery of the consciousness-of-guilt instruction was reversible constitutional error.

The foundation for these rulings is *People v. Crandell* (1988) 46 Cal.3d 833, which noted that consciousness-of-guilt instructions do not specifically mention mental state and concluded: "A reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'" (*Id.* at p. 871.)

The *Crandell* analysis is mistaken for three reasons. First, the instruction does not speak of "consciousness of some wrongdoing;" it speaks of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instructions to mean something they do not say. Elsewhere in the instructions the term "guilt" is used to mean "guilt of the crimes charged." (*See, e.g.*, CT 1507 [CALJIC No. 2.90 stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a rea-

sonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; *see Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.)

Secondly, although consciousness-of-guilt instructions do not specifically mention a defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad. They expressly advise the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.

In a different context, this Court repeatedly has held that an instruction which refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court needn't deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and doesn't mention intent, mental state, or any similar term. (*People v. Marshall*(1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.) In fact, the trial court in this case chose not to deliver CALJIC No. 2.02, on the ground that it was covered by other instructions. (RT 7322-7323.)

Thirdly, this Court itself has drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, it reviewed the evidence of a defendant's mental state at the time of the killing, expressly relying on consciousness-of-guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.) In *Hayes*, this Court wrote:

> There was also substantial evidence, apart from James' testimony, that defendant killed Patel *with the intent to rob*

> *him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested*, the knife that killed Patel was found in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 608, emphasis added.)

Since this Court considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with intent to rob, it should acknowledge that jurors might do the same.

The consciousness-of-guilt instruction permitted a second irrational inference, *i.e.*, that Appellant was guilty not only of unlawfully killing, but also of robbery. This Court approved an inference precisely that far-reaching in *People v. Rodriguez* (1994) 8 Cal.4th 1060, when it held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140, original emphasis; *accord*, *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [holding that it is rational to infer "that false statements regarding a crime show a consciousness of guilt of all the offenses committed during a single attack"].)

Appellant's escape could not necessarily reflect a consciousness of guilt—a charge he denied in his testimony. (*See United States v. Durham* (10th Cir. 1998) 139 F.3d 1325,1332; *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149 [ruling that consciousness of guilt instructions should not be given where they, in effect, tell the jury "that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt.") Embodying such "circular" reasoning (*ibid.*) in a jury instruction permitting a jury to arbitrarily infer guilt there from would – and in this case did – constitute a clear denial of due process. (U.S. CONST., 14th Amend.) Inferences permitted by the consciousness-of-guilt instructions

accordingly was constitutionally infirm. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167.)

Because the consciousness-of-guilt instruction permitted the jury to draw irrational inferences of guilt against Appellant, use of the instruction undermined the reasonable doubt requirement and denied him a fair trial and due process of law (U.S. CONST., 14th Amend.; CAL. CONST., art. I, §§ 7 & 15). The instruction also violated his right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. CONST., 6th & 14th Amends.; CAL. CONST., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. CONST., 8th & 14th Amends.; CAL. CONST., art. I, § 17).

D. Reversal is Required

Giving the consciousness-of-guilt instruction was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, Appellant's murder and robbery convictions, the special circumstance findings, and the death judgments, must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *see Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].) This the prosecution cannot do.

The error affected the pivotal contested issues of the case: was Appellant guilty of the homicides and robbery; if so, what was the nature and degree of the homicides. The jury's verdict revolved around Appellant's credibility. If the jurors had believed him, they could not have convicted him of murder, much less first degree murder. The effect of the consciousness-of-guilt instruction was to tell the jury that Appellant's own conduct showed he was aware of his guilt. In the context of this case, the instruc-

tion was certainly not harmless beyond a reasonable doubt. Therefore, the convictions, special circumstance findings, and death judgments, must be reversed.

XIII.

THE COURT GAVE CONFLICTING ACCOMPLICE INSTRUCTIONS

The trial court gave two conflicting accomplice instructions under CALJIC 3.16 and 3.19. First it advised the jury that Shane Woodland was an accomplice "as a matter of law" since obviously a murder had been committed:

> If the crimes of murder as charged in Court 2 of the Indictment and robbery as charged in Count 3 of the Indictment and the special allegations were committed by anyone, the witness, Shane Woodland, was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration.

(RT 2948; CT 2724 [CALJIC 3.16].)

Then the jury was given the conflicting instruction that even though Wood was an accomplice "as a matter of law", it had to make a separate determination as to whether he was an accomplice:

> You must determine whether the witness, Shane Woodland, was an accomplice as I have defined that term. The burden of proof is by proving by a preponderance of the evidence that Shane Woodland was an accomplice in the crimes charges against the defendant.

(RT 2948; CT 418 [CALJIC 3.19].)

The two instructions are totally conflicting. Because of the latter instruction, the jurors might have concluded that Woodland was not an accomplice. In that even, no corroboration of his harmful testimony was needed. The obvious prejudice flowing from such a likely scenario was obvious.

CALJIC instructs the jury to make a finding as to Woodland being an accomplice "as a matter of law." Then, the court advises that the jury

must determine whether Woodland was an accomplice. In the former he was an accomplice if the charged crimes were committed. In the latter the jurors must decide, separate from the determination of whether the crimes had been committed, if he was in fact an accomplice.

It was improper for the court to give both instructions. Each contradicted the other, resulting in confusion. Consequently, Appellant was deprived of the right to due process of law and a fair trial, guaranteed by Amendments Five, Six and Fourteen.

"A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt". (*Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316.) Certainly it cannot be said that the error was harmless. Woodland was a pivotal witness in the case in which Appellant's life hung in the balance. Further, because the conflicting instructions allowed the jury to draw irrational inferences of guilt, use of both instruction undermined the reasonable doubt requirement and denied Appellant a fair trial and due process of law. (U.S. CONST., 5th, 6th & 14th Amends.; s; CAL. CONST., art. I, §§ 7 & 15). Finally, the instructions violated the right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. CONST., 6th & 14th Amends.; CAL. CONST., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. CONST., 8th & 14th Amends.; CAL. CONST., art. I, § 17).

Capital Sentencing Error

XIV.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, IS CONSTITUTIONALLY DEFECTIVE

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Chal-

lenges to most of the features have been rejected by this Court. Thus, the arguments are presented in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without taking into account their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. "The constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6;[38] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards, that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled Cali-

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38. In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Kansas v. Marsh, supra*, 126 S.Ct. at p. 2527.)

fornia's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime—even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home)—to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute—but that was specifically passed for the purpose of making every accused killer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.2 Is Impermissibly Broad

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must

genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Appellant the statute contained approximately 22 special circumstances[39] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

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39. This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)*, *supra*, 31 Cal.3d 797. The number of special circumstances has continued to grow and is now at 33.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[40] (See Section E. of this Argument.)

B. The Death Penalty Judgment Is Invalid Because Penal Code Section 190.3(A) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a

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40. In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[41] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[42] or having had a "hatred of religion,"[43] or threatened witnesses after his arrest,[44] or disposed of the victim's body in a manner that precluded its recovery.[45] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homi-

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41. *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.
42. *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).
43. *People v. Nicolaus*, *supra*, 54 Cal.3d at pp. 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).
44. *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.
45. *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

cide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts—or facts that are inevitable variations of every homicide—into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they out-

weigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make—whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *Cunningham v. California* (2007) 2007 WL 135687.

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) It was ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the high court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to

the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at p. 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance—and even in that context the required finding

need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[46] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (CT 485), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[47] These factual determinations are

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46. This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also—and most important—to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

47. In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment

essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[48]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at p. 1254.)

This reasoning was explicitly rejected in *Cunningham.*[49] In *Cunningham* the principle that any fact which exposed a defendant to a greater

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contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.'" (*Id.*, at p. 460)

48. This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

49. *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id., pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, at -p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, at p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not ap-

ply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[50] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. This was rejected Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

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50. Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

(*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at p. 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the federal constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors—a prerequisite to imposition of the death sentence—is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,* 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colorado. 2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[51])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[52] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

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51. See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala. L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

52. In its *Monge* opinion, the court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri,*] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732, emphasis added.)

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved.

In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship*, supra, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, it was reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a

> criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child-neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as

possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's

wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefore." (*Id.*, 11 Cal.3d at p. 267.)[53] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland*, *supra*, 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require

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53. A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, § 2280 et seq.)

them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty

The Eighth Amendment forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review—a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. at p. 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other*

checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g.,

People v. Marshall (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by Appellant. (E.g., RT 3123-3131.)

Recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g))

acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not"—factors (d), (e), (f), (g), (h), and (j)—were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-

> 1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[54]

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest—the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775)—and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522.

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54. There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to aggravate the sentence. (See *People v. Cruz*, No. S042224, Appellant's Supplemental Brief.)

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. (RT 3152-3159.) It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State—as represented by the trial court—had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

XV.

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

As noted in the preceding arguments, the high court has repeatedly directed that a greater degree of reliability is required when death is to be

imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[55] as in *Snow*,[56] this Court analogized the process of deter-

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55. "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra*, 30 Cal.4th at p. 275, emphasis added.)

56. "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose

mining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[57]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against

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one prison sentence rather than another." (*Snow, supra*, 30 Cal.4th at p. 126, fn. 3, emphasis added.)

57. In light of the decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

persons subject to loss of life; they violate equal protection of the laws.[58] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

XVI.

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENS

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason"—as opposed to its use as regular punishment—is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of

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58. Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes—as opposed to extraordinary punishment for extraordinary crimes—is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot*

(1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[59] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright*, supra, 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should thus be set aside.

XVII.

THE CUMULATIVE EFFECT OF THE GUILT AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENTS

It is established in the preceding that errors of constitutional significance occurred during the guilt and penalty phases of the trial. Each was individually so prejudicial as to warrant reversal. Nevertheless, this Court is asked to assess the combined effect of all the errors.

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959.) That occurred in the case at hand. As more recently expressed by this Court: "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill, supra*, 17 Cal.4th at p. 844; *accord, People v. Purvis* (1964) 60 Cal.2d 323, 348, 353 [combination of "relatively

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59. See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

unimportant misstatement[s] of fact or law," when considered on the "total record" and in "connection with the other errors," required reversal]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal]; *In re Jones* (1996) 13 Cal.4th 552, 583, 587 [cumulative prejudice from defense counsel's errors requires reversal on habeas corpus]; *People v. Ledesma, supra,* 43 Cal.3d at pp. 214-227 [same]; *People v Samayoa* (1997) 15 Cal.4th 795, 844 [prosecutorial misconduct does not require reversal "whether considered singly or together"]; *People v. Bell* (1989) 49 Cal.3d 502, 534 [considering "the cumulative impact of the several instances of prosecutorial misconduct" before finding such impact harmless]; cf. *People v. Espinoza* (1992) 3 Cal.4th 806, 820 [noting the prosecutorial misconduct in that case was "occasional rather than systematic and pervasive"].) It has been recognized that "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of a the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Regarding the second phase of the trial, the jury's consideration of all the penalty factors resulted in two general verdicts of death. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233.) The court should also evaluate the penalty phase errors cumulatively with the errors which occurred at the guilt phase. "Although the guilt and penalty phases are considered separate proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the

latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; see also *People* v. *Frank* (1985) 38 Cal.3d 711, 734-735.)

Here, Appellant has identified numerous errors that occurred during the guilt and penalty phases of his trial. Each individually, and all the more clearly when considered cumulatively, deprived him of due process, of a fair trial, of the fight to confront the evidence against him, of a fair and impartial jury, and of fair and reliable guilt and penalty determinations in violation of Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, such error, by itself, is sufficiently prejudicial to warrant reversal of Appellant's conviction and/or death sentences. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

For reasons of both fact and law, the numerous guilt and penalty phase errors cannot be as harmless. Their cumulative effect was prejudicial t and requires reversal of the penalty judgment.

CONCLUSION

For the foregoing reasons, the convictions and death judgments must be reversed.

Dated: December 10, 2007

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(1)(A))

I, Robert R. Bryan, am the appointed counsel for Robert Carrasco in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 94,521 words in length excluding the tables and this certificate.

Dated: December 10, 2007

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DECLARATION OF SERVICE BY MAIL

I declare that I am over 18 years of age, not a party to the within cause; my business address is 2088 Union Street, San Francisco, California 94123. Today I served a copy of the attached

Appellant's Opening Brief

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

Executed on this the 10th day of December, 2007, in San Francisco, California.

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