IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY 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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INTRODUCTION

This Reply Brief is submitted in response to the arguments raised in Respondent's Brief.

A number of errors occurred at the trial level. Overriding them all was the fact that the court denied to the indigent Appellant the appointment of counsel. He was facing the death penalty in two separate and unrelated murder cases, was unable to pay the attorney who had been initially retained two years before trial for just 50 hours of work by the family when there was only one non-capital accusation. Appellant's family ran out of money and was unable to pay anything more, so defense counsel was forced to go to trial without being compensated. He told the court that it would be impossible to competently represent Appellant under the

circumstances, and fruitlessly asked to be released from the case and that the public defender be appointed in his place. Motions were also denied for the assistance of a second lawyer, even though counsel informed the court that he had never before defended a death penalty case. Only $1,500 was authorized for both an investigation and the services of forensic experts—the money went unused. The result was 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.

Prejudice is presumed where there is an actual or constructive denial of counsel at a critical stage of the proceedings. State interference resulting in a denial of fundamental rights mandates a reversal and new trial—a showing of prejudice is not required. Because the court refused to appoint counsel or release the initial lawyer from the case and appoint another, appoint second counsel, and/or provide adequate funding for ancillary services, Appellant had no chance of a fair trial.

ARGUMENT

Jury Selection

I.

APPELLANT WAS TRIED BEFORE A JURY THAT 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

Respondent argues that "Appellant forfeited his claim by failing to challenge the jury-selection procedure in the trial court", and that there has been no showing that there was "a systematic exclusion of a distinctive group in the community." (RB 38.) Respondent is wrong.

A. 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

The jury trial is a fundamental component of the justice system. (See *People v. Holmes* (1960) 54 Cal. 2d 442, 443-444 (The constitutional right to jury trial is fundamental and therefore defendant was not precluded from raising claim for the first time on appeal).) Additionally, a criminal defendant is entitled to trial by an impartial jury drawn from a representative cross-section of the community. (*People v. Harris* (1984) 36 Cal.3d 36; U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16.) "That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community." (*People v. Ramirez* (2006) 39 Cal.4th 398, 444.) To establish a prima facie violation of the fair cross-section requirement a defendant must show that: (1) the group allegedly excluded is a "distinctive" group in the community; (2) the group's representation in jury venires is not fair and reasonable in relation to the community as a whole; and (3) the under-representation is due to the systematic exclusion of such persons in the jury selection process. (*Ramirez, supra,* 39 Cal.4th at 444 (citing *Duren v. Missouri* (1979) 439 U.S. 357, 364).)

Due to the death determination function of the jury in capital cases, the need to assure a representative cross-section is paramount for the selection of a fair and impartial jury. (See *Taylor v. Louisiana,* (1975) 419 U.S. 522; *People v. Wheeler* (1978) 22 Cal.3d 258, 272; *People v. Armendariz* (1984) 37 Cal.3d 573, 583.) Yet, capital cases inherently lose the opportunity for a representative cross-section due to the length of time necessary to conduct a bifurcated jury trial. Inevitably, a significant portion of potential jurors is excused due to financial hardship. "The exclusion of a substantial portion of the community from jury service through excuses or exemptions seriously alters the representativeness and inclusiveness of a jury panel." (ABA, *Principles for Juries and Trials* (2004), citing D. Thomas Munsterman, Nat. Center for State Courts, *Jury System Management,*

Elm. 6 (1996).) In particular, excessive excuses on grounds such as job obligations or inadequate jury fees "can upset the demographic balance of the venire in essential respects." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 273.) As such, there must be strict limitation on the number of individuals released from jury duty through excuses and exemptions to achieve the goals of representativeness and inclusiveness in the jury pool.

Although defense counsel eventually stipulated with the district attorney to excuse all potential jurors whose employers would not pay for at least 25 days of jury service, (RB 60; see 2 RT 45-46; 3 RT 89)), Respondent does not address Appellant's argument that a county must not be permitted to 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]).)

Moreover, defense counsel, before jury selection and at the time of the stipulation, attempted to keep a juror whose employer paid for 20 days of service. (2 RT 26.) Indeed, both counsel stipulated to the 25 days hardship precisely because the trial was not expected to finish before four weeks. (2 RT 25.) The trial court itself expressed that it would be its "intention to just excuse those people [whose employers only pay for ten days] without any further questioning," (2 RT 24B), and that "twenty-five [days] is five weeks. Why don't we just keep those." (2 RT 26.) The trial court reasoned that it "wouldn't want a juror to feel pressured to reach a verdict." (2 RT 46.)

The trial court's sentiments bring to bear the core of Appellant's argument: To preserve venire representativeness, a county must establish budget procedures that ensure adequate funding to maintain the jury system and ensure inclusiveness. See Michael L. Buenger, *Of Money & Judicial Independence: Can Inherent Pow-*

ers Protect State Courts in Tough Fiscal Times? 92 KY. L. J. 979, 981-93 (2003-04).

"Few persons making more than the minimum wage can afford [the] . . . sudden and involuntary cut in pay" imposed by a lengthy jury service. (Jon Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 11 (1977).) As such, courts will often excuse from service "blue collar" and low-income "white collar" workers such as laborers, sales people, support staff, unemployed parents with childcare expenses, and sole proprietors of small businesses. (Janice T. Munsterman, et al., NATIONAL CENTER FOR STATE COURTS, *The Relationship of Juror Fees and Terms of Service to System Performance* (1991).) Thus, the character of the representative jury pool is severely diminished.

In the present case, the grant of financial excuses to approximately 40 percent of venirepersons must have upset the demographic balance of the venire from which counsel selected jurors. 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 "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.) The state, by failing to amend the statutes governing jury fees to reflect current economic realities, undermines and weakens the institution of jury trial.

Respondent argues that because Appellant mistakenly lists four prospective jurors as excused for financial hardship who were in fact not excused for that reason, Appellant's statistical assessment is not persuasive. (RB 66.) Appellant's true fault is that he did not include a margin of error. Between 107 and 121 jurors (i.e. approximately 30 to 40 percent) were excused for financial hardship. To be sure, Appellant invites the Court to review the jury selection transcripts from

which these excusals may be found: 2 RT 27, 29-30, 32-42, 44-57; 3 RT 106, 108-111, 114-121, 123-129, 131-135, 148, 150, 157; 4 RT 196, 198, 200, 211, 216, 221-230, 232-236, 238-243, 245.)

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

This Court should recognize people who suffer financial hardship 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. Following *Lockhart v. McCree* (1986) 476 U.S. 162, a group that is both identifiable and whose judicial recognition would advance the purposes of the fair cross-section requirement should be considered "distinctive." (Mitchell S. Zuklie, *Rethinking the Fair Cross-section Requirement* (1996) 84 CAL. LAW REV. 101, 134.) Under this test, people who are excused for economic hardship, are a distinctive group. (*Id.* at pp. 1, 3, 4-146. Cf. *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 distinctiveness described in *Lockhart*, and acknowledge people who suffer financial hardship as a distinctive group.

Finally, regardless of the *Duren* criteria, the exclusion of approximately 30 to 42 percent of the jury pool for economic hardship was "excessive" under *Wheeler* and upsets the demographic balance of the venire. (See *People v. Wheeler*, *supra*, 22 Cal.3d at p. 273; see also, Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the Fair Cross-Section of the Community* (1995) 69 SO. CAL. L. REV. 155 (selection procedures that result in large numbers of hardship excuses and exemptions undermine the fair cross-section requirement).)

Economic hardship because of the low fees paid to jurors caused appellant's jury to be selected from a panel unrepresentative of a cross-section of the

community. (See *People v. Burgener* (2003) 29 Cal.4th 833, 857 [the disparity is the result of an improper feature of the jury selection process].) "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 nature and varieties of human experience, the range of which is 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*.)

C. Appellant's Trial Counsel Rendered Ineffective Assistance of Counsel and Therefore the Court Should Review the Claim on the Merits

Respondent argues appellant's claim is procedurally barred due because appellant's trial counsel not only failed to contemporaneously object to the panel composition and move to quash the venire, but because trial counsel actually stipulated to the jury selection procedure. (RB 49.) "As a general rule, an appellate court can reach a question a party has not preserved for review if the issue involves neither the admission nor the exclusion of evidence." (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 520 (citing *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6); see *People v. Marchand* (2002) 98 Cal. App. 4th 1056, 1061 [appellate court has discretion to adjudicate important question of constitutional law despite party's forfeiture of right to appellate review].) Here, what is at stake is nothing less fundamental than the denial of appellant's 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 and 14th Amends.; Cal. Const., art. I, §§ 7 & 16; see *People v. Johnson* (2004) 119 Cal. App. 4th 976, 985 [appellate court reached merits of reasonable doubt instructions despite absence of contemporaneous trial objection].)

Indeed, the basis for inclusion of distinctive groups relies upon the presumption that a defendant facing a jury from which members of his or her group were excluded ran an impermissible risk of prejudice derived only because of his or her membership in that group. (See *Strauder v. West Virginia* (1879) 100 U.S.

303, 308.) Absent members of the defendant's particular group, there was too great a possibility that the jury would not be impartial. (*Ibid.*) The Court should consider Appellant's claim because the exclusion of a substantial number of jurors for financial hardship undoubtedly affected Appellant's opportunity for a fair trial. Indeed, much of the prosecution's case centered upon Appellant's alleged motive caused by his status as a working class man faced with the prospect of financial devastation. (12 RT 1197-1198.) Without jury members drawn from a broader segment of the working class, Appellant lost the vital perspective and scrutiny of other working class people.

D. Conclusion

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.

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.

The failure to provide adequate compensation to jurors resulted in a 40 percent loss of prospective jurors due to financial hardship, thereby skewing the 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, sec-

tions 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

Respondent contends that this argument must fail because it was not raised in the trial court. He also generally argues that felons have no right to serve on juries.

California law disqualifies from jury service those who have been convicted of a felony. (Code Civ. Proc. § 203(a)(5).) 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. 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. (8 RT 669-670.) After the Court looked up the applicable law and read it to counsel, both sides stipulated to his excusal. (8 RT 672.)

Respondents argue Appellant's claim is forfeited because Appellant's trial counsel failed to contemporaneously object to the panel composition and move to quash the venire; indeed, trial counsel actually stipulated to the jury selection procedure. (RB 53-54.) "As a general rule, an appellate court can reach a question a party has not preserved for review if the issue involves neither the admission nor the exclusion of evidence." (*People v. Gutierrez*, 174 Cal. App. 4th 515, 520 (Cal.

App. 5th Dist. 2009 (citing *People v. Williams, supra,* 17 Cal.4th at p. 61, fn. 6); see *People v. Marchand* (2002) 98 Cal. App. 4th 1056, 1061 [appellate court has discretion to adjudicate important question of constitutional law despite party's forfeiture of right to appellate review].) Here, nothing less fundamental is at stake than the denial of Appellant's 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., 5th, 6th and 14th Amends.; Cal. Const., art. I, § 16; see *People v. Johnson* (2004) 119 Cal. App. 4th 976, 985 [appellate court reached merits of reasonable doubt instructions despite absence of contemporaneous trial objection].)

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.) "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.).[1]

Ex-felons, such as Appellant, have common experiences and perspectives unshared by other members of society: They "have had the experience of 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. Superior Court* (1979) 24 Cal.3d 93, 98 (plurality opinion).) As such, to say that other members of society may adequately represent an ex-felon's perspective is without merit. Instead, the exclusion of ex-felons imposes a great

1. States "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. 522, 538.)

risk that the jury will freely impose stereotypes and bias against ex-felon defendants.

B. Legal Standards

The Supreme Court has not provided any elaboration of what comprises a "distinct group." (*Holland v. Illinois, supra*, 493 U.S. at pp. 478, 481, 483-484.) However, the 9th Circuit 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.) "The distinctiveness and homogeneity of a group under the Sixth Amendment depends upon the time and location of the trial." (*Willis v. Zant*, supra, 720 F.2d at p. 1216; see *United States v. Cabrera-Sarmiento* (SD Fla. 1982) 533 F.Supp. 799, 804.)

To exclude ex-felons from jury service is to exclude 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. (See *Rubio v. Superior Court, supra,* 24 Cal.3d at p. 98.) 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. (*Ibid*; see B.C. Kalt, *The Exclusion of Felons from Jury Service*, 53 Am. U. L. REV. 65, 82 (2003).) They share the common experience of having been confined to prison where they are deprived of liberty, forced to live in an institutional environment, subject to a set of rules that they cannot control, and under the total authority of prison guards. Further, as ex-felons they are stigmatized by the community. (*Ibid.*) 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. 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, as ex-felons would likely have a unique perspective on certain precepts of law that form the foundation of this country's justice system.

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.

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. (*People v. Wheeler* (1978) 22 Cal.3d 258.) When a "cognizable group" within the community is systematically excluded from jury service, that right is violated. (*Id.* at p. 272.)

This Court has defined a "cognizable group" 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.*)

Ex-felons 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. Superior Court*, *supra*, 24 Cal.3d at 98.) Yet, the Court has refused to recognize

the absence of other members of the community capable of adequately representing the excluded ex-felon perspective. (*Id.* at pp. 99-100.) Instead, 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.*)

"But spending a year in a prison is very different from a month in a jail or time in a hospital," and "the stigma attached to felonies after release differs greatly from that attached to misdemeanors or hospitalization." (Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV 65, 83-84 (2003) (citing *Rubio*, 24 Cal.3d at 109-112 (Tobriner, J., dissenting) [discussing the irrationality of the majority's theory]).) Moreover, "[t]he litany of civil disabilities imposed only on felons bears witness to this fact." (*Id.* at 84.) Also, the adequate representation test seems absurd when viewed in light of the rationale that an ex-felon is inherently biased against the "system" that convicted him or her.

> Assume that felons are adequately represented by misdemeanants, juvenile offenders, and mental patients. If felons are supposedly too biased for jury service, how does it justify their exclusion to say that other groups with the same perspectives are not excluded? If the two groups are similar, there is no principled basis for including one but not the other. On the other hand, if the groups differ in some significant way, there is not adequate representation.

(Kalt, *supra*, at 84 [citing *Rubio*, 24 Cal.3d at 109-112 (Tobriner, J., dissenting]).)

Justice Tobriner exhibited particular insight when he argued that a fair "cross section" of the community must also take proportional representation 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. (*See People v. White* (1954) 43 Cal.2d 740, 750, cited by the dissent, *Id.* at 109.) This argument is especially per-

tinent today in light of the massive expansion of the prison system that has occurred over the last decade and a half in California and other states; as a matter of course, this 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. (*Ibid.*) 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—roughly 1 in 194 Californians.[2] In 2001, minorities made up 61.4% of those confined to California prisons.[3] By 2005, the minority population had increased to 72.8% of the total.[4] 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 in 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.

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 *Rubio* holding 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

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2. U.S. Census Bureau, California: Population and Housing Narrative Profile: 2005, http://factfinder.census.gov/servlet/NPTable?_bm=y&-geo_id=04000 US06 &-qr_name = ACS_2005_EST_G00_NP01&-ds_name=&-redoLog=false (noting that "data are limited to the household population and exclude the population living in institutions, college dormitories, and other group quarters.").

3. Calif. Dept. of Corrections and Rehabilitation, Prison Census Data (2006), http://www.cya.ca.gov/ReportsResearch/OffenderInfoServices/Ann-ual/Census/ CENSUSd0606.pdf.

4. Calif. Prisoners & Parolees, Calif. Dept. of Corrections and Rehabilitation (2005), http://www.cya.-ca.gov/ReportRsearch/OffenderInfo-Services/-Annual CalPris/CALPRISd2005.pdf.

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.

C. 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.

III.

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

Respondent contends that Appellant's assertion that he was denied the right to be present at critical stages of the trial is perfunctory was without authority and meritless. (RB 57–58.) This is untrue.

A. The Court Should Address The Merits Of The Claim

Appellant presents a claim that is "sufficiently developed to be cognizable." (*People v. Turner* (1994) 8 Cal.4th 137, 214.) He had an absolute right to be present at all critical stages of the trial. (AOB 45.) This is based upon facts, not speculation. There were various instances when he was absent from critical proceedings held by the judge in the hallway. (*People v. Ashmus* (1991) 54 Cal.3d 932, 1011; AOB 45, citing: 3 RT 163-171; 6 RT 322, 337, 396; 7 RT 462, 511-513, 532; 8 RT 590, 622, 708; 9 RT 753-756, 765-775, 781-786, 801, 816-822, 832-835; 10 RT 860-865, 872-876, 909-911, 938-948, 972, 999-1005, 1027; 13 RT 1335-1336, 1419-1421; 18 RT 2010-2011, 2101-2103; 22 RT 2516-2518; 25

RT 2768-2772, 2779-2781; 26 RT 2968-2969; 28 RT 3096-3099; 29 RT 3131; *see Turner, supra* 8 Cal.4th at p. 214.)

Moreover, to preserve a "discrete contentio[n]" for review does not require extensive argument. (*Turner, supra* 8 Cal.4th at p. 214.) A claim is preserved for federal review, "so long as the claim is stated in a straightforward manner accompanied by a brief argument." (*People v. Schmeck* (2005) 37 Cal.4th 240, 304; *see* AOB 45.) Although Appellant did not ask the court to reconsider its past rejections of similar claims (*see Schmeck, supra* 37 Cal.4th. at p. 304), he did "cite [] legal authority to support his contention," most prominently the federal Constitution. (*People v. Cates* (2009) 170 Cal.App.4th 545, 552; AOB 45 (citing U.S. CONST. amend. V, VI, and XIV)).

Respondent concedes that throughout the proceedings Appellant "was in restraints, and that when appellant had to move, the jury was excused so it would not see the restraints." (RB 49, fn. 14; *see* 1 RT A-182-183.) Therefore, Respondent concedes, Appellant "did not move into the hallway for the conversations" cited in Appellant's opening brief. (*Id.*; *see* AOB 45.) These "conversations" were critical hearings held outside the presence of the jury, during which Appellant had the right to be present. (*See infra.*)

The court had alternative means to arrange for Appellant's presence at all such hearings, including excusing the jury and properly conducting the hearings in the courtroom. The court instead chose to conduct hearings without the Appellant, which violates his rights under the Fifth, Sixth and Fourteen Amendments. An accused is entitled to due process of law, to be present, to confrontation, and to equal protection of the law. Additionally, 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.

B. Appellant Was Denied His Constitutional Right to Be Personally Present at All Critical Stages of His Trial

A defendant has a federal constitutional right derived from both the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment "to be present at any stage of the criminal proceedings that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*People v. Marks* (2007) 152 Cal. App. 4th 1325, 1332 (citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1356–1357; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745).) Moreover, a defendant has "the right to be personally present at critical proceedings, pursuant to the state Constitution (Cal. Const., art. I, § 15; *People v. Johnson* (1993) 6 Cal.4th 1, 18), as well as pursuant to statute ([Cal Pen. Code] §§ 977, 1043)." (*People v. Bradford*, 15 Cal.4th at p. 1357.)

Additionally, a defendant is entitled to be personally present "either in chambers or at bench discussions that occur outside of the jury's presence" in matters where defendant's presence bears "a reasonably substantial relation to the fullness of his opportunity to defend against the charge." (*People v. Bradford*, 15 Cal.4th at p. 1357.) " Appellant has the burden of proof to show that his or her "absence prejudiced his [or her] case or denied him [or her] a fair trial." (*People v. Panah* (2005) 35 Cal.4th 395, 443.)

Here Respondent primarily relies upon three cases, *People v. Ochoa* (2001) 26 Cal.4th 398, *People v. Holt* (1997) 15 Cal.4th 619, and *People v. Kelly* (2007) 42 Cal.4th 763, to argue that "many of the conversations in question occurred during jury selection and involved prospective jurors' sensitive answers to the questionnaire" that "generally do not require the defendant's presence." (RB 80.) However, in *Ochoa*, the trial court conducted sidebar inquiries of prospective jurors whose jury questionnaires designated certain items "confidential." (*People v. Ochoa, supra,* 26 Cal.4th at p. 433.) Although these inquiries occurred in the defendant's absence, defendant failed to show "any way in which his presence at the sidebar conferences bore a reasonably substantial relation to his opportunity to de-

fend himself." (*Ibid.*) The Court denied relief on the ground that defendant's claims were "based on undue speculation." (*Ibid.*)

In *Holt*, the trial court held several proceedings out of the defendant's presence, such as a "conference on jury selection procedures," "in-chambers discussion of juror hardship forms" and of "the timing of questioning individual jurors on hardship," "sidebar discussions of a challenge for cause," and an "in-chambers examination of" a sitting juror. (*People v. Holt*, *supra*, 15 Cal.4th at p. 707, fn. 29.) The Court found that the defendant failed to show that these proceedings "bore any substantial relation to [his] opportunity to defend." (*Id.* at p. 706.) "Since his presence at these proceedings was not necessary to protect his interests, assure him a fair and impartial trial, or assist counsel in defending the case, there was no error." (*Id.* at pp. 706–707.)

However, contrary to the defendant in *Ochoa*, Appellant argues that he and the prospective jurors were not only out of earshot but also out of sight during the hallway conversations and that for certain conversations, nothing in the record intimates that confidential matters were discussed. (See *People v. Marks*, *supra*, 152 Cal. App. 4th at p. 1334 [holding that defendant's due process right was violated by the trial court's conducting a portion of the jury selection off the record, outside the presence of the prospective jurors, and outside his presence without his waiver].) Instead, during the jury selection proceedings, hallway conversations occurred concerning a prospective juror, Dennis White, had bias in favor of law enforcement (9 RT 816-822); and conversations regarding a dismissed juror, Jack Livingston, who many potential and elected jurors heard denigrate the system in general and as it was applied to this case (10 RT 938-999). None of these conversations concerned confidential matters with regard to the jury questionnaires. Additionally, and contrary to *Holt*, Appellant argues that the *suitability*, not the availability, of the prospective jurors was at issue during these hallway conversations. (See *People v. Marks*, *supra*, 152 Cal. App. 4th at p. 1334.) The hallway conversations with Mr. White concerned his ability to be fair to Appellant consid-

ering his leanings toward law enforcement, and thus his suitability to be a juror in Appellant's case. Likewise, the conversations regarding Mr. Livingston concerned not only his suitability as a juror, but also many of the selected and potential jurors.

These hallway conversations substantially affected Appellant's opportunity to defend himself and induced a breakdown in attorney-client communication. Indeed, at one point, the court, defense counsel, and the district attorney agree against questioning every potential juror because there was "no point" unless they would reach the panel. (10 RT 984.) This occurs after defense counsel initially requests that *all* potential jurors be questioned. Appellant was not present during this conversation. Appellant's presence at these proceedings was necessary to protect his interests, assure him a fair and impartial trial, and assist counsel in defending the case.

Had Appellant been present, he would have communicated with his attorney his strong desire to question all potential jurors regarding Mr. Livingston's many comments about the court process. Mr. Livingston was clearly in favor of the prosecution and referred to others in that position as "smart" ones. (10 RT 968.) Even if the jurors did not respect his opinion, the tainting of the jury pool already occurred, as they were made to think along inappropriate lines. The adequate deference for the judge and the attorneys no longer existed. Further, the system is in place to protect the rights of Defendant. If the system and its procedures are challenged, that naturally prejudices the defendant.

Appellant meets his burden of showing that his due process right was violated by the court's conducting hallway conversations outside his presence without his waiver, whether express or implied, oral or written, personal or by counsel. (See *People v. Marks* (2007) 152 Cal. App. 4th 1325, 1334 (citing *Kentucky v. Stincer* (1987) 482 U.S. 745; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 108; *People v. Bradford* (1997) 15 Cal.4th 1229, 1356–1357; U.S. Const., 14th Amend.; Cal. Const., art. I, § 15.)

Additionally, Respondent claims that several of the other hallway conversations "dealt with administrative matters" and that "Appellant could not have been prejudiced by his absence at such routine procedural discussions on matters that do not affect the outcome of the trial." (RB 83-84.) Respondent mischaracterizes these hallway conversations. In particular, what Respondent deems an "administrative matter" of "whether an employee of Javier Chacon should be excluded as a spectator," on the record presents as a question of whether Carlos Nunez, an employee of Javier Chacon, intended to tamper with the witnesses or jurors. (9 RT 753-757.) Defense counsel alerted the court to Nunez's presence and note taking throughout voir dire and that he believed Nunez would "send on information to Chacon about the testimony during the trial." (9 RT 753.) Mr. Nunez had originally represented to defense counsel that he was a student. (9 RT 755.) Later, outside Appellant's presence and in another hallway conversation concerning the same matter (9 RT 761-772), both counsel and the court discussed (1) whether Appellant knew Mr. Nunez; and (2) whether Appellant "appeared to be fearful" of Mr. Nunez. (9 RT 770-772.) Clearly, Appellant's presence during these conversations was necessary to protect his interests, assure him a fair and impartial trial, and assist counsel in defending the case.

Indeed, Mr. Nunez's presence during voir dire—"the most dull part of the jury trial"—was strange, even to the point where both attorneys and the court commented upon it. (9 RT 770.) Mr. Nunez's presence was especially strange given his work hours from 3:00 a.m. to 8:00 a.m. (9 RT 765.) Despite working long nights, he managed to make it to the voir dire proceedings everyday starting at 10:30 a.m. (9 RT 765.) Appellant knew Mr. Nunez and that he Mr. Nunez worked for Mr. Chacon at his Auto Body shop (where, consequently, Shane Woodland had also worked). (See 9 RT 754.) Moreover, Appellant was in the best position to discuss Mr. Nunez's and his relationship, as well as his anxiety re-

garding Mr. Nunez's presence. However, Appellant was absent and thus unable to assist his attorney in his defense and protect his interests.[5]

Appellant was denied his constitutional right to be present at all critical stages of his trial. (U.S. Const. amends. VI and XIV; Cal. Const., art. I, § 15.)

IV.

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

Respondent concedes that "the special circumstance allegations that the murders were heinous, atrocious, and cruel, manifesting exceptional depravity, must be stricken." (RB 54; *see People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797*; accord, People v. Wade* (1988) 44 Cal.3d 975. *See also People v. Franc* (1990) 218 Cal.App.3d 588 [affirmed Los Angeles County Superior Court ruling granting a defense motion to strike the special circumstance, citing *Engert* as binding precedent.].) The Court must accordingly strike the heinous, atrocious and cruel special circumstance findings in Appellant's case. (*See Engert, supra* 31 Cal.3d 797.)

However, Respondent argues that any error in the special circumstance instructions was harmless. This is not so:

> It is precisely because the words "heinous, atrocious or cruel" do not provide a jury with constitutionally sufficient guidance to separate those murders for which the death penalty is a possibly appropriate penalty from those for which it is not, that the special circumstance described in section 190.2, subdivision (a)(14) was declared invalid.

(*People v. Silva* (1989) 45 Cal.3d 604, 647 (Broussard, dissenting) (citing *Engert, supra*, 31 Cal.3d 797).)

Appellant, in this case, was precluded from arguing that the circumstances of his crime did not necessarily militate in favor of a sentence of death by findings,

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5. The record indicates that Mr. Nunez did eventually voluntarily leave after the court admonished him that if he stayed he could not speak with potential witnesses. (9 RT 773.) However, the court never excluded him from the rest of the trial. The record does not indicate whether Mr. Nunez returned.

rendered under a concededly invalid or inapplicable provision, that certain aspects of his offense were not only aggravating but sufficient to elevate him into the category of death-eligibility. These improper findings may well have affected the jury's verdict and therefore constitute constitutional error. (*People v. Silva* (1989) 45 Cal.3d 604, 647 (Broussard, dissenting).)

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

Respondent argues that even though a crucial piece of evidence was not preserved by the prosecution, the claim fails because Appellant has not shown "bad faith on the part of law enforcement." (RB 55.) Respondent also contends that any error was harmless. Such contentions are misplaced.

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

The state has the duty to preserve evidence "that might be expected to play a significant role in the suspect's defense," that is, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta* (1984) 467 U.S. 479, 488-489, fn. omitted.)

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.) Further, if "a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence [constitutes] a denial of due process of law." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58; see *People v. Cooper*, *supra*, 53 Cal.3d at pp. 810-811.)

The prosecution acted in bad faith in not preserving the can. Although neither negligence nor gross negligence give rise to a finding of bad faith, "'reckless disregard for the prosecution's constitutional obligations' may rise to flagrant misconduct." (*United States v. Schoonover* (2009) U.S. Dist. LEXIS 30078 at *5 (citing *United States v. Chapman* (9th Cir. 2007) 524 F.3d 1073, 1085); see *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.)

Contrary to Respondent's argument, it simply does not follow that because the "prosecutor stated that she never intended to admit the can itself into evidence," "the latent print was the material evidence, not the can." (RB 102; see 11RT 1053-1054.) For this logic to hold true, the standard for materiality of evidence would solely rely on the prosecution's intent to use potentially exculpatory evidence at trial. Plainly, this is not the correct standard.

Instead, and as Appellant argues, the can was material. This the prosecutor should have known, based upon defense counsel's specific request for the can. (2 Supp. 2CT 293, 295.) Indeed, a prosecutor is put on notice of the requested item's evidentiary value upon defense counsel's specific request. (See *In re Steele* (2004) 32 Cal.4th 682, 700.) "And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." (*In re Steele*, *supra*, 32 Cal.4th at p. 700 (citing *United States v. Bagley* (1985) 473 U.S. 667, 682-683 (plur. opn. of Blackman, J)).) Accordingly, to determine "whether evidence was material, 'the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.'" (*In re Steele*, *supra*, 32 Cal.4th at p. 700 (citing *United States v. Bagley* (1985) 473 U.S. 667, 683 (plur. opn. of Blackman, J).)

In the alternative, the can was "potentially useful" in "that it could have been subjected to tests, the results of which might have exonerated" Appellant. (See *Arizona v. Youngblood*, *supra*, 488 U.S. at pp. 57-58.) The can was the only physical evidence introduced against Appellant at trial. Yet, after a single testing, the can was discarded back into the glove box of the Honda and returned with the car to the car's owner. (11RT 1054. Cf. *Illinois v. Fisher* (2004) 540 U.S. 544, 548 ("At most, respondent could hope that, had the evidence been preserved, a *fifth* test conducted on the substance would have exonerated him" (emphasis original).) Appellant had lived with the Chacons. (21 RT 2334, 2340-2341, 2343-2344.) And, on the date of Friedman's murder, Appellant and Woodland were living in the same residence with the Chacons. (21 RT 2344, 2349-2350; 22RT 2445.) Delia Chacon testified that she always purchased the brand and type of hairspray that was found in the glove compartment of the Honda and that everyone in her household, including Woodland and Appellant, used the same can of hairspray. (21 RT 2348; 22 RT 2460-2461.) The can was potentially useful in that it could have been tested for accompanying fingerprints besides Appellant's. The presence of other person's fingerprints could have created a reasonable doubt that Appellant occupied the Honda at the time of the murder. Additionally, the can was potentially useful for other reasons, including to analyze how old it was and how long it had been in the car. If the can had been placed inside the vehicle long ago, its usefulness against Appellant at trial diminishes substantially.

To counter Appellant's argument that bad faith is evidence by the extended length of time taken to disclose that the loss of the hairspray, Respondent claims "the record does not show that the prosecution deliberately delayed in informing defense counsel of the can's unavailability." (RB 103.) However, and as Appellant argues, the record does show that after defense counsel submitted his discovery motion on September 9, 1996 (2Supp.2CT 283-288; *Ibid.* at 285 (seeking, among other things, "[a]ll physical evidence obtained in the investigation of the case, whether or not the People intend to/or may use it against Defendant"), the

prosecutor indicated on October 1, 1996, "that in approximately 40 days we can provide all the discovery . . ." (1 RT A-17.) Well past the prosecutor's own 40-day deadline, the discovery remained undisclosed. Indeed, on December 29, 1996[6], defense counsel filed a Notice of Motion For Pretrial Discovery Compliance Order pursuant to Penal Code section 1054.5, in which he specifically requested to examine the hairspray can "for purposes of investigating for the presence of fingerprints" (2Supp.2CT 293) and "to [examine it] in order to adequately provide a defense for the defendant." (2Supp.2CT 295.) Yet, the prosecution did not disclose the can's unavailability until sometime within the week prior to February 10, 1997. (2Supp.2CT 329.)

Respondent states "appellant did not have any complaints about the speed with which the prosecution was complying." (RB 103 (citing 1 RT A17-18, A20-21, A23, A29).) However, Respondent's assertion is incorrect and Respondent's supporting citations are misleading. On October 1, 1996, Deputy District Attorney Bozajian informed the court that he "believe[d] that in approximately 40 days" he could "provide all the discovery." (1 RT A17-18.) On November 13, 1996, another pretrial hearing occurred and Mr. Bozajian provided defense counsel with "a copy of all the rap sheets of all the civilian witnesses in the case." (1 RT A20-21.) Respondent then cites to another pretrial hearing on January 13, 1997, in which the inference supposedly is that defense counsel's silence about the discovery noncompliance was some sort of acquiescence. However, as aforementioned, defense counsel had already (approximately two weeks prior the hearing) filed his December 29, 1996 motion for an order for discovery compliance. (2Supp.2CT 293.) Moreover, during the January 13, 1997 hearing, the court set a date to hear defense counsel's December 29, 1996 motion—February 3, 1997. (1 RT A27.)

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6. Appellant's Opening Brief incorrectly cites to defense counsel's specifically discovery request for the hairspray can on December 29, 2007. (AOB 55.) The correct date that defense counsel filed his "Notice of Motion for Pretrial Discovery Compliance Order (Pen. Code § 1054.5)" was on December 29, 1996. (2Supp.2CT 292.)

Indeed, on February 3, 1997, the court and both attorneys addressed the discovery issue. (1 RT A33.)

It should be noted that defense counsel did have at least one pretrial complaint about the speed of discovery compliance on the record—specifically, the December 29, 1996 motion. To be sure, counsel repeatedly complained to the court that he had been told the hairspray can was available and that it would be provided to the defense. (See, e.g., 2Supp.2CT 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"]; 11 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."], 18 RT 2101, 2103 ["the can has not been preserved like they said it would. It was going to be" and "Miss Boyadjian [sic] had it and it would be made available to me, and all of [a] sudden, it is not"].) While defense counsel did not obtain Mr. Bozjian's promises on the record, he consistently stated that he had specific discussions about the can with the Mr. Bozajian "at several [pretrial] hearings . . . regarding discovery." (18 RT 2102.) It seems the attorneys spoke off the record regarding the discovery. Indeed, an example of such an off the record discovery conversation exists at a pretrial hearing on February 3, 1997, wherein Ms. Meyers states that she made an indication to defense counsel that she would walk over with him to the Los Angeles Police Department to disclose the can. (1 RT A33.)

Respondent also claims "the prosecution clearly did not believe that the can was part of the motion because the lifted print was the material evidence, not the can itself." (RB 103 (citing 11 RT 1052-1054).) However, this argument does not hold. Defense counsel's September 9, 1996 discovery motion clearly stated that defense counsel sought "[a]ll physical evidence obtained in the investigation of the case, whether or not the People intend to/or may use it against Defendant." (2 Supp. 2CT 285.) Additionally, defense counsel's December 29, 1996 motion spe-

cifically requested to analyze the can so that he could look for fingerprints and "adequately provide a defense for the defendant." (2 Supp.2CT 293, 295.)

Finally, Respondent contends "[A]ppellant has not shown any bad faith on the part of the police" because "[t]he record shows that photographs were taken of the can where it was found in the glove compartment of the Honda" (18 RT 2107) and "Caudell preserved the lifted latent print itself, which was provided to the defense for its own evaluation and comparison to appellant's prints. (18 RT 2108.)" (RB 105.) However, this argument is bunk. While it is true that the latent print pulled off of the can could have been tested by other experts and that a subsequent lifting of the same print off the can would be the same as the latent print pulled by Caudell, it does not follow that "further testing of the can would have been fruitless." (RB 105.) This is a limited and one-sided view. (*In re Steele*, *supra*, 32 Cal.4th at p. 700 ("In some circumstances, the obligation to disclose evidence favorable to the defendant may require the prosecution to provide materials that the defendant specifically requests as potential exculpatory materials even if their potential exculpatory nature would not otherwise be apparent to the prosecution.").) Again, the further testing of the can could have revealed other people's fingerprints (see 11 RT 1189.), the age of the can, and other potentially valuable physical attributes.

Moreover, it is of no value to Respondent that Caudell "testified that it was not *his* practice to maintain an item from which he has lifted a latent print" because he considers "the print itself is the evidence, not the item from which it was removed." (RB 105 (citing 19 RT 2182-2183) (emphasis added); see *People v. Farnam* (2002) 28 Cal.4th 107, 166-167 [no bad faith shown in law enforcement's failure to refrigerate or freeze biological evidence recovered from the crime scene when, at the time, *the police crime laboratory* did not routinely retain evidence in that fashion and "freezers were not even available in the police department's property division" until a year after testing.])

In *People v. Stansbury* (1993) 4 Cal.4th 1017, 1054, the police seized and examined the freezer of an ice-cream truck for physical evidence of a murder victim's presence. "Before they removed the contents of the freezer, they photographed most of the interior of the freezer" and "found no physical evidence of the victim" inside. (*Ibid.*) The ice-cream truck and its contents were returned to their owner. (*Ibid.*) The Court found, in part, that because the police criminalist "considered that the contents of the freezer could be reconstructed by using the photographs taken at the time of the search, and that this would be adequate to determine whether a body had been in the freezer" the record was devoid of evidence that the police acted in bad faith to deprive defendant the opportunity to examine the freezer for evidence that it did not contain a body. (*Id.* at p. 1056.)

However, unlike *People v. Stansbury*, Caudell, the prosecution's fingerprint expert, did not consider whether the can could be tested further for additional fingerprints, age, or anything else. (19 RT 2183-2185.) Instead, he testified that he would have preserved the can if he knew or thought that someone else was going to analyze it. (19 RT 2183-2184.) Caudell also stated that in his opinion, he'd be the last person to analyze the can even if someone else were to subsequently analyze it. (19 RT 2184.)

Finally, the homicide detectives were well aware of the rules of discovery and preservation of evidence. Indeed, the lead detective in the Friedman homicide testified at the preliminary hearing that he had been a peace officer for 20 years. (2Supp.1CT 137.) Respondent does not counter this point.

Nor does Respondent address the recklessness with which the police released the car and hairspray can. The can was kept in police custody in a well-secured room. (18 RT 2105.) Access to the room required logging in and showing identification. (18 RT 2126.) These procedures evidence an awareness and consideration of the necessity to preserve evidence from loss, destruction, or corruption. To release the can despite the defense's specific request and without a

showing of routine practice to do so displays a conscious disregard for the preservation of the evidence on behalf of both the police and prosecution.

C. Conclusion

The prosecution acted in bad faith and was reckless with regard to the preservation of the can. Further, 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. The substantial weight of the evidence favored exclusion. Consequently Appellant was deprived of the right to due process, fair trial, effective assistance of counsel, and equal protection rights under Amendments Five, Six and Fourteen.

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

Respondent argues that Appellant forfeited his claim because defense counsel failed to request additional curative actions to those already taken by the trial court. (RB 71–72.) Nonetheless, the Court should address the merits of the claim to forestall an ineffective assistance of counsel claim through a writ of habeas corpus. Moreover, Respondent argues that the audience snickering did not prejudice Appellant. Respondent is wrong. The audience snickering prejudiced Appellant, because it reflected a belief of Appellant's guilt and Appellant was not allowed to test the comment through confrontation—this violated his right to a fair trial.

A. The Court Should Address the Merits Of The Issue

The Court should address the merits of this claim to forestall an ineffective assistance of counsel claim through a writ of habeas corpus. Trial counsel's failure to properly object and request a mistrial brings this case under the umbrella of the

rule that courts will assume an issue "is cognizable and decide it on the merits to forestall an appellant's alternative claim that trial counsel was ineffective if he failed adequately to preserve the issue." (*People v. Johnson* (2006) 139 Cal. App. 4th 1135, 1146 (citing *People v. Riel* (2000) 22 Cal.4th 1153, 1192; *People v. Lewis* (1990) 50 Cal.3d 262, 282; *People v. Scaffidi* (1992) 11 Cal. App. 4th 145, 150–151; *People v. Yorba* (1989) 209 Cal. App. 3d 1017, 1026.); see *People v. Barber* (2002) 102 Cal. App. 4th 145, 150 ("[C]onstitutional issues [such as defendant's right to a fair trial] may be reviewed on appeal even where the defendant did not raise them below."); *People v. Norwood* (1972) 26 Cal. App. 3d 148, 153 ("A matter normally not reviewable upon direct appeal, but . . . vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal . . .."); see also *People v. Crittenden* (1994) 9 Cal.4th 83, 146 (defense counsel forfeited issues of prosecutorial misconduct when counsel failed to object: "Nonetheless, in view of the potential claim that counsel's failure to object on the specific grounds urged on appeal denied him his rights under the state and federal Constitutions to the effective assistance of counsel, [the Court] review[ed] these claims on the merits"; *People v. Rivera* (2003) 107 Cal.App. 4th 1374, 1379 ("Because appellant contends that any waiver would constitute ineffective assistance of counsel, we will consider appellant's contention."))

There can be no reasonable strategic basis behind defense counsel's choice to request neither a mistrial nor a jury admonition. Indeed, after outbursts from the audience, the trial court felt it necessary to admonish the audience (although, outside the presence of the jury). The judge felt that the spectators' misconduct so threatened the dignity of the proceedings that he threatened contempt citations and arrest. (See 23 RT 2715–2716.) Additionally, the trial judge removed Mrs. Friedman, the victim's mother, from the courtroom after he noted on the record that he immediately stopped the proceedings after two jurors reacted to her snickering. (23 RT 2646-2649.) Due to the incompetence of his trial counsel and the resulting prejudice to the outcome, the Court should address Appellant's claim.

B. The Spectator Misconduct Prejudiced The Jury

Misconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict. (*People v. Panah* (2005) 35 Cal.4th 395, 451; see also *People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) Moreover, where a spectator's comment is such that it reflects a belief in the defendant's guilt—an "informal accusation" that the defendant is not allowed to test the comment through confrontation, his right to a fair trial is seriously infringed. (See *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. Chatman* (2006) 38 Cal.4th 344, 369, the Court reviewed a trial judge's refusal to grant a mistrial after a spectator misconduct claim in which the victim's mother made interjections that she had viewed her daughter's body during trial. The Court found no abuse of discretion because the mother's "outbursts were unrelated to defendant's guilt or innocence . . ." (*Id.* at 369 (citing *People v. Hill* (1992) 3 Cal.4th 959, 1000).) The Court reasoned that the remarks "provided the jury with no significant information it did not already know or might not readily surmise," and that " any reasonable juror would know that the crime had caused the victim's family anguish." (*People v. Chatman*, *supra*, 38 Cal.4th at p. 369.)

However, unlike the circumstances in *Chatman*, Mrs. Friedman's snickering was related to Appellant's guilt or innocence. Because it occurred during Appellant's testimony, it reflected a belief in Appellant's guilt and presented an unacceptable risk of outside influence upon the jury. Mrs. Friedman's snickering occurred in response to questioning whether or not Appellant had killed Mr. Friedman–a question pivoted upon Appellant's credibility. (See RT 2646.) No physical evidence connected Appellant to the shooting, and thus his responses on the stand were key to his defense. As such, the timing of the outburst made Mrs. Friedman's snicker pregnant with negative implications regarding Appellant's

credibility and guilt or innocence. Indeed, a snicker at a crucial moment can be far more eloquent than mere emotive words. The Court cannot be confident that these outbursts did not yield a verdict based on caprice, or on impermissible or irrelevant factors. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 370.)

C. Conclusion

The repetitive spectator misconduct seriously infringed Appellant's right to a fair trial and impartial 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

Respondent argues "Appellant forfeited his equal protection claim by failing to object on that ground below and by failing to offer supporting argument in his appellant brief." (RB 77.) Additionally, Respondent asserts that "Appellant's due process claim fails because the trial court properly ruled that the evidence was more probative than prejudicial" and that "any error was harmless." (*Ibid.*) These four contentions are without merit.

A. Appellant's Equal Protection Claim Is Preserved For Review

"What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Additionally, Appellant's new constitutional arguments were not forfeited on appeal because "the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal*

consequence of violating the Constitution." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

At trial, defense counsel made a specific and timely objection to the presentation of escape evidence. (2 RT 8–9.) Defense counsel argued that the introduction of the escape evidence substantially prejudiced Appellant in violation of California Evidence Code section 352. (*Ibid.*) From that argument, the constitutional claim of Equal Protection flowed. Defense counsel's objection was sufficient to preserve an Equal Protection claim as it is an additional legal consequence of the asserted error . . . (See *People v. Partida, supra*, 37 Cal.4th at p. 438 (holding that a defendant may argue an additional legal consequence of the asserted error in overruling the Evidence Code section 352 objection is a violation of due process.).)

Moreover, to preserve a "discrete contentio[n]" for review does not require extensive argument. (*Turner, supra* 8 Cal.4th at 214). A claim is preserved for federal review, "so long as the claim is stated in a straightforward manner accompanied by a brief argument." (*People v. Schmeck* (2005) 37 Cal.4th 240, 304; *see* AOB 45.) Moreover, Appellant "cite[d] [] legal authority to support his contention," most prominently the federal Constitution. (*People v. Cates* (2009) 170 Cal. App. 4th 545, 552; AOB 45 (citing U.S. Const. amend. V, VI, and XIV)).

Also, a theory that presents a question of law based on undisputed facts in the record may be raised for the first time on appeal. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; *People v. Borland* (1996) 50 Cal.App.4th 124, 129; *People v. Whitfield* (1993) 19 Cal. App. 4th 1652, 1657, fn. 6; *People v. Carr* (1974) 43 Cal. App. 3d 441, 444-445.) This includes, for example, the constitutionality of a statute. (*People v. Hines* (1997) 15 Cal.4th 997, 1061; *In re Samuel V.* (1990) 225 Cal. App. 3d 511.)

Appellant argued in his Opening Brief that the use of escape evidence to imply consciousness of guilt prejudices racial minorities and Appellant, "a member of a minority group (Appellant is Hispanic)," who "[d]istrust in the system . . .

who [grew] up in poverty where the police are a constant presence, and jail time is commonplace for members of the community." (AOB 63.) "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." (AOB 61–62 (citing *People v. Morris* (1991) 53 Cal.3d 152, 196).) The particular circumstances of Appellant necessarily include his racial and socioeconomic status.

B. The Trial Court Improperly Admitted The Escape Evidence

In a capital case, where the defendant is on trial for his life, a court should carefully consider how a jury's inferences might overcome the assumption of the defendant's innocence, resulting in a denial of due process under the state and federal constitutions. The Evidence Code section 352 "balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion." (*Kessler v. Gray* (1978) 77 Cal. App. 3d 284, 291.) 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).).

The trial court failed to carefully consider how a jury's inferences might overcome the assumption of the defendant's innocence. Because consideration of the escape was used as evidence in support of guilt on the counts of murder and robbery, the trial court could not reasonably conclude introduction into the trial of evidence about Appellant's escape, was relevant to any main issue in the case and would not confuse and mislead the jury. Thus the court abused its discretion in admitting the evidence.

C. Admission Of The Escape Prejudiced Appellant

The admission of the escape evidence prejudiced Appellant. An escape may arise from many motives, and is not necessarily probative of guilt or innocence. However, the prosecutor alleged that the escape was tantamount to Appellant's guilty conscience. (26 RT 2852.) Indeed, she specifically asked the jury to consider the escape as evidence to support a finding of guilt on the murder and robbery counts. (*Ibid.*) Additionally, the escape evidence was used to undermine the testimony of Appellant's alibi witness for the Friedman homicide to imply that she aided and abetted Appellant's escape (*See 26* RT 2854-2857.) Thus, all references to the escape were prejudicial to Appellant without providing probative value.

D. Conclusion

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.

Denial of Right To Counsel

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

Respondent argues that the lower court did not err in refusing to appoint trial counsel who had been retained to represent Appellant on a single murder charge, but was not prepared nor paid to represent Appellant on a second and unrelated murder case, nor against a death penalty allegation. Despite trial counsel's

repeated entreaties, the trial court refused to appoint second counsel or to relieve him and appoint the public defender. (RB 85.) Respondent's strange counterargument is that the defense attorney failed to renew the appointment motion, even though he repeatedly moved to be either appointed or relieved from the case. (See, e.g., 2Supp.2CT 376, 378, 380. 382, 385, 387, 389, 392, 394.) It is also asserted that the retainer initially paid for one non-capital case was enough for the lawyer to be compelled to represent Appellant even though the client had no additional funds to pay trial counsel when a separate murder charge was added, and the district attorney decided to pursue the death penalty. Further, the client's family only paid for 50 hours work two years prior to trial. (2Supp.2CT 388-389.)

Appellant's family ran out of money to pay the lawyer over two years before trial. Even if the case had remained non-capital, the payment was woefully inadequate. The agreement was that counsel be paid an hourly rate against the retainer equaling a total of 50 hours, which is far below an adequate payment for defending any murder case, much less two unrelated murders in which the state seeks the death penalty. (*Ibid.*) It is unreasonable to expect that any attorney paid for just 50 hours of work should be required to represent a defendant in a death-penalty case during pretrial preparation, hearings, and the trial. The trial court erred in requiring trial counsel to represent Appellant without assistance and without additional financial resources; respondent's assertions to the contrary are unsupportable.

Respondent argues that "[i]n any event, appellant has failed to show he was prejudiced" by the denial of the various motions for the appointment of counsel. (RB 85.) In fact, defense counsel Robert H. Beswick warned the court that if he or a replacement lawyer was not appointed, the indigent Appellant would be prejudicially deprived of the right to a fair trial and effective representation. Beswick admitted his lack of experience and that he was overwhelmed trying to provide competent representation in two distinct capital cases. (2Supp.2CT 378, 380-382, 388-389, 393-394.) As a solo practitioner he could not afford to represent Appel-

lant without being paid. (2Supp.2CT 392-394.) Further, 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, Appellant was deprived of the right to counsel, 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.

B. Trial Counsel Did Not Abandon His Motions For Appointment Or To Withdraw

Mr. Beswick sought to be appointed or released from representing Appellant. The claim that he "abandoned" his motion is misplaced. (RB 92.) Not only was Mr. Beswick not paid, he received no money for expenses. He 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 explained that defending Appellant required simultaneously preparing separate defenses in three separate cases, the Camacho murder, the Friedmann murder, and the escape charge. Each was complex; moreover, the prosecution was seeking the death penalty which required separate preparation for the penalty phase trial. Mr. Beswick explained that he would be overwhelmed without being either appointed or released, and his law practice would be financially destroyed.

Appellant was charged on February 12, 1996, with murdering Allan Friedman. (2Supp.1CT 1-4, 15-16, 209-210.) Mr. Beswick was substituted in as counsel for Appellant five months later. (2Supp.1CT 228; RT A11-14.) It was not until the passage of another 13 months that separate murder and robbery charges were added that were unrelated to the first, as well as four special circumstance allegations, i.e., financial gain, multiple murder, robbery, and that the killings were especially heinous, atrocious, and cruel manifesting exceptional depravity. (1CT 255-257.) An escape charge was then added. (4Supp.1CT 1-2, 130-131.) The prosecution gave notice that it was seeking the death penalty. (1CT 267;2Supp.2CT 357.)

Mr. Beswick was *never* hired to represent Appellant in the second murder, robbery or escape charges, and was not being paid even on the first murder case. The retainer two years earlier was for 50 hours of work. (2Supp.2CT 393.) Yet the court refused to appoint him. Appellant had no funds to pay Beswick on the first murder charge beyond the retainer, much less for the additional murder case and other new accusations. Thus began a series of motions in which Appellant's lawyer asked to be appointed or released from the case and other counsel appointed. He moved "that the court appoint him as counsel for the defense," and also for the appointment of a second attorney due to the complexity of the case. (2Supp.2CT 376.) The lawyer set out his dire financial circumstances which would destroy his law practice if were not appointed or released from the case. (2Supp.2CT 378-379.) "Should the court not feel that there is a need . . . *for appointment of myself, then I respectfully request that the court allow me to withdraw and that a public defender take over representation.*" (2Supp.2CT 380-382.) The motion was denied. (2Supp.2CT 375.)

The judge made the patently incorrect statement that "[t]he case is not a complex one" even though the prosecution was seeking the death penalty in two separate, unrelated murder cases, and was also prosecuting Appellant for escape and robbery. (2Supp.2CT 375.) He also misread the motion because it was treated as only a request for second counsel—he inserted "[Second]" in referring to the Motion for Appointment of Counsel, and also included "Second Counsel" in the title of the order. However Mr. Beswick stated in the motion: "*[C]ounsel moves that the court appoint him as counsel for the defense*." (2Supp.2CT 376, emphasis added.) Further, he described the complexity of the case and necessity for his appointment. (2Supp.2CT 377-379). The concluding paragraph of his declaration specifically referred to seeking the "*appointment of myself*" with the request that if denied, Mr. Beswick be permitted to withdraw and the "public defend be charged with the duty of representing the defendant." (2Supp.2CT 379, 382, emphasis added.)

Then Mr. Beswick filed another motion seeking "an order appointing counsel." (2Supp.2CT 385-390.) Even though presented in the Opening Brief, it bears repeating:

> 3. *I was originally retained to defend Mr. Carrasco against one charge of murder.*
>
> 4. Defendant entered into a fee agreement which 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.*

(2Supp.2CT 388-389, emphasis added.)

The lawyer advised the court that being forced to represent Appellant without any payment, "I would be very hard pressed to provide the representation needed. . . ." (2Supp.2CT 388.) Then Beswick filed a more detailed declaration concerning his dire financial situation caused by representing Appellant. He explained that he was initially paid two years before trial for 50 hours of work at a reduced hourly fee,[7] but that nothing thereafter was paid and the client was indigent.

> 5. . . . 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 from 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*

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7. *See* 2Supp.2CT 392-393.

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.[8] Therefore, court appointed counsel would be needed to defend Mr. Carrasco in the event I was not involved in this case. [T]he case will last over two months. It is likely the case will last over three months . . . 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 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.*

(2Supp.2CT 392-394, emphasis added.)

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8. The co-defendant, also charged with murder, eventually negotiated a guilty plea agreement in which he was sentenced to six years for manslaughter. (2-A Supp.1CT 159-161; 30C RT 3299-3300, 3705.)

The court still refused to appoint Mr. Beswick or other counsel to represent Appellant. The trial judge, in orally denying relief, commented: "I don't in good conscience, see how I can bill the county for that. " (2 RT 3.) Thus the lawyer went into trial without either being appointed to represent Appellant or paid beyond the first 50 hours expended two years earlier, and was also denied the assistance of second counsel despite Beswick's admitted lack of capital case experience. It was an impossible situation, requiring that the attorney sacrifice either his practice or Appellant's defense, or both. Compounding the problem was the court's refusal to appoint second counsel. (2Supp.2CT 343-352, 361-366.) Mr. Beswick explained during a September 9, 1997 hearing that he was initially retained on one murder case concerning a murder charge in which the death penalty was not sought, 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.*" (1 RT A-112, emphasis added) The motion was denied. (2Supp.2CT 367, 370.)

Mr. Beswick continued attempting to avoid the catastrophe facing himself and his client. (2Supp.2CT 376-382A.) To avoid a "disastrous" outcome, he asked to be allowed to withdraw from the case if a second attorney was not appointed. Both requests were denied. (2Supp.2CT 367, 375.) He was thus forced to essentially abandon his client by doing almost nothing other than showing up in court. But for the state court ignoring his pleas, such a constitutional disaster would not have occurred. Beswick sought relief continuously in the superior court to no avail. (2Supp.2CT 361367, 370, 375, 382A, 385-390, 392-396.) There was nothing more that he could have done.

The problem was compounded by the fact this was Mr. Beswick's first death penalty case and he had never before had to deal with multiple murder charges. As he expressed to the court; "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." (2Supp.2CT 380.)

C. The Trial Court Abused Its Discretion To The Prejudice Of Appellant

Respondent's argument that the lower court did not abuse its discretion in refusing to appoint Mr. Beswick, or release him from the case and appoint other counsel, is contrary to the facts. (RB 93.) Appellant was represented by a lawyer who was not being paid beyond an initial $15,000 payment from appellant's family. (2Supp.2CT 345, 363, 378, 380-381, 386-388, 392-394.) Turning down yet another entreaty from Mr. Beswick to be appointed or to have second counsel appointed, Judge Harbin characterized this payment as "substantial monies," and called the case – involving two unrelated murders and an escape charge – "straightforward." (2 RT 3; RB 94.) These comments, standing alone, evidence an abuse of discretion: The cost of adequately defending a multiple murder/death penalty case in Los Angeles County far exceeds $15,000, and there was nothing "straightforward" about the two murders, with gang and drug dealing overtones, not to mention the complication of an escape from county jail. The prosecution added four special circumstance allegations. Moreover, Mr. Beswick consistently informed the trial court of his lack of experience in capital defense. Respondent's assertion that the trial court's refusal to appoint Mr. Beswick or replacement counsel, under these conditions, was neither an abuse of discretion nor prejudicial to Appellant is disingenuous. (RB 94.)

Respondent cites *People v. Castillo* (1991) 233 Cal.App.3d 36, 51-52. There, with *no* analysis, the Court of Appeal concluded that there was no conflict of interest where trial counsel learned just prior to trial that "further payment" would be unlikely, and requests to be appointed were rejected. (*Ibid.*) In contrast, Mr. Beswick informed the court, repeatedly and long before the trial began, that he was not being paid for his continued representation, and also mentioned his lack of experience in capital cases and his need for appointment of assistant counsel. (2Supp.2CT 378-382, 285-390, 392-394.) The notion that "appellant never per-

sonally requested to discharge Beswick" is beside the point. (RB 95.) It was the lawyer who consistently sought to be appointed or released from the case because of the crippling financial situation. What the client may or may not have thought is irrelevant.

Further, it is false that "Beswick *continued* to prepare for trial . . . and continued to represent appellant throughout the trial even without appointment." (*Ibid*, emphasis added.) As revealed in the hearing on Appellant's new trial motion (3CT 546-592.), the facts establish that the attorney did not "prepare" for anything. He had no option *but* to appear and attempt to represent Appellant, because the court had entered orders denying the motions for appointment and/or to release counsel from the case.

Absent was any semblance of a fair trial and due process of law, due to the trial court's refusal to appoint Mr. Beswick, appoint assistant counsel, or relieve Mr. Beswick and appoint substitute counsel. By comparison, the District Attorney had no funding restrictions, and had the support of law enforcement entities. Appellant was represented by inexperienced, inadequately compensated and underfunded counsel, creating a breakdown in the adversary system that is essential to the basic constitutional guarantees governing the fairness of proceedings. The trial was not a confrontation between equally-supported adversaries. (*United States v. Cronic* (1984) 466 U.S. 648, 655-656.)

Generally, proof of constitutional violation is secured—and consequently so is the constitutional guarantee of effective assistance of counsel—through the two-pronged test that counsel erred and the error prejudiced 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.) In certain Sixth Amendment contexts, however, prejudice must be 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." (*Id.*, at p. 692.) Prejudice will be presumed if there is an actual or con-

structive denial of counsel at a critical stage of the proceedings. (*United States v. Cronic*, *supra*, 466 U.S. at p. 659.) The deprivation so undermines a defendant's ability to effectively advance potentially meritorious defenses that the court need not engage in an individualized prejudice inquiry.

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 make the case that even if counsel is available to assist the accused, the likelihood that any lawyer—even a competent one—could provide effective assistance is so very small as to justify a presumption of prejudice. (*United States v. Cronic*, *supra*, 466 U.S. at p. 659.) Appellant's convictions and sentence were obtained under such circumstances, rendering his convictions and sentence unreliable, requiring reversal.

Here prejudice should be presumed because the circumstances were such that even a skilled attorney could not have effectively represented Appellant due to the failure of the court to appoint him and pay him, appoint second counsel, or relieve counsel and appoint other counsel. Mr. Beswick told the court that without 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 . . . the court to appoint me." (2Supp.2CT 381-382.) He was neither appointed nor being paid, and clearly represented to the trial court that he had neither the experience nor resources to provide effective assistance.

The effect of the trial court's action was to deprive Appellant of counsel. That right is absolute under the Sixth Amendment. (*Powell v. Alabama* (1932) 287 U.S. 45, 71.) Courts frown upon any interference with the full right to the effective assistance of counsel. (*Boulas* v. *Superior Court* (1986) 188 Cal.App.3d 422, 434 [Dismissal only effective remedy for interference with attorney-client relationship by a state agent].) Yet the judges who rejected Mr. Beswick's appoint-

ment motions were more concerned with the county budget than with Appellant's constitutional rights. "I don't, in good conscience, see how I can bill the county for that." (2 RT 3.)

Rough justice in capital cases is not acceptable. (See *Ford v. Wainwright* (1986) 477 U.S. 399; *Gardner v. Florida* (1977) 430 U.S. 349; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Furman Georgia* (1972) 408 U.S. 238, 289. And no safeguard against rough justice is more vital than the right to counsel.

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

Respondent argues there was no state interference, even though the court forced upon him an attorney who warned that he could not provide competent representation due to his inexperience and without being paid. (RB 95.) Respondent essentially asserts that as long as Mr. Beswick was filling space in the courtroom, Appellant's constitutional right to counsel was protected. To contend that "appellant's constitutional rights were not violated" does not satisfy the constitutional requirement. (RB 96.) More is mandated. Without adequate representation a defendant does not have the 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* (1938) 304 U.S. 458; *Gideon* v. *Wainwright* (1963) 372 U.S. 335.) More is required than the mere presence of an attorney—rather, the Constitution requires that capital case counsel must be effective under the Sixth Amendment. (*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.) That is what was missing in the court below, which should not come as a surprise since the trial judge was forewarned of these conditions by Mr. Beswick.

There are two paths to proving inadequate representation. First, counsel can perform in an ineffective manner by failing to render adequate legal assis-

tance. (*Strickland v. Washington, supra,* 466 U.S.. at p. 686.) In that regard Mr. Beswick failed miserably, as detailed in Arguments IX and X. Alternatively, as also present in Appellant's case, 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; *Herring New York, supra*, 422 U.S. 853; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-613; *Ferguson v. Georgia* (1961) 365 U.S. 570, 593-596.)

The trial court's interference with the right of Appellant to effective assistance of counsel and a fair trial was astounding. It 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. (2Supp.2CT 375.) Yet, the lawyer had provided in detail the complexity of the two unrelated murder cases and added escape charge, the amount of work involved, that he (a solo practitioner) had not been paid in this case for years, and that the client and his family were poor. (2Supp.2CT 385.) Mr. Beswick then moved, with more detail, for an appointment. (2Supp.2CT 376-382A.) He asked to be relieved if the motion was not granted. (2Supp.2CT 382.) He even submitted without success an additional declaration justifying the appointment of counsel. (2Supp.2CT 392-394.)

He had informed the judge that he was not being paid and was overwhelmed by the complexity of the situation. (2Supp.2CT 378-382.) In another motion he again, with great specificity, pointed out that he could not competently represent Appellant without being appointed. (2Supp.2CT 385-390.) 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.*" (2Supp.2CT 388, emphasis added.) The appointment of counsel was constitutionally mandatory and would have avoided the pending disaster which occurred.

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

Respondent also argues that Mr. Beswick provided competent representation. (RB 97.) Even though there is a reversal *per se* standard for state-induced ineffective assistance of counsel claims, which occurred here, more than enough grounds exist which demonstrate that the failure to appoint Mr. Beswick, appoint assistant counsel, or release him from the case resulted in Appellant's deprivation of the rights to counsel and a fair trial.

Mr. Beswick's failings due to the trial court's refusal to appoint counsel or take other ameliorative steps, were documented in a motion for a new trial presented by a replacement attorney, William Pitman, who entered the case after the guilt and death verdicts had been returned. (3CT 546-592, 624; 30C RT 3240-3918.) The evidence presented demonstrated that the state's interference in refusing to appoint counsel, appoint assistance counsel, or relieve counsel and appoint replacement counsel caused Appellant to be denied the right to a fair trial. As predicted by Mr. Beswick, he totally failed to adequately represent Appellant.

In view of Respondent's argument (RB 97-98), counsel's failings are once more detailed:

> Failure to conduct any investigation and thus no strategic basis for any decisions, e.g., Mr. Beswick claimed to have made a strategic decision not to investigate Appellant's drug history to present at the penalty phase because it would "impeach" Appellant's testimony in the guilt phase that he was not a drug abuser. (30G RT 3541.) The drug history came into evidence anyway, through unprepared witnesses, and Mr. Beswick was unable to respond. (*Ibid.*)
>
> Raised a drug dealing theory in opening statement, but never presented any supporting. (11 RT 1076-1077.)
>
> Mr. Beswick never employed an investigator, but asked a bail bondsman to get the addresses of two people; the bondsman was never retained. (30C RT 3249-3251.)
>
> Had only two brief meetings with the client prior to trial, totaling 10 minutes. (3CT 548, 722; 30C RT 3275-3276.)
>
> 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. (2Supp.2CT 376, 378-382, 388-389, 392-394.)

Requested the appointment of co-counsel as the case expanded beyond his experience. (2Supp.2CT 343-347, 361-368, 376-382.)

Moved to be dismissed from the case since court refused to grant motions for appointment and for co-counsel. (2Supp.2CT 378-379, 382.) Did not interview family members in preparation for the guilt phase. (E.g., 30G RT 3559-3560, 3563, 3621, 30H 3626-3628.)

Spoke with family members about penalty phase testimony only after the guilt phase verdict was returned; and the penalty phase immediately followed the guilt phase. (30C RT 3306, 30G 3559-3560, 3563, 3621, 30H 3626-3628.)

Neither retained nor consulted with any forensic experts, criminalists, psychologists, psychiatrists, mitigation specialists or social workers. 30C RT 3256-58.

Failed to retain a fingerprint expert to advise and analyze a fingerprint allegedly lifted from a hairspray can, the only physical evidence linking appellant to the car used in the Friedman homicide. (Argument X(G); 1 RT A-112, 120; see 2Supp.2CT 348-352.)

No investigation of the actual killers, Greg Janson and Shane Woodland. (30C RT 3286-3288, 3300-3302, 30D 3392-3393.)

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.

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.

Obtained no releases from appellant for release of medical, employment, school, or any other records. (30C RT 3269.)

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 wit-

ness, 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 an aggravating factor, and referring to evidence that he had neither investigated nor presented.

Mr. Beswick conceded having provided ineffective assistance of counsel to appellant in his motion for a new trial. (30C RT 3275.)

F. Conclusion

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.

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

Respondent argues that the trial judge "acted well within his discretion in denying the motions" for the appointment of second counsel. (RB 98.) Such a position, in the context of the case facts, is contrary to well–established law. Likewise, the contention that "[i]n any event, any error was harmless because Beswick did not render ineffective assistance is not supported by what occurred at trial. " (*Ibid.*) The record facts reveal that the defense lawyer's performance was constitutionally defective both at the guilt and penalty phases.

Mr. Beswick had never tried a capital case. He pursued no investigation, and had no investigator working on the case.

It is correct that a denial of the appointment for co-counsel is reviewed for an abuse of discretion. (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430.) What the court did here was to exercise "its discretion in a an arbitrary, capricious, or patently absurd manner that result[ed] in a miscarriage of justice." (*People v. Roldan* (2005) 35 Cal.4th 646, 688.) "The right of a capital defendant to the resources necessary for a full defense must be carefully considered, and the demands of pretrial preparation in a complex case weigh in favor of appointing an additional attorney." (*People v. Lancaster* (2007) 41 Cal.4th 50, 71.) The appointment of second counsel in a capital case is not absolute: The defense must make a showing of necessity. (*Ibid.*) That is exactly what happened in the court below. Mr. Beswick was not being paid beyond his initial retainer, had no death-penalty case experience, admitted to being overwhelmed by the complexity of defending two unrelated murder cases, and warned the court that he could not provide effective representation in a death penalty case, in which he had no true experience.

Mr. Beswick's motions for appointment of second counsel were summarily denied, with the trial court unreasonably finding that the separate murder cases in which the death penalty was sought, and an escape charge, was *not* sufficiently complicated to warrant appointment of second counsel. (RB 100; 2CT 367, 370, 375.) This overlooks the fact that he was being forced into a situation in which he admitted he could not provide competent representation and was facing financial ruin by representing Appellant without appointment or the appointment of co-counsel, or relief from representing Appellant in order to appoint substitute counsel.

Mr. Beswick repeatedly moved for the court to appoint second counsel. (2Supp.2CT 343-347, 361-366, 376-382.) 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 in two cases requiring separate preparation for the penalty phase.

Respondent concedes that "Beswick was a solo practitioner and had not been paid", but claims Beswick stated "insufficient grounds" for appointment of a second attorney. (RB 102.) That position flies in the face of the reality of the trial facts and the defense lawyer's situation.

Without appointment or the assistance of a second lawyer, Mr. Beswick made clear that court would be forcing him into a situation where he would inevitably be ineffective under the Sixth and Fourteenth Amendments, resulting in prejudice to the client. The trial court denied all of these motions quite summarily. Consequently, Appellant was deprived of a fair trial, a defense, and competent representation.

B. Overview

What occurred factually in the lower court is vital to respond effectively to Respondent's contentions. Appellant was charged with the murder of Allan Friedman on February 12, 1996. (2Supp.2CT 1-4, 15-16, 209-210.) In July, 1996, Appellant's family paid Mr. Beswick to defend him, but ran out of money. (2Supp.2CT 228.) Over a year after being arrested, Appellant was indicted on a second murder charge and robbery unrelated to the first, pertaining to the death of George Camacho. (1CT 255-257.) A separate escape charge was subsequently added. (4Supp.1CT 1-2, 130-131.) There were also four special circumstance allegations: (1) that the killing of Mr. Camacho was for financial gain; (2) that the death of Mr. Friedman was committed during the commission of a robbery; (3) that both were "especially heinous, atrocious, and cruel, manifesting exceptional depravity"; and (4) an allegation of multiple murder. The prosecution then gave notice that it was seeking the death penalty. (1CT 267; 1 RT A-57.)

In addition to seeking appointment because he had not been hired to represent the indigent Appellant in the new cases or against the death penalty, Mr. Beswick sought the appointment of second counsel. (2Supp.2CT 343-352, 361-366.) Beswick explained that not only was second counsel essential due to the multiple murder accusations, but also because the prosecution was seeking the

death penalty in two separate cases. His lack of capital experience was cited as a reason for appointment of additional counsel. (2Supp.2CT 364, 378, 380-381, 388.) Even though Beswick's statements are set out in previous briefing, Respondent's argument necessitates that part be repeated:

> 3. *[A]ppointment of co-counsel is appropriate and necessary . . . 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. [The] 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.

(2Supp.2CT 345-346, 363-364, emphasis added.)

Beswick explained that he was initially retained on just one murder case. Over a year later Appellant was charged with a second murder "s*o we actually have three cases, and he [the client] has no money.*" (1 RT A-112 (emphasis added).) The motion was denied with the court stating: "The application fails to provide any specific or compelling reasons requiring the assistance of additional counsel." (2Supp.2CT 367, 370.)

Mr. Beswick renewed his request for appointment of second counsel. He again explained that it was impossible to competently represent Appellant without the participation of a second attorney, and he asked to be relieved unless the motion was granted:

> *[C]ounsel 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. *[C]ounsel 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.*

(2Supp.2CT 377-379 (emphasis added).)

A supporting declaration provided additional justification for the appointment of second counsel, including the need for a different attorney present the penalty phase:

> 2. *[D]efendant has been charged with committing two*

murders . . . 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. *. . . 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. . . . 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. *. . . 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. *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 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.*

(2Supp.2CT 381-382 (emphasis added).)

In denying the motion to appoint second counsel, the court displayed a stunning lack of appreciation of the situation, observing that the "case is not a complex one." (2Supp.2CT 375.) Further, the trial judge said: "I don't in good conscience, see how I can bill the county for that. " (2 RT 3.) That is "patently absurd on its face" as contemplated by § 987(d). (*Keenan v. Superior Court*, *supra*, 31 Cal.3d at p. 430.)

As reflected in the above-cited and quoted motions, Mr. Beswick made repeated and increasingly desperate requests for appointment of second counsel. He plainly stated that without second counsel, he could not provide constitutionally adequate representation in this case. He explained that as a solo practitioner, he could not maintain his practice if forced to try the case alone. He also confessed to being insufficiently experienced in capital defense to conduct the trial by himself.

It is error for a court not to inquire into the reasons for a defendant's request for appointment of second counsel: "In the case at bar, once trial counsel announced his inability to handle the proceedings unassisted, a substantial question as to the constitutional integrity of the proceedings was raised for the court's consideration." (*Pierce v. United States* (1979) 402 A.2d 1237, 1245.) That substantial question was raised without need for inquiry in Appellant's case, when Mr. Beswick admitted he was not capable of adequately defending Appellant under the circumstances thrust upon him. (2Supp.2CT 378, 380-382.)

Conversely, where trial counsel did not confess doubt as to his ability to represent the defendant, nor did the defendant express his doubts about his counsel's competence, the trial court did not have a duty to inquire as to trial counsel's capabilities, distinguishing this case from *Pierce*. Moreover, the trial court had opportunity to observe trial counsel in pretrial proceedings. This Court determined reversal was not warranted. (*People v. Jackson* (1980) 28 Cal.3d 264, 287, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889.)

Pierce is cited with approval in *People v. Lancaster*, *supra*, 41 Cal.4th at 71-72, to distinguish a situation in which defendant's counsel of choice, an inexperienced attorney who agreed to represent defendant *pro bono*, was replaced by the trial court both due to lack of experience and because he had four other cases set for trial before defendant's case was scheduled to begin. While this Court disagreed with defendant Lancaster's interpretation of *Jackson*, declaring that "*Jackson* does not stand for the proposition that inexperience on the part of retained

counsel justifies the appointment of co-counsel," the trial court's action taken to protect the defendant's Sixth Amendment right to competent counsel is upheld. "The court was not required to ensure that defendant was represented by the counsel he preferred. It was required to take steps to provide him with an effective advocate, at public expense if necessary." (*Id.*, at p. 73.)

The trial court in appellant's case had all the information necessary to understand that forcing Mr. Beswick to represent appellant without co-counsel was "raising a substantial question as to the constitutional integrity of the proceedings." It is important to note that the court did not question the truth of Mr. Beswick's representations that the trial would involve two unrelated murders, special circumstances, and potentially a penalty trial, that he was a solo practitioner who was not getting paid, and who had no previous capital case experience. Despite acknowledging these facts, the lower court unreasonably declared that the case "was not a complex one" and denied appellant's application for second counsel. (2Supp.2CT 375-376.)

Thus, Mr. Beswick wound up without the crucial assistance of second counsel. Thereafter, he in effect surrendered Appellant to the prosecution by doing little other than showing up in court. The record, especially from the 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 circumstances would have been a difficult load even for a skilled attorney who was adequately compensated; Mr. Beswick admitted that he was *not* experienced and the trial court was informed repeatedly that he was *not* being paid.

The result was predictable. Mr. Beswick was unable to adequately prepare for the trial, made many errors during the proceedings, was unable to provide evidence to support the defense theory offered in his opening statement, and the only mitigating evidence presented at the penalty phase was accomplished by appel-

lant's sisters, ex-wife, and mother; Appellant's sisters even prepared subpoenas. Without a second attorney appointed to help prepare for and present this complex case, 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 under the circumstances warrants reversal. The denial of second counsel where the trial attorney was unpaid, not appointed, and inexperienced in capital defense was a cumulative error warranting reversal.

C. The Error Was Not Harmless, But Rather Resulted In A Fundamental Violation Of Appellant's Due Process Rights As Well As His Sixth Amendment Right To The Effective Assistance Of Counsel

Respondent argues that "any error was harmless." (RB 104.) Such a conclusion is defied by the facts. The Attorney General also incorrectly contends that "the evidence against appellant was strong." (RB 105.)

In the declarations accompanying his motion for additional counsel, the defense attorney in *Keenan* stated that he needed to interview many 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. He asserted that the assistance of another attorney would be important in preparation. (*Keenan v. Superior Court, supra,* 31 Cal.3d 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 to the trial court by Mr. Beswick for appointment of second counsel were more extreme than those found by this Court to mandate the appointment of second counsel in *Keenan.* Mr. Beswick explained that because he was neither paid and nor appointed, he would be unable to devote himself to preparing for the defense. (2Supp.2CT 381-382.) The attorney in *Keenan* had only one homicide to defend; 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, upon which the prosecutor relied heavily as proof of consciousness of guilt. The defendant in *Keenan* faced only one murder charge with two special circumstances, felony-murder (burglary) and felony-murder (robbery). In contrast, Appellant was charged in two distinct murder cases and faced four special circumstance allegations, i.e., murder for financial gain, multiple murder, "especially heinous, atrocious, and cruel" murder, and robbery–murder. (1CT 256.)

Like counsel in *Keenan*, in pretrial proceedings Mr. Beswick stated that many witnesses needed to be interviewed. He also said he would have to retain and consult with experts. (2Supp.2CT 380.) As in *Keenan*, Mr. Beswick also said there needed to be many pre-trial motions, appellate review would likely be needed as to those motions, and the defense had only a short time to prepare for trial. (2Supp.2CT 343-352, 361-366, 377-382.) Further, there was a separate escape charge which needed to be defended. The court's "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.) 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. (*Id.*, at p. 432.) In the case at hand, the court chose to ignore the great complexity of the case and defense counsel's plight which was predictably destined to prejudice the client.

The trial court was on notice that the trial would be a constitutional disaster unless Mr. Beswick had help. He specifically alerted the court that the refusal 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.

Respondent seems to be arguing that a defendant faced with strong inculpatory evidence has fewer constitutional rights. (RB 105.) The evidence against Appellant was in fact weak: the only physical evidence connecting him to either

murder was a fingerprint on a hairspray can that went missing from police custody. The balance of evidence against Appellant was testimony from dubitable witnesses to supposed confessions. Even if the evidence had been stronger, the implication that the strength of evidence produced against a defendant determines the proportion of constitutional rights afforded is contrary to well-established legal principles. Regardless of the strength of the prosecution's case, 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.)

As pointed out, Mr. Beswick did little in the case other than show up each day at trial, providing only as much defense as he could concoct on the spot. During the new trial motion, he admitted his failure to prepare for the trial. (2CT 529.) The right to counsel is more than 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.)

Requests for second counsel in death-penalty cases are usually granted due to the complexity of such 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. (ABA Guideline for Defense Counsel in Capital Cases, 10.4 (2008); 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.

Here, the trial 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. (2Supp.2CT 367, 370.) Yet, he had provided in detail the complexity of the two *unrelated* murder and escape cases, and the amount of work involved. (2Supp.2CT 343-347.) Then he moved again for the appointment of second counsel with an even more detailed description of the need. (2Supp.2CT 376-382A.) Mr. Beswick recited not only the amount of work that should be done to prepare for trial, and the need for second counsel if Appellant were convicted, but also detailed his own lack of experience in capital trials and the fact that he was not being paid by Appellant or Appellant's family. He even asked to be relieved if a second lawyer was not appointed. 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 judge to appoint second counsel in any case. (*See* 2Supp.2CT 375.)

Appellant was in a hopeless situation caused by state interference. (*See* Argument VIII, *ante*.) The court had refused to appoint Mr. Beswick or any attorney in either murder case even though Beswick had informed the judge that he was overwhelmed by the complexity of the case and was not being paid. (2Supp.2CT 378-382.) In a third motion he again, with great specificity, pointed out that he could not competently represent Appellant without being appointed. (2Supp.2CT 385-390.) He 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." (2Supp.2CT 388.) Still seeking to obtain adequate representation for Appellant, Beswick requested that the trial court appoint second counsel so that at least one attorney on the case would be paid. Under the circumstances, appointment of co-counsel was mandatory to ensure that Appellant was effectively represented. This would have helped alleviate the looming disaster which occurred because of Appellant being deprived of any semblance of effective representation.

Contrary to Respondent's argument, Mr. Beswick recognized that he was not capable of doing the bulk of work required in order for Appellant to have a fair trial and to ensure adequate legal assistance without the participation of second counsel. It was too much for him, and he was drowning financially due to not being paid. (2Supp.2CT 235, 250, 252-254.) That the court did not address this situation was constitutionally intolerable. Mr. Beswick was candid in asking the court for assistance in an effort to avoid a disaster. Under the unique circumstances of this case, Appellant was entitled to the appointment of second counsel. The trial court's rulings violated Appellant's rights protected under the Fifth, Sixth, Eighth and Fourteenth Amendments.

D. Appellant Was Prejudicially Deprived of the Right To Effective Assistance of Counsel Because Of The Trial Court's Refusal To Appoint Co-counsel

Appellant's Opening Brief devoted 42 pages to detailing the prejudicial failings of Mr. Beswick due to being overwhelmed because the court refused to appoint co-counsel. (AOB 110-152.) The lack of effective representation was stunning.

As pointed out, this case is exceptional, warranting consideration of ineffectiveness of counsel on direct appeal, because there is so much in the record on direct appeal as to the prejudicial effect of the trial court's refusal to appoint second counsel. That occurred due to a motion for new trial being pursued by replacement counsel following the death verdict. He created an extensive record of the evidence not presented by Mr. Beswick and of the preparation not undertaken by Mr. Beswick. (3CT 546-592, 624-659; 30C RT 3240-3918.)

The record here provides ample grounds demonstrating that the failure to appoint second counsel actually denied Appellant the adversarial testing of the charges required under the Sixth, Eighth and Fourteenth Amendments. For example, as covered in the Opening Brief, investigative steps regarded as mandatory and agreed upon by both the prosecution and defense experts on effective assis-

tance of counsel presented at the hearing on the motion for new trial in capital cases, and known to Beswick, were not accomplished. (30D RT 3389, 30H 3748.)

It bears repeating that Mr. Beswick warned the court prior to trial that he was unprepared to competently represent Appellant in either the guilt or penalty phases. He was overwhelmed by the magnitude and complexity of having to defend, with no help and no financial support, two separate murder cases in which the prosecution was seeking the death penalty. The appointment of a second attorney was a constitutional necessity under the circumstances.

The trial court erred in refusing to appoint co-counsel under the distinctive circumstances of this case. Mr. Beswick was admittedly unable to perform the most basic functions necessary to adequately represent a defendant in a double-murder trial. As detailed in the Appellant's Opening Brief, he rarely engaged in conversations with the client about the case. When he did, the conversations were brief. Appellant's counsel had no investigator, utilized no expert witnesses, confused witness names during closing argument, conducted no investigation for the defense, failed to use and lost important discovery evidence for impeachment, and needlessly disclosed harmful information to the jury. (AOB 110-135.) There was no background investigation of Appellant for the penalty phase. (AOB 135-149.) These failures prejudicially damaged Appellant. Mr. Beswick was so weighed down by the enormity of the task of representing Appellant that he could not function adequately. It was too much without the requested support and assistance of a second attorney. 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 law.

E. Conclusion

The purpose behind section 987(d), which specifically discusses the appointment of co-counsel, is "to provide the defendant with effective representation." Although the constitution may not require the appointment of second counsel for indigent capital defendants, "having provided such an avenue, how-

ever, a State may not 'bolt the door to equal justice' to indigent defendants." *(Halbert v. Michigan* (2005) 545 U.S. 605, 610.) Here, even though there was substantial need for the appointment of co-counsel, the door to a fair and reliable trial was locked to Appellant.

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

Respondent makes the assertion that defense counsel "competently represented appellant and that appellant was not prejudiced by any of counsel's acts or omissions." (RB 106.) The prejudicial ineffectiveness of Robert Beswick has been previously presented in great detail, all of which is incorporated herein as if set forth in full. (AOB 154-218.) Nonetheless, there are some areas of Respondent's argument that bear further discussion and clarification.

It is recognized that denial of new trial motions are reviewed for an abuse of discretion. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1188.) That discretion was clearly abused in the case at hand. Mr. Beswick's performance was admittedly and demonstrably below established professional norms, and it prejudiced the outcome of the trial.

A clear indication of the attorney's ineffectiveness was the fact that he did not even secure the services of an investigator to interview anyone. (30C RT 3256.) A small amount of funds was initially authorized for an investigation, with

Beswick having the responsibility of going back to the court when more was needed. (1 RT A-112.) Yet he *never used* what was approved, and did not ask for more even though he was entitled to investigative funding pursuant to Penal Code section 987.9.

Trial counsel was not being paid beyond an initial retainer of $15,000, and he unsuccessfully sought to be appointed to represent Appellant. As another alternative, Mr. Beswick sought to persuade the trial court to appoint second counsel to share the burden and prevent a constitutional disaster; this request was also denied. Mr. Beswick warned the judge well in advance of trial that "[t]he burden of representing the defendant . . . without additional counsel and without appointment will be overwhelming." (2Supp.2CT 382, *see also* 345-346, 363-364, 377-379.) Mr. Beswick cited his financial dire straits, his inexperience in capital trials, his status as a solo practitioner, and the complexity of the charges against appellant as reasons for his need for appointment and/or appointment of second counsel. (2Supp.2CT 364, 378, 380-381, 388.) The trial court denied all proposals. (2Supp.2CT 367, 370, 375361-364, 376-382, 385-389, 392-394.)

Mr. Beswick was aware of the difficulty in providing competent representation with neither payment nor assistance: "*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.*" (2Supp.2CT 388, emphasis added.) To avoid such a "disastrous" outcome, Beswick asked that if second counsel were not appointed, he be allowed to withdraw from the case. Both requests were denied. (2Supp.2CT 367, 375.)

Under these circumstances, little was done in preparation for trial, especially for the penalty phase. Mr. Beswick admitted at the new trial motion that his representation had been deficient:

> 5. Defendant's counsel stated to the court that due to his being a sole practitioner that co-counsel be appointed to aid in the

> preparation of the defense. The request was denied, consequently, defendant only met with the defendant only a few times prior to trial. . . . [T]his was insufficient for defendant to be prepared for, and adequately represented at the trial of this matter.

(2CT 530.)

The parties are not in disagreement as to the applicable legal standards. Respondent's lengthy argument is devoted primarily to taking issue with the effect of the facts. (RB 106-194.) The theme throughout is that the defense lawyer's actions and failings were tactical, and that there was no prejudice. The fact remains that Beswick did little on behalf of his client, including the kind of investigation that would support genuine tactical decisions. The extensive record of trial counsel's deficiencies was laid out in the new trial hearing in which Appellant was represented by replacement counsel. (2CT 544-3CT 676; 30C RT 3240-3918.)

As noted previously, Mr. Beswick did not even utilize the $1,500 approved by the court for investigation. (1 RT A-112.) The trial court's appropriation (30C RT 3291) went untouched, and no more was requested. The case, involving two separate capital murder charges, demanded an extensive investigation that never occurred. (30C RT 3251, 3256, 3259.) Contrary to Respondent's arguments, trial counsel's stunning failure cannot be dismissed as a tactical choice. Rather, it is demonstrative evidence of gross ineffectiveness under the Sixth and Fourteenth Amendments.

Respondent incorrectly states that Mr. Beswick "retain[ed] Mark Garrelts of Nationwide Fugitive Recovery as a defense investigator in appellant's case around the time the trial started." (RB 109.) It is also wrongfully stated that "Beswick paid for Garrelts's services with funds granted by the trial court." (RB 109.) Garrelts[9] is a bondsman. If Beswick was to be believed, the bondsman's "function was to locate a couple of witnesses . . ." (30C RT 3249.) The wit-

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9. Mark Garrelts Bail Co., Van Nuys and Northridge, CA (www.macraes-bluebook.com/search/company.cfm?company=1396834; www.manta. com/c/mtm\8jkw/-mark-gar-relts-bail-bonds).

nesses, Brian Skolfield (25 RT 2754-2763) and Michael Carranza (25 RT 2777-2792) were actually in custody and brought to the trial court by the prosecution. (30C RT 3250.) Gerralts never interviewed anyone, provided no reports, and submitted no bill for his purported services. (30C RT 3248-3249, 3278-3279.)

Beswick never secured the services of forensic experts. (RT 3256-3257.) There was no criminalist, medical doctor, psychologist, social worker, or penalty phase mitigation expert. (30C RT 3257.) He admitted having met with Appellant a few times, at most, before trial. (30C RT 3275.)

Respondent relies strongly on the words of Beswick in the new trial motion hearing, where he essentially became the state's witness on the issue of competent representation. His self-serving statements during the evidentiary hearing on the motions for new trial should, at best, be viewed with caution. This Court is asked to take judicial notice that Beswick was subsequently disbarred after being convicted of a crime involving moral turpitude regarding his credibility. He was found to have made "false, fictitious and fraudulent statements and false representations" in the U.S. District Court, Eastern District of Michigan, Detroit.[10] In other words, he lied.

Beswick made a concentrated effort during the evidentiary hearing to justify his actions at the expense of his former client. (30C RT 3245-3345, 3442-3483-3555.) For example, he claimed that he did not take notes even during the few times he met with his client "[b]ecause of incriminating evidence against Bert" (30G RT 3538.) Such a gratuitous comment served no purpose other than to harm Appellant in the eyes of the court. Later he changed his testimony, stating that he did not remember if he took notes. (30G RT 3550.) In fact Beswick only met with Appellant "one or two" times in the jail. (30C RT 3550.)

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10. Robert H. Beswick was convicted in the U.S. District Court, Detroit, Michigan, of making "false, fictitious and fraudulent statements and false representations." (*United States v. Beswick*, No. CR 03-80128-DT (E.D.Mich. 2003).) He was declared not eligible to practice law on September 1, 2003, and summarily disbarred on Nov. 27, 2004. (State Bar of California, Member No. 85941.)

The former defense lawyer appears to have lied in his testimony during the new trial hearing. Respondent argues that "Beswick testified that he personally interviewed witnesses and conducted an investigation." (RB 154.) That makes no sense, because Beswick had told the court before trial that he could not adequately represent Appellant without being appointed and thus paid, and that the appointment of co-counsel was essential. He explained that he would be overwhelmed and could not adequately represent Appellant and maintain his law practice without being appointed and thus paid. (2Supp.2CT 345-346, 363-364, 377-379. As it was, he had no help and was receiving no compensation. Further, he did not even secure the services of an investigator to conduct interviews. It was an "overwhelming" situation for him. (2Supp.2CT 382.) Yet he, and Respondent, wants this Court to believe that rather than using an investigator, Beswick assumed the job of wearing two hats—that of an attorney and investigator—even though he was not experienced and was not adequately compensated. (*See, e.g.*, RB 110-111; 30C RT 3313.)

Beswick's failings have been previously presented. He did not have his client psychiatrically or psychologically evaluated, even though Appellant has a history of mind-altering drug use and treatment therefore. (30C RT 3279.) Beswick did not even do the minimal for the penalty phase by subpoenaing and presenting obviously mitigating documents at the penalty phase: Trial counsel did not obtain releases for, nor did he obtain, records from a drug treatment program (30C RT 3269-3271, 3298-3299, 3304, 3338-3339), school records (30C RT 3271, 3303), or medical records (30C RT 3269, 3279, 3304).

The new trial hearing focused on more than the penalty phase. (RB 133.) It also dealt with Beswick's deficient representation pretrial and in the guilt phase trial. That Beswick neither retained the services of an investigator nor pursued any pretrial investigation on behalf of Appellant is virtually unheard of in the modern era of capital defense in California. (See Mark Olive & Russell Stetler, *Using the Supplementary Guidelines On the Mitigation Function To Change the Picture In*

Post-Conviction, Hofstra L. Rev. (2008); ABA, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice: A Report On the ABA's Hearings On the Right To Counsel in Criminal Proceedings* (2004); Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges In Capital Post-Conviction Proceedings*, J.of App. Prac. & Process (2003); ABA, *Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003); *ABA, The ABA Standards for Criminal Justice: Prosecution and Defense Function* (1993).) Due to the failure to utilize the assistance of an investigator, Beswick failed to develop any credible defense. Thus, Beswick went into trial without any plan or strategy. As evidence of his lack of a plan, Mr. Beswick announced in his opening statement that the defense would reveal that connections with drug dealing were involved in the homicides, but failed to introduce any such connections. Without reasonable preparation, he was ill equipped to make any informed choices on behalf of Appellant.

Beswick was admittedly 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, he was unable to convince the court that second counsel should be allowed. It was his first death penalty case, and he was forced to go it alone, much to the detriment of his client.

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 the Fifth, Sixth, Eighth and Fourteenth Amendments.

XI.

DEFENSE COUNSEL 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. Overview

Respondent argues that defense counsel was effective at the penalty phase, and thus the motion for new trial was properly denied. (RB 194.) However, there is extensive evidence before this Court which establishes that the representation provided by the attorney, Robert H. Beswick, fell below an acceptable level. These facts have been previously set out in detail in Appellant's Opening Brief, and all need not be repeated. (AOB 219-258.)

Respondent contends that Beswick's failings and inaction was based on "informed strategic choices." (RB 198.) That assertion raises questions that go to the heart of the matter. How could any decision be an "informed strategic choice" when the attorney did not retain an investigator or search for mitigating evidence? What could possibly have been the strategy in making almost no effort on behalf of the client?

Contrary to Respondent's argument (RB 194), the motions for new trial raised the issue of the lawyer's failing both at the guilt and penalty phases. (2CT 529-534, 3CT 546-568, 624-656, 743-754.) The contention throughout was that he had been defective at the penalty phase. In fact, he confessed to his own ineffectiveness. (2CT 530, 534.)

Mr. Beswick was hamstrung by having to represent Appellant with neither compensation nor the assistance of a second lawyer. The court's rejection of motions for counsel and co-counsel, and refusal to release Beswick from representing Appellant, created a situation in which the lawyer could not function at a minimally acceptable level at the penalty phase. (2Supp.2CT 343-346, 361-394.) It was an unusually complicated case that concerned separate murders and the prosecution was seeking the death penalty in each. The attorney said in no uncertain

terms that he could not properly represent Appellant. (2Supp.2CT 382, 388.)

> The burden of representing the defendant who is indigent in this matter without appointment 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.

(2Supp.2CT 382.)

> 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.

(2Supp.2CT 388.)

As previously contended, this is a case in which prejudice should be presumed because of the constructive denial of counsel at a critical stage. (*United States v. Cronic* (1984) 466 U.S. 648, 658-659; *Strickland v. Washington* (1984), 466 U.S. 668, 692.) The denial of motions for appointment and second counsel, or for the public defender to be appointed, deprived Appellant of counsel. (2Supp.2CT 343-347, 361-368, 370, 375-382A, 385-390, 392-396.) That rejection resulted in state interference with counsel's ability to provide effective representation. (*See, e.g., Herring v. New York* (1975) 422 U.S. 853.) Further, courts should presume prejudice when the circumstances make the case that even if counsel is available to assist the accused, the likelihood that any lawyer—even a competent one—could provide effective assistance is so small as to justify a presumption. (*United States v. Cronic, supra*, 466 U.S. at p. 659.)

Here, the problem of Beswick not being paid or even allowed any assistance, was compounded by his lack of experience. He told the court that he had "never represented a defendant in a case involving the death penalty." (2Supp.2CT 364.) The trial judge even recognized that Beswick "had not represented a defendant in a death penalty case." (2Supp.2CT 375.)

The ineffectiveness of counsel was reflected in his inability to articulate mitigating factors on behalf of Appellant. Beswick argued that age was a mitigat-

ing factor because the client was 41 years of age. He even opened the door for the introduction of otherwise inadmissible evidence of arrests and an alleged threat made 18 years earlier. (28 RT 3094-3097.) Mr. Beswick's performance was well below established professional norms and in contravention of the 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

Beswick did not conduct a minimally acceptable investigation for the penalty phase, prejudicing Appellant. The little time spent speaking with family members occurred at the courthouse because they approached the lawyer (30C RT 3305-3306), no documents were gathered as to social, psychological or medical history (30C RT 3302-3304), there was no consultation with experts such as social workers, psychologists, psychiatrists (30C RT 3279-3280), and counsel did not prepare any witnesses for their penalty phase testimony except at the court building shortly before the penalty phase started (30C RT 3305-3306). He also did not investigate or have even have an investigator, other than a bail bondsman who allegedly looked up the addresses of two witnesses, and did so little that he did not even charge the attorney. (30C RT 3249-3251.) There was a failure to even interview the damaging prosecution witness, Richard Morrison, although the prosecution gave ample notice of its intention to call him. (30J RT 1424.) Beswick did nothing to prepare for Morrison's testimony. (30D RT 3379.) There was no rationale or strategy for counsel's inaction. It is probable that the outcome of the proceeding would have been different had Appellant been properly represented.

In the hearing on Appellant's motion for a new trial motion, the court was presented with ample evidence of Mr. Beswick's inadequate performance, but re-

fused to overturn the death sentence and grant a new penalty phase trial. (30J RT 3914.)

1. The Failure To Investigate And Present Mental Health And Social Background Evidence

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. He did not even obtain releases from his client or client's family members. (30C RT 3269.) 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* (1985) 41 Cal.3d 353, 366; *People v. Davenport* (1985) 41 Cal.3d 247, 276.)

Respondent has failed to discuss the testimony on the minimum standards for representing someone in a death penalty case. Carl Jones, a prominent attorney, appeared as a legal expert in the new trial hearing. (30C RT 3348-3374, 30D RT 3375-3442.) He explained that capital defense seminars 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, socio-cultural problems, institutionalization, and mitigation." (30C RT 3360, 30D 3391.) Such an investigation was the standard in capital cases, but Beswick failed to gather a single document relating to Appellant's social history. The attorney admitted that he essentially did nothing on behalf of his client in preparation for the penalty phase—there were no family interviews; no mental-state evaluation, no review of medical records, no search for social service records, and no presentation of school records. (30C RT 3279-3280,

3302-3303.) The prosecution's legal expert, Bruce Hill,[11] agreed to the importance of investigating the social history in capital cases. (30H RT 3749-3750.)

Respondent continually asserts that appellant has failed to demonstrate prejudice. However, 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.) Here it was not abandoned, for Mr. Beswick never even *started* a penalty-phase investigation.[12]

The duties of defense counsel in a capital case are clear. As explained in *Porter v. McCollum* (2009) 130 S.Ct. 447, 452-453: "It is unquestioned that under the prevailing professional norms . . . counsel had an 'obligation to conduct a thorough investigation of the defendant's background.' *Williams v. Taylor* (2000) 529 U.S. 362, 396. The investigation conducted by . . . counsel clearly did not satisfy those norms. . . . [H]e had only one short meeting with [petitioner] regarding the penalty phase. He did not obtain any of [petitioner's] school, medical, or military service records or interview any members of [his] family." Further, whereas counsel in *Wiggins* "'fell short of . . . professional standards' . . . [by] not expanding their investigation beyond the presentence investigation report and one set of records they obtained, . . . [h]ere counsel did not even take the first step of interviewing witnesses or requesting record. . . . Beyond that, like the counsel in *Wiggins*, he ignored pertinent avenues for investigation of which he should have been aware. The court-ordered competency evaluations, for example, collectively reported [petitioner's] very few years of regular school, his military service and wounds sustained in combat, and his father's 'over-disciplin[e]." Even where a pe-

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11. Bruce Hill, the prosecution legal expert, was the attorney for Shane Woodland, the co-defendant and key witness against Appellant. (30H RT 3706, 3716-3717.) Replacement counsel at the hearing on the motion for new trial, objected to the testimony due to Mr. Hill's conflict of interest. (30H RT 3706.)

12. Additional evidence of prejudice due to counsel's ineffective assistance will be presented in the related Petition for Writ of Habeas Corpus.

titioner was "fatalistic and uncooperative," and "instructed [him] not to speak with [his] ex-wife or son," that did "not obviate the need for defense counsel to conduct some sort of mitigation investigation." (*Porter v. McCollum*, *supra*, 130 S.Ct. at p. 453, citing *Rompilla v. Beard* (2005) 545 U.S. 374, 381-382). Petitioner "did not give him any other instructions limiting the witnesses he could interview. . . . The decision not to investigate did not reflect reasonable professional judgment" (*Id.*, at p. 453, citing *Wiggins, supra,* at p. 534.)

2. 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 A Violent Environment

a. Failure To Investigate, Hire An Expert, Or Present Evidence Of Effects Of The Use Of PCP And Other Mind-Altering Drugs From Childhood Until Age 30

After first denying any knowledge, Beswick changed his testimony and admitted that he was aware that Appellant "had used PCP" along with other mind-altering drugs (30G RT 3528.) The drug problem had been so severe that his client had been in drug rehabilitation programs. (30G RT 3530.) Yet trial counsel did not gather records from the programs or interview anyone who treated appellant or present any evidence to the jury regarding the drug problem. Respondent contends that this failing was excused because it "was a decision he and Appellant made together." (RB 197.) Then Respondent quotes *Strickland*: "Counsel's actions are usually based . . . on informed strategic choices made by the defendant and on information supplied by the defendant." (*Strickland v. Washington, supra*, 466 U.S. at p. 691; RB 198.) Yet, here there could not have been an informed decision by the attorney or client as to whether to present evidence of the drug use because Beswick failed to gather sufficient evidence upon which to base a decision. Beswick never investigated the facts regarding his client.

Mr. Jones, the defense legal expert, explained that it is not possible to make a tactical decision without an investigation and preparation. "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." (30D RT 3439; *see Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006; *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1456-1457.)

It is inappropriate for an attorney to acquiesce to the client's demands if he or she has not made an "informed and knowing" decision. (*Jeffries v. Bodgett* (9th Cir. 1993) 5 F.3d 1180, 1193.; s*ee 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 had an obligation to pursue a penalty-phase investigation even where the client opposes it. The duty to investigate exists even where a defendant is actively obstructive, which was not the case here. (*Rompilla v. Beard, supra,* 545 U.S. 374; *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1085.) Respondent disagrees, seemingly suggesting that a defense lawyer is little more than a marionette on strings being controlled by an ill-informed client. (RB 197.)

Defense counsel did not consult a single mental-health expert. Further, he obtained *no* school records or documentation of Appellant's substance abuse, which were readily available. (30G RT 3530-3533, 3571-3572.) However, Respondent argues that "it is not reasonably probable that any evidence of long-term effects of drug use would have benefitted appellant at the penalty phase." (RB 201.) Competent counsel would have recognized that Appellant's significant use of drugs such as PCP mandated exploring its effect upon the client in relation to mental illness or brain dysfunction. (30C RT 3362.) Mr. Jones explained that learning of such drug use "should jump up like a red flag." (30C RT 3362.) Appellant admitted in testimony 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. (29 RT 3138-3139). Yet Beswick did not explore the possible roots of this behavior, whether his client suffered ill-effects from such long-term abuse, or even endeavor to present such startling evidence to the jury. There was *no* evaluation of the client's mental state. Appellant's self-confessed history of drug abuse which began at a shockingly early age, should have triggered an investigation into the short and long-term effects of the drugs and the treatment received. For Respondent to argue that such information would have been of no value to the jury in determining whether Appellant should lie or die, defies logic and is nonsense.

During the new trial hearing, the jury learned from Appellant's family of his drug use and its effects on his mind. (30G RT 3571.) His mother testified that while on drugs, he had headaches and believed that people were following him. He was so delusional that he even believed there was a man in a tree spying on him. (30G RT 3571.) Appellant's former wife explained that he used PCP, cocaine and crack, resulting in hallucinations and paranoia. For example, on one occasion when they were in a hotel room several stories up, he closed the drapes in reaction to "someone walking by" the window, an obvious impossibility. (30H RT 3633.) She recalled that another time while Appellant was under the influence of drugs, he came home, laid down, and began howling; Appellant's mother and daughter fled and sought treatment for him. (30H RT 3636.)

Contrary to Appellant's argument, the presentation of drug use is a mitigating factor. Evidence of the influence of drugs, along with the underlying reasons for drug abuse, may provide a reason for a jury not to return a death verdict. (*See e.g. Bell v. Ohio* (1978) 438 U.S. 637, 641-642; *Roberts v. Louisiana* (1977) 431 U.S. 633, 637.) Alcohol and drug use constitutes mitigating 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* (1987) 43 Cal.3d 171, 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 pertinent since it too concerned both a defendant with a long-term use of PCP and a defense lawyer who pursed no investigation. In that case, evidence was received regarding the highly destructive and mind-altering effects of PCP. Where there is evidence that a defendant has seriously abused the drug, as here, mental defenses are generally available and may indeed be meritorious; therefore, the matter must be investigated. (*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 a mental evaluation and his background investigated. (*Ibid.*) Mr. Beswick sought none of this for Appellant.

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

Respondent argues that "some of the evidence in these issues was presented to the jury during the penalty phase." (RB 202.) While it is true some small amount of evidence was presented, the presentation was marginal, without documentary support, and without expert testimony to put it in context and to explain to the jury the effects of Appellant's childhood experiences. Moreover, some significant events were *not* presented to the jury at all.

During childhood Appellant fell on his head hard enough to break a vertebrae in his back. (30G RT 3572-3573.) As an adult he suffered injuries to the head, jaw, and skull in an automobile; it caused his entire head to swell. (30C RT 3356, 3383, 3415, 3547-3548, 3572-3574.) Further, he may have had prenatal difficulties due to his mother's toxemia and injuries associated with her seizures during his birth. (30G RT 3567.) Mr. Beswick neither investigated the severe head

injuries and likelihood of organic brain damage, nor had a medical expert evaluate the effect of these events on Appellant's brain functioning and behavior. (30C RT 3279-3280.)

Where as here even a superficial investigation uncovers evidence of head injuries, thoroughly probing a defendant's medical history is a mandatory part of the investigation (ABA Guideline for Defense Counsel in Capital Cases, *supra*; and 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.) Carl Jones, the defense legal expert, explained that 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." (30D RT 3384.) Trial counsel did not even attempt an investigation. (30D RT 3384-3385.) Mr. Jones explained that "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." (30D RT 3384-3385.)

The disaster at Appellant's penalty phase trial caused by Beswick's failings was a direct result the court refusing 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.) And, even if this Court determines it does not constitute a complete breakdown of the adversarial system due to the trial court's erroneous funding decisions, the prejudice is obvious and without any possible tactical justification. The failure to adequately investigate medical history for the penalty phase is prejudicial. (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* (Cir. 1994) 21 F.3d 1446; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825; *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d ; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073; *Ainsworth v. Woodford* (9th Cir. 2001) 268 F.3d 868.) 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 here at the hearing on the motion for a new trial: multiple head injuries, prenatal problems, and prolonged drug abuse, particularly of PCP. (See *e.g., Bean, supra*, at 1073; *Jackson, supra,* 211 F.3d 1148.)

c. Failure To Investigate Impact On Appellant At Age 10 Of Father's Death And Mother's Remarriage To An Abusive Alcoholic

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 Appellant. (30G RT 3565-3568.) He never investigated allegations of physical abuse in the household by the stepfather or the effect of the man's alcoholism. (30H RT 3696.)

Respondent argues that some of the evidence did come out at the penalty phase, and that "appellant has failed to show that there was any information about his stepfather which would have benefitted the defense . . ." (RB 207.) That is not accurate. Had counsel merely talked to Appellant's mother in more than a cursory manner, he would have discovered, as Appellant's mother disclosed in the new trial proceedings, that the client was significantly affected by his father's death. Appellant's mother and sisters testified that he had a close relationship with his father. (30H RT 3679.) Appellant 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. (30G RT 3565.) A 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 . . . He was always gone." (30H RT 3678.) He became depressed. (30H RT 3678.)

Appellant's mother remarried. (30G RT 3568.) She testified at the post-trial hearing that her new husband 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." (30G RT 3568-3569.) "[T]he kids . . . tried to hide from him . . ." (*Ibid.*) A sister recalled that the stepfather hit her and that the police were called to the house on four or five occasions, and once he was taken to jail. (30H 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 Beswick and presented at the penalty phase. The jury needed to understand the effect this had on Appellant.

Another of Appellant's sister, Leanda Kamba, testified briefly at the penalty phase about what happened following their father's death: "He was always there for me and always there for my sisters and would protect us all the time." (28 RT 3082.) Another sister, Barbara Carrasco-Gamboa, 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." (28 RT 3090.)

Mr. Beswick testified at the post-trial hearing regarding his limited contact with the family and lack of investigation. He spoke with Appellant's sisters between the guilt verdicts and the penalty phase—the penalty phase began the same day. (30C RT 3305-3306.) Yet, Respondent argues that "Appellant has failed to show Beswick's investigation . . . was deficient." (RB 206.)

Beswick never interviewed the family members in advance of trial and failed to prepare them to testify, thus he was not able to use their testimony effectively to humanize Appellant. Nor did he investigate his client's history of being

abused and suffering head injuries. The attorney made no mention of these events, or any other testimony regarding the family even in his closing argument. (See 29 RT 3159-3163.) These failures constitute ineffective assistance of counsel, in violation of the Sixth Amendment.

d. Failure To Present Evidence Of The Staggering Poverty And Notorious Gang Activity In The Projects In Which Appellant Grew Up

Respondent argues that Beswick's failure to investigate and present evidence of Appellant's poverty and poor childhood environment was not ineffective. (RB 208.) Appellant disagrees. Appellant grew up in an environment where drugs, guns, violence, and gangs were rampant. (28 RT 3063, 3072, 3073, 3084, 30G RT 3568.) Because his father had died leaving five children, Appellant was forced to start working at age 13. (28 RT 3064.)

Contrary to Respondent's contenting, failings by counsel at the penalty phase require reversal. For example, reversal was required 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 . . ." (*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*, Beswick failed to investigate the influence of Appellant's poverty-ridden Hispanic background on his upbringing or the impact of the notorious gang activity. Appellant was exposed to the murderous activity of gangs in the neighborhood where people he knew were often shot and killed. (29 RT 3140.) Because of the presence of an abusive stepfather, his home had ceased to provide a safe haven from the violence. (30G RT 3569.) As a result, Appellant

spent more time on the street, increasing his exposure to drugs and gang activity. (30G RT 3570.)

e. Counsel's Failure To Investigate Fell Below Professional Norms

Mr. Beswick's failure 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.) Beswick had a duty to attempt to discover all "reasonably available mitigating evidence"—abandoning an investigation after acquiring "rudimentary knowledge" from a "narrow set of sources" is not sufficient. (*Wiggins, supra,* at p. 524.) 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, 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, but the lawyer spent no time with them except for a few minutes just 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

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. (13 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. (13 RT 1424.) However, the court interrupted him, continuing the discussion for the next day so it could review prosecution material related to the witness. (13 RT 1424.) However, there was no further discussion regarding the witness, and 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, to Appellant's prejudice and without significant challenge. (29 RT 3123-3129.)

Respondent argues that Beswick's deficiency is unsupported by the record. (RB 211.) In fact, even though he was given ample time to investigate and interview Richard Morrison, Mr. Beswick did not do so. Despite having notice of his proposed testimony, Beswick did nothing to prepare for Mr. Morrison's testimony and maintained no records in his file relating to prosecution discovery or to the witness. (13 RT 1424, 30D 3379.) Because of a lack of preparation, the prosecutor was able to present testimony by a former co-worker at a different dairy that, 20 years earlier, Appellant purportedly pointed a gun at him and said, "Get out of here." (29 RT 3123-25) Morrison testified that, on the basis of that threat alone, he immediately quit his job without even giving notice. (29 RT 3125.) Beswick questioned the witness regarding his failure to report the incident, but elicited only answers that solidified the testimony that he was terrified. (29 RT 3125-3129.) Beswick had not conducted any investigation to determine whether Morrison had worked at that job, quit without notice, or had any other possible reason for leaving the job.

Carl Jones, the legal expert on minimal standards in defending capital cases presented by the defense at the hearing on the new trial motion, testified that Mr. Beswick's failure to insist on discovery would "enhance" his opinion that the lawyer was incompetent. (30D RT 3379.) Beswick had received discovery, but his cross-examination of this witness was so poor that the new motion 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 Beswick did not interview or investigate 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 Beswick was "prepared for each witness" (30J RT 3914), the lawyer was unprepared for Morrison. (30D RT 3379.)

"[B]efore 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.) This is true in all criminal trials, but imperative here because the death penalty is involved.

Beswick's advocacy was so deficient 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. And this breakdown was directly related to the trial court's refusal to appoint (and pay) Beswick, to appoint second counsel, or to relieve Beswick and appoint other, more experienced, counsel. (*United States v. Cronic, supra,* 466 U.S. at p. 657.)

The unchallenged testimony of Morrison was devastating to Appellant. It was particularly damaging because it was presented out of order, after Mr. Beswick had presented the testimony of family members and just before Appellant took the stand. Morrison's testimony that Appellant had threatened his life many years earlier allowed the jury to conclude that his dangerous behavior was long lasting and unlikely to change. That conclusion was certainly an important factor in the jury's decision in favor of death. 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 one of Appellant's sisters, his trial attorney unnecessarily asked if her brother had ever been arrested, had "run-ins with the law," or had ever been convicted of any felonies. Beswick also asked her about acts of violence. Either Beswick did not know enough about his client to realize 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. (28 RT 3094-3095.)

The prosecutor then moved to introduce evidence of both arrests and prior acts of violence that had previously been found inadmissible. The court ruled: "I am satisfied the door has now been opened." (28 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 Appellant's two prior arrests and a prior incident of violence. But for the questions of the attorney, such information was not admissible. Even though previously presented, the questions of the prosecutor to Appellant's sister, Eva Carrasco, after Beswick opened the door, bear repeating:

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.

(28 RT 3103-3104.)

The trial was in recess for a day in order for the prosecution to bring in the rebuttal witness, Morrison, whose testimony of alleged threats became admissible through the questions posed by Beswick. Morrison had worked with Appellant at the Edgemar Dairy 18 years before the trial. Morrison recalled that he abruptly quit his job out of fear for , explaining it was because he "was threatened with a gun." (29 RT 3124.) "[H]e came up to me and just pulled a gun . . . I think he said . . . 'get out of here.'" (*Ibid.*) Morrison called the dairy the next day and quit. (*Ibid.*)

The damage to Appellant was severe. Evidence of threatening Morrison with a pistol and putting him in such fear that he quit his job, caused enormous damage. Further, the similarity to the crimes for which he had been convicted compounded the effect. Any concern for lingering doubt was lost with the jury.

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; he admitted he did. (29 RT 3145.) Then he was asked about being arrested for assault with a firearm, which he admitted. (29 RT 3147-3148.)

The damaging evidence was introduced because of Beswick's errors, which Carl Jones referred to as "proof positive of his incompetence." (30D RT 3441.) Certainly a trial attorney in a *capital case* 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 the case to know where not to venture in questioning witnesses. In a death penalty case, 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 attentiveness to the 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. Not knowing the arrest history of one's own capital client is patently incompetent, and his performance was far below professional standards, to Appellant's detriment.

Respondent argues that "it is not probable appellant would have achieved a more favorable result had Beswick failed to question defense witnesses regarding appellant's nonviolent character." (RB 220.) That is simply not true. The errors of counsel were prejudicial. The list of Appellant's arrests presented by the prosecutor was very damaging to his defense. Beswick had not prepared the penalty phase and thus was dependent entirely upon the unrehearsed testimony of four family members and himself. As the only source of mitigating evidence, the family's testimony was crucial. A sister close in age to Appellant was in a position to provide important mitigation on his behalf. (28 RT 3088-3089.) But because Beswick had not talked with her in advance about her relationship with Appellant and his background, her testimony was brief and superficial. (28 RT 3088-3096.) And 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. Appellant's sister denied any knowledge, but the damage was in the questioning. (28 RT 3088-3096.) When the jury began its deliberations shortly thereafter, and thought back upon the sister's testimony, it is likely that what they remembered were 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 Beswick's client to

an unfair penalty phase hearing, in violation of Amendments Five, Six, Eight and Fourteen.

E. Trial Counsel's Ineffectiveness Was Prejudicial

The 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*, *supra*, 494 U.S. at p. 382.) The information readily available to defense counsel was the type of evidence that is critical for a jury to consider in deciding whether to impose a death sentence. Although 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 did not seem to understand what his responsibilities were at the penalty phase. The 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 lack of understanding of counsel's role at such a critical stage, Beswick did not seem to know what to ask. Even one of Appellant's sisters, independent of the lawyer, had to prepare subpoenas on her own—Beswick was not involved. (30G RT 3604.)

The penalty phase trial began the same day the guilt verdicts were returned. (28 RT 2983-3009.) Up to that time, Beswick had not conducted a penalty investigation. Appellant's mother had to approach him at a hot dog stand outside the courthouse during a lunch break to ask if he "wanted to know anything about my 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'." (30G RT 3561-3562.) Appellant's mother and sister had not planned to attend the trial that day: "[I]t was just luck that we were here and he put us on the stand. (30G RT 3562.) [Sorry, but this is a new thought: Did the trial court make any

findings re: the credibility of Bert's family members as witnesses? If not, it is worth noting.]

It was not until after the guilt verdicts that Beswick talked for the first time to Appellant's mother, two of his sisters, and his former wife regarding the client's background. (30G RT 3560-3563, 3601-3603.) That was "[a]fter the guilt phase and the penalty [phase] started." (30G RT 3560.) There was no effort prior to trial or even during the guilt trial to conduct the interviews. What preparation the witnesses were given was done as a group. (30G RT 3602.) None of these interviews occurred until just before the testimony at the penalty phase. (30G RT 3559-3560.) A sister 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." (30H RT 3673.)

Incredibly, 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 the defendant's life on the line. "He told us not to get emotional and not to seek . . . sympathy from the jury." (30F RT 3464.) Mr. Beswick told us: "Don't show any emotion and don't ask for sympathy from the jury." (30G RT 3578.) Appellant's sister, Martha Hearedia, explained: "Mr. Beswick said: 'Please don't try to elicit any sympathy from the jury. Don't say anything that might do that.'" (30H 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." (29 RT 3174.) Instructing family members to restrain their emotions undermined the presentation of mitigation and prejudiced the outcome.

Another sister, Leandra Kamba, asked Beswick if Appellant's oldest daughter, then a student at UCLA, should come testify. "He said, 'No, it would be too much for her'." (30G RT 3602.) The uniquely helpful and humanizing infor-

mation from a daughter would have been of significant importance—it was the type of testimony that could have swayed the jury away from voting for death.

The materials on which a convincing case in mitigation could be built were readily available to Mr. Beswick, but he did not obtain much of it, and what he had, he did not use effectively. Some of the information was alluded to at the trial but in a disorganized manner that failed to present a coherent portrait of Appellant. That family members were moved to prepare declarations in mitigation weeks after the penalty verdict, when they could be of no benefit, because of their dismay over Mr. Beswick's performance, 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. (3CT 546-591, 624-659.) The evidence was explained and expanded during the hearing on the motions. (30C RT 3240-3934.)

Appellant began using PCP and other mind-altering drugs at the age of eight—a habit that lasted two decades.[13] His mother suffered from toxemia while pregnant, and experienced seizures during his birth which may have caused neurological damage. (30G RT 3567.) Further, he fell on his head at a young age with a force strong enough to break a vertebrae. (30G RT 3572.) Such a drop could have caused organic brain damage. (30D RT 3384.) When 10, he watched his father being taken away in an ambulance after a fatal heart attack, and never saw him again. (30G RT 3565-3566.) His step father was physically abusive with his mother and as a result Appellant avoided home and spent more time hanging out on the streets. (30G RT 3570.) 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.

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13. PCP causes neurological damage, brain atrophy, memory loss, psychosis and a host of other problems. (30B RT 3362-3371, 3380-3382, 3423.)

Further, Appellant was in a car crash that resulted in serious head injuries. (30D RT 3383-3385) 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 his brain. (30D 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. 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. (30H RT 3638.) Records from the program, Victory Outreach, were available but never obtained and presented at trial. (30H RT 3636.) The attorney never spoke with a drug counselor who could have testified that he arranged for Appellant's admission to the Victory and Brotman Medical Center for Drug Abuse. (30H RT 3636-3637.)

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 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. (30I RT 3786, 3792, 3793, 3803; see *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1043; *Deutscher v. Whitley*, *supra*, 884 F.2d at p. 161; *Bloom v. Calderon*, *supra*, 132 F.3d 1267, 1270; *Smith v. Steward* (9th Cir. 1998) 140 F. 3d 1263, 1271; *Correll v. Steward* (9th Cir. 1998) 137 F.3d 1404.)

The prosecution presented aggravating factors that could have been countered by Beswick with evidence of mental health issues and social history. The prosecution stressed such things as the absence of mental or emotional disturbance. Beswick knew or should have been aware, had he conducted a minimal in-

vestigation, that such contentions were not true. Yet, the jury was in the dark because of the failings and incompetence of counsel. 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 would have humanized Appellant.

F. Conclusion

Contrary to the arguments of Respondent, Beswick's penalty-phase failings resulted in Appellant being prejudicially 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. The penalty phase verdict must be set aside, and a new trial ordered.

XII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT DUE TO FLIGHT

Respondent states that Appellant forfeited his claim for failure to object to the instruction below. (5 RB 225.) Respondent also argues that Appellant's arguments lack merit and that any instructional error was harmless. (5 RB 225–231.) However, Appellant's claim is not forfeited, and the trial court committed prejudicial error in instructing the jury on consciousness of guilt due to flight. The instruction violated Appellant's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as sections 7 and 15 through 17 of article I of the California Constitution.

A. Appellant's Claim Is Preserved

A criminal defendant need not object at trial to raise on appeal an instructional issue affecting his substantial rights. (Penal Code §1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976-977 and fn. 7 [finding no waiver for the failure to object to an instruction erroneously given containing a permissive presumption or in-

ference]; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7 [finding no waiver for the failure to object to an instruction that removed an element of the offense]; *People v. Hannon* (1977) 19 Cal.3d 588, 600 [no waiver due to failure to object to an instruction that was supported by evidence]; *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10 [finding no waiver for the failure to object to an erroneous instruction on felony murder]. See *People v. Smith* (1992) 9 Cal. App. 4th 196, 207, fn 20 ("The People make their oft-repeated, but only occasionally applicable, contention the issue was waived, or alternatively that any error was invited, because defendants failed to object to, or request modification of, the challenged instruction. As appellate courts have explained time and again, merely acceding to an erroneous instruction does not constitute invited error. [Citations omitted.] Nor must a defendant request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial court's fundamental instructional duty.").)

As stated in Appellant's brief, the "instruction was unnecessary and argumentative, and permitted the jury to draw irrational inferences against Appellant." (AOB 259.) As such, the instruction violated Appellant's substantial rights, namely his right to due process, a fair trial, a jury trial, equal protection and a reliable jury making determinations on guilt, special circumstances and penalty. (AOB 259–260.)

Respondent's cite *People v. Loker* (2008) 44 Cal.4th 691, 705–706 to show that "the failure to object to a flight instruction forfeits any complaint that the instruction was given." (RB 225). Counsel misstates the law and misleads the Court. *People v. Loker* held that the absence of a defendant's objection when the court failed to implement a modification it previously stated it would implement forfeited his claim. (*Id.,* at 705–706.) The *Loker* Court then cited to *People v. Cole* (2004) 33 Cal.4th 1158, 1211. (*Ibid.*) *People v. Cole* similarly held that "a defendant may not complain on appeal" when he " "did not ask the trial court to

clarify or amplify the instruction" to "an instruction [that] was incomplete." (*People v. Cole*, *supra*, 33 Cal.4th at p. 1211.)

Here, Appellant does not contend that the flight instruction was incomplete. Thus, Respondent's reliance on *People v. Loker* is misplaced. Likewise, Appellant did not "join[] in requesting" the flight instructions. (See *People v. Jackson* 13 Cal.4th 1223.) Nor did Appellant "at the time the [trial] court discussed jury instructions, [] agree [that] the evidence supported [the instructions]," and then fail to object "to the court's proposed wording." (*People v. Bolin* (1998) 18 Cal.4th 297, 326 (citing *People v. Jackson*, *supra*, 13 Cal.4th 1223).) As such, Respondent's reliance on these cases for the argument that appellant's claim is forfeited is also misplaced.

Finally, Respondent's reliance upon *People v. Farnam* (2002) 28 Cal.4th 107, 165, is also misplaced. In *People v. Farnam*, the defendant argued that a modified version of the CALJIC No. 2.06 instruction was prejudicially erroneous "because it specifically referred to the evidence that he attempted to refuse to comply with the court order requiring his blood and hair samples." (*People v. Farnam, supra*, 28 Cal.4th at p. 165.) The Court refused to review defendant's argument on the ground that defendant failed to raise this particular claim in the trial court, and cited to *People v. Bolin*, *supra*, 18 Cal.4th at p. 326 as support. (*Ibid.*)

However, here Appellant does not dispute the wording of a modified instruction, but rather the instruction itself. As such, Respondent's reliance on these cases for the argument that appellant's claim is forfeited is also misplaced. Appellant's claim is not forfeited.

B. The Consciousness-of-Guilt Instructions Improperly Duplicated The Circumstantial Evidence Instruction, And Was Unfairly Partisan and Argumentative

The court may "properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence." (*People v. Hovarter*

(2008) 44 Cal.4th 983, 1021 (citing *People v. Moon* (2005) 37 Cal.4th 1, 30).) "The court must, however, refuse an argumentative instruction, that is, an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.'" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Moreover, "[a]n instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue. [Citations.]" (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.)

The duplicative nature of the instruction under CALJIC No. 2.52 in conjunction with instructions under CALJIC Nos. 2.00, 2.01, and 2.02 provided the prosecution with an unfair advantage over Appellant. CALJIC Nos. 2.00, 2.01, and 2.02 instruct the jury on the general principle that jurors may draw inferences from the circumstantial evidence and that circumstantial evidence is acceptable proof of a fact—this gains the prosecution an unfair advantage. Similarly, CALJIC 2.52 instructs the jury to infer Appellant's guilt of the offenses for which he was charged and tried from certain factors alleged that are supposed to show "consciousness of guilt", i.e. flight. These instructions all repeat the circumstantial evidence instruction, allowing the prosecution the benefit of a four-tongued instruction. The jury heard four separate times that circumstantial facts could prove guilt or consciousness of guilt. They also heard these instructions four times in conjunction with a specific example of such circumstantial evidence, flight. Such reiterations and repetitions were unnecessarily duplicative and suspect.

Moreover, such reiterations implicate an opinion of the court and invite the jury to draw inferences favorable to the prosecution. The instruction coaches the jury: if you find evidence of flight, you may consider that evidence as indicative of consciousness of guilt. Such an instruction is analogous to the instruction that the *Mincey* Court found argumentative. (See *People v. Mincey*, *supra*, 2 Cal.4th at p. 437.) To allow these duplicative and argumentative instructions violates Appellant's due process and equal protection rights to a fair, impartial, and balanced

trial. As such, Appellant requests this Court to reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative.

Respondent's charge that CALJIC No. 2.52 is a "cautionary instruction which benefited the defense" is naïve. (RB 227.) The instruction, combined with the other circumstantial evidence instructions, do not guide properly inform the jury as to what else must be found before the jury can find guilt beyond a reasonable doubt. Instead, the instructions allow the jury to unduly emphasizes a single piece of circumstantial evidence. Indeed, the instructions themselves highlight such evidence and intimates certain weightiness not otherwise necessarily assigned. That is, the instructions placed a judicial *imprimatur* on the prosecution's theory of the case and 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

Finally, the trial court's instructions welcome improper permissible inferences. (*See People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) While Respondent may "disagree[]" with such an argument, it is meritorious. (*See* RB 229.) The instruction under CALJIC No. 2.52 allowed the jury to infer consciousness of guilt from the flight evidence. This instruction concentrated on the specific flight evidence and such focusing necessarily blurs the other evidence. (*See United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.)

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.) Yet, in this case, the improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer, not only the *actus reas*, but also Appellant's intent or mental state required for conviction of first-degree murder and robbery. As Appellant aforementioned in its Opening Brief, while the consciousness-of-guilt evidence may bear on a defendant's state of mind subsequent to the killing, it is *not* probative of a defendant's *mens rea* immediately prior to or during the homicide. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) To hold otherwise necessarily permits the jury an impermissible logical jump to a finding of guilt. 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.

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. While flight evidence may be logically relevant to show consciousness of guilt for a single act, it does not follow that the same evidence is also logically relevant to show consciousness of guilt for multiple acts within a single event. Such reasoning is logically infirm and arbitrarily assigns an inference of guilt. The instruction therefore constituted a clear denial of due process. (U.S. Const., 14th Amend.)

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 Appellant 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

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* (1967), 386 U.S. at 824; *see Schwendeman v. Wallenstein* (9th Cir, 1992) 971 F.2d 313, 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

Respondent argues that any error in the flight instruction is harmless because Appellant would not have received a more favorable result in the absence of such an instruction. (RB 229–230.) For this, Respondent relies on the fact that the jury instructions also identified that the prosecution has the burden to prove each fact beyond a reasonable doubt. (RB 230.) Respondent then lists off various witness statements and points to the evidence of the latent fingerprint lifted from a missing hairspray can. This cannot do.

The trial consisted primarily of witness statements. As such, it became a trial of credibility. Additionally, the instructional error affected the meat of the case, namely, was Appellant guilty of the homicides and robbery; and if so, what was the nature and degree of the homicides. Therefore, the jury's verdict revolved around Appellant's credibility. If the jurors found Appellant credible, they would have to have found Appellant innocent. 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 instruction 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

Respondent concedes that the trial court gave conflicting accomplice instructions under CALJIC 3.16 and 3.19, but claims that such error does not implicate federal constitutional rights and was harmless. (RB 231–238.)

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.

(26 RT 2948; 25 RT 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.

(26 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 event, no corroboration of his harmful testimony was needed. The 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 instructions undermined the reasonable doubt requirement and denied Appellant a fair trial and due process of law. (U.S. Const., 5th, 6th & 14th Amends.; 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).

Respondent additionally argues that Appellant was not prejudiced by Woodland's testimony because the error was harmless because "it is not reasonably probable appellant would have achieved a more favorable result had the jury been properly instructed." (RB 391.) First, Respondent argues that Woodland was not an accomplice. This argument is weak.

"A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [non-target offense] that is a natural and probable consequence of the intended crime. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 920.) The latter question is judged objectively. (*Ibid.*) "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in

the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*People v. Medina*, *supra*, 46 Cal.4th at p. 920.) The jury is to determine whether a consequence is reasonably foreseeable in light of all the factual circumstances of the individual case. (*Ibid.*)

Here, Woodland pled guilty to manslaughter for Friedman's murder. (18RT 1986-1987.) Moreover, Woodland drove the vehicle with knowledge of the pending drug sale to the site of the shootings, remained there during the shootings, and drove the get away vehicle. (18 RT 1994, 1998.) Additionally, Woodland stated that he knew that he was involved in the shootings, (18 RT 1994), and that he saw Appellant holding a gun in the car prior their arrival at the drug sale site. (18 RT 2005-2006.) Although murder is not considered "a natural and probable consequence of any drug deal involving a large sum of money," it is a natural and probable consequence of a drug deal in which the buyer carries a gun. (See *People v. Hinton* (2006) 37 Cal.4th 839, 880.)

Moreover, Woodland's testimony that he lacked the requisite intent to rob and murder lacks significant credibility. (18 RT 1975.) Woodland was originally charged with first-degree murder and subject to a possible sentence of 25 years to life. (18 RT 1993-1994 1997.) To this charge he pled not guilty. (18 RT 1995.) However, he subsequently made a deal with the prosecutor to plea guilty to manslaughter, for a sentence of only six years, in exchange for his testimony at trial against Appellant. (18 RT 1995.) Additionally, Woodland had a motive to cover up for Gabby Chacon, who "acted like [his] father," and housed, clothed, and fed Woodland in 1993 and 1994, and whose involvement in this crime remains cloaked. (18 RT 2003-2004.) Regardless, the question is not whether he actually believed a murder would be committed, but rather that Appellant's alleged use of a gun would have been reasonably foreseeable to an objectively reasonable person in Woodland's position.

Respondent's reliance upon *People v. Garrison* (1989) 47 Cal.3d 746 is misplaced. In *People v. Garrison*, the alleged accomplice admitted to aiding the defendant to a burglary site but "claimed he did not know defendant was armed and that he was surprised by the killing . . . and everything that followed." (*People v. Garrison, supra*, 47 Cal.3d 746, 772.) The Court held the truthfulness of the alleged accomplice's testimony were factual issues for the jury to decide, and therefore the trial court did not err when it refused to give instructions that the alleged accomplice was an accomplice as a matter of law. (*Ibid.*)

Here, the trial court gave both the instruction that Woodland was an accomplice as a matter of law and the instruction that Woodland's testimony was a factual issue for the jury's determination. Thus, it was unclear and confusing for the jury as to its role. Moreover, unlike the alleged accomplice in *People v. Garrison*, Woodland stated that he did know that Appellant carried a gun. (18 RT 2005-2006.) As such, Woodland admitted to driving an armed man to make a drug deal, foreseeable consequences of which are a robbery and murder. Although Woodland claims to have been under duress during the drive *away* from the murder, he stated both that he voluntarily agreed to drive Appellant to a drug deal and he knew Appellant was armed, the objective natural and probable consequences of which are robbery and murder.

Because the evidence did establish that Woodland was an accomplice, the jury was improperly instructed to determine whether Woodland was an accomplice. The fact that the jury was also instructed that Woodland was an accomplice as a matter of law could not "only have worked to appellant's benefit" as Respondent argues. (RB 397.) The jury was instructed to do two different, conflicting things. Which instruction each member relied upon is not obvious and therefore Respondent's argument that the jury nevertheless followed the court's instruction that Woodland was an accomplice as a matter of law is unfounded. The court erred in giving opposing instructions—which necessarily created confusion. Accordingly, appellant was prejudiced.

However, Respondent next argues that even if Woodland was an accomplice as a matter of law, the conflicting instructions created only harmless error. (RB 397.) In support, Respondent relies upon *People v. Garceau* (1993) 6 Cal.4th 140, 189. Respondent's reliance is misplaced. In that case, the court found that the two instructions, on conspiracy and accomplices, were not conflicting nor confusing, but justified by defendant's defense theory. (*Id.,* at p. 189.) Clearly, the facts of this case differ substantially from those in *Garceau.* Here, Respondent admits the two instructions conflicted. Moreover, Respondent does not propose that Appellant's defense at trial justified the instructions.

Although the prosecutor reiterated in her closing argument that Woodland's testimony needed corroboration and cautioned that it must be viewed with distrust, she did not summarize the evidence which she believed would support Appellant's guilty verdicts independent of Woodland's testimony. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 782. But see 26 RT 2842 [prosecutor highlighted the fact that Friedman's bag was found on Oxnard Street "corroborates Shane Woodland. The accomplice must be corroborated"].) Accordingly, it is reasonably probable that the jury did not follow the court's instruction that Woodland was an accomplice as a matter of law and found instead that Woodland was *not* an accomplice and did *not* view his testimony with caution. Thus, Appellant was prejudiced by the accomplice instructions.

Lastly, Respondent argues that there existed corroborating evidence of Woodland's testimony. (RB 399-400.) This is untrue. First, the evidence of Appellant's fingerprint found on a can inside the Honda (18 RT 2105-2111) was improperly admitted and should not be considered as corroborating evidence. (See AROB, Arg. V, *infra.*) Moreover, that one neighbor testified he was only 70 percent certain Appellant was the passenger of the Honda (17 RT 1844-1846) does not corroborate Woodland's testimony as it shows that the neighbor was, if anything, uncertain that Appellant was the passenger. Indeed, the "corroboration" supplied by Respondents that neighbors saw the Honda drive away with two occu-

pants (16 RT 1683, 1687; 17 RT 1840-1841); cocaine was found wrapped in a sweatshirt in Friedman's Jeep (18 RT 2135); Friedman's bag was found where Woodland testified it would be (18 RT 1975, 2138-2139; 19 RT 2155-2158); and that Friedman's gunshot wounds were inflicted from close range (13 RT 1385-1397) are only corroborative of *someone* committing the crime. These facts do not implicate Appellant committed the crime. Finally, any reliance upon Janson's testimony is unreasonable. Janson claimed memory loss and required repeated refreshing of his recollection (13 RT 1414, 1415, 1416, 1417, 1418-1419; 15 RT 1443, 1441, 1443, 1444, 1446, 1447, 1448, 1456, 1458, 1459, 1469, 1473, 1486-1487, 1488, 1489, 1490, 1491, 1492, 1493.) Although Janson eventually claimed that Appellant confessed to the murder, he previously twice stated that he did not tell the police that Appellant said he killed Camancho, because Janson did not remember Appellant ever telling him that Appellant had killed Camacho. (13 RT 1416.) Moreover, Janson testified that he heard "so many different things" regarding the murder from other people at the dairy. (15 RT 1482.) This included "many different rumors," "stories," and "versions." (*Ibid.*) Finally, Janson admitted that during the preliminary hearing he stated repeatedly that he did not remember anything about Appellant's alleged confession. (15 RT 1489-1492, 1497-1504.)

Interestingly, Janson's testimony also implicates Woodland wherein he states that Appellant said that he and a "younger male" "were going to go exchange [drugs] for money or something, and then they were going to take it both [sic] back, take the money and the drugs back." (15 RT 1451.) Contrary to Respondent's proposition, Janson contradicts Woodland's testimony. And, anywhere that Janson does corroborate Woodland would seem to be outweighed by Janson's reluctance and incredible testimony. Because Woodland's testimony was not sufficiently corroborated, the trial court's error in giving contradictory accomplice instructions was not harmless, but prejudiced Appellant.

XIV.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, IS CONSTITUTIONALLY DEFECTIVE

In Appellant's Opening Brief, numerous bases are presented on which California's death penalty statute violates the Fifth, Sixth, Eighth, and Fourteenth Amendments, while acknowledging that this Court has already rejected these claims of error. (AOB 272-298.) Respondent simply relies on this Court's prior decisions without adding any new arguments. (RB 238-243.) Accordingly, the issues are fully joined and no reply is necessary.

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

It has been previously established that 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. (AOB 298-301.) This differential treatment violates the constitutional guarantee of equal protection of the laws. This differential treatment violates the constitutional guarantee of equal protection of the laws and for one to be free from cruel and unusual punishment under the Eight and Fourteenth Amendments. Respondent simply relies on this Court's prior decisions without adding any new arguments. (RB 243.) Accordingly, the issues are fully joined and no further reply is necessary.

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 AMENDMENTS

The very broad death scheme in California and the use of death as regular punishment violate both international law and the Eighth and Fourteenth Amendments. (AOB 301-303.) Appellant's death sentence should thus be set aside. Respondent simply relies on this Court's prior decisions without adding any new arguments. (RB 244.) Accordingly, the issues are fully joined and no further reply is necessary.

XVII.

THE CUMULATIVE EFFECT OF THE GUILT AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENTS

In response to Appellant's argument that reversal is required based on the cumulative effect of the errors in this case (AOB 303-305), Respondent simply contends that when the merits of the issues are considered there are no multiple errors to accumulate. (RB 245.) Respondent's contention lacks merit, as it cannot be fairly said that Appellant received a fair and reliable guilt or penalty phase trial.

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 judgment should be reversed as to both the guilt and penalty phases.

Dated: August 24, 2010

Respectfully submitted,

ROBERT R. BRYAN
Attorney for Appellant

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. The Appellant's Reply Brief uses a 13-point Times New Roman font. I conducted a word count of this brief using my office's Apple computer software. On the basis of that computer-generated word count, I certify that this brief contains 36,639 words excluding the tables and this certificate.

Dated: August 24, 2010

ROBERT R. BRYAN
Attorney for Appellant

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 Reply Brief

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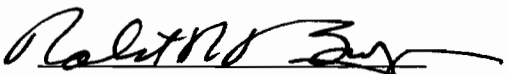
I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24th day of August, 2010, in San Francisco, California.



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