SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	CASE NO. S030533
v.	
	(Los Angeles Superior Court No. TA 006961)
GEORGE BRETT WILLIAMS	
Defendant and Appellant.	

AUTOMATIC APPEAL FROM THE JUDGMENT OF DEATH
SUPERIOR COURT LOS ANGELES COUNTY
HON. MADGE WATAI

Argument XV of
APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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TABLE OF CONTENTS

Page

XV. TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE BY, INTER ALIA, (1) FAILING TO INTERVIEW OR HAVE TESTIFY THE PERSON WHOM HE IDENTIFIED IN HIS OPENING STATEMENT TO BE THE MOST IMPORTANT WITNESS OF ALL FOR THE DEFENSE; (2) TAKING NO NOTES DURING TRIAL DUE TO A CRIPPLING MEDICAL CONDITIONS; (3) MISREPRESENTING HIS QUALIFICATIONS AND EXPERIENCE TO THE COURT; (4) TRYING THIS CAPITAL CASE WHILE DEFENDING HIMSELF AGAINST PROSECUTION BY THE STATE BAR; AND (5) NOT SHOWING UP FOR VOIR DIRE.

Prologue

Appellant realizes that claims of ineffective assistance of counsel are ordinarily raised and reviewed on habeas corpus. In such a posture, the Court has the benefit of a full record establishing what trial counsel did and did not do, and why. However, this case is unusual in that there was a lengthy evidentiary hearing in support of Appellant's Motion for New Trial, at which Appellant was represented by new counsel and at which trial counsel testified at length and filed supporting materials. Although the record on habeas corpus would be more complete than the appellate record, Appellant submits that the appellate record is sufficient to enable the Court to determine that the derelictions of trial counsel warrant reversal of appellant's conviction and death sentence.

Introduction

During the course of his pre-trial and trial court proceedings, George Williams was represented by four separate attorneys, three of

whom were subsequently disciplined by the State Bar. Stanley Granville, an attorney who appeared on Mr. Williams' behalf during preliminary proceedings, was sanctioned by the Bar. One month before the start of jury selection, Douglas McCann, the attorney who conducted Mr. Williams' voir dire was convicted of his own criminal offense. Shortly after Mr. Williams' trial he too was disciplined by the Bar; later, he was disbarred. Before, during and after Mr. Williams' trial, Ronald LeMieux, who represented Mr. Williams at both the guilt and penalty phases of the case, was defending himself against a State Bar investigation that resulted in his being disciplined. A later State Bar investigation resulted in LeMieux's suspension from the practice of law.

This section of the brief focuses on the conduct of just one of Mr. Williams' attorneys – Mr. LeMieux. The record in this case reveals that attorney LeMieux violated professional standards and case law obligations in virtually every aspect of his representation of Mr. Williams. Indeed, LeMieux broke nearly every professional rule of conduct in the book.

As discussed in greater detail below, when he offered to represent Mr. Williams, LeMieux had no death penalty experience. He lied to the court about his qualifications, failed to associate qualified co-counsel, and then sought compensation which was grossly inadequate to provide competent representation. At the time of trial, Mr. LeMieux was suffering

from debilitating medical conditions which prevented him from writing or even taking notes during the entire trial. Mr. LeMieux would admit at a post-trial hearing that he did not believe in filing pretrial motions, conducting pretrial discovery, examining the State's physical evidence, interviewing the State's witnesses, seeking funds for defense experts, retaining defense experts, investigating the State's aggravating evidence, or investigating mitigating evidence. He did not even appear at voir dire, instead abdicating capital jury selection to a lawyer with almost no felony experience, no death penalty trial experience, and a criminal rap sheet of his own. As a capital defendant, Mr. Williams was entitled to the "guiding hand of counsel at every step in the proceedings" against him. Powell v. Alabama (1932) 287 U.S. 45, 69. Instead, Mr. Williams endured counsel who neglected his basic duties at every turn.

In Argument A, below, Mr. Williams will assess Mr. LeMieux's performance – starting with the onset of representation and proceeding through each phase of trial – against the professional norms of practice that prevailed at the time of trial. In Argument B, Mr. Williams will explain that because of Mr. LeMieux's repeated blunders, the trial in this case lost its essential character as a confrontation between adversaries; under these unusual circumstances, a showing of case-specific prejudice is not required to establish a Sixth Amendment violation. United States v. Cronic (1984)

466 U.S. 648, 656-657. But even if case-specific prejudice is required, Mr. Williams explains in Argument C that such a showing can be made on the trial record of this case, which makes clear that LeMieux's errors undermine confidence in the outcome of trial. Strickland v. Washington (1984) 466 U.S. 668, 694.

A. Trial Counsel's Failures in Every Aspect of His Representation Fell Below the Standard of Care Required by the Sixth Amendment.

1. Trial Counsel was Unqualified to Represent Mr. Williams

Mr. Williams was charged with two counts of felony-murder and two special circumstance allegations on each of the murder counts: multiple murder (Penal Code §190.2(a)(3)) and robbery-murder (Penal Code §190.2(a)(17)(i)). After retaining competent trial counsel, H. Clay Jacke, II, in the Municipal Court, Mr. Williams became frustrated with the progress of his case. He privately retained Mr. LeMieux, replacing both Mr. Jacke who had been appointed in Superior Court, and second counsel, who had been appointed pursuant to Penal Code §987.9. (See CT 180, 183, 188, 195, 476.) In their stead, Mr. LeMieux, who was utterly inexperienced in capital litigation, promised the defendant that he would try the case quickly and cheaply.

a. Counsel Lacked the Legal Knowledge and Skill to Adequately Represent Mr. Williams.

As an initial matter, the United States Supreme Court has recognized that an attorney's prior experience "may shed light in an evaluation of his actual performance." Cronic, supra, 466 U.S. at p. 665. Thus, the ABA Model Rules of Professional Conduct ("ABA Model Rules") and the State Bar Rules of Professional Conduct ("State Bar Rules") require that a lawyer possess the legal knowledge and skill "reasonably necessary for the representation." ABA Model Rule 1.1; State Bar Rule 3-110 (A), (B). The State Bar Rules go on to state that if a member does not have the learning and skill necessary for competent performance, he may nevertheless undertake representation if he acquires sufficient learning and skill before performance is required. State Bar Rule 3-110 (C).

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Death Penalty Performance Guidelines") were adopted in 1989, two years before Mr. LeMieux sought to represent Mr. Williams in this case.[45] These ABA guidelines set forth the *minimum mandatory* qualifications and performance standards for defense counsel in capital cases. See ABA Death Penalty Performance Guidelines, Introduction. See also, In re Lucas (2004) 33 Cal.4th 682, 723

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[45] The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases were revised in 2003. When the 2003 Guidelines are referenced in this brief, the date is noted in parentheses.

(observing that the United States Supreme Court views the ABA Guidelines as setting forth "standards to which we long have referred as 'guides to determining what is reasonable.'") Those Guidelines provide that lead counsel in a capital case "should" have "prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought." Guideline 5.1(A)(iii).[46] The Guidelines further provide that within one year of assuming representation in a capital case counsel should "have attended and successfully completed . . . a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought." Guideline 5.1(A)(vi).

Ronald LeMieux did not come close to meeting the minimum qualifications for capital counsel established by the ABA or the State Bar. When Mr. LeMieux offered to represent Mr. Williams in February 1991, he had never tried a capital case (CT 563, 571; 52 RT 3663.) He had never conducted a penalty phase investigation or penalty phase argument. (52 RT 3663; CT 571.) He had no background, no training, attended no conferences, lectures or other educational courses in capital defense work. (52 RT 3663.) And he took no steps to acquire "sufficient learning and skill" to try a capital case, an "extremely specialized and demanding" task.

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[46] In the ABA Death Penalty Performance Guidelines, "'should' is used throughout as a mandatory term and refers to activities which are *minimum* requirements." Guidelines Introduction.

ABA Death Penalty Performance Guidelines, Introduction. In LeMieux's words:

> I cannot recall whether prior to [the Williams case] I was ever compelled to do any research or reading on [capital representation]."

(52 RT 3663-64).

LeMieux did not belong to any professional organizations, and received no publications from such organizations. (52 RT 3668-69.) What is more, LeMieux appeared never to have handled a legal case of any sort that was so complex that the case materials filled more than a single banker's box. As a result, he was overwhelmed simply by the documents that he (belatedly) retrieved from attorney Jacke. "I never had a case where I was presented . . . with so much material to deal with. When I obtained the [trial] file . . . from Clay Jacke it was *two* file boxes full of stuff. (53 RT 3812.) (emphasis added.)

Nor was LeMieux psychologically prepared to undertake the daunting and demanding task of trying a capital case. To the contrary, in 1990, one year before assuming representation of Mr. Williams, LeMieux vacated his law office which was in a suite with other attorneys, and moved his practice into his home "as the first step to leaving the practice of law." (52 RT 3672.)

> When I moved into my home from the law office, the idea was to gradually leave the practice of law; I no longer wished

> to be a trial attorney. . . . **I felt burned out** psychologically and emotionally. I did not find the practice of criminal law to be rewarding.

(52 RT 3671) (emphasis added.)

The ABA rules make clear that counsel should be familiar with the practices and procedures unique to capital cases. See, e.g., ABA Death Penalty Performance Guideline 5.1(A). LeMieux failed to meet this requirement as well. For example, LeMieux was unaware of even the basic rule that in capital trials the entire proceedings must be on the record, transcribed by a court reporter. (See 16 RT 1266.) He did not know he was supposed to provide the prosecutor with a written list of the witnesses the defense planned to present. (19 RT 1901.) He also mistakenly thought that he would automatically be given "at least 30 days" after the end of guilt phase proceedings "to conduct a penalty phase investigation before the penalty phase trial began." (CT 571).

b. Counsel Misled the Court About His Qualifications

State Bar Rules of Professional Conduct provide that "trial counsel shall not seek to mislead the judge . . . by an artifice . . . or false statement of fact." State Bar Rule 5-200. In the course of representing Mr. Williams, LeMieux made a series of statements to the court that materially misstated – through gross exaggeration – his professional qualifications and experience. In the context of explaining (and discounting) Mr.

Williams' desire to fire his attorney and represent himself, LeMieux prefaced his remarks to the court with the claim that "[i]t has been my experience in death penalty cases – and I've done a number of them in the last 22 years . . . ." (30 RT 3131.) In discussing with the court his potential difficulties in going forward with his penalty phase defense, he stated "I have done these things before." (31 RT 3152.) In fact, as noted above, LeMieux, had never before handled a capital case.

LeMieux's false statements did not end there. During his closing argument to the jury at penalty phase, LeMieux faced an objection to his statement to the jury that, regardless of their verdict, "[Mr. Williams] will die in prison." At side-bar, LeMieux told the court ". . . the previous arguments I have made in death penalty cases where my client has been convicted, I have incorporated this part of the argument that I am now going into without objection . . ." (35 RT 3443.). Again, LeMieux had never before made an argument in a single capital case, let alone multiple ones, and had never had occasion to argue that his client should not be sentenced to death because he will "die in prison."

Similarly, when faced with an objection during his penalty phase argument to his comparison of Mr. Williams' crimes to other heinous murders, LeMieux responded that "[t]hat is an argument I've made before and I've heard other attorneys made [sic] before." (35 RT 3457.) But this

assertion was also false, because LeMieux, never having tried a penalty phase proceeding, would never have had occasion to make such an argument to a jury.

c. Counsel Lacked Office Staff and Basic Legal Tools.

The ABA Death Penalty Performance Guidelines require that "[c]ounsel in death penalty cases . . . have adequate . . . resources for preparation." Guideline 11.2(B). LeMieux's failure to request funds for the court to pursue investigation and retain experts, and his offer to try this capital case in return for compensation that was clearly inadequate for the task are resource issues that are discussed below. It is important to note, however, that besides lacking sufficient funds to undertake a capital trial, LeMieux also lacked sufficient office personnel and office-related materials to assist him. During his representation of Mr. Williams, LeMieux, a solo practitioner, who had begun winding down his practice of criminal law (52 RT 3671-72), had no secretary, no paralegal, and no assistance from any other support staff. (52 RT 3667-68.) He practiced out of his home, which had an incomplete assortment of California Reporters, no subscription to criminal defense periodicals, and no photocopier. (52 RT 3666.)

d. Counsel Failed to Associate Qualified Co-Counsel.

Recognizing that every experienced criminal defense attorney once tried his first criminal case (see Cronic, supra, 466 U.S. at p. 665), the State Bar Rules provide that if a member does not have the learning and skill necessary for competent performance, he may nevertheless undertake representation if he associates more learned counsel. State Bar Rule 3-110 (C). The ABA Death Penalty Performance Guideline are more specific. They state that "in cases where the death penalty is sought," defendants should be represented by "two qualified trial attorneys." Guideline 2.1. Those Guidelines define "qualified" co-counsel, in part, as having (1) "prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder . . .", (2) "completed . . . at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought", and (3) "demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases." Guideline 5.1(B) (ii).

Not only did Mr. LeMieux not possess the legal knowledge and skill "reasonably necessary for the representation" as required by ABA and State Bar rules, but he exacerbated the problem by not associating more experienced counsel, as required by the State Bar Rules and ABA

Guidelines. Instead, LeMieux entirely abdicated his role and responsibilities for selecting Mr. Williams' jury to Douglas E. McCann, a junior attorney and friend of LeMieux's who had considerably *less* criminal trial experience. Mr. McCann had never tried a capital case; he had never conducted Hovey voir dire, (52 RT 3726)); he had no prior training or course work in capital litigation; he did not meet the ABA's qualifications for second-counsel (see CT 562); and he was subsequently disbarred from the practice of law in California.[47]

Prior to being hired by LeMieux to pick Williams' capital jury, McCann's criminal trial experience was limited to roughly one year (1988-1989) in the Los Angeles County Public Defender's Office, where he was assigned to traffic and misdemeanor cases. After leaving the defender's office, McCann opened a solo practice focusing on criminal defense. (CT 562.)

McCann's ignorance of capital jury selection was evident. Although the court explained the jury selection process to him (3 RT 78), he was unfamiliar with its procedures. On the record, he questioned why

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[47] Douglas McCann was disbarred from practicing law in California after a lengthy history of disciplinary problems beginning with unlawful conduct that occurred one month before the beginning of voir dire in this case. See State Bar of California, http://members.calbar.ca.gov/search/member.aspx

50 additional jurors needed to be brought in when 206 had already been selected to complete questionnaires (4 RT 136-137).

McCann appeared reluctant to pick-up copies of juror questionnaires to review over the weekend, even after special arrangements had been made for them to be quickly copied for that purpose (4 RT 142.) He wondered why voir dire would stop once 100 jurors had been selected (5 RT 220-221) and was uncertain as to the number of peremptory challenges available to him (5 RT 221; 13 RT 1094.). When the prosecutor suggested using the "6-pack method" for initial questioning, McCann stated that he "didn't really follow how it's going to work." (13 RT 1094.)

The voir dire undertaken by McCann was also wholly deficient. First, McCann's questions of prospective jurors tended to confuse and distort rather than clarify and elicit. See, e.g.,12 RT 942 ("since [defense] counsel got you sufficiently confused"), 12 RT 959 (prosecutor notes that juror "was confused during the whole process of his questioning" by defense counsel); 10 RT 688; 11 RT 804 (prosecutor complains that McCann's questions employ confusing terms); 6 RT 260-62 (prosecutor objects that McCann's questions confuse and misstate the law); 6 RT 276, 342, 344 (juror confused by McCann's questioning); 8 RT 535, 564 (same); 7 RT 439 (prosecutor notes, and court agrees, that McCann's

exaggerated voice inflections in his questions distorts the accuracy and credibility of the jurors' responses.); 7 RT 441 (court observes "jurors . . . led right along [by McCann's] questions" without knowing how to answer).

Second, in inquiring during voir dire whether prospective jurors would automatically vote for the death penalty, McCann utterly neglected to tailor any of his questions to elicit jurors' feelings about the type or nature of aggravating evidence that the State planned to introduce in Mr. Williams' case. As this Court has made clear, a defendant may "probe the prospective jurors' attitudes" and "responses to the facts and circumstances of the case" to determine whether those facts and circumstances would cause them to automatically vote for the death penalty. People v. Cash (2002) 28 Cal.4th 703, 721, 722 (finding reversible error where trial court prohibited capital defense counsel from questioning prospective jurors about client's prior murder). Defendant's right to engage in such an inquiry is of heightened importance where, as here, the facts and circumstances encompass a defendant's prior conduct, and that conduct – including an alleged prior murder – is "likely to be of great significance to prospective jurors." Cash, supra, 28 Cal.4th at p. 721.

As discussed more fully in Argument XI, supra, the State argued that Mr. Williams should be executed, in part, because of his participation

in three assaults with a deadly weapon, one on Kenneth Moore (who died), a second on a law enforcement officer, and a third on a father and daughter. (See 32 RT 3175-3181.) With respect to Moore's killing, the State further claimed that "Mr. Williams[']... culpability for the crime was that of a *murderer*." (RT 3438.) (Emphasis added.) In Cash, this Court noted that a capital defendant's "prior murder" was precisely that type of "general fact or circumstance . . . that could cause some jurors invariably to vote for the death penalty." Cash, supra, 28 Cal.4th at p. 721. As a result, this Court held that the defendant in Cash was entitled to a penalty reversal because his counsel was denied the opportunity to adequately voir dire prospective jurors about the defendant's prior conduct.

The particularized death-qualifying voir dire that this Court approved in Cash is precisely what Mr. Williams deserved but did not get. As in Mr. Cash's case, the State in Mr. Williams's case planned to present aggravating facts "likely to be of great significance to prospective jurors," Cash, supra, 28 Cal.4th at p. 721, including evidence of a murder. The record does not reveal why McCann failed to question jurors about whether these circumstances might substantially impair the performance of their duties as jurors. McCann may have failed to do so because he had zero capital voir dire experience and so it simply never occurred to him to particularize his death-qualifying voir dire to the State's anticipated penalty

case; or perhaps McCann was unfamiliar with the State's penalty case and the aggravating evidence it planned to present (he had, after all, been recently retained by LeMieux to work only on jury selection, and not on any other aspects of the case); or his failure to conduct adequate voir dire may be attributable to actions of the State.[48] But regardless of the reason, the scope of McCann's voir dire was wholly deficient. McCann failed to ask *any* of the prospective jurors about their views of *any* of the incidents that the State planned to present in aggravation. Thus, McCann remained fully ignorant of whether "any juror who eventually served [would be] biased against" Mr. Williams because of alleged prior conduct. Cash, supra, 28 Cal.4th at p. 722. Consequently, Mr. Williams was denied an adequate voir dire and effective assistance of counsel at this critical stage of his trial.

In retaining McCann, LeMieux did not have even the (limited) benefit of working alongside, and getting feedback and assistance from, unqualified and inexperienced second-counsel. This was so because McCann was never truly a full-fledged "second-counsel". Rather,

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[48] As discussed in Arguments XI and XII, above, the State failed to provide adequate and timely notice to the defense as to what evidence and arguments it would present in aggravation, and so might well have interfered with McCann's ability to make critical tactical decisions during voir dire aimed at ensuring Mr. Williams a fair trial. Cf. Sheppard v. Rees (9th Cir. 1990) 909 F.2d 1234, 1237.

LeMieux retained McCann only to select the jury. As a result, McCann did not attend Mr. Williams' trial or assist LeMieux during the trial.

In hiring McCann to select Mr. Williams' jury, it was *not* LeMieux's intent to retain "co-counsel" or "second counsel". LeMieux was not paying someone to assist him, for example, to craft a juror questionnaire, formulate questions for voir dire designed to elicit information relevant to the facts of Mr. Williams' case and theories of the defense, further investigate prospective jurors about potential biases, or to closely observe the actions, reactions and temperaments of prospective jurors in order to provide LeMieux with insight and opinion about which of them could fairly adjudicate the case. LeMieux never anticipated such teamwork at voir dire. Instead, LeMieux paid McCann to serve as *substitute* counsel. He retained McCann to select the jury by himself. In LeMieux's words, "it's the intention of Mr. McCann and myself, that Mr. McCann would conduct the entire voir dire and that I would conduct the actual trial of this matter . . . ." (3 RT 15.). It was LeMieux's further intention to stay home during voir dire, ostensibly to prepare for the guilt phase portion of Mr. Williams' trial. And stay home, he did, not stepping foot in the courtroom of Mr. Williams' trial during the voir dire proceedings. (See 52 RT 3739.)

In sum, not only did LeMieux fail to associate more learned counsel to assist him with Mr. Williams' defense, LeMieux substituted for himself Doug McCann, a woefully inexperienced attorney, to undertake an important phase of the capital trial – the selection of Mr. Williams' jury. LeMieux then failed to adequately supervise McCann who, like LeMieux, lacked any background in capital jury selection. In short, LeMieux entirely abdicated his lawyering responsibilities during a critical phase of trial.

e. Counsel Sought Inadequate Compensation to Provide Adequate Representation.

ABA Death Penalty Performance Guideline 10.1 states that capital counsel should receive "a reasonable hourly rate which is commensurate with the provision of effective assistance of counsel and *which reflects the extraordinary responsibilities inherent in death penalty litigation.*" (emphasis added.)

For his proposed efforts to represent Mr. Williams, LeMieux sought $15,000 from his prospective client to try both the guilt and penalty phases of his capital trial. (CT 583).[49] Mr. Williams, who had never faced a felony trial before, sensed that this sum was too low and offered to pay Lemieux $10,000 over his asking price to cover "all trial work." (Id.)

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[49] By contrast, Williams' first counsel, H. Clay Jacke, II, received $10,000 to represent Mr. Williams only through his preliminary hearing in Municipal Court. (See CT 475.)

Once retained, LeMieux hired Douglas McCann to conduct jury selection, a task for which LeMieux paid McCann a flat fee of $5,000. (CT 563.) LeMieux chose to forgo court-funding of co-counsel or an investigator, instead paying for both from funds received from his client's family. (52 RT 3704.) Nor did LeMieux seek any court funds to retain forensic or mitigation experts.

As the ABA Death Penalty Performance Guidelines observe, "[w]hen assigned counsel is paid a predetermined fee for the case regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee." ABA Death Penalty Performance Guideline 9.1 (2003) (Commentary). As subsequent sections make clear, trial counsel failed to invest adequate time or resources in the preparation and investigation of Mr. Williams' case. LeMieux's lump-sum, low-ball approach for the charging of his services in a capital case reflects the fact that he was unqualified and unfit to handle a proceeding of a complexity and gravity that he clearly did not appreciate. It also likely contributed to his astonishingly deficient performance from the moment he began representing Mr. Williams through the close of the penalty phase.

2. Trial Counsel was Physically and Mentally Unable to Represent Mr. Williams

In addition to the professional and ethical rules requiring that counsel not take a case for which he does not yet have sufficient skill and experience, the ABA Model Code of Professional Responsibility provides that an attorney must not accept "employment . . . when he is unable to render competent service." Section EC2-30. See also, ABA Standards for Criminal Justice, The Defense Function, Standard 4-1.3(e) ("defense counsel should not [have other matters] that interfere[] with the rendering of quality of representation . . . or may lead to the breach of professional obligations."); ABA Death Penalty Performance Guideline 6.1 (same). Accord, ABA Death Penalty Performance Guideline 11.2(B) ("[c]ounsel in death penalty cases should be [able] to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation . . . who has had adequate time and resources for preparation.")

As the following sections make clear, Ronald LeMieux violated these standards as well by representing Mr. Williams while simultaneously struggling with three serious and debilitating matters: (1) crippling medical conditions; (2) bitter and consuming familial strife; and (3) an active State Bar disciplinary investigation and proceedings against him which ultimately led to sanctions.

a. Counsel was Unable to Provide Competent Representation Due to Debilitating Medical Conditions.

LeMieux's capital inexperience was compounded by serious mental and physical problems which undermined his ability to investigate and prepare for Williams' trial, and to cross-examine the State's witnesses during trial. Douglas McCann, whom LeMieux hired to select Mr. Williams' jury in LeMieux's absence, acknowledged that both before and after jury selection he "had concerns about LeMieux's physical stamina and whether he was physically prepared to try such a case." (CT 564.)

LeMieux confirmed McCann's concerns, testifying that his health "was quite a common topic of conversation between the two of us," in the summer of 1991 as Williams' trial date was approaching. (52 RT 3767.) During trial, there were indications in the record of LeMieux's failing mental and physical health. On September 16, 1991, the first day of the guilt phase proceedings – indeed, LeMieux's first full day in court in the Williams case, having not appeared during jury selection – LeMieux asked the court "that we not be in session on Fridays" or, if that is not possible, "that this Friday . . . we not be in session *for medical reasons*." (16 RT 1260) (emphasis added.) To accommodate LeMieux's medical request, the court reversed its earlier promise to the jurors that "the trial itself will be in session from Monday to Friday," (3 RT 20) and canceled all guilt phase

proceedings on Fridays. (See 23 RT 2393; 27 RT 2893 (noting "we've had Fridays off."))[50] On September 24, 1991, LeMieux asked to cut short the afternoon proceedings for apparent medical reasons, (21 RT 2169) and the court reluctantly agreed to do so. (21 RT 2197). On September 26, the court observed that LeMieux was not feeling well. (23 RT 2442.) On Thursday, October 3, after the court informed counsel that it wanted to give the jury its guilt phase instructions that afternoon and begin closing arguments the following day, LeMieux sought a continuance to the following Monday. (27 RT 2893.)[51] In July 1992, in the middle of Mr. Williams' motion for new trial proceedings, LeMieux suffered a physical and/or mental breakdown and "passed out" in court during voir dire proceedings in another case. (52 RT 3684.)

On August 27, 1992, LeMieux was unable to appear in court for medical reasons and the court granted a continuance on medical grounds. Attorney Otto observed,

> There is a real question now as to whether Mr. LeMieux is going to be able to proceed [in preparing the Motion for New

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[50] On that first day of trial, LeMieux, apparently short of stamina, sought a recess in the middle of his opening statement, a request he withdrew when the judge asked him to hold out until the approaching lunch break (16 RT 1309.)

[51] In addition to the abridgement of the trial calendar due to LeMieux's health issues, the record reflects that prior to trial LeMieux inexplicably failed to appear for two scheduled court appearances. (14 RT 1096.)

> Trial], and I would suggest that in lieu of just continuing this matter for the motion for new trial, that we might set a hearing in approximately three weeks to determine whether Mr. LeMieux is competent to continue representing Mr. Williams at this time.

(45 RT 3560.) The trial court agreed that LeMieux's health was a concern and that his poor health raised a possible issue for the motion for new trial. (45 RT 3560.)

On September 25, 1992, LeMieux failed to appear for a status conference, despite having been personally notified of the conference by the court clerk. (46 RT 3565-66.) Attorney Otto informed the court that he had met with LeMieux the previous day but that LeMieux failed to bring the materials he had promised, and, for medical reasons, LeMieux adjourned the meeting before Otto could complete the interview. (46 RT 3567). As Otto told the court,

> I asked [Mr. LeMieux] to write a couple of things down that we were discussing, and he was unable to do so. I could see that his hands were visibly shaking and he just had a lot of difficulty concentrating. . . . And [after two and one-half hours with one break] he was . . . obviously exhausted and [had to leave for] an appointment with his psychiatrist at that time.

(46 RT 3568.)

LeMieux visited a series of medical specialists in mid-1992, after he passed out in court. He was diagnosed with anxiety and depression, with concurrent physical problems caused by depleted levels of seratonin. (52

RT 3684.) At the new trial proceeding LeMieux testified that he had experienced mental and physical problems related to these conditions **prior to and throughout his representation of Mr. Williams**, including chronic and severe sleep disturbance (resulting in an average of only four or five hours of sleep a night during Williams' trial), pronounced tremors in his upper limbs, acute dry-mouth, and the "inability to concentrate" for "more than five or seven minutes or so" at a time. (52 RT 3688-90.) LeMieux indicated that his limb tremors were one reason he did not take notes during Williams' trial. (52 RT 3689.)

> **[D]uring the trial . . . I simply couldn't write with my right hand.**

(53 RT 3804.)

Unable to take notes during Mr. Williams' trial, LeMieux said it was his "practice" ". . . *at the end of the day* when I got home and [ate] sup[p]er and rested, I would sit . . . and type up my thoughts as to what was said during the day and this sort of thing." (Id.) (Emphasis added.)

Despite the debilitating nature of his symptoms, separately and combined, LeMieux "ignor[ed] them" during the course of his representation of Mr. Williams. (52 RT 3688.) Because LeMieux's physical and mental health was severely compromised when he undertook representation of Mr. Williams, and because his medical conditions left him "unable to render competent service", ABA Model Code of

Professional Responsibility Section EC2-30, LeMieux violated fundamental standards for ethical lawyering by taking a case that required him to exceed his physical and mental abilities.

b. Counsel was Unable to Provide Competent Representation Due to Acute, Consuming Familial Problems

For eight years before the Williams trial, LeMieux had raised his two sons – who were in their early teens during the Williams trial – as a single parent. (52 RT 3692, 3683.) In 1988 LeMieux had two more children with a new wife. (52 RT 3692.) For reasons not clear from the record, LeMieux's first two sons did not live with LeMieux and his new wife and children.

On September 1, 1991, two weeks before opening arguments, LeMieux united his first two sons with his new family in a home that he recently leased in Malibu. While McCann selected Mr. Williams' capital jury, LeMieux spent "two complete weekends" moving his family from Glendale to Malibu and made several additional trips to the new home with "odds and ends" (52 RT 3691.) LeMieux, meanwhile, continued to reside in Glendale apart from his family.

The new living arrangements quickly caused problems, adding to LeMieux's stress and distraction on the eve of Williams' trial. He described the situation thus:

> [M]any of the typical problems that develop between step-children and step-parents began to develop between [my second wife] and my two sons, so that it developed into a constant state of friction between the lifestyle my two sons had experienced with me and the bonding they had with me and now all of a sudden within the house there is a stepmother with two stepchildren, and the mix was volatile to say the least. There were constant arguments and constant friction.

(52 RT 3692).

During the course of Williams' guilt and penalty phases, LeMieux "was constantly on the phone at night ironing [out] differences, [and] refereeing" disputes. (52 RT 3692). On an average of two weekday evenings a week, "maybe on occasion three times" each work-week (52 RT 3693), LeMieux made "trips to Malibu [from Glendale] to settle arguments. It was constant friction and stress." (52 RT 3692.).

> The time that I should have been spending on [Mr. Williams'] case at night in the quiet solitude of my home in Glendale was being consistently interrupted by necessity to mediate these family disputes, and so many times I would find myself getting back into Glendale at 2:00, 3:00 in the morning and perhaps just dozing an hour or so in an easy chair rather than even going to bed . . . . .

(52 RT 3693.)

These family disturbances, seriously "interfere[d] with the rendering of quality representation" in violation of ABA Standards for Criminal Justice, The Defense Function, Standard 4-1.3(e). When combined with

LeMieux's debilitating medical conditions, counsel's ability to represent his client was largely eviscerated.

c. Counsel was Unable to Provide Competent Representation Due to an Ongoing State Bar Disciplinary Investigation and Prosecution Against Him.

What little energy and focus LeMieux could muster for the Williams' case in light of his medical and family problems was further dissipated by his efforts to defend himself against investigation and professional censure by the State Bar of California.

LeMieux was first notified in about 1989 that he was being investigated by the State Bar for the mishandling of client funds in about a dozen cases.[52] The Bar investigators and staff pursued their case against LeMieux through 1990 and 1991, spanning the full tenure of LeMieux's representation of Mr. Williams, which began in February 1991. (52 RT 3680-81.) To defend himself against the serious charges levied by the State Bar, LeMieux retained legal counsel and remained "actively involved" in the preparation of his own defense during the course of the Williams capital case. (52 RT 3682.).[53]

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[52] At the hearing on the Motion for New Trial, LeMieux testified that it was his custom *not* to segregate client funds in trust accounts until the money was earned, but rather to deposit all monies received from clients into his general operating account. (52 RT 3767.)

[53] As noted above, LeMieux was one of three trial attorneys for Mr. Williams who faced State Bar disciplinary problems. Douglas McCann,

Thus, George Williams, who was on trial not just for his freedom but for his life, was represented by an attorney facing charges and disciplinary proceedings that threatened his legal career. As the trial record reflects, and as is chronicled more fully below, LeMieux's State Bar problems, health problems and family problems – not to mention his lack of experience, skill, and zeal – resulted in LeMieux's failure to undertake the most basic tasks required of capital defense counsel.

3. Trial Counsel Failed to Adequately Prepare for Trial

Case law has long recognized counsel's obligation to investigate the facts surrounding his client's case. "[T]he constitutional right to be represented by counsel embodies a right to be represented by a 'diligent, conscientious advocate.'" (In re Jones, supra, at p. 59 (quoting Pope, supra, 23 Cal.3d at p. 424).) Counsel must, at a minimum, conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent his or her client. Strickland, supra, 466 U.S. at 691. "There is nothing strategic or tactical about ignorance . . . ." (Pineda

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who selected Mr. Williams' jury, was disbarred in California after a lengthy disciplinary record that began with a criminal offense that McCann committed one month before he began voir dire in this case. See State Bar of California, http://members.calbar.ca.gov/search/member.aspx. Attorney Stanley Granville, who served as associate counsel with H. Clay Jacke II, was also later sanctioned by the State Bar.

v. Craven (9th Cir. 1970) 424 F.2d 369, 372.) See also Bragg v. Galaxy (9th Cir. 2001) 242 F.3d 1082, 1088.

The ABA standards are in accord. Under those standards, defense counsel has a general obligation to investigate which extends to documentary evidence, physical evidence, and witnesses. "An attorney representing the accused in a death penalty case must *fully* investigate the relevant facts." ABA Death Penalty Performance Guidelines 2003 (Commentary, Representation at Trial). (Emphasis added.) As a general matter, "[c]ounsel appointed in any case in which the death penalty is a *possible* punishment should . . . begin preparation for the case as one in which the death penalty *will* be sought. . . ." ABA Death Penalty Performance Guideline 11.3. (Emphases added.) What that means, in practical terms, is that "[c]ounsel should conduct *independent* investigations relating to the guilt/innocence phase *and* to the penalty phase of a capital trial." (Emphases added.) ABA Death Penalty Performance Guideline 11.4.1(A). Accord, ABA Model Code of Professional Responsibility DR6-101(A)(2) (attorney should not handle cases "without preparation adequate in the circumstances."). "[P]roviding quality representation in [a] capital case[]" thus "requires counsel to undertake correspondingly broad investigation and preparation." ABA Death Penalty Performance Guidelines (2003) (Commentary,

Representation at Trial). (Emphasis added.) See also, ABA Death Penalty Performance Guideline 8.1 (Commentary) ("[P]retrial investigation and preparation are fundamental to attorney competence at trial,"citing Gary Goodpaster, Effective Assistance of Counsel in Capital Cases (1983) 58 N.Y.U. L. Rev. 299, 344-45).

The ABA Guidelines are also clear about *when* counsel should undertake comprehensive investigation and preparation efforts. "[I]nvestigation[] should begin *immediately upon counsel's entry into the case* and should be pursued expeditiously." ABA Death Penalty Performance Guideline 11.4.1. Counsel may not "'sit idly by, thinking that investigation would be futile.' The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's evaluation and advice amount to little more than a guess." ABA Death Penalty Performance Guideline 11.4.1 (Commentary) (citing People v. Ledesma (1987) 43 Cal.3d 171, 200-204, 207-209, 221-223.).

The failure of trial counsel to adequately investigate the facts of the case and possible defenses constitutes ineffective assistance. (People v. Pope (1979) 23 Cal.3d 412, 424-425.) Where, as here, trial counsel failed to make even minimal effort to investigate his client's case, counsel's abdication of his duties, and the Sixth Amendment violation to which his

conduct gives rise, may also be properly analyzed under United States v. Cronic, supra, 466 U.S. at pp. 656-657.

Whatever the cause – Mr. LeMieux's failing health, his protracted family problems, the ongoing State Bar proceedings against him, his capital inexperience, his lack of knowledge of death penalty jurisprudence and procedure, or a simple lack of zeal which led to idleness – the result was that LeMieux failed to adequately prepare for Mr. Williams' trial. As the following sections describe in greater detail, LeMieux did not review the documentary evidence in the case in a timely or adequate manner. He failed to investigate independently any of the physical evidence in the case. He did not interview Mr. Williams' prior capital counsel (or that counsel's investigator) in preparing for trial. He did not seek funds from the court to pay for a defense investigator or experts. He failed to interview the State's guilt or penalty phase witnesses. He failed to investigate, interview or subpoena a critical defense witness. He filed only one pretrial motion – a declaration of indigency so that the court would pay for the preparation of transcripts of portions of a co-defendant's case – but failed to file any other pretrial motions, including no request for discovery. As a result of LeMieux's failure to undertake even the most basic duties of felony defense representation – much less capital defense representation – Mr. Williams' trial "lost its essential character as a confrontation between

adversaries," and constituted a violation of the Sixth Amendment. United States v. Cronic (1984) 466 U.S. 648, 656-657.

a. Counsel Failed to Timely or Adequately Review Documentary Evidence

i. The Client's Case File

"Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes *at minimum* . . . examining the files of prior counsel." ABA Death Penalty Performance Guideline 10.7 (B)(1) (2003) (emphasis added.). As noted above, this elemental task should be done "*immediately upon counsel's entry into the case*" ABA Guideline 11.4.1 LeMieux, however, did not act expeditiously in this regard. In fact, LeMieux did not retrieve Mr. Williams' case file from the attorney for whom he substituted, H. Clay Jacke, II, until one month *after* LeMieux's initial court appearance on behalf of his client. (52 RT 3700; CT 560.)

ii. The Charging Documents

ABA Death Penalty Performance Guideline 11.4.1(D)(1) states that "[c]opies of all charging documents in the case should be obtained and examined" in order to make a thorough and searching review of claims that can be raised to attack those documents and prepare a defense.

Before trial LeMieux neglected to obtain the charging documents filed against Mr. Williams' alleged accomplices and co-defendants, who

had already been found guilty and were going to testify against Mr. Williams for the State. Thus, two days into the prosecutor's case during the guilt phase trial, defense counsel remained ignorant of the precise charges filed against three of the State's key witnesses – witnesses who pinned the crime on Mr. Williams. Indeed, LeMieux did not even know whether or not these witnesses had faced special circumstance charges by the State for their accomplice roles in the double murders for which Mr. Williams was being tried capitally. (18 RT 1708-09.)

iii. The Murder Books

Professional standards of practice require that trial counsel "make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports." ABA Death Penalty Performance Guideline 11.4.1(D)(4). See also, ABA Standards for Criminal Justice, The Defense Function, Standard 4-4.1, entitled Duty to Investigate.

A "murder book" is a compendium of most, if not all of the official paperwork created and collected by law enforcement that follows a murder from its initial report to the arrest of the subject(s). The murder books in this case spanned three separate volumes of materials. A careful review of the documents contained in the murder books is essential to gain an adequate and accurate understanding of the State's case against the

defendant(s) – including, but not limited to, a detailed description (and photographs) of the crime scene; physical evidence; statements and criminal histories of witnesses, accomplices, and informants; notes, ideas and theories of law enforcement investigators and personnel; leads, false leads, and untried leads of the case detectives; and other material evidence – and to discern the strengths and weaknesses of each part of the State's case. In most cases, reviewing the murder books would be one of the critical first steps in formulating a pretrial investigation and expert consultation plan. Such a plan typically involves (but is not limited to) creating a list of witnesses to be located, interviewed and (if necessary) subpoenaed, creating a list of documents and other materials to be collected, subpoenaed or at least preserved, identifying investigative, forensic and other experts to consult and perhaps retain, and composing questions for comprehensive client and witness interviews. The documents contained in the murder books are also useful for determining what pretrial motions should be filed, crafting lines of direct and cross-examination for anticipated testimony, and drawing up funds requests to the court for defense investigators and experts.

The murder books in Mr. Williams' case contained law enforcement documents dating from January 2, 1990, to September 13, 1991, three days before opening arguments were heard and well after LeMieux had

retrieved the trial files from attorney Jacke. (25 RT 2587.) Though the murder books here contained more than twenty months of case-related documentation generated by the State, LeMieux failed – repeatedly – to retrieve and review them, even despite the State's overtures to him to do so.

On Wednesday, September 11, 1991, just five days before the start of Williams' trial, LeMieux inexplicably failed to appear at a scheduled pretrial conference. The prosecutor, noting a pattern, put on the record that LeMieux had also twice failed to appear to review the murder books. As the prosecutor explained, he had the murder books brought to court "so [LeMieux] would have an opportunity to go through all the murder books, the three that are present here in court today, to make sure he had all items." According to the prosecutor, "[t]his is the second time I've made [the murder books] available here at the courthouse for Mr. LeMieux on his own time table . . . and Mr. LeMieux didn't show on that occasion either." Nor did LeMieux follow up by phone with the chief detective to arrange yet another appointment to review the murder books. (14 RT 1096.)

In short, as the prosecutor remarked, likely with some bewilderment and dismay, that on the eve of trial, "Mr. Lemieux has never taken that opportunity to look at these [murder] books." (Id.)

On September 16, 1991, the first day of the guilt phase trial, the murder books were brought to court a *third* time for LeMieux's inspection. (16 RT 1262.) The record is silent as to whether LeMieux reviewed them on this occasion. However, LeMieux noted – on this first day of trial – "there are [still] some [discoverable] items I do not have." (16 RT 1262.) Understandably, the prosecutor and court asked LeMieux for a list of the discoverable items that he wished. Even though the guilt phase trial was about to begin, LeMieux responded that he had not bring his list to court: "I have it at home in the form of a pleading and intend to give it to the court in the form of a request." (16 RT 1263.)

He never did. In fact, LeMieux never filed any pleading or request for the discoverable items that he lacked.

Counsel, of course, was obligated *before the start of trial* to collect and review documents created by law enforcement related to the crime. LeMieux wholly failed in this obligation. As described in more detail below, LeMieux also neglected his duty to collect and review *before the start of trial* all of the documentary evidence created by the State related to the penalty phase, including materials that shed light on his client's background, as well as on the weight and accuracy of the prosecution's aggravating evidence.

iv. Official State Agency Documentary Evidence

"Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts to obtain all necessary information." ABA Death Penalty Performance Guideline 11.4.1(D)(7)(D). Despite his client's specific instructions in advance of trial to do so, LeMieux failed to obtain records from the Board of Control, the state agency which disburses victim compensation funds. (48 RT 3607-08.) Mr. Williams informed his trial counsel that he had applied for and received a significant amount of money from the fund as a result of being shot. (Id.) He further informed LeMieux that Detective Tony Moreno provided substantial assistance in preparing and submitting the application, including falsifying information on the application to render Williams eligible for compensation. (53 RT 3923-29). According to Williams, the application would have demonstrated, inter alia, that Williams had a close and long-standing relationship with Detective Moreno. (See 48 RT 3607-08; 53 RT 3928-29.) Notwithstanding his client's wishes, LeMieux did not seek a signed release from Mr. Williams to send to the Board in order to get the documents; he did not try to subpoena the documents; and he did not file a request for the file pursuant to the California Public Records Act. Quite simply, he made no effort whatsoever to get the documents. In that in his opening statement to the jury (described more fully below) LeMieux placed Moreno front-and-

center of the defense's theory of the case, it defies reason that he did not try to secure these official papers to determine if they bolstered his planned defense by showing the close connection between Detective Moreno and Mr. Williams.[54]

In short, the record here makes clear that LeMieux (1) failed to conduct a timely and adequate investigation before the start of trial, including document collection; and (2) he failed to adequately investigate his client's case after the trial began.

b. Counsel Failed to Investigate Any of the Physical Evidence

ABA Death Penalty Performance Guideline 11.4.1(D)(5) states that "counsel should make a prompt request to the police or the investigative agency for any physical evidence or expert reports relevant to the offense

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[54] LeMieux also failed to provide the State with materials to which it was arguably entitled. Three days into the guilt phase portion of Mr. Williams' trial, the prosecutor repeated (for at least the third time) his request that the defense provide him with a list of the names of the defense's witnesses. LeMieux told the prosecutor he has no written list but that the defense planned to call Mr. Williams, Monique Williams, and Detective Tony Moreno. (19 RT 1901.) The prosecutor then asked the defense for "any statements of any sort" about what the defense witnesses are going to say. (Id.) LeMieux responded "I have nothing," (19 RT 1902.) But LeMieux added, "I hope to have certain documentary records which I don't have in my possession yet. . . ." (Id.) LeMieux did not specify what the records are that he had yet to obtain even though the trial was well underway, or why he had not yet gotten them. Nor does the record reflect that LeMieux ever received such records or provided them to the prosecution. Thus, LeMieux neglected his duties both to his client and opposing counsel.

or sentencing." Case law, too, has long recognized counsel's obligation to investigate the facts surrounding his client's case. See, e.g., Strickland v. Washington, supra, 466 U.S. at 691; Bragg v. Galaxy (9th cir. 2001) 242 F.3d 1082, 1088.

The ABA standards further recognize that the proper investigation of physical evidence will often be a highly technical endeavor requiring the assistance of experts who can guide and advise counsel and, where appropriate, be called by counsel to testify in court. Thus, ABA Death Penalty Performance Guideline 5.1(A)(iv) provides that lead counsel in a capital case must be "familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, . . . forensic evidence. . . ." Similarly, ABA Guideline 11.4.1(D)(7) states that "counsel should secure the assistance of experts" when doing so would (1) assist the attorney to adequately prepare the defense case, (2) understand the prosecution's case, (3) rebut "any portion" of the prosecution's case, or (4) present mitigation. See also ABA Death Penalty Performance Guideline 1.1 (Commentary) (noting "[u]tilization of experts has become the rule, rather than the exception, in proper preparation of capital cases."); ABA Death Penalty Performance Guideline 8.1 (Commentary) (observing "[a]n adequate defense . . . requires the service of expert witnesses to testify on behalf of the client and to prepare defense counsel to effectively cross-

examine the state's experts."); ABA Death Penalty Performance Guideline 10.7 (2003) (Commentary) ("With the assistance of appropriate experts, counsel should . . . *aggressively re-examine all* of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.") (Emphasis added.)

The importance of pre-trial investigation and expert consultation is heightened where, as in this case, the physical evidence – particularly that related to fingerprints, pagers and cellphones found at the crime scene – is less than conclusive and open to interpretation. (Eze v. Senkowski (2nd Cir. 2003) 321 F.3d 110, 128.)

In preparing for Williams' trial, LeMieux failed to retain any expert, forensic or otherwise, to undertake the tasks in need of expert assistance, including, but not limited to, reconstructing the crime scene, examining the physical evidence, reviewing the State's reports about the physical evidence, and advising counsel how best to proceed in investigating this evidence, how to challenge the State's use of this evidence in its case-in-chief, or how to marshal this evidence for use by the defense. (CT 568.)

i. Fingerprint Evidence

As noted in the post-trial motions and arguments, some of the most critical evidence collected by the State and used by the prosecution against Williams were fingerprints lifted at the crime scene. Nevertheless,

LeMieux never consulted or retained a fingerprint expert to examine the State's evidence and to rebut the arguments of the prosecutor that Williams' fingerprints connected him to the crime.

LeMieux failed to independently investigate the fingerprint evidence in this case even though it occupied a central place in the prosecution's strategy. LeMieux knew as much, telling the jury in his opening statement, "There is going to be a great deal of . . . fingerprint evidence . . . ." (16 RT1303.)

The prosecutor, in his opening statement, informed the jury "you've got [George's] fingerprints everywhere" in this case. (16 RT 1287.) "The phone that George was holding at the time that he shot Jack Barron initially is at the crime scene with his prints on it." (16 RT 1289-90.) "We have got George's prints on the car where the bodies were found." (16 RT 1294.) The State called four separate witnesses who testified about fingerprints, including three different forensic experts who specialized in fingerprint evidence to testify about the prints lifted in the case. For example, one such expert, Howard Samshuck, who lifted prints at the crime scene, testified that he obtained 82 lift cards from the crime scene, containing roughly 100 prints. (23 RT 2377.) Samshuck further testified that Williams' prints were found on a telephone, a cabinet door in the apartment, and on the driver's side mirror of the vehicle in which bodies

were found in the apartment's garage. Detective Joe Herrera testified that the .38 caliber revolver with blood stains was preserved for fingerprinting. (25 RT 2708.)

In his guilt phase closing argument LeMieux focused on the fingerprint evidence in an attempt to raise doubts about the prosecution's case. "With respect to the beeper [and other items found at the crime scene]," LeMieux argued, "we didn't even hear one word that they were even submitted for fingerprint analysis . . . so how do we know whose fingerprints were on that beeper they found at the scene?" (28 RT 3075-76). Instead of trying to answer his own question, LeMieux did nothing and remained ignorant of the facts of the case. He did not investigate the presence, absence and/or identity of fingerprints on the items found at the crime scene, which the defense understood to be relevant – for example, cell phones (23 RT 2382), beepers, and bags (24 RT 2472), or the Chevy Sprint vehicle that belonged to one of the victims parked a few blocks from the scene (53 RT 3822).

LeMieux's stated reason for not investigating was simple: If he independently investigated the physical evidence, he feared (1) he might learn something that was not helpful to the defense, and (2) he would have to disclose this potentially harmful evidence to the jury or prosecution. (53 RT 3823.) But the fear of learning more about one's case is not a

reasonable ground for not undertaking basic investigation of one's case, and cannot constitute a valid strategic choice, or an exercise of reasonable professional judgment, to decide to do virtually no work to assess and rebut the State's evidence or to prepare the defense case. Similarly, it is legally implausible for LeMieux to believe that he lacked any and all ability to prevent the State from discovering whatever unhelpful information that he might unearth. In short, LeMieux lacked any reasonable explanation to support his egregious limitation on investigation. (See Strickland, supra, 466 U.S. at pp. 690-691.)

After the close of trial, LeMieux acknowledged in hindsight that "a fingerprint expert could have assisted me in evaluating the fingerprint evidence that was introduced at trial and also could have made recommendations as to the additional fingerprint evidence that could or should have been obtained or was unavailable, or could have assisted me in preparing arguments that might have been made as a result of the status of the fingerprint evidence in the case." (CT 568.)

ii. Pager ("beeper") and Cell Phone Evidence

The prosecution, through the testimony of co-defendants Linton, Cyprian and Lee, and of Dietrich Pack, an employee of Delcomber's Communications, put on substantial evidence that a pager found in the apartment where the murders took place belonged to Mr. Williams. In his

opening and closing statements, the prosecutor repeatedly pointed to the multiple pieces of testimony and documentary evidence about the pager, claiming this evidence provided strong corroboration to the testimony of the co-defendants that Mr. Williams was present at the scene of the crime at the time of the crime. (See e.g., 28 RT 2968-2994.)

But Williams, who steadfastly denied being in the apartment when the crimes occurred, told his attorney that the pager found in the apartment was not his; that he in fact carried a beeper that had been provided to him by a police officer with the Los Angeles Police Department (and that was used almost daily by Detective Moreno to page him); that he had purchased a separate beeper from Delcomber's Communications, a store which sold pagers, several months before the one found at the crime scene was purchased; and that the beeper purchased at Delcombers on October 30, 1989, was not bought by or for him. Mr. Williams also told his attorney that he did not own the portable cellular phone found at the crime scene; rather, he owned only a cell phone that was permanently installed in his car. (See, e.g., 52 RT 3706-07.)

With the apparent intent to prove up his client's story, LeMieux, in his opening statement to the jury, boldly proclaimed:

> ". . . the evidence in this case, ladies and gentlemen, will prove to you that the beeper [found at the crime scene] did not belong to [Mr. Williams]. It belonged to Patrick Linton."

(16 RT 1313.) LeMieux then cross-examined the State's witnesses about which of the co-defendants also owned beepers (see 18 RT 1659-61 (Linton); 19 RT 1822 (Cyprian); and 26 RT 2730 (Lee)). He elicited from them the fact that prior to the crime each of Williams' three co-defendants also owned beepers. (26 RT 2732.). In LeMieux's words, there were "beepers are all over the place in this case." (19 RT 1819). According to LeMieux, identifying the correct owner of the crime scene beeper was critical to exonerating his client, or, at the very least, blasting a major hole in the prosecution's theory of the case.

To this end, LeMieux instructed Jackie Glover to obtain documents related to pager sales from Delcombers in order to demonstrate his client had bought a pager from Delcombers before October 1989. When Mr. Glover went to Delcombers, Glover was told by Delcombers' manager that Glover needed to serve the store with a subpoena duces tecum in order to get the records he sought. Glover promptly so informed LeMieux. LeMieux, however, never prepared a subpoena for Glover to serve on Delcombers. (52 RT 3705-06.)

LeMieux also failed to pursue related investigation. He did not inquire into who owned the stand-alone cell-phone found at the crime scene, notwithstanding his claim to the jury that it did not belong to Williams. He did not undertake alternative efforts to trace the ownership

of the pager or cell phone found in the apartment. He failed to take adequate steps to identify and trace the history of the pagers and cell phone that his client admitted to owning, possessing and using. Nor did he subject these items to fingerprint analysis, despite having accused the State of failing to do just that. (28 RT 3075-76.)[55]

In sum, defense counsel failed to take basic and essential steps before or during trial to investigate evidence regarding the ownership of a beeper and cell-phone found at the crime scene which his client steadfastly denied belonged to him but which the prosecutor relied on heavily to bolster the State's case against Mr. Williams. LeMieux's wholesale failure to investigate this highly material body of evidence was objectively unreasonable – incompetence that was compounded by his opening promise to the jury that he would "prove" that the beeper "did not belong" to his client. (16 RT 1313.)

iii. The Murder Weapon

In his opening statement, LeMieux told the jurors that the firearm used to kill the victims was not among the guns found at the scene, and that the .38 caliber revolver was, contrary to the State's claims, never fired:

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[55] As discussed in Argument B, infra, through no fault of Appellant, the State lost or destroyed the pagers and cell phone found at the crime scene after Mr. Williams' trial. (People's Exhibits 63 and 27.)

> *[W]e're . . . going to prove to you* that that .38 revolver was not the murder weapon. The murder weapon was not found at the scene of this crime. *We're going to show you that* that .38 revolver that he showed a picture had not even been fired, had not even been shot.

(16 RT 1329.) (Emphases added.) LeMieux emphasized this dramatic defense claim a second time:

> The two individuals who were shot were not shot by that gun. They were shot with a murder weapon that escaped with other people who were involved in this killing.

(Id.)

LeMieux, however, never conducted an independent analysis of the alleged murder weapon.[56]

iv. Other Weapons found at the Crime Scene.

During his opening statement LeMieux informed the jury: "We're going to prove to you that the defendant loaned those three guns [to the co-defendants] on January the 1st." (16 RT 1329.) LeMieux's theory of defense was that while the guns belonged to Williams, he had loaned them to his co-defendants. (54 RT 4158-59.) In other words, at the time of the crime Williams was neither at the crime scene nor in possession of the firearms. This theory was in stark contrast to that of the State, which

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[56] As discussed in Argument B, infra, through no fault of Appellant, the State lost or destroyed the alleged murder weapon found at the crime scene after Mr. Williams' trial. (People's Exhibit 31.)

alleged that Mr. Williams owned the guns found at the crime scene and fired the gun that killed the victims. (28 RT 3105.)

LeMieux, however, never analyzed these other weapons in an attempt to trace their ownership histories, and never undertook any other type of investigation to prove his theory of possession.[57]

c. Plastic Bags at Crime Scene

In his closing argument, LeMieux contended that evidence found on the kitchen counter of the crime scene, including a plastic bag containing various items, "was planted there." (28 RT 3067.) He also drew attention to the fact that the State never acknowledged having the plastic bags found in the apartment tested for fingerprints. 28 Rt 3075. Yet Mr. LeMieux did not undertake any independent investigation of his own of these items to determine whether they could have been planted, and whether they contained exculpatory fingerprints.[58]

vi. Shoelaces

In his opening statement, LeMieux directed the jury's attention to the shoelaces found at the crime scene that were used to bind the victims,

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[57] As discussed in Argument B, infra, through no fault of Appellant, the State lost or destroyed the firearms found at the crime scene after Mr. Williams' trial. (People's Exhibits 29 and 30.)

[58] As discussed in Argument B, infra, through no fault of Appellant, the State lost or destroyed various plastic bags found at the crime scene after Mr. Williams' trial. (People's Exhibits 120, 132, 133.)

stating that the "shoestrings . . . [were] an *absolute critical point* for the defense." (16 RT 1314.) (Emphasis added.) Despite being "absolute[ly] critical," LeMieux never analyzed the shoelaces or pursued this line of defense.[59]

vii. Plastic Bucket

In his opening statement, LeMieux implored the jury as follows: "[P]lease remember this, and it is going to sound peculiar but it is a *very important* piece of evidence in this case, an orange water bucket. That is a *pivotal* piece of physical evidence in this case that will assist you in proving and believing and being persuaded that George Williams was not present at that house." (16 RT 1320.) Despite the pivotal importance of the orange water bucket, LeMieux never had the bucket analyzed for prints, or blood or any other forensic evidence, and never presented to the jury how this piece of evidence exonerated his client.[60]

d. Counsel Failed to Interview His Client's Prior Defense Team

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[59] As discussed in Argument B, infra, through no fault of Appellant, the State lost or destroyed the bag containing shoe laces found at the crime scene after Mr. Williams' trial. (People's Exhibit 133.)

[60] As discussed in Argument B, infra, through no fault of Appellant, the State lost or destroyed the orange plastic bucket found at the crime scene after Mr. Williams' trial. (People's Exhibit 84.)

"Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes *at minimum* interviewing *prior counsel and members of the defense team* . . . ." ABA Guideline 10.7 (B)(1) (2003). (Emphases added.) As with counsel's obligation to obtain and review the client's file created by prior counsel, the duty to interview prior counsel is one that should be fulfilled "*immediately upon counsel's entry into the case*." ABA Death Penalty Peformance Guideline 11.4.1

i. Prior Counsel

From the onset of his representation through the trial of his client, LeMieux *never* interviewed Mr. Williams' prior counsel, H. Clay Jacke, II.

In February 1990, Williams retained Mr. Jacke to represent him shortly after he voluntarily surrendered to police and was charged with robbery and murder in this case. Mr. Jacke first represented Mr. Williams in Municipal Court and succeeded in getting the charges dismissed against his client at an initial preliminary hearing. Mr. Jacke then represented Mr. Williams at a second preliminary hearing, at which Mr. Williams was held to answer. Mr. Jacke then followed the case to Superior Court where he was appointed to represent Mr. Williams. In Superior Court Mr. Jacke filed a motion to dismiss pursuant to Pen. Code § 995. In addition, Mr. Jacke successfully sought court permission to bring on second counsel at

public expense to help him try Mr. Williams' case. (CT 183.). Mr. Jacke also retained appellate practitioner Andrew R. Willing to prepare and file a writ on Mr. Williams' behalf. The writ challenged the Municipal Court's refusal at the preliminary hearing to apply Penal Code § 1111 to the testimony of Mr. Williams' alleged accomplice Dino Lee. (CT 476; CT Supp. II at 1.) In addition, Mr. Jacke hired a private investigator and billed the court for his services. Further, Mr. Jacke filed a pretrial discovery motion (CT 164), though the motion was never heard. (CT 582; CT 476; CT 559-60.)

By virtue of his efforts on Mr. Williams' behalf over an extended period of time, Mr. Jacke became acquainted with the physical evidence in the case, the State's key witnesses, and the State's theory of the case. Attorney Jacke and other members of his defense team met with and interviewed his client. Most importantly, Mr. Jacke had both the opportunity and the incentive to develop the theory of defense and an investigation plan for trial. As a result, Mr. Jacke was a critical resource to be tapped by substitute counsel.

LeMieux had every opportunity to glean valuable information, ideas, and insight from Mr. Jacke about the factual and legal aspects of Mr. Williams' capital case, as well as about the background and character of his client. Mr. LeMieux, however, "never called [Jacke] to talk about the

case." (CT 560.) LeMieux never went to Mr. Jacke's office to interview him about the case. The only time LeMieux did go to Mr. Jacke's office, it was to retrieve Mr. Williams' case files – one month after LeMieux began representing Williams. Even then, Lemieux simply "picked the[] [files] up and carried them out of [Jacke's] office." (52 RT 3739.) Although Mr. Jacke was in his office, LeMieux acknowledged that "we did not discuss the case." (Id.)

In fact, the only non-perfunctory conversation LeMieux had with Jacke occurred "*after* the trial was in progress" (52 RT 3739) when the two lawyers happened to run into each other in the Compton Courthouse. They spoke for "approximately 20 minutes," (CT 560), but even on this lone occasion, both men acknowledged that they "did not discuss the [Williams'] case in any depth." (CT 560) (Jacke). As LeMieux succinctly stated:

I never sat down and discussed the case with [H. Clay Jacke].

(52 RT 3703.) "We never sat down and discussed any aspect of this case . . . at all prior to September 16 . . .," the first day of the guilt phase trial (52 RT 3739.)

ii. Prior Investigator

As noted above, capital trial "[c]ounsel . . . [has] an obligation to . . . *at minimum* interview[] prior . . . . members of the defense team . . . ."

ABA Guideline 10.7 (B)(1) (2003). (Emphases added.) Jackie Glover was retained by Mr. Jacke and paid by the court to investigate Mr. Williams' case. The only conversation with a member of the previous defense team that LeMieux had *before* the onset of the guilt phase was with Glover. However, like the conversation with attorney Jacke, it took place purely by happenstance. As LeMieux stated on the record on the first day of the guilt phase proceedings, moments before opening statements to the jury, "I spoke to Mr. Glover . . . at the L.A. County jail about two weeks ago when I just inadvertently ran into him. . . ." (16 RT 1265.) As with his interaction with Mr. Jacke, LeMieux's conversation with Glover was superficial and non-substantive. When the trial court asked LeMieux what investigation Glover had undertaken with the investigative funds that the court had paid Glover when he was employed by attorney Jacke, LeMieux answered "I do not know. I must say that honestly. I do not know." (16 RT 1265.) Indeed, LeMieux was unaware that Glover had been paid for his investigative work. (See CT 476.)

In fact, the discussion about investigator Glover on the first day of trial caught the prosecutor off guard, as he had never heard of Mr. Glover and was unaware of any defense investigation in the case. (16 RT 1265.) The prosecutor, fearing he was being sand-bagged just as he was about to deliver his opening statement to the jury, complained to the court that he

had "made a Proposition 115 discovery motion requesting all reports of investigators . . . and have received absolutely nothing. . . ." (16 RT 1265.)

It was not until the second day of the guilt phase trial, September 17, 1991 – seven months after he entered the case – that LeMieux contacted investigator Glover "**for the first time**" and learned that Glover did indeed have a discoverable report in his possession that neither LeMieux nor the assistant district attorney had seen. (17 RT 1404.) Nevertheless, two weeks later, on the final day of the State's guilt phase presentation, the prosecutor again protested that he "still [had] received absolutely nothing from the defense in the way of discovery." (25 RT 2577.)[61]

d) Counsel Failed to Seek Court Appointment of an Investigator

The ABA Death Penalty Performance Guidelines are clear: "Counsel must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator . . . ." Guideline 1.1 (2003)(Commentary). See also, Guideline 4.1(A)1 ("The defense team should consist of . . . an investigator . . . .") As the ABA explains:

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[61] It appears from the record that LeMieux's response that he did not possess any discoverable reports might have been inaccurate. At the motion for new trial, LeMieux testified that prior to trial he received from Mr. Jacke a report prepared by Jacke's investigator. (52 RT 3703.)

> The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial . . . [T]he prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation. Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness.

Guideline 4.1 (2003) (Commentary).

Williams' first counsel, Mr. Jacke, retained investigator Glover and successfully sought public court funds to pay for Glover's investigation in the case. (25 RT 2579). The trial court indicated to LeMieux that it was willing to continue to pay for an investigator for LeMieux, so long as the defense filed documentation properly accounting for the investigator's time and expenses. (25 RT 2578-79.) In fact, the court was briefly under the mis-impression that it had already approved the appointment and payment of an investigator for LeMieux. (See id.).

LeMieux, however, incomprehensibly failed to take the court up on its offer and never requested a court-appointed investigator. To be sure, LeMieux, on the first day of the guilt phase trial, told the court:

> It is my intention tomorrow to request the court for reappointment of Mr. Glover . . . I [will] prepare an order and bring it to the court tomorrow,"

(16 RT 1265.) But, as the record shows, "tomorrow" never came. LeMieux "never followed through" with his promise to prepare an order

and request the re-appointment of a defense investigator. (52 RT 3704.) He gave no reason – strategic, tactical, or otherwise – for this failure.

Instead, LeMieux briefly retained Glover to conduct a very limited investigation. LeMieux, moreover, paid Glover out of his limited private funds, even though the court was willing to compensate Glover from public funds (and had previously done so when Glover was retained by attorney Jacke). (52 RT 3704.)

The scope of the investigation that LeMieux assigned Glover was exceedingly narrow: to locate and interview one witness, Yvette Pearson; to obtain documentary evidence about beepers from Delcomber's Communications; and to subpoena detective Tony Moreno.[62] These investigative tasks were the sum total of the investigation sought by LeMieux and paid for by his client throughout the course of his representation of Mr. Williams. The investigation cost "somewhere between 500 and a thousand dollars." (52 RT 3705.)[63]

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[62] As discussed more fully below, it is not clear when exactly LeMieux asked Glover to subpoena Moreno, but the request was not made before trial started.

[63] LeMieux's failure to request a court-appointed investigator fits a pattern. LeMieux also failed to request court funds for the transcription of videotaped statements provided the police by his client and the three co-defendant accomplices (53 RT 3819-20); he failed to request second counsel pursuant to Pen. Code § 987.9 (CT 568); and he failed to request the assistance and funding of experts to assist him in the presentation of guilt and penalty phase issues (CT 568).

It appears that investigation yielded nothing. The trial record is silent about the Pearson investigation turning up any material evidence; no documentary evidence was obtained from Delcomber's (because, as noted above, LeMieux failed to give Glover a subpoena); and Moreno was never served with a subpoena. (52 RT 3705-06.)

As discussed elsewhere in more detail, there were many critical areas in need of investigation which LeMieux left untouched, including, but not limited to, fingerprint evidence, beeper evidence, Mr. Williams' relationship with Detective Tony Moreno, and penalty phase mitigation. Whether LeMieux was held back by lack of experience, lack of initiative, a misplaced faith that he could rely entirely on the State to unearth the facts for the defense, or some other reason is not clear. But it was apparent from the first day of trial that LeMieux was not inclined to invest the time, money, or energy to plug evidentiary gaps, even "very important" ones. (16 RT 1307.)

For example, LeMieux observed that "there is a number . . . that shows up on . . . telephone records" from the victims' workplace and meeting place. During his opening statement LeMieux told the jury "I have to stand here and tell you that I do not know whose number that is, and I hope to learn that information from the evidence in this case, but that

is apparently a *very important* number." (16 RT 1307.) (Emphasis added.) LeMieux never investigated to whom the number belonged.

When LeMieux addressed the issue of the beepers found at the crime scene, he told the jurors that one of the calls that appeared on the beeper was to Thomas Aldridge. LeMieux, however, admitted ". . . I don't know who Thomas Aldridge is . . . and I don't know what, if any relationship he has in this case . . . ." (16 RT 1308.) LeMieux also told the jurors, "And then there is another number on the [beeper's] digital display, 604-9037, and I have no idea whose number that is, and perhaps the evidence the prosecution presents will show that." (16 RT 1308-09.) Similarly, LeMieux described for the jury several packages wrapped in brown paper found at the crime scene. "The claim is that inside of those packages were cut-up pieces of Yellow Pages. / I don't know what the evidence will show about the contents of the packages . . . ." (16 RT 1313-14.)

LeMieux said he considered the beeper evidence to be one of the "lynch pins" of the prosecution's case. (41 RT 3539.) He was further aware that the packages found at the crime scene were important pieces of evidence. Yet LeMieux did not investigate these – and many other – issues, even though he could have done so, or retained an investigator to do so, at court expense.

e. Counsel Failed to Interview any Eyewitnesses

In addition to reviewing discovery and investigating physical evidence, part of an attorney's job is to prepare for the presentation of evidence. This includes the duty to interview potential State witnesses and prepare his own witnesses to testify. "Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including . . . (1) *eyewitnesses* or other witnesses having purported knowledge of events surrounding the alleged offense itself. . . ." ABA Death Penalty Performance Guideline 10.7 (2003) (Commentary) (Emphases added.) See also, ABA Death Penalty Performance Guideline 11.4.1(D)(3)(A) (urging counsel to interview "eyewitnesses or other witnesses having purported knowledge of events surrounding the offense. . . .")

Here, LeMieux did not interview any of the State's eyewitnesses who testified against Mr. Williams at the guilt phase.[64] At least three negative consequences flowed from this omission. First, LeMieux forfeited the opportunity to lock the witnesses into a particular version of events that he could either rely upon or discredit at trial. Second, he missed the chance to learn additional information about the witnesses and their personalities that could have helped him impeach their testimony or

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[64] LeMieux's failure to interview penalty phase witnesses is discussed separately below.

blunt their effectiveness on the stand. Third, by failing to interview the witnesses LeMieux neglected to adequately familiarize himself with their past and/or proposed testimony. As a result, when they testified at trial, he was, to a significant degree, in the same position as the jurors: he was hearing the State's case for the first time. In LeMieux's words, "[i]t wasn't until *after* each person testified . . . that I gained a sufficient knowledge of the case to be able to construct an argument based on the evidence presented . . . ." (27 RT 2894-95) (Emphasis added.)

i. Irma Sazo

There is no question that the State considered Irma Sazo to be one of the centerpieces of its case. As the prosecutor observed in his opening statement to the jury, "The big downfall for the defendant in this whole case is not going to be the testimony of [his accomplices] but a woman named Irma Sazo. Everybody's case should have an Irma Sazo in it." (16 RT 1287.) And as the prosecutor argued in opposition to the Motion for New Trial, the physical evidence presented by the State against Mr. Williams paled in its evidentiary importance next to the testimony of Ms. Sazo. (41 RT 3541.)

LeMieux, too, understood the importance that the prosecution placed on Sazo's testimony: "I regarded Irma Sazo as the most important witness that the People had." (52 RT 3731.) As he told juror's in his guilt

phase closing argument, Sazo was "a critical witness in this case. . . ." (28 RT 3020.)

Sazo lived next door to the apartment where the murders occurred, and called the police on the night of the crime after she heard gunshots. After the gunshots she purportedly saw Mr. Williams and his co-defendants outside the crime scene. As LeMieux noted, Sazo testified at both trials of Mr. Williams' co-defendant Patrick Linton, but was not cross-examined on either occasion. (52 RT 3730.) Accordingly, although Sazo was the State's "most important witness," LeMieux "had no idea what her testimony would be" at Mr. Williams' trial. (Id.) Yet LeMieux's ignorance about what Sazo would testify to, "though profoundly disturbing" to him (id.), did not motivate him to interview Sazo in advance of trial. (54 RT 4160.)

LeMieux later claimed that he did not interview Sazo because he did not want to "forewarn [her] of the type of question you are going to ask and give [her] time to think of the appropriate answer, time to discuss it with the police detective or the D.A." (52 RT 3730).[65] When it was

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[65] LeMieux also explained that as a general rule he did not conduct pretrial interviews with critical witnesses, like Sazo, so that he could "catch the witness by surprise on the witness stand." (52 RT 3731.) This astounding theory of trial non-preparation is completely at odds with all accepted theories of trial preparation. It lauds laziness and indifference, not the diligence required of defense counsel, particularly in a capital case. Moreover, as noted elsewhere in the brief, LeMieux's practice of not interviewing witnesses resulted in *his* being caught by surprise during Mr.

pointed out to LeMieux that he could have used an investigator to interview Sazo and could have impeached her testimony if it materially differed from her interview by putting the investigator on the stand, LeMieux responded enigmatically, "That's a possibility, yes, but I discounted that with [Sazo]." 52 RT 3731. When asked what reason he had to discount an interview, LeMieux responded that because Sazo "was the most important witness that the People had" he "would be making a strategic and tactical mistake" if he "discredit[ed]" her. (Id.) Instead, LeMieux intended to make clear to the jury that Sazo "was merely mistaken in her identification" of his client.

LeMieux's failure to interview Irma Sazo flies in the face of ABA Death Penalty Performance Guideline 11.4.1(D)(3)(A). His purported justifications for not interviewing the State's key witness are nonsensical rationalizations. There was no strategic downside to learning in advance of trial what the State's most important witness planned to testify to at trial. There was also no strategic downside in discrediting the State's most important witness if the testimony of that witness departed from the witness's pretrial statements. Moreover, contrary to LeMieux's belief, pointing out such a discrepancy to the jury does not necessitate calling the witness a "liar." (52 RT 3731.) LeMieux's responses are nonsensical in

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Williams' trial. See, e.g., 16 RT 1402 (testimony of Marcella Pierre was "a surprise").

that to prove that a witness is "mistaken" in her recollection of what she saw *is* to "discredit" that witness, regardless of whether one calls the witness a "liar", "confused," or simply "forgetful." Thus, the strategic choice on which LeMieux justified his failure to investigate Sazo – to point out Sazo's mistakes, but not to discredit her – is a false dichotomy that cannot support a decision not to interview such a critical witness prior to trial.

ii. Jose Pequeno

Jose Pequeno, a friend of one of the victims, helped run the Mi Cabana Bar at which the victims planned to transact a drug deal on the night of their murders. (22 RT 2231.) Pequeno identified a truck similar in appearance to Patrick Linton's Blazer as being present in the parking lot of the Mi Cabana Bar on January 2, 1990, and observed the victims speaking with the driver of the Blazer. (22 RT 2235-36.)

The ABA Death Penalty Performance Guidelines direct counsel to interview such a witness. See Guideline 11.4.1(D)(3)(A). What is more, Mr. Williams directed his counsel to interview Pequeno to determine whether Pequeno was going to identify Williams as being present at the parking lot and speaking with the victims on the night of the murders. (CT 473; 54 RT 4160.) LeMieux, however, did not interview Pequeno. (54 RT 4160.)

iii. The Three Co-Defendants

As previously noted, ABA Death Penalty Performance Guideline 11.4.1(D)(3)(A) directs counsel to interview "eyewitnesses or other witnesses having purported knowledge of events surrounding the offense. . . ." Mr. Williams' three co-defendants, each of whom admitted to being involved in the crimes and pled guilty to charges arising therefrom, certainly qualify as "eyewitnesses" "having purported knowledge of events surrounding the offense."

Co-defendant Patrick Linton, one of the State's first witnesses, testified how he planned to participate in a drug deal that was set up by Mr. Williams (17 RT 1559); how he accompanied Mr. Williams and Cyprian to the Mi Cabana Bar to meet the victims, Barron and Thomas (17 RT 1563), and then re-met the victims at Ernie Pierre's Spring Street Apartment after going with Williams and Cyprian to retrieve guns and fake money from Mr. Williams' house. (17 RT 1572-73.) He testified that Mr. Williams tied the victims up in the apartment (17 RT 1576.), ordered Barron to make a phone call, and accidentally shot Barron in the chest while dialing the phone for him, whereupon Mr. Williams shot Thomas twice in the head and then shot Barron once in the head. (17 RT 1581-82.). Linton also testified as to how he, Williams, Cyprian, and moved the bodies from the apartment to his Blazer truck in the garage. (18 RT 1634-66.)

LeMieux regarded Patrick Linton to be one of "*the most important witnesses* in this trial . . . ." (52 RT 3730) (Emphasis added.) What is more, Mr. Williams specifically directed LeMieux to interview Linton. (52 RT 3733; CT 478). LeMieux, however, never spoke with Linton before he testified for the State. (54 RT 4160.) As with his failure to interview Irma Sazo, LeMieux said he did not interview Linton because he did not want to "alert" Linton as to what he "had in mind" to ask him at Mr. Williams' trial. (52 RT 3734.) A review of LeMieux's cross-examination of Linton, however, reveals absolutely no questions or line of questions that impeached, cornered, tripped-up, or otherwise surprised Linton and advanced a defense theory of the case. To the contrary, LeMieux's cross-examination of Linton largely rehashes the questions that were asked on direct examination.

Dauras Cyprian testified that he regularly hung out with Mr. Williams and that, along with Linton, he planned to participate in a drug deal set up by Williams. (18 RT 1765.) Cyprian testified that Mr. Williams set up the deal with the victims at the Mi Cabana Bar (18 RT 1767-68) and ordered the victims tied up in the Spring Street apartment shortly after they arrived. (18 RT 1772.) Mr. Williams then told Cyprian to move the victims' car away from the apartment. (18 RT 1777.) When Cyprian returned from this task, Mr. Williams told Cyprian that he had

accidentally shot one of the victims and then killed them both to eliminate witnesses. (19 RT 1786.)

Cyprian testified that he fled the scene with Mr. Williams (19 RT 1791), followed Mr. Williams' directions on how to dispose of evidence (19 RT 1794), and ultimately flew to New York with Mr. Williams and remained there with him for several days. (19 RT 1806-10.)

As with Linton, LeMieux regarded Cyprian, in his role as an accomplice, to be one of "*the most important witnesses* in this trial . . . ." (52 RT 3730.) (Emphasis added.) And as with Linton, Mr. Williams directed his attorney to interview Cyprian. (52 RT 3733; CT 478). LeMieux, however, never spoke with Cyprian before he took the stand for the State. (54 RT 4160.) As with his failure to interview Irma Sazo or Patrick Linton, LeMieux said he did not interview Cyprian because he did not want to "alert" Cyprian as to what he "had in mind" to ask him at trial. (52 RT 3734.)[66] LeMieux's cross-examination of Cyprian, however, largely tracks the direct examination, does not uncover new ground or seriously challenge Cyprian with respect to factual inconsistencies. It is wholly unapparent from his cross-examination of Cyprian to what issues,

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[66] Not only did LeMieux fail to interview Dauras Cyprian, LeMieux acknowledged that he managed to obtain a transcription of a police interview with Cyprian in March 1990 only *after* Cyprian had taken the stand and begun testifying for the State. (19 RT 1832) ("I received a copy of that transcript *last night*," i.e., September 18, 1991).

facts, or strategies LeMieux feared he would "alert" Cyprian had he interviewed him.

Dino Lee was the third co-defendant-accomplice in the crime. As with Linton and Cyprian, LeMieux regarded Lee, in his role as an accomplice, to be one of "*the most important witnesses* in this trial . . . ." (52 RT 3730.) (Emphasis added.) Anticipating that Lee would be called as a prosecution witness, LeMieux, intent on undercutting Lee's credibility, in his opening statement to the jury told the jurors that they "should distrust the testimony of one particular accomplice, namely, Dino Lee." (16 RT 1325.) The State, however, never asked Lee to take the stand.

For reasons that are not clear, LeMieux, after taking direct aim at Lee's credibility at the start of trial, reversed course and called Lee as the first – and the main – witness for the defense. Notwithstanding the gravity of Lee's lead (and lead-off) role for LeMieux, his client's instructions to interview Lee in advance of his testimony (52 RT 3733; CT 478), and LeMieux's express distrust of Lee's veracity, LeMieux never spoke with Lee before putting him on the stand to begin the defense portion of the guilt trial. (54 RT 4160.) As with his failure to interview Sazo, Linton and Cyprian, LeMieux said he did not interview Lee because he did not want to

"alert" Lee as to what he "had in mind" to ask him at trial. (52 RT 3734.) The outcome was devastating to the defense.

Lee was one of only four guilt phase witnesses for the defense.[67] Lee testified on direct examination that he was standing three feet from Barron when Mr. Williams shot Barron and Thomas. (26 RT 2723-26, 2741.) Lee then stated that Mr. Williams moved both bodies to the garage. 26 RT 2769.) And Lee described how all the co-defendants fled the crime scene when they learned the police were on the way. (26 RT 2774-75.) On cross-examination, the prosecution had Lee describe Mr. Williams' role in the shootings in greater detail.

Lee's testimony lasted nearly twice as long as the next-lengthiest defense witness, Monique Williams. Yet LeMieux only hurt the defense

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[67] Two of the defense's four witnesses, Monique Williams and Detective Herrera, had already testified for the prosecution and added little to the defense case when examined by LeMieux. The defense's fourth and final witness, Ingrid Tubbs, an aunt of Monique Williams, was someone LeMieux never planned to have testify. In fact, on September 23, 1991, five days into the guilt trial, LeMieux noted that Ingrid Tubbs was one of three persons sitting in the first row of the courtroom gallery. LeMieux, however, told the prosecutor and court, "I am not going to call these . . . three people. . . I know Mrs. Tubbs . . . *I don't have her on my witness list.* (20 RT 1974-75) (emphasis added.) What is more, Ms. Tubbs' testimony did not have anything to do with the crime but only concerned her and Monique Williams' whereabouts during the first week of Mr. Williams trial.

As Tubbs' example suggests, and the testimony of the other defense witnesses magnifies, LeMieux had not done his homework and lacked a coherent trial strategy or defense theory of the case.

by putting Lee on the stand.[68] Had LeMieux interviewed Lee prior to calling him to testify, he would have learned how unhelpful Lee was going to be for the defense case and chosen not to call him. Alternatively, had LeMieux interviewed Lee and obtained helpful statements from him, LeMieux could have used those statements to impeach Lee if Lee had testified differently on direct exam. But LeMieux did not interview Lee and so lacked the ability to make an informed decision about whether, and for what purpose, to call Lee as a defense witness. What is more, LeMieux's excuse for not interviewing Lee prior to trial was patently unreasonable. A review of Lee's testimony on direct examination does not reveal any lines of questioning that would have been jeopardized had LeMieux conducted a pretrial interview.

iv. Marcella Pierre

"Barring exceptional circumstances, counsel should seek out and interview potential witnesses . . . ." ABA Death Penalty Performance Guideline 10.7 (2003) (Commentary)

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[68] As attorney Otto observed at the new trial proceedings, "One of the things you learn if you talk to Dino Lee is that he is going to bury your client. He's going to present evidence to corroborate the testimony of other witnesses that have testified against him. And yet [LeMieux] calls Dino Lee in the defense. It's just another outcropping of the failure of Mr. LeMieux to adequately investigate the case." (54 RT 4126.)

Marcella Pierre was the first witness called by the State. She is the mother of Dauras Cyprian, one of Mr. Williams' three co-defendants, and Ernie Pierre, who lived in the apartment where the crime took place. Ms. Pierre also resided nearby, across the street from Irma Sazo. Ms. Pierre testified on direct examination as to whom she saw at her son's apartment shortly before the crime and what she saw after shots were fired in the apartment.

When the court called a side-bar conference to ask LeMieux how much time his cross-examination of Ms. Pierre would take, LeMieux responded that it would be much longer than he originally thought because Ms. Pierre's direct examination "testimony is a surprise because her statement to the police doesn't say any of this." (16 RT 1402.) LeMieux's "surprise" about the testimony of the State's lead-off witness underscores LeMieux's deficient investigation. Had LeMieux undertaken pretrial discovery and conducted an adequate interview of Ms. Pierre before she testified, LeMieux would have learned how her testimony would differ from the information contained in the police reports. Additionally, LeMieux would have obtained statements from her with which he could quickly and efficiently impeach her on cross-examination.

Mr. LeMieux's inadequate pretrial preparation was again revealed at close of his cross-examination of Ms. Pierre. At that point, LeMieux, at

side bar, noted that he "believe[d]" that Ms. Pierre had a prior felony conviction but did "not have any proof of that." (17 RT 1465.) LeMieux told the court he thought (but was not certain) that Ms. Pierre "had just been released from county jail prior to the shooting," where she had served "approximately one year as a suspended prison sentence." (17 RT 1466.) Thus, *after he completed his cross-examination of Ms. Pierre,* LeMieux requested the court to issue an order requiring the prosecution to disclose Ms. Pierre's prior convictions. Diligent and timely trial preparation, thorough discovery motions, comprehensive witness interviews, and independent background investigation of the State's witnesses – prerequisites to competent lawyering in a capital case – would have yielded an accurate accounting of Ms. Pierre's criminal history *before* she took the stand and would have enabled trial counsel to use this information during his examination of the State's first witness.

f. Counsel failed to Interview or Subpoena Potential Alibi Witnesses

"Barring exceptional circumstances, counsel should seek out and interview . . . *potential alibi witneses*. . . ." ABA Death Penalty Performance Guideline 10.7 (2003) (Commentary) (emphasis added.) In addition, counsel should not make factual claims to the jury in opening statements that counsel cannot verify; nor should counsel promise to present the jury with testimony that counsel is unable to secure. See

Wiggins v. Smith (2003) 539 U.S 510; State v. Zimmerman (Tenn. Crim. App. 1991) 823 S.W.2d 220, 225-26 (finding ineffective assistance of counsel where counsel failed to call witnesses or introduce evidence promised to the jury in the opening statement.)

In Wiggins v. Smith, a capital case, the United States Supreme Court granted penalty relief on the ground of ineffective assistance of counsel where the defense counsel promised the jury during his opening statement that the defense would present material mitigating evidence about his client but never followed up on that promise. Counsel failed to deliver on his promise to the jury not because he strategically abandoned that line of defense but because of "inattention" (Id. at p. 534). At several points in the Wiggins opinion, the Supreme Court observed that counsel's failure to investigate precisely that evidence which he spotlighted in his opening rendered counsel's deficient performance all the more glaring. In declaring counsel ineffective, the Supreme Court found that the investigation supporting counsel's decision not to introduce the evidence that he had referred to in his opening statement "*was itself unreasonable.*" (Id. at p. 523.) (Emphasis in original.)

As discussed below, Mr. Williams' trial counsel flagrantly neglected to fulfill the most elemental duties set forth in both the ABA Guidelines and United States Supreme Court doctrine. It is clear from the

record that LeMieux failed to conduct basic background investigation, including, but not limited to, interviewing potential alibi witnesses, before promising Mr. Williams' jury that he would present them with dramatic, exculpatory evidence – evidence he neither investigated nor produced.

i. Tony Moreno

Counsel failed to investigate or subpoena detective Tony Moreno, or to seek a continuance of trial when efforts to locate Moreno were unsuccessful. In his opening statement to the jury on September 16, 1991, LeMieux attempted to plant the seeds with the venire members regarding what he said would be one of the most critical elements of the defense case: Detective Tony Moreno. Moreno, according to LeMieux, was the piece of evidence that could destroy the State's case and exonerate his client. Moreno was an alibi witness who would at the very least cast doubt on, and quite possibly disprove, the State's claim that George Williams was in the Spring Street apartment when the victims were shot. Moreno was not just any witness. He was an established law enforcement officer who was an expert both in gangs and narcotics, and who had a close, long-standing professional relationship with Mr. Williams.

As the Deputy District Attorney observed, LeMieux "made an opening statement where he alluded to Tony Moreno all over the place. . .

." (28 RT 3044.) For example, LeMieux, during his opening statement, informed the jurors:

> . . . you'll learn in this case that my client was an informant working for the L.A. County Sheriff's Department and the L.A.P.D. and actively setting up dope deals for various officers. Including an officer by the name of Tony Moreno. **Write that down, Tony Moreno**.

(16 RT 1312.) (Emphasis added.) LeMieux went on to tell the jurors:

> You are going to learn more about . . . Tony Moreno, the L.A.P.D. detective, and you are going to learn that George Williams since 1985 was an undercover informant for the police department and the L.A. County Sheriff's Department and that he worked very closely on a day-to-day basis with Tony Moreno.[69]

(16 RT 1330.)

As these opening statements made clear, LeMieux regarded Moreno to be the centerpiece of his case. LeMieux underscored this fact even before the trial began. In a conversation with the Court before the start of guilt phase arguments, LeMieux told the judge:

> Tony Moreno is an *absolutely essential material witness* for the defense. If he were not material on the issue of guilt or innocence, he is certainly absolutely essential on the issue of penalty, should we get to that point.

(16 RT 1267) (Emphasis added.) LeMieux elaborated for the court: "My client was an informant for several . . . sheriff's deputies . . . and my client

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[69] LeMieux informed the court that the defense would present testimony that Moreno was "involved in the entire setting up of the dope [deal] and the murders." (19 RT 1847.)

worked very actively with [Tony] Moreno as [an] informant for over a year on almost a daily basis. . . ." (16 RT 1268.) LeMieux promised that "Tony Moreno's name will pop up all over this case." (Id.)

Most dramatically, LeMieux told the court that:

> *one of the two* defenses that's going to occur in this case is there's going to be – I hope to show a lot of circumstantial evidence indicating that this was a frame-up, that my client was framed in this case by Tony Moreno amongst other officers in order to shut him up. . . .

(16 RT 1268.) LeMieux emphasized his point:

> it's going to be the suggestion of the evidence that Tony Moreno had an active part in this case, was very possibly present during the murders, and after the murders were committed was involved in framing my client . . . .

(16 RT 1268-69.) For LeMieux, then, Mr. Williams' defense hinged on the testimony of Moreno: "I hope by having Tony Moreno on the witness stand to be able to show a number of things which will be very valuable in persuading the jury that my client was not the shooter in this case." (16 RT 1269.)

In the event he had not made his theory of the case clear, LeMieux re-emphasized the point: "I think it is *absolutely essential* that Tony Moreno be available [to testify]." (16 RT 1271.) (Emphasis added.) See also, 41 RT 3536 (describing Moreno's testimony as "so vital to this case."); 41 RT 3541 (describing Moreno as a "very important figure in this

case."); 19 RT 1842 (trial court notes that LeMieux has "indicated Tony Moreno from the very beginning is tied in."); 53 RT 3843 (trial court notes that Moreno "has been so very important to" the defense.)

In light of the critical importance of Moreno to LeMieux's theory of the case – again, Moreno was "one of the two defenses" LeMieux planned to present – it defies reason that at the time LeMieux told the jury during his opening statement to memorialize Moreno's name in their notebooks, **LeMieux had not even located Tony Moreno, much less investigated him, spoken with him, or subpoenaed him to testify**. (41 RT 3531). See also, 41 RT 3542 (LeMieux acknowledges he gave his opening statement "[w]ithout having contacted [Moreno] or interviewed him" or subpoenaed him.)

Although the record does not reveal precisely when LeMieux first learned of Moreno's existence, the record is clear that, at the very latest, LeMieux became aware of his client's relationship to Moreno (and other Los Angeles law enforcement officers) when the prosecutor provided the defense with a copy of a faxed FBI report on or about August 22, 1991 – three weeks before the start of guilt phase, and during the voir dire process. (52 RT 374[6]).[70] LeMieux also acknowledged speaking with his client,

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[70] Hovey voir dire commenced August 12, 1991, more than a month before LeMieux presented his opening statement. (3 RT). The record reflects that attorney Jacke, who represented Williams at his preliminary hearing but whom LeMieux never interviewed, knew of Tony Moreno. (52

Mr. Williams, about Moreno's "involvement" in the case before the start of the guilt phase. (52 RT 3741.) And attorney Doug McCann, hired by LeMieux to select Mr. Williams' jury, recalls that he was aware of Tony Moreno's importance and "was personally . . . concerned about the Moreno issue *prior to* beginning the Hovey" voir dire. (53 RT 3855.) (Emphasis added.) (McCann stated that he felt "100 percent sure . . . that during the Hovey process it was a concern that [Moreno] was not under subpoena and here we are about to start the trial.") (Id.)[71]

Had LeMieux promptly interviewed his client's family, he would have learned of Moreno from the onset of his representation. Mr. Williams' family knew of Tony Moreno because "before George was even incarcerated Tony [Moreno] would come around to the house and really harass" Williams' mother. (54 RT 4106.) Williams' sister Edna Vickers spoke with Mr. Williams almost daily after his arrest and Mr. Williams mentioned Moreno to her during these pre-trial conversations. (54 RT 4109.)

RT 3736; CT 560.) Further, Kevin McCormick, the Deputy District Attorney who prosecuted Williams, met Moreno shortly after Williams was arrested in early 1991 when Moreno, who was not an investigating officer in the case or connected to the case in any obvious manner, showed up at interviews that McCormick conducted of Williams (48 RT 3593; 52 RT 3738).

[71] The record further reveals that Moreno's name appears in the murder books (26 RT 2873; 28 RT 3041) and other discovery documents to which LeMieux had access *before trial* (53 RT 3857).

"[T]here were a lot of reasons why Moreno was on [the defense lawyers'] mind[s]" *before* the start of trial (53 RT 3857), according to attorney McCann. In fact, McCann was "insistent on a persistent basis that [LeMieux] interview Tony Moreno. . . ." (52 RT 3740.) LeMieux, however, took no steps before trial to investigate Moreno. (52 RT 3747) He neither investigated Moreno nor sought a continuance of the trial date so that he could have additional time to investigate Moreno. (52 RT 3753.) Nor did he request additional resources from the trial court to conduct such an investigation before he delivered his opening statement to the jury.

As discussed above, the record shows that in the weeks leading up to trial, LeMieux, instead of preparing the defense case, was pre-occupied and distracted by non-case-related matters.[72] What is also clear from the record is that LeMieux did not investigate Moreno prior to trial. Instead, LeMieux planned to investigate the central figure in his defense theory *after* the start of trial. In fact, LeMieux did not plan to investigate Moreno until well after he had already built Moreno up to be the centerpiece of the

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[72] Specifically, during this critical period LeMieux spent substantial time and energy on uniting his sons from his first marriage with his second wife and their young children, moving this new family unit into a newly leased home in Malibu (52 RT 3746- 48), and traveling several times a week between his home in Glendale to Malibu to break up fights between family members. (52 RT 3758.) He was suffering from a clinically diagnosed, agitated depression (52 RT 3758) which prevented him from sleeping, concentrating, and even writing. And he was defending himself against an active California State Bar Investigation for misappropriation of client funds.

defense in the eyes of the jury in his opening statement, and until well after the prosecution's case was underway.

LeMieux told the trial court only moments before presenting his opening statement, "I intend *tomorrow* to ask the Court to order the prosecution or the L.A.P.D. or whoever to provide me with the current whereabouts in terms of address, telephone number, et cetera, of . . . Moreno." (16 RT 1267.) (Emphasis added.) "I'm going to ask the court for that order . . . So I know where to find this man to subpoena him, if for no other purpose than to interview him." (16 RT 1271.).

As of the third day of the guilt phase trial LeMieux still had not located, subpoenaed or interviewed Moreno, but he nonetheless informed the court and the prosecutor that Moreno was going to be a defense witness. (19 RT 1901.) Indeed, LeMieux's erroneous assurance on the first day of trial that he would subpoena Moreno amounted to a hollow (and delinquent) gesture. LeMieux never asked the trial court to order the State to locate Moreno. In fact, LeMieux subsequently admitted that did not even know "what procedures would be required or not required to get [Moreno] into court." (41 RT 3531.)[73]

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[73] It appears that at some point after the guilt phase was underway, LeMieux directed investigator Glover to serve Moreno with a subpoena at the Metro division of the police department (52 RT 3754), but Glover was unsuccessful in this task. (52 RT 3754-56.) LeMieux made no further effort to overcome whatever obstacles he and Glover encountered, and did not enlist the assistance of the court to secure Moreno's presence.

In short, LeMieux put Moreno at the center of the defense case at the start of trial, but neglected before trial to do the basic groundwork that justified making such a claim, and failed during trial to take appropriate measures to investigate, interview, subpoena or otherwise secure Moreno's testimony or presence for trial. As LeMieux would later admit, the result was that "I was caught with my pants down, literally [sic] speaking." (52 RT 3747).

Nor did LeMieux hasten to investigate Moreno on October 8, 1991, when the jury delivered its guilty verdict and his client became "very upset" with LeMieux and tried to fire him because of his "failure to . . . produce Tony Moreno as a witness in the case." (30 RT 3126-27.)

If Moreno "was unavailable as a witness under Evidence Code Section 240, " as LeMieux contended after the close of Mr. Williams' trial (41 RT 3537), LeMieux unreasonably neglected to uncover this material fact before placing Moreno at the crux of "one of the two defenses" and then delivering an opening statement to the jury that spotlighted Moreno as the lynchpin witness whose testimony would exonerate his client.

Obviously, when faced with an obstacle to presenting a central theory of his case, LeMieux could and should have sought a continuance of the trial. With a continuance, LeMieux could have taken the necessary steps to verify or refute Moreno's unavailability – including, but not

limited to, filing pretrial motions – and to uncover the nature of Moreno's relationship with Mr. Williams, particularly on the date of the crime. (52 RT 3756-57).

But LeMieux did not seek a continuance. Puzzled as to LeMieux's inaction at this critical stage, Attorney Otto, appointed by the court to represent Mr. Williams in his motion for new trial, engaged LeMieux in the following colloquy:

Otto: When it became clear to you that you were not going to be able to subpoena Tony Moreno in this case, did you ask the court for a continuance or otherwise explain . . . your dilemma?

LeMieux: No.

Otto: Why?

LeMieux: That did not occur to me. . . .

Otto: Did you try to make a motion for a continuance?

LeMieux: No I did not.

Otto: And is the reason you didn't do that the same reason you've indicated to us that you didn't bring to the court's attention your dilemma?

LeMieux: Well, . . . as I mentioned, it just never really occurred to me at that point in time to interrupt the trial proceedings and to ask for a continuance and explain to the court my dilemma . . . .

Otto: Is it fair to say that . . . once you determined that you were not going to get Tony Moreno into court at least by subpoena that you weren't ready to proceed with the trial?

LeMieux: That's correct.

(52 RT 3756-57.) LeMieux's failure to seek a continuance cannot be chalked up to reasonable strategic or tactical considerations. Rather, it was the result of constitutionally deficient performance.[74]

Only on December 20, 1991, two months after the jury's death verdict and more than three months after his opening statement, did LeMieux take steps – albeit inadequate and unsuccessful ones – to locate Tony Moreno. (40 RT 3514.) It was not until LeMieux was replaced by court-appointed attorney Doug Otto that Detective Moreno was actually subpoenaed. (48 RT 3584).

LeMieux's build-up of Moreno to the jury and the trial court, absent his investigation of this potential witness, was incredibly irresponsible and damaging to Mr. Williams. But it is important to note that irrespective of LeMieux's remarks about Moreno at the beginning of trial, LeMieux was obligated to thoroughly investigate Moreno "in light of what counsel actually discovered" about Moreno prior to trial. (Wiggins, supra, 539

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[74] LeMieux's obligation to request a continuance of trial and to file pretrial motions to secure Tony Moreno's testimony are discussed in greater detail in the next section.

U.S. at p. 525.) The prosecution informed LeMieux before trial that his client had a working relationship with several members of law enforcement. In August 1991, during jury selection proceedings, the defense received a copy of a memorandum sent by facsimile to the Los Angeles District Attorney's Office by an Assistant United States Attorney. The record indicates that the fax revealed "significant information about" Mr. Williams (52 RT 3747), including the following facts: Mr. Williams was interviewed at length by the FBI; Mr. Williams may also have been interviewed by the Los Angeles Police Department and Los Angeles Sheriff's Department; Mr. Williams was questioned in connection with his work as a police informant; Mr. Williams was also questioned about his connections to, and relationship with certain members of the LAPD; and one of the police officers expressly mentioned was Detective Tony Moreno. (See 16 RT 1270-71; 52 RT 3735.) LeMieux, however, did not lift a finger to investigate the many leads provided by this information.

It is important to add that an experienced, prepared, and zealous advocate for Mr. Williams would not have rested on Moreno's testimony alone. Setting aside the fact that such counsel would have successfully subpoenaed and interviewed Moreno prior to trial, when faced with Moreno's testimony on the stand such counsel would have sought an immediate continuance of the trial in order to investigate the several

important evidentiary leads that Moreno's testimony offered in order to find documentation that – and other witnesses who – could corroborate or strengthen the exculpatory (or at least doubt-inducing) character of his testimony.[75] (As discussed in a separate section below, Moreno's testimony would also have given defense counsel substantial and weighty material for use as mitigating evidence at the penalty portion of Mr. Williams' trial.)

In capital representation, the defense theory of the case should be based upon the evidence collected as part of a comprehensive investigation and analyzed during careful pretrial preparation. See, e.g., ABA Death Penalty Performance Guideline 11.7.1 ("As the investigations *mandated* by [the ABA Death Penalty Performance Guidelines] produce information, counsel should formulate a defense theory."). The theory of the defense

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[75] For example, competent counsel would have sought an opportunity to further investigate various facts about Detective Moreno's whereabouts and activities on the evening of the crime, including, but not limited to, the identity of Moreno's police partner, whether Moreno attended a Protective League meeting which his log-book indicated he attended, whether he performed five straight hours of paperwork, at what time he left his office, and to what location he went after he left his office – all matters about which Moreno professed no memory. Competent counsel also could reasonably have characterized this part of Moreno's testimony as suspiciously evasive in that Moreno, a 17-year police veteran, could not speak to these basic issues though he had long known that his records would be subpoenaed and he would be questioned under oath about them. Counsel could (also quite reasonably) have then attributed Moreno's evasiveness to an attempted cover-up of evidence that incriminated him and exculpated Mr. Williams.

that LeMieux presented to the jury during his opening was entirely unconnected to any evidence collected through defense investigation.

ii. Other Alibi and Rebuttal Witnesses

Mr. Williams told LeMieux to interview and subpoena an alibi witness, Collis Brazil, whom he was with around the time the murders took place. (53 RT 4005; 53 RT 4024; CT 478.) LeMieux, however, made no effort to locate Brazil (52 RT 3728), claiming on the one hand he did not know where to look for him, while acknowledging that Williams may have told him that Brazil lived across the street from Williams. (52 RT 3727.) Williams also told LeMieux to interview Dana Stokes and a woman named Carmen, two additional persons whom he was with on the night of the crime. (53 RT 4005; CT 478). LeMieux did not locate and interview these other alibi witnesses either.

Mr. Williams told LeMieux to interview and obtain a statement from Joyce Scott, his hairstylist, from whom he received a Jheri-curl cut shortly before Christmas 1989 (52 RT 3732; CT 580, 583.) Williams informed LeMieux that by attesting to George's hairstyle, Scott could further discredit Sazo's identification of Williams, who stated that Williams wore his hair in an Afro on the night of the crime. LeMieux, however, did not interview, subpoena or obtain a statement from Scott. (52 RT 3732.)

g. Counsel, As a Matter of Personal Practice, Failed to File Pretrial or Trial Motions

ABA Death Penalty Performance Guideline 11.5.1(B) states that "[c]ounsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase." See also, People v. Pope (1979) 23 Cal.3d 412, 425 (noting that a defense lawyer must be prepared to litigate motions prior to trial, a task involving "[researching] the law, [investigating] the facts and [making] the motion in circumstances where a diligent and conscientious advocate would do so.")

Notwithstanding his professional obligations, and despite repeated inquiries from the court about his intentions to file pretrial motions (see, e.g., 3 RT16), LeMieux filed only one pretrial motion: on August 12, 1991, he filed a declaration on indigency and a request for the preparation of reporter's transcripts of Patrick Linton's first trial at County expense. This was the first and only pretrial motion filed by Lemieux. (CT 235.) The record, nevertheless, makes clear that a competent attorney would have had strong grounds to file several substantive and procedural pretrial motions, including, but not limited to the following:

i. Request for Appointment of Second Counsel.

As noted above, pursuant to the State Bar Rules, the ABA Guidelines, and the State Penal Code, LeMieux was not merely entitled to have the court appoint him associate counsel to assist him with Mr. Williams' capital trial, but, given LeMieux's inexperience with capital litigation, he was obligated to seek second, more experienced counsel. (See State Bar Rule 3-110 (C) (unqualified counsel must associate more learned counsel in order to undertake representation); ABA Death Penalty Performance Guideline 2.1 (capital defendants should be represented by "two qualified trial attorneys"); Cal. Pen. Code § 987.9.) What is more, H. Clay Jacke, II, who preceded LeMieux in his representation of Mr. Williams, applied for and received court-appointed second counsel. LeMieux, however, never sought appointment of second counsel and failed to associate more learned, skilled counsel to assist him on the case. (CT 568.)

ii. Request for Discovery

ABA Death Penalty Performance Guideline 11.5.1(B)(6) states that counsel should consider addressing in a pretrial motion "the discovery obligations of the prosecution . . . ."

As noted previously, LeMieux failed to file *any* motions for discovery with respect to guilt phase evidence. Instead, he simply left it to

faith that the prosecution would provide him everything he should have to properly try his case. Had LeMieux diligently pursued pretrial discovery, he would not have been left ignorant at the time of trial about various pieces of information in the hands of the State, including, but not limited to, Marcella Pierre's criminal history and probation status (17 RT 1465), the transcripts of police interviews given by the co-defendants (see, e.g., 19 RT 1832), or the three co-defendants' plea deals. In addition, had he pursued pretrial discovery, he would not have been caught short in the middle of trial having to request "at the last minute" the presence of law enforcement officers who helped investigate the case. (23 RT 2443.)

It appears from the record that LeMieux's failure to file any discovery-related motions in this case was part of a larger pattern and practice. As LeMieux acknowledged, with apparent pride, while testifying about his performance at trial, he

"**had not filed a discovery motion in 22 years of practice.**"

(52 RT 3695). A lawyer who consistently practices law in this manner is simply not qualified to handle capital litigation.

iii. Request for Production of Physical Evidence

ABA Death Penalty Performance Guideline 11.4.1(D)(5) states that counsel should promptly request "any physical evidence or expert reports relevant to the offense or sentencing." In this case, the State heavily relied,

inter alia, on fingerprint evidence, ballistics evidence, blood-spatter evidence, hand-writing evidence, autopsy reports, and telephonic records.

LeMieux did not file *any* motions requesting production of the physical evidence in this case. (CT 568). He failed to do so despite the wealth of such evidence and the presence of major gaps in the evidence that LeMieux could not explain absent further investigation, as LeMieux himself acknowledged during his opening statement. See, e.g., 16 RT 1307.)

iv. Motion for Appointment of Defense Experts at Guilt Phase.

The ABA Death Penalty Performance Guidelines state that counsel "should secure the assistance of experts where it is necessary or appropriate" for preparing the defense, or understanding and rebutting the prosecution's case. ABA Guideline 11.4.1 (D) (7). See also, ABA Guideline 8.1. Despite the technical, scientific evidence presented by the State concerning fingerprints, blood spatters, ballistics, cause of death and handwriting analysis, LeMieux, who had no apparent background in any of these subjects, failed to request or otherwise retain expert assistance to prepare Mr. Williams' case and to review and rebut the prosecution's evidence. (CT 568.)

v. Motion for Continuance of Guilt Phase Trial.

Not only did LeMieux fail to ensure that he had a full and complete accounting of the State's anticipated evidence, but he also failed to secure sufficient time to review and investigate the evidence and information that he did possess. The ABA Death Penalty Performance Guidelines expressly address the need for counsel to seek a continuance if more time is needed to adequately prepare for trial. See Guideline 11.5.1(B)(11) (noting counsel must secure "defendant's right to a continuance in order to adequately prepare for his . . . case.").

As of September 16, 1991, the first day of the guilt phase proceedings, LeMieux had not interviewed the State's witnesses or investigated the underpinnings of the theory of the defense case that he presented to the jury in his opening statement. Indeed, LeMieux, who claimed he learned about his client's relationship with Detective Moreno when it was brought to his attention by the prosecution before trial, had not pursued this lead – and several other loose ends – by the start of trial.

Obtaining a continuance of the trial date was critical to enable LeMieux to prepare adequately for trial. But LeMieux did not seek a continuance. (See CT 570.) He failed to do so not because he had some larger strategic or tactical purpose, or because he had an alternative theory

of the defense case that required no further development, but because requesting a continuance

"**just never really occurred to me** . . ."

(52 RT 3757.) (Emphasis added.)

vi. Motions Related to Detective Moreno's Unavailability

ABA Death Penalty Performance Guideline 11.5.1(B) provides that "[c]ounsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case. . . ." As the California Supreme Court observed in People v. Pope (1979) 23 Cal.3d 412, 425, defense counsel must be prepared to litigate motions, a task involving "[researching] the law, [investigating] the facts and [making] the motion in circumstances where a diligent and conscientious advocate would do so."

Although LeMieux's efforts to interview or subpoena Detective Moreno were belated and inadequate, LeMieux also believed that Moreno, with the help of his law enforcement colleagues, was actively and inappropriately trying to avoid being subpoenaed. As LeMieux noted, "it appears . . . that the police are shielding [Moreno] and they're lying to us about the existence of court orders protecting Tony Moreno from coming into court and testifying . . . ." (23 RT 2445.). In light of LeMieux's concerns, LeMieux should have sought additional time to investigate

Detective Moreno and look into any improper state interference. If necessary, LeMieux should have requested a hearing to determine Moreno's unavailability and any related state interference. And LeMieux should have sought a mistrial or other appropriate relief if Moreno was not produced and there was evidence of state interference with respect to obtaining his statements.

When faced with the obstacle of finding and subpoenaing Moreno, admittedly the key defense witness, however, LeMieux did nothing. (CT 570-71.)

vii. Motion In Limine to Exclude Gang-related Evidence.

As set forth by ABA Death Penalty Performance Guideline 11.5.1 (B) (12), one of the issues counsel should consider addressing in a pretrial motion includes "matters of evidence . . . which may be appropriately litigated by means of a pretrial motion in limine . . . ." Case law, too, makes clear that competent counsel must be prepared to object to inadmissible evidence which is important to the state's case. See People v. Ledesma, 43 Cal.3d 171, 224-225 (1980).

One evidentiary issue of which LeMieux was aware was the prosecution's intent to elicit the highly inflammatory evidence of Mr. Williams' alleged gang affiliation, even though the crime at issue was not gang-related. (See CT 634-38; 54 RT 4132. See also 3 RT 78-79; 18 RT

1755-56; 19 RT 1795-96; 20 RT 1917, 1943; 24 RT 2455; 25 RT 2637.) Evidence of gang affiliation was irrelevant to both the issue of Mr. Williams' culpability and whether "the circumstances of the crime" warranted a death sentence . (CT 403.) At the same time such evidence was highly inflammatory. Nonetheless, LeMieux did not file a motion in limine seeking to prevent the prosecution from eliciting and relying on such evidence for these purposes at the guilt or penalty trials.

viii. Motion to Discover Benefits Received by Mr. Williams' Co-Defendants in Exchange for their Plea Bargains.

Another pretrial motion that was "potentially available" to LeMieux was a motion for the prosecution to disclose the benefits provided by the State to Mr. Williams' co-defendants for pleading guilty and testifying against him. (ABA Death Penalty Performance Guideline 11.5.1(B)). The testimony of Mr. Williams' alleged accomplices formed a central part of the State's case. What benefits they received in return for their testimony was highly relevant to their credibility. LeMieux, however, was unaware of precisely what benefits the co-defendants received and thus floundered badly on cross-examination in trying to elicit this information from them. (See 18 RT 1706-17, 19 RT 1888-91.) Competent counsel would have filed a pretrial motion seeking this information; LeMieux did not.

ix. Motion to Produce Evidence to be Used in Aggravation at Penalty Phase.

The ABA Death Penalty Performance Guidelines require that counsel consider addressing in a pretrial motion "the discovery obligations of the prosecution including the disclosure of aggravating factors to be used in seeking the death penalty . . . ." Guideline 11.5.1(B)(6). While filing such a motion is commonplace practice in capital litigation, such a motion had particularly importance in this case, where the Clerk's Transcript is devoid of any Notice of Aggravation filed by the State. Because the State never provided LeMieux with any formal notice of aggravating factors, it was incumbent on him to seek such information. LeMieux, however, did not file any motion seeking the disclosure of aggravating factors to be used in seeking the death penalty.

x. Motion for Appointment of Defense Experts at Penalty Phase.

The ABA Death Penalty Performance Guidelines state that counsel "should secure the assistance of experts where it is necessary or appropriate" for "rebuttal of any portion of the prosecution's case at the . . . sentencing phase of the trial" or for "presentation of mitigation." ABA Guideline 11.4.1 (D) (7). Because LeMieux had no experience investigating or presenting mitigating evidence in a capital case, he (and his client) would have benefitted tremendously from the assistance of a

skilled mitigation specialist to explore the many fruitful areas of mitigation that Mr. Williams' case presented. Nevertheless, LeMieux failed to request or obtain expert assistance for the preparation and presentation of a penalty phase defense. (CT 571.)

xi. Motion for Continuance of the Penalty Phase Trial

As noted above, ABA Death Penalty Performance Guideline 11.5.1(B)(11) provides that counsel must secure the "defendant's right to a continuance in order to adequately prepare for his . . . case." On the eve of the penalty phase trial, LeMieux had not interviewed potential mitigation witnesses, had not reviewed, much less investigated, the State's evidence in aggravation, and had not take other basic steps toward preparing a penalty phase defense. What is more, LeMieux erroneously believed that there would be a 30-day break between the guilt and penalty phases of trial. (CT 571.) Notwithstanding his unpreparedness to go forward with the penalty phase, LeMieux did not seek a continuance of the penalty trial. (CT 571.)

4. Trial Counsel Did Not Show Up for Jury Selection

In what may be a unique occurrence in the annals of California capital litigation, the lead counsel for the defense absented himself entirely from the jury selection process and instead substituted in his place a novice solo practitioner, Douglas McCann, to select the jury that would determine

his client's guilt and penalty. Mr. Williams' trial counsel, Ronald LeMieux, did not set foot in Mr. Williams' courtroom during jury selection. (See 52 RT 3739.) Instead, LeMieux planned to sequester himself at home in order to belatedly prepare the defense case for trial.[76] When LeMieux returned to court for the start of the guilt phase trial, attorney McCann ceased representing Mr. Williams.

Because of this radical separation of duties – even the prosecutor thought it wrong to describe McCann as a member of the "defense team" (53 RT 3857) – and because of LeMieux's tardiness in waiting until the eve of trial to prepare his case, McCann was left to conduct Williams' voir dire **without** (1) Hovey voir dire experience; (2) capital trial experience; (3) significant felony trial experience; (4) skilled supervision and assistance; and (5) a working-knowledge of the defense theories of the case for either the guilt or penalty trials. Indeed, with respect to the last point, as has been noted previously, on the eve of trial LeMieux lacked a coherent plan to try the guilt phase and did not give any thought to the

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[76] As previously noted, the record indicates that in the weeks before Mr. Williams' trial, including the period used for voir dire, LeMieux devoted much of his time to uniting his sons from his first marriage with his second wife and their young children, moving his family unit into new home, (52 RT 3746- 48), commuting frequently between his separate place of residence and the new home to break up family fights (52 RT 3758), battling serious depression (52 RT 3758) which impeded his sleep and crippled his concentration, and defending himself against an active California State Bar investigation for professional misconduct.

penalty phase until the jury convicted Mr. Williams. What is more, it was not until jury selection was already underway that McCann first met with Mr. Williams to discuss the details of the case with his client. (53 RT 3848-3849.) Thus, McCann was not in a position to question prospective jurors to elicit important information about their predispositions about key aspects of the defense (or prosecution) case at either phase of trial.

LeMieux, for his part, laid eyes on Mr. Williams' jurors – and they on him – for the first time on the day of opening statements in the guilt phase of trial. Although the record is silent as to whether LeMieux reviewed the voir dire transcripts and the completed questionnaires of his jurors prior to entering the courtroom, it is clear that LeMieux had never assessed the jurors' personalities, sized up their temperaments, or probed their potential biases. Having never interacted with the jurors, LeMieux had not built any foundation to establish rapport with them when he addressed them in his opening statement.

5. Trial Counsel Abdicated His Duties at Guilt Phase

Roughly one month before the commencement of jury selection, LeMieux informed the court that the guilt phase would take "about a week for the defense" to try. (1 RT - 6th page.) In fact, LeMieux's case lasted

less than one day.[77] As the following sections make clear, the fact that LeMieux's prediction was so far off, and his presentation of the defense case so short, is illustrative of the pervasive and crippling shortcomings of his legal representation of Mr. Williams at guilt phase.

a. Counsel Did Not Investigate or Introduce Exculpatory Evidence, or Interview or Have Testify Critical Witnesses That He Promised in his Opening Statement to Present.

"Defense counsel's opening statement should be confined to . . . the evidence defense counsel believes in good faith will be available and admissible. Defense counsel should not allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted into evidence." ABA Criminal Justice Standards - The Defense Function, Standard 4.74. See also McCloskey, Criminal Law Desk Book, §§ 1506(3)(O)(Matthew Bender, 1990).

The failure of counsel to produce evidence that in his opening statement he told the jury he would produce is a failure sufficient in itself

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[77] Of the four witnesses LeMieux called for the defense, three had testified for the prosecution. One of those witnesses was Dino Lee, one of Williams' three co-defendants. As attorney Otto observed, "One of the things you learn if you talk to Dino Lee is that he is going to bury your client. He's going to present evidence to corroborate the testimony of other witnesses that have testified against him. And yet [LeMieux] calls Dino Lee in the defense. It's just another outcropping of the failure of Mr. LeMieux to adequately investigate the case." (54 RT 4126.)

to support a claim of ineffectiveness of counsel. When counsel primes the jury to hear a different version of the events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to whom counsel referred in his opening statement "were unwilling [or] unable to live up to their billing." Anderson v. Butler (1st Cir. 1988) 858 F.2d 16, 17. The prejudicial impact of such a blunder cannot be overstated: "A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made." Ouber v. Guarino (1st Cir. 2002) 293 F.3d 19, 28.

State and federal courts around the country have found counsel's performance deficient where counsel has withheld evidence at trial after having promised it in an opening statement. See, e.g., Anderson, supra, 858 F.2d at p. 17; Ouber, supra, 293 F.3d at p. 35 ("defense counsel's abandonment of an oft- repeated promise that [a critical witness] would testify, enunciated in his opening statement, amounted to ineffective assistance of counsel in violation of the Sixth Amendment."); McAleese v. Mazurkiewicz (3rd Cir. 1993) 1 F.3d 159, 166-67; People v. Lewis (Ill. App. Ct. 1992) 609 N.E.2d 673, 677 (counsel ineffective in failing to fulfill promise in opening statement to produce exonerating evidence); People v. Davis (Ill. App. Ct. 1992) 677 N.E.2d 1340, 1346-47 (counsel ineffective for failing to investigate the most important piece of evidence

he had promised to produce, and then failing to produce it.); State v. Zimmerman (Tenn. Crim. App. 1991) 823 S.W.2d 220, 225-26; Montez v. State (Tex. Ct. App. 1992) 824 S.W.2d 308, 311; People v. Ortiz (Ill. App. Ct. 1992) 586 N.E.2d 1384 (defense counsel's conduct was deficient where counsel suggested to the jury during opening statement that there was another suspect and then failed to introduce such evidence). Cf. Wiggins v. Smith, supra, 539 U.S. at p. 526.

In Anderson, defense counsel, in his opening statement, told the jury he would call two witnesses, but later rested his case without calling them. As the court noted, "Little is more damaging than to fail to produce important evidence that had been promised in an opening." Anderson, supra, 858 F.2d at p. 17. See also, Harris v. Reed (7th Cir. 1990) 894 F.2d 871, 877-79 (finding Sixth Amendment violation where defense counsel failed to call witnesses who he claimed in opening statement would support defense theory of the case).

As discussed more fully below, LeMieux breached this rule when he used his opening statement to focus the jury's attention on (i) Detective Tony Moreno, (ii) the ownership of the pager found at the crime scene, (iii) the make of automobile owned by Mr. Williams at the time of the crime, (iv) the transfer of possession of the guns found at the crime scene, and (v)

the fact that Mr. Williams would take the stand in his own defense at trial to explain everything.

i. Tony Moreno

As noted earlier, LeMieux's references to Detective Tony Moreno in his opening statement were numerous and audacious. LeMieux informed the jurors ". . . you'll learn in this case that my client was an informant working for the L.A. County Sheriff's Department and the L.A.P.D. and actively setting up dope deals for various officers. Including an officer by the name of Tony Moreno. **Write that down, Tony Moreno**." (16 RT 1312.) (Emphasis added.) LeMieux continued, "You are going to learn more about . . . Tony Moreno, the L.A.P.D. detective, and you are going to learn that George Williams since 1985 was an undercover informant for the police department and the L.A. County Sheriff's Department and that he worked very closely on a day-to-day basis with Tony Moreno." (16 RT 1330.) As the prosecutor observed, LeMieux "made an opening statement where he alluded to Tony Moreno all over the place. . . ." (28 RT 3044.)

Having told the jury to expect the testimony of Moreno, counsel was obliged to deliver Moreno, lest he subject the defense to an incalculable loss of credibility. But, as discussed more fully above, LeMieux made these statements about Moreno without having

investigated, interviewed, or subpoenaed Moreno. In fact, defense counsel never called Moreno as a witness.

What is more, LeMieux, contrary to his promise that the jury "would learn that George Williams since 1985 was an undercover informant for the police department and the L.A. County Sheriff's Department," presented absolutely no evidence in support of this claim during the guilt or penalty phases.

ii. Pager Evidence

LeMieux also used his opening to emphasize that he would present pager evidence that would undercut the State's evidence placing Williams at the murder scene at the time of the crime. He told the jury ". . . the evidence in this case, ladies and gentlemen, will prove to you that the beeper [found at the crime scene] did not belong to [Mr. Williams]. It belonged to Patrick Linton." (16 RT 1313.)

As discussed more fully above, LeMieux never investigated the beeper, never subpoenaed the pager-related evidence in advance of trial, and never presented any evidence to show one beeper "did not belong to" Mr. Williams..

iii. Mr. Williams' Automobile

Irma Sazo, one of the State's key witnesses, testified that she saw Mr. Williams and his black BMW outside the crime scene on the day of,

and shortly after, the crime. (21 RT 2189.) It was central to LeMieux's defense to demonstrate that Sazo's identification of Mr. Williams was in error. He intended to show that while she had seen Mr. Williams on several occasions at the apartment where the murders occurred because he frequently hung out there, he was not present at the time of the crime. One of the ways LeMieux apparently intended to show this was to prove that Mr. Williams no longer was in possession of the black BMW that Ms. Sazo reported seeing. To this end, LeMieux promised the jury in his opening statement that "we're going to produce for you the man, Kevin Chain, who owns [the BMW formerly owned by Mr. Williams] . . . and he will testify when he bought that vehicle and under what circumstances." (16 RT 1328.)

LeMieux, however, never asked an investigator to interview or subpoena Mr. Chain. Mr. Chain never testified at trial, and the jury never heard any more about him.

iv. Murder Weapon

In his opening statement, LeMieux told the jurors that the firearm used to kill the victims was not among the guns found at the scene, and that the .38 caliber revolver was, contrary to the State's claims, never fired:

> *[W]e're . . . going to prove to you* that that .38 revolver was not the murder weapon. The murder weapon was not found at the scene of this crime. *We're going to show you that* that

> .38 revolver that he showed a picture had not even been fired, had not even been shot.

(16 RT 1329.) (Emphases added.) LeMieux then re-emphasized this claim a second time:

> The two individuals who were shot were not shot by that gun. They were shot with a murder weapon that escaped with other people who were involved in this killing.

(Id.)

As discussed above, LeMieux, however, never conducted an independent analysis of the weapons to support this dramatic assertion and presented no independent ballistics or forensic evidence, expert or otherwise, in fulfillment of the promise he made to the jury in his opening.

v. Transfer of Guns

According to the State, Mr. Williams owned the guns found at the crime scene and fired the gun that killed the victims. (28 RT 3105.) LeMieux's theory of defense was that while the guns belonged to Williams, he had loaned them to his co-defendants. (54 RT 4158-59.) In other words, at the time of the crime Williams was neither at the crime scene nor in possession of the firearms. During his opening statement LeMieux informed the jury: "We're going to prove to you that the defendant loaned those three guns [to the co-defendants] on January the 1st." (16 RT 1329.)

LeMieux, however, broke this promise as well and never presented any such evidence and the jury never heard any testimony to this effect.

vi. Mr. Williams' Purported Flight from Authorities.

In his opening statement LeMieux told the jury that he would prove to be "all lies" the State's argument that Mr. Williams fled across country after the murder, going first to New York, and then eventually returning by way of Las Vegas to Los Angeles, in order to escape the attention of law enforcement.

"[*T*]*he evidence will prove that.*"

(16 RT 1326.)

LeMieux, however, presented no evidence to disprove this aspect of the State's case.

vii. Plastic Bucket

LeMieux promised the jury that he would explain to them how "a *very important* piece of evidence in this case, an orange water bucket," "a *pivotal* piece of physical evidence" "will assist you in proving and believing and being persuaded that George Williams was not present" during the crime. (16 RT 1320.) (Emphases added.) LeMieux, however, offered no explanation, presented no evidence, put on no testimony about how the orange bucket exonerated his client.

viii. Mr. Williams' Promised Testimony

LeMieux promised the jury, the prosecutor, and the trial court that his client would take the stand to testify in his own defense at the guilt trial. In the prosecutor's words, LeMieux "made representations – from the beginning . . . [that] his client [would] testify." (25 RT 2580.) Despite LeMieux's repeated assurances to this effect, Mr. Williams did not take the stand.

In his opening statement, LeMieux made a dramatic admission to the jury. He told the jury that the defense would not deny that the guns found at the crime scene, including the alleged murder weapon, belonged to Mr. Williams. "[T]here's no dispute as to my client's three guns found there." (28 RT 1312.) LeMieux made this admission because, as he informed the jury, he planned to show that Mr. Williams had loaned the guns to Patrick Linton and Dauras Cyprian the day before the crime took place. (Id.) Central to this part of LeMieux's defense strategy was the anticipated testimony of Mr. Williams.

> *[Mr. Williams] will tell you* that on January 1st, 1990, he loaned those three weapons to Patrick Linton and Dauras Cyprian, that they wanted to borrow those thre weapons because they were involved in a dope deal. And my client after considerable hesitation and reluctance eventually did loan them those three weapons.

(16 RT 1312-13.) (Emphasis added.)

In other words, LeMieux tied the issue of who possessed the guns on January 2 to the identity of those persons who planned and participated in the drug deal that evening, and who were present at the time of the killings. LeMieux then tied the predicate issue of who possessed the guns – and thus the ultimate issue of who committed the robberies and murders – to the credibility of Mr. Williams, who, LeMieux promised, would take the stand, and "tell you . . . he loaned those three weapons" to his co-defendants.

LeMieux's promise that his client would testify at the guilt trial did not end with the jury, but extended to the prosecutor and judge. Twice during his opening statement LeMieux referred to the fact that Mr. Williams voluntarily surrendered himself to police and provided them a statement denying his involvement in the crime but freely admitting that he owned the guns found at the crime scene. It was LeMieux's contention that because his client was innocent of the crime he had no reason to lie about owning the guns, and that this admission enhanced the credibility of the defense theory of the case. The prosecutor strenuously objected to LeMieux's references to Mr. Williams' statements to police, arguing that such references were "inappropriate" during opening statements because the prosecutor had not yet decided to introduce Mr. Williams' statements into evidence. Absent those statements being admitted into evidence, the

prosecutor argued to the court at sidebar, LeMieux could reference them during his opening only if LeMieux "is prepared at this time to tell the court that his client is going to get up [on the stand] and say that he made those admissions." (16 RT 1304.) (See also, 16 RT 1298; 16 RT 1369.)

In response to the prosecutor's challenge, LeMieux stated:

> I agree with Mr. McCormick. *I will represent to the court that my client intends to take the stand and [repeat the statements that he made to the police] to the jury.*

(16 RT 1304-05.) (Emphasis added.)

After making this representation at sidebar, LeMieux continued his opening statement:

> As I said, ladies and gentlemen, when George Williams voluntarily surrendered . . . he admitted to the police that those three guns . . . belonged to him. And you will learn the circumstances of that admission and how it came about, *and that is very critical in this case.*

(16 RT 1305.)

Notwithstanding his promises to the jury, the prosecutor and the court, LeMieux never put Mr. Williams on the stand, and the jury never learned the facts and circumstances of Mr. Williams' loaning of the guns to Linton and Cyprian, or his statements to the police.

viii. Summary

Lemieux promised the jury in his opening statement:

> We are going to present what is called an affirmative defense. In other words . . . we're going to put on evidence also.

(16 RT 1329.) But no such defense was made. LeMieux gave an opening statement to the jury that repeatedly emphasized exonerating evidence which defense counsel did not possess, failed to obtain, chose not to present, or lacked "a good faith and reasonable basis for believing such evidence [would] be tendered and admitted into evidence." (ABA Criminal Justice Standards - The Defense Function, Standard 4.74.)

Against this backdrop, the observation made by the court in Anderson, supra, is fitting: "[W]e cannot but conclude that to promise [in an opening statement] even a condensed recital of such powerful evidence, and then not produce it, could not be disregarded as harmless." Anderson, supra, 858 F.2d at p. 19. LeMieux's extreme recklessness in this regard was not lost on the prosecution, which time-and-again assailed LeMieux for over-promising in his opening statement and then under-delivering at trial. (See, e.g., 26 RT 2872-75, 27 RT 2911-12, 2965-66.).

b. Counsel Failed to Prepare Closing Argument

LeMieux's closing argument was as inauspicious as his opening statement. And like his opening, his closing was severely compromised by his unpreparedness. When it came time for guilt phase closing arguments, LeMieux finally sought a continuance (27 RT 2893) – something he had not done when a continuance might have provided him the opportunity to

investigate his case and present evidence on behalf of his client. In asking for more time to develop his closing, LeMieux complained that he had not had a chance to do so earlier. Instead, he had spent his evenings during trial simply focusing on "the next day's work in court . . . ." (27 RT 2894.) He did not explain why he had not thought about his closing during his pretrial preparations.

In a remarkable admission that underscored his lack of preparation, his futile attempts to play "catch-up", and just one of the negative consequences of his failure to interview any of the State's witnesses before trial, LeMieux stated:

> [i]t wasn't until after each person testified . . . that I gained a sufficient knowledge of the case to be able to construct an argument based on the evidence presented . . . .

(27 RT 2894-95.)[78] This admission explains LeMieux's failure to grasp the trial as a whole, his inability on the one hand to distill the State's evidence, and, on the other hand to shape the defense case into a coherent story corroborated by testimony and documents. The admission also indicates why LeMieux's cross-examinations of the State's witnesses were woefully incomplete and inept: he was unable to process the significance

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[78] Not only did LeMieux not know what the State's witnesses would say on the stand, he did not know who the State planned to call to testify and when. (See 25 RT 2580 ("I'm not sure who . . . the prosecution intends to call or what he intends to do."))

of the witnesses' testimony because he was hearing it for the first time as they were giving it. As a result, he could not timely spot and exploit inconsistencies between witnesses' testimony and previous statements made by them or others.

The trial court refused to give LeMieux the length of continuance he sought to prepare his closing argument. The court trenchantly observed that LeMieux should have used his time before and during trial to prepare his closing argument. (27 RT 2899.)

LeMieux's closing argument did not go well. His lack of preparation was evident, as he repeatedly misstated testimony and evidence and made improper arguments. During his brief remarks to the jury, he drew 15 objections from the State. Seven of these objections were sustained. (28 RT 2998 (improper argument); 28 RT 2998-2999 (misleading statement); 28 RT 3037-3050 (improper argument); 28 RT 3069 (misstatement of testimony); 28 RT 3073 (speculation); 28 RT 3075 (misstatement of testimony); 28 RT 3079 (misstatement of evidence).) For eight of the objections, the court issued a cautionary instruction to the jurors to rely on their recollection of events or LeMieux's self-correction of the error. (28 RT 3005 (misstatement of testimony); 28 RT 3025 (misstatement of testimony]); 28 RT 3061-3062 (misstatement of testimony); 28 RT 3062 (misstatement of testimony); 28 RT 3071

(misstatement of testimony); 28 RT 3075 (misstatement of testimony); 28 RT 3077 (misstatement of evidence); 28 RT 3077-3078 (irrelevant argument).)

LeMieux's blunders were so numerous and material that on rebuttal, the prosecutor seized on LeMieux's misstatements and accused the defense of "deception," "manipulat[ion]" and "perversion [of the] entire system." (28 RT 3084.)

His argument in shambles from the repeated objections, LeMieux got flustered and treated the remaining of his closing more like a foot race rather than a careful, methodical summation of the defense case in a capital trial. LeMieux told the jury, "I'm going to have to skip an awful lot out of this case because of the time.. . ." (28 RT 3077.) The court then sustained the prosecutor's objection to what LeMieux intended to be his concluding thought (28 RT 3077). Seemingly lost and confused, LeMieux mustered only the following synopsis of the defense theory: "Seems to me clear that somebody shot these people. Something went wrong and then guns, et cetera, things were planted in the sense that they were left at the scene. And a lot of people got out of there. This case is just incredibly confusing and cloudy as to who did what. We only know one thing for certain, those poor victims were murdered." (28 RT 3081.)

6. Trial Counsel's Performance was Deficient at Penalty Phase

In California and under the Federal Constitution, a lawyer has a duty to investigate carefully all defenses of fact and law that may be available to the defendant. (People v. Pope (1979) 23 Cal.3d 412, 424-425.). This duty extends to the penalty phase of a capital trial. (Williams v. Taylor (2000) 529 U.S. 362.) "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present [] and explain [] the significance of all the available [mitigating] evidence.'" (Mayfield v. Woodford (9th Cir. 2001) 270 F.3d 915, 927 (citing Williams v. Taylor (2000) 529 U.S. 362, 393).)

The ABA Death Penalty Performance Guidelines set forth with specificity the obligations of trial counsel at penalty phase. Guideline 11.8.1, for example, states that "[c]ounsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." Guideline 11.8.5 provides that "[i]f the jurisdiction has rules regarding notification of [the aggravating factors on which the prosecution will rely], counsel should object to any noncompliance . . ."[79] See also, Guideline 11.8.6 (Commentary) ("Experienced criminal counsel familiar with sentencing

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[79] Notwithstanding Penal Code § 190.3, LeMieux failed to request, and did not receive, formal notice of the aggravating evidence the State planned to present. The clerk's transcript lacks any mention of notice of aggravation from the State.

practices in non-capital cases may not recognize the different form of advocacy required at a death penalty sentencing trial.")

The Guidelines further state that as with the guilt phase, "[c]ounsel should conduct *independent* investigations relating to the . . . penalty phase of a capital trial." 11.4.1.(A). (Emphasis added.) The penalty phase investigation "should begin immediately upon counsel's entry into the case and should be pursued expeditiously." Id. Further, "The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." ABA Death Penalty Performance Guideline 11.4.1(C).[80]

As the record reflects, Williams' trial counsel, Ronald LeMieux, who had never before participated in a penalty phase of a capital case, did virtually nothing to prepare for the penalty phase portion of the case. He failed, inter alia: to appreciate the constitutional significance of the sentencing phase in this capital case; to request a continuance of the penalty proceedings so he could *begin* to prepare for this phase of the case; to familiarize himself with how to try a capital penalty phase; to seek resources from the court to investigate penalty phase issues; to retain,

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[80] Many of the specific obligations of defense counsel concerning the adequate investigation, preparation, and presentation of penalty phase evidence, as discussed in case law and the ABA Standards, were listed for the trial court at the Motion for New Trial proceedings in the Declaration of Myra Thomas. (CT 587-591.)

through court or private funding, any expert assistance for the collection and presentation of penalty phase evidence; to independently investigate the State's aggravating evidence; and to investigate mitigating evidence on behalf of his own client.

a. Counsel Failed to Appreciate the Constitutional Significance of the Penalty Phase Portion of the Case.

ABA Death Penalty Performance Guideline 11.8.1 states that "[c]ounsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." For LeMieux, however, the penalty phase was but an afterthought. His various statements attest to his failure to appreciate the significance and workings of the penalty trial. For example, LeMieux remarked under questioning at the hearing on the Motion for New Trial that "[t]he fact there was a penalty phase attached to [this case] is something I would address *if it became appropriate*." (52 RT 3759.) (Emphasis added.) He added, "It wasn't until *after* the guilty verdict that I knew who it was in the world to go to conduct more extensive interviews . . . . " (52 RT 3762.) (Emphasis added.)

Setting aside for the moment the fact (described more fully below) that, when the guilt phase concluded, LeMieux did *not* conduct more extensive interviews of anyone with respect to penalty phase, these

comments by LeMieux reflect his complete ignorance about the obligations of defense counsel to adequately prepare and try a capital case, and the importance of coordinating the development of penalty phase theories, evidence and arguments in tandem with guilt phase work. See, e.g., ABA Death Penalty Performance Guideline 1.1 (Commentary) ("trial counsel must coordinate and integrate the evidence presented during the guilt phase of the trial with the projected [strategy for seeking a non-death sentence] at the penalty phase.") The following sections elaborate on this basic theme by describing counsel's penalty phase failings in greater detail.

b. Counsel Failed to Request a Continuance After the Guilt Phase to Prepare for Penalty Phase.

As noted above, ABA Death Penalty Performance Guideline 11.5.1(B)(11) requires defense counsel to pursue "the defendant's right to a continuance" if doing so is necessary for the adequate preparation of the case.

LeMieux, by his own admission, had done no substantive work to prepare his penalty phase defense prior to the close of the guilt phase. (CT 571.) Perhaps one reason for this failure was his unfounded belief that were his client convicted of a capital offense LeMieux "would be given at least 30 days to conduct a penalty phase investigation before the penalty phase trial began." (CT 571.) This misconception is astonishing on at least three levels. First, LeMieux thought that a 30-day break in the

proceedings would automatically occur even though such a provision is not to be found in any published rules, procedures or local custom. Second, LeMieux relied on this (non-existent) 30-day break to prepare for penalty phase notwithstanding the need to "coordinate and integrate" the guilt and penalty presentations. See ABA Death Penalty Performance Guideline 1.1 (2003) (Commentary), supra. Third, when Lemieux learned on the day the jury returned its guilt verdicts that he would not be given "at least 30 days" to investigate and prepare for the penalty trial, he did not immediately seek a continuance. (CT 571.)

Nor did LeMieux seek a continuance when he learned that the prosecutor had given him an illegible copy of the aggravating evidence the State planned to present. As the record reflects, the jury returned its verdict of guilty on Tuesday, October 8, 1991 (30 RT). The next day the court heard arguments on Mr. Williams' motion to fire his attorney and proceed pro per. (31 RT.). The following day, Thursday, October 10, 1991, the prosecution began its presentation of penalty phase evidence at 9:30 a.m. As described more fully below, LeMieux did not even begin to review the prosecution's aggravating evidence until *the night before the start of penalty phase*. When he discovered that night (or on the morning of the start of penalty phase) that the aggravating evidence provided by the prosecutor, in the form of police reports, was completely illegible due to a

photocopier malfunction, LeMieux did not seek a continuance even then. The consequences of LeMieux's failure to seek a continuance are described below.

c. Counsel was Unfamiliar with How to Try a Penalty Phase Proceeding.

ABA Death Penalty Performance Guideline 11.8.2 requires counsel to "be familiar with the procedures for capital sentencing in the given jurisdiction. . . ." By contrast, LeMieux acknowledged: "I cannot recall whether prior to [the Williams case] I was ever compelled to do any research or reading on [capital representation]." (52 RT 3663-64.) A review of LeMieux's conduct with respect to the penalty phase portion of Mr. Williams' trial indicates that LeMieux did not feel compelled to learn about capital representation even *after* becoming Mr. Williams' counsel. He erroneously believed he had a right to, and would be given "30 days to conduct a penalty phase investigation" between the guilt and penalty phase portions of trial (CT 571); he failed to conduct any preparation for the sentencing trial until the night before penalty phase began; he did not retain any investigators or experts, or apply to the court for funds to do; and he conducted no independent investigation of aggravating or mitigating evidence prior to or during trial.

As discussed in subpart i) below, LeMieux was utterly unfamiliar with the types of arguments that case law prohibited the State and the

defense from presenting at the penalty trial. As a result, LeMieux was prevented by the prosecutor and the court from advancing most of the arguments he planned to make to persuade the jury not to sentence his client to death. Indeed, upon examining LeMieux about capital representation at the Motion for New Trial, where these and other examples of LeMieux's lack of knowledge, skill and preparation were elicited, attorney Otto observed, "I have made a record that [LeMieux] doesn't have a clue about this kind of work." (52 RT 3678.)[81]

d. Counsel Failed to Seek Resources for Investigation and Presentation of Penalty Phase Evidence.

As the ABA Guidelines note, "Immediately upon counsel's entry into the case" "[c]ounsel must . . . attempt to obtain the investigative resources necessary to prepare" the penalty phase portion of the case.

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[81] Even the prosecutor, after hearing Otto's direct examination of LeMieux about his readiness to defend Mr. Williams, could muster only that LeMieux was "*fairly* accurate in *most* of the things he said in terms of how penalty phase works . . . . " (52 RT 3678.) (Emphasis added.) As noted throughout this section of the brief, the ABA standards and controlling case law require that death penalty defense counsel have more than a passing or partial understanding of the rules and procedures governing capital trials. See, e.g., ABA Death Penalty Performance Guideline 1.1. (Commentary) ("At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation.")

ABA Death Penalty Performance Guideline 1.1 (Commentary) (citing Guidelines 11.4.1 and 11.5.1(B)(9)).

Neither prior to nor during Mr. Williams' trial did LeMieux request from the court any funds to investigate the penalty phase part of trial. Nor did LeMieux use private funds to hire an investigator to review the State's evidence in aggravation, locate witnesses to rebut the State's penalty witnesses, or explore the client's background for evidence in mitigation. (CT 570; 548-49.)

LeMieux may have erroneously believed that because Mr. Williams had privately retained him the defense was not entitled to public funding for investigators and experts – a distinct possibility given LeMieux's ignorance about so many aspects of capital litigation. Or perhaps he fell victim to the danger of which the ABA Guidelines warn: that a "flat-fee [arrangement poses] an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee." ABA Death Penalty Performance Guideline 9.1 (2003) (Commentary). Whatever the reason, LeMieux wholly abdicated his duty to secure adequate resources to investigate, prepare and present a penalty phase defense.

e. Counsel Failed to Retain Expert Assistance at the Penalty Phase.

ABA Death Penalty Performance Guideline 11.4.1(D)(7) states that "counsel should secure the assistance of experts" when doing so would assist the attorney to adequately prepare or "present mitigation." See also, ABA Death Penalty Performance Guideline 8.1 (Commentary) (stating "[c]ounsel . . . cannot adequately [investigate and present mitigating evidence] and other crucial penalty phase tasks without the assistance of investigators and other assistants.); Guideline 1.1 (2003) (requiring counsel to "promptly obtain . . . *at minimum* the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case.") (emphasis added.) Accord, Guideline 4.1(A)(1) (2003) (stating "the defense team should consist of *no fewer than* two [qualified] attorneys . . . an investigator, and a mitigation specialist."). See also, id. (Commentary) (observing that "[t]he assistance of an investigator who has received specialized training is *indispensable* . . . . [T]he prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation.)

Ronald LeMieux did not hire any investigator to review the State's aggravating evidence. Nor did he hire a mitigation specialist to collect documentary evidence about his client's background, or to interview biological and adoptive family members and other individuals who had important insights into Mr. Williams' life, accomplishments, and deficits.

He did not retain a mental health expert to examine his client's psychological status at the time of the crime and at trial. And he did not enlist a law enforcement expert who could address the dangers faced by, and the courage required of long-term confidential police informants, such as Mr. Williams. This is but a partial list of experts that a review of the trial record makes clear should have been employed by defense counsel in preparation for the penalty phase. In failing to use the assistance of *any* experts, LeMieux abdicated his duty to adequately – much less zealously – represent his client at sentencing.

f. Counsel Failed to Investigate or Rebut Aggravating Evidence.

Pursuant to ABA Death Penalty Performance Guideline 11.4.1(C), investigation for preparation of the sentencing phase "should comprise efforts to discover all . . . evidence to rebut any aggravating evidence that may be introduced by the prosecutor." See also, id. at 11.4.1(D)(2)(B) (counsel should "explore the existence of other potential sources of information relating to . . . the presence or absence of any aggravating factors under the applicable death penalty statute."); ABA Death Penalty Performance Guideline 11.8.3(A) ("[c]ounsel should seek information to present to the sentencing entity . . . to rebut the prosecution's sentencing case.").

Even more pertinent is the Commentary to Guideline 1.1 of the ABA Death Penalty Performance Guidelines (2003), which states: "If uncharged prior misconduct is arguably admissible, defense counsel must assume that the prosecution will attempt to introduce it, and accordingly *must thoroughly investigate it* as an *integral* part of preparing for the penalty phase." (Emphases added.) Case law is in accord. See Wiggins v. Smith, supra, 539 U.S. at p. 524 (noting "ABA Guidelines provide that investigation . . . 'should comprise efforts to discover *all reasonably available* . . . evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'") (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)), p. 93 (1989)). (Emphasis in Court's opinion.)

As discussed above, the State's case in aggravation was devoted almost entirely to proving that Mr. Williams was "involved in" four prior crimes, three of them uncharged: a May 1993 assault with a deadly weapon on Kenneth Moore; a December 1983 assault with a deadly weapon on Carl Sims; a July 1985 assault with a deadly weapon and robbery of Mona Thomas and David Williams; and a December 1985 possession of a concealed firearm.

Here again, Ronald LeMieux apparently adhered to his personal lawyering philosophy:

investigation is [not] the best trial tactic in every single case.

(52 RT 3777.) (Emphases added.) As LeMieux acknowledged, he did no independent investigation of any of these aggravating incidents. (52 RT 3776-77.) As he put it, he failed to "go out and talk to any particular individuals." (52 RT 3776.) Rather, the full extent of LeMieux's exploration of these incidents consisted of "reading and studying the police reports" that were handed to him by the prosecution. (52 RT 3774.)

But the record suggests that even this limited preparation was done at the eleventh hour, literally on the eve of the start of penalty phase, and that his belated review of these materials was woefully incomplete. Referring to the police reports that form the basis for the State's case in aggravation, LeMieux informed the Court only seconds before the State began its penalty phase arguments on October 10, 1991, that "[i]n reviewing those documents *last night* . . . I discovered my copy that had been furnished to me was *basically unreadable* because of problems with the photocopying machine." (32 RT 3174.) (Emphases added.) Ten minutes earlier, the prosecutor had given LeMieux legible copies of the police reports. (Id.) But instead of requesting a continuance so that he could carefully review the reports – the *only* documentary evidence that LeMieux said he inspected for the penalty trial – LeMieux simply told the court that he would read the documents over lunch, *after the prosecution*

had already begun its case in aggravation and examined its first two witnesses. (Id.)

The record further reflects that Mr. LeMieux's penalty phase "investigation" did not even extend to interviewing Mr. Williams about the State's aggravating evidence. (53 RT 4032-34.) In fact, LeMieux did not describe for his client the nature of the State's case in aggravation until the start of the penalty phase proceedings. (54 RT 4085.)

In short, LeMieux did not lift a finger to independently investigate and attack the State's case for death.

g. Counsel Failed to Counter Improper Information Introduced by the State at Sentencing.

ABA Death Penalty Performance Guideline 11.8.2(A) requires counsel to be familiar with the information that the State may present to the jury. In the same vein, Guideline 11.8.2(C) requires that "counsel should seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity. . . ." Accord, ABA Death Penalty Performance Guideline 11.8.5(B) (noting counsel should consider appropriate trial or pretrial strategies to prevent the prosecutor from relying on or offering improper, inaccurate or misleading evidence in support of a death sentence.). See also, ABA Death Penalty Performance Guideline 10.11 (H) (2003) ("Trial counsel

should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules."); ABA Death Penalty Performance Guideline 10.11 (I) (2003) ("Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.")

As noted elsewhere in this brief, the State argued at penalty phase that Mr. Williams should be held liable for criminal activity committed by others if the State had broadly proven he was somehow "involved in" that activity. Such an argument was improper where, as here, Mr. Williams' culpability for as many as three of the four prior factor 190.3 (b) incidents was (if anything) vicarious. What is more, in his closing argument to the jury at penalty phase, the prosecutor for the first time relied on a factor (b) crime of which he had given the defense absolutely no notice, asking the jury to sentence Mr. Williams to die because he had committed a prior murder.[82]

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[82] The state also was permitted at penalty phase to introduce evidence of prior crimes far beyond the applicable statutes of limitations,

LeMieux failed to adopt appropriate trial or pretrial strategies to prevent the State from introducing and relying upon improper, inaccurate and misleading aggravating evidence at the penalty phase, to the great detriment of his client.

h. Counsel Failed to Investigate and Present Mitigating Evidence.

"Counsel in a capital case is obligated to conduct a thorough investigation of the defendant's life history and background . . . ." ABA Death Penalty Performance Guideline 8.1 (Commentary). Pursuant to ABA Death Penalty Performance Guideline 11.4.1(C), investigation for preparation of the sentencing phase "should comprise efforts to discover all reasonably available mitigating evidence . . . ." Specifically, counsel should "explore the existence of other potential sources of information relating to . . . any mitigating factors." Guideline 11.4.1(D)(2)(B). The Guidelines further provide that "[c]ounsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity . . . in the most effective possible way," (ABA Death Penalty Performance Guideline 11.8.2(C)) and that "[c]ounsel should consider all potential methods for offering mitigating evidence . . . including witnesses,

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and in violation of double jeopardy, as Defendant argues separately.

affidavits, reports . . . letters and public records." (ABA Death Penalty Performance Guideline 11.8.6(C).)

The ABA Guidelines list several sources of potential mitigating information. Those sources include, but are not limited to, "medical history", "educational history", "family and social history", and "employment and training history." Id. at 11.4.1(D)(2)(C). The Guidelines further require counsel to "[o]btain names of collateral persons or sources to verify, corroborate, explain and expand upon" the mitigating evidence collected. See also, ABA Death Penalty Performance Guideline 11.8.3(F); id. at 11.8.6.; Guideline 11.4.1(D)(3) (B) (urging counsel to interview "witnesses familiar with aspects of the client's life history" that could yield "mitigating evidence to show why the client should not be sentenced to death.")

The ABA Guidelines also address two important issues of penalty phase preparation that are relevant to this case. First, "[c]ounsel's duty to investigate is not negated by the expressed desires of the client." ABA Death Penalty Performance Guideline 11.4.1 (Commentary). Second, "Nor may counsel 'sit idly by, thinking that investigation would be futile.' The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's

evaluation and advice amount to little more than a guess." Id. (citing People v. Ledesma (1987) 43 Cal.3d 171).

As with the other types of investigation fundamental to capital case work, "preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case." ABA Death Penalty Performance Guideline 11.8.3(A).

Ronald LeMieux failed to meet any of the above requirements for penalty phase representation.

i. Counsel Failed to Interview Family Members about Mr. Williams' Background.

Notwithstanding counsel's "well-defined" duty to conduct penalty phase investigations that "comprise efforts to discover *all reasonably available* mitigating evidence . . . ." Wiggins, supra, 539 U.S. at p. 524 (citing ABA Death Penalty Performance Guidelines 11.4.1(C)) (emphasis in Supreme Court's opinion), defense counsel LeMieux, like the defense counsel in Wiggins, "abandoned the[] investigation of [his client's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." Wiggins, supra, 539 U.S. at p. 524 (citing ABA Guidelines, supra, at section 11.8.6, p. 133). See also, 1 ABA Standards for Criminal Justice 4-4.1, Commentary ("The lawyer also has a substantial and important role to perform in raising mitigating factors both

to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions.") (quoted in Wiggins, supra, 539 U.S. at pp. 524-25).

The record reflects that the sum total of LeMieux's "investigation" of his client's background consisted of a couple of informal conversations with Mr. Williams' parents in the course of asking them for additional money to represent their son. LeMieux took no notes during these conversations, had no checklist of questions to ask them, and failed to conduct (1) follow-up interviews with other family members (biological or adoptive), friends, instructors, mentors or acquaintances, (2) document collection, or (3) any other type of investigation into mitigating evidence.

When LeMieux put on the record two days before the start of the penalty phase that he planned to accede to the supposed wishes of his client not to investigate or present mitigating evidence (see 31 RT 3154) ("I have not discussed [Mr. Williams' background] with the various family members"), LeMieux did not also mention that this plan directly contravened accepted standards of practice. Nor did LeMieux suggest that he had taken any concrete steps to persuade his client to abide by or even assist with a mitigation strategy. Tellingly, it was the *prosecutor* who – familiar with the case law of capital sentencing, and perhaps sensing a post-conviction reversal in the making – took great pains to convince the

defense lawyer and his client to chart a different course. As the Deputy District Attorney implored:

> I strongly urge if there is any mitigating evidence and it can be presented that you would do that. . . . I'm recommending that you present any [mitigating evidence], if you have any. . . . I know this court would recommend the same thing. [Mitigating evidence] will assist [the jury] in making an appropriate determination as to what the appropriate penalty is in light of all the circumstances. . . . If you have mitigating evidence, you should produce it. This is the time to do that. This is the place to do that. And if you can get the witnesses here to present the mitigating evidence, there is nobody that's interested in you not presenting. You have subpoenas. You have subpoena power to bring witnesses in to court. And if you can do that – if no one else urges you, *I certainly do* – present mitigation evidence if you have got it.

(31 RT 3154-55.)

Despite the powerful urging by the prosecutor to pursue and present any and all mitigation, and his specific advice to exercise subpoena power to do so, LeMieux took the path of least effort. As the record makes clear, LeMieux simply cold-called three of Williams' adoptive family members to testify at the penalty phase. Prior to putting them on the stand, he failed to interview them about Mr. Williams' background or discuss their testimony with them to any meaningful degree. In LeMieux's words, "I did not . . . sit down with any of these family members and have a discussion at any length or in any degree" about Mr. Williams' background. (53 RT 3783.) (See also 53 RT 3782.) As Jessie Mae Williams, George Williams' foster and adoptive mother, noted, she had

"very little communication with Mr. LeMieux" during her son's trial and does not recall being interviewed by defense counsel about her son's background, upbringing, family life, education, accomplishments, hobbies, and the like before taking the stand. (54 RT 4093-94; 4096.)

Betty Hill, one of Williams' two adoptive sisters, stated that she "never talked to [LeMieux] until that day when I came to testify for the penalty phase" (54 RT 4102) and categorically denied ever being asked questions by LeMieux prior to her testimony about her brother's background. (54 RT 4101.) The extent of LeMieux's preparation for Ms. Hill's testimony involved pulling her aside in the hallway outside the courtroom for "a minute, two minutes" before putting her on the stand. (54 RT 4102.)

Edna Vickers, Williams' other adoptive sister, gave a similar account: LeMieux spoke with Edna for the first and only time "less than 5 minutes" before she entered the courtroom to testify at her brother's penalty trial. At no point before then did LeMieux interview Ms. Vickers about her brother's background. (54 RT 4108.)[83]

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[83] LeMieux's recollection differed somewhat. He stated that prior to the onset of penalty phase he "spoke with one of [Williams'] sisters", Betty, and Williams' adoptive parents, but did not make notes of his conversations for later reference and use. (52 RT 3761.) The substance of LeMieux's conversation with Williams' mother before the penalty phase appears to be only her observation that Williams was "courteous, respectful, polite, never a problem in the house, never swore, never talked back . . . ." (52 RT 3762.)

Jessie Mae Williams, Betty Hill and Edna Vickers were the sum total of the witnesses that LeMieux presented at the penalty phase of Mr. Williams' trial. This fact was not lost on the prosecutor, who seized on it during his closing argument and spun it into a powerful indictment for death. "Ask yourself something," the prosecutor challenged the jurors. "When you came here and you heard all the evidence, what's the very, very least you could possibly expect in terms of mitigation, the least you could hope for or imagine? Who is the first person who would have to be up there asking you to spare his life? His mom, of course. . . . Right after that would be the sisters." (35 RT 3424.) The prosecutor then drilled home why the jurors should not spare Mr. Williams' life:

> You heard from [his mother and sisters]. *That's where they stopped.*
>
> Where is a teacher? Where is a friend? Where is somebody outside the immediate family? Where is *anybody* that he associated himself with outside of the parameters of his mother's home? Anybody? His wife? His ex-wife? His kids? His father? *Anybody*. Teachers, friends, people from the community that knew him, anybody from society that [sic] came in contact with George during 26 years.

(Id.) (Emphases added.) Thus, four trial days after the prosecutor admonished the defense to present a case in mitigation (31 RT 3154-55) the prosecutor skewered the defense for failing to do so, telling the jury that the only thing Mr. Williams had given them is "a plea for mercy" made by those family members "who you would most likely expect to be

the first people to come forward. . . ." (35 RT 3424.) The prosecutor then told the jury the value of such a plea: "If that's enough to create enough mitigating evidence to overcome the death of Jack Barron and Willie Thomas I think it cheapens their lives." (35 RT 3424-25.)

When asked at the Motion for New Trial to describe what efforts he made to investigate and present a penalty phase defense and to fill the mitigation gaps underscored by the prosecution, LeMieux made no mention of collecting *any* documentary evidence about, or conducting *any* focused (much less methodical or meticulous) interviews aimed at uncovering information about Mr. Williams' medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, or religious and cultural influences." Wiggins, supra, 539 U.S. at p. 524 (citing ABA Guidelines, supra, at section 11.8.6, p. 133) (Emphasis omitted.) (See also, 53 RT 4030.)

As the Supreme Court observed in Wiggins, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the [limited aggravating factors] in [defendant's] background." (Wiggins, supra, 539 U.S. at p. 525.). What is more, LeMieux "uncovered no evidence in [his] investigation to suggest that a

mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." (Id.)

ii. Counsel Failed to Investigate Additional Mitigating Evidence, Including Mr. Williams' Long-Term Work As a Confidential Informant for Los Angeles Law Enforcement Agencies.

As noted above, before he gave his opening statement at guilt phase, LeMieux considered Tony Moreno to be an "absolutely essential" material witness for the defense "on the issue of penalty." (16 RT 1267.) At no point prior to trial, during the guilt phase, or prior to or during the penalty phase did LeMieux make any effort to explore what mitigating evidence Moreno could adduce for Williams at the penalty trial. Nor did LeMieux subpoena Moreno as a penalty phase witness for the defense. LeMieux also failed to collect, subpoena, authenticate, or introduce evidence that would have corroborated Moreno's testimony, including the five-page report created by the United States Attorney's office he received before the start of trial (16 RT 1267-68) and documents from the State Board of Control (48 RT 3607-08.) Nor did LeMieux use these and related documents as grounds for conducting a broader mitigation investigation concerning Williams' close and socially beneficial ties to law enforcement.

LeMieux's failure to take even the most basic measures to investigate the mitigation potential of the "absolutely essential" Detective

Moreno was objectively unreasonable and fell far below accepted standards for effective lawyering.

i) Counsel's Ignorance of Controlling Case Law Prevented Him From Delivering His Penalty Phase Closing Argument In Support of Life

LeMieux's closing argument at the penalty phase was marred by his unfamiliarity with the rules concerning capital sentencing. His plea for Mr. Williams' life began inauspiciously when he told the jury that it was "an extremely, extremely difficult thing to do. . . . I just simply find this to be so incredibly difficult for me to do . . . ." (35 RT 3440.)

Matters only got more difficult for LeMieux when he turned to the substance of his presentation. Virtually every argument that LeMieux raised to advocate for his client's life ran headlong into an objection from the prosecution. (See 35 RT 3441-3446, 3448, 3450, 3451, 3452.) As LeMieux himself observed during his closing argument, his unfamiliarity with controlling case law, the State's objections to his many improper arguments, the ensuing side-bar conferences, and the court's sustaining of the State's objections "seriously interrupted" his ability to provide a coherent argument to the jury to spare his client's life. (35 RT 3459.)

B. Because Trial Counsel's Repeated Blunders Permeated The Entire Trial, The Sixth Amendment Was Violated and Mr. Williams' Conviction and Sentence Should be Reversed.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel. This right also guarantees the right to effective representation. McMann v. Richardson, 397 U.S. 957 (1970).

The reason is simple. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." United States v. Cronic, supra, 466 U.S. at 655, citing Herring v. New York, 422 U.S. 853, 862 (1975). It is this "very premise" which underlies and gives meaning to the Sixth Amendment. United States v. Cronic, supra, 466 U.S. at 655-656. The adversarial process envisioned by the Sixth Amendment requires that the defendant have "counsel acting in the role of an advocate." United States v. Cronic, supra, 466 U.S. at 656. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." Id. at 656. Where trial counsel's actions lessen the state's burden of persuading the jury or otherwise reflect a fundamental breakdown of the adversarial process, there has been a Sixth Amendment violation and there is no need to show actual prejudice. See, e.g., Conde v. Henry (9th Cir. 1999) 198 F.3d 734; United States v. Swanson (9th Cir. 1991) 943 F.2d 1070.

Ultimately, the question is easily phrased. Where trial counsel's errors – either singly or together – cause the trial process to "lose[] its character as a confrontation between adversaries the constitutional guarantee is violated" and a new trial must be provided. United States v. Cronic, supra, 466 U.S. at 656-657, 666. Here, that is just what happened.

There is no need to repeat the details of Ronald LeMieux's abysmal representation. Suffice it to say that he violated professional standards and case law obligations in virtually every aspect of his representation of Mr. Williams. LeMieux took a case he did not have the experience, skill, stamina, or temperament to handle; he relied on the services of an assistant with even less experience; he never sought discovery, inspected the evidence, filed motions, interviewed or prepared witnesses, or objected to critical evidence – at either the guilt or the penalty phase.

This was not a case where truth could be discovered by "powerful statements on both sides of the question." United States v. Cronic, supra, 466 U.S. at 655. Instead, it is a case where defense counsel did nothing to investigate or seriously challenge the State's case. By the end of trial in this case, the proceeding had indeed "los[t] its character as a confrontation between adversaries . . . ." Reversal under Cronic is required.

Counsel is aware that the People have argued to this Court in other cases that the United States Supreme Court's decision in Bell v. Cone (2002) 535 U.S. 685, overruled Cronic, or somehow obligates defendants similarly situated to Mr. Williams to demonstrate prejudice. Such an argument, however, is in error.

In Cronic, the United States Supreme Court identified three separate situations in which prejudice could be presumed from a violation of the right to effective assistance of counsel. First, prejudice could be presumed where there was the "complete denial of counsel" at a critical stage of the proceedings. (Cronic, supra, 466 U.S. at 659.) Second, prejudice could be presumed where counsel's errors cause the trial process to "lose[] its character as a confrontation between adversaries . . . ." (Id. at pp. 656-657.) Third, prejudice could be presumed where counsel was called upon to represent a defendant under circumstances where competent representation simply could not be provided. (Id. at pp. 659-662.)

In Bell v. Cone, supra, the United States Supreme Court addressed the second exception identified in Cronic. But Cone involved a situation very different from this case. In fact, Cone involved a situation where defense counsel had given compelling tactical reasons for his decisions and both the state courts and the United States Supreme Court had found these decisions entirely reasonable.

In Cone the defendant was charged with capital murder. The guilt phase defense was not guilty by reason of insanity. Because this was the guilt phase defense, the defense was able to introduce extensive lay and expert testimony about the defendant's background as a Vietnam veteran and his ensuing dependency on drugs. (Cone, supra, 535 U.S. at pp. 699-700.) After the defendant was convicted, defense counsel made an opening statement at the penalty phase, asking the jurors to consider the mitigating evidence already before them. (Id. at p. 691.) His cross-examination of state witnesses at the penalty phase again emphasized the defendant's military service, revealing that defendant had been awarded the Bronze Star for his service in Vietnam. (Id.) After a "low-key" closing argument by the junior district attorney assigned to the case, defense counsel waived final argument – thereby "preventing the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal." (Id. at pp. 691-92.) After defendant received a death sentence, he argued that his lawyer had provided ineffective assistance of counsel in failing to (1) present mitigating evidence during the penalty phase and (2) make a closing argument at the penalty phase. (Id. at p. 692.) Arguing that his lawyer's conduct did not subject the state's case to adversarial testing, defendant claimed that the Cronic standard of prejudice should apply. (Id. at p. 696.)

The state courts found that defense counsel had compelling and reasonable tactical reasons for the decisions he had made. (Id. at p. 692.) In federal court, defendant repeated his argument that reversal was required without a showing of prejudice.

The Supreme Court rejected this argument, and with good reason. The Court agreed with the state courts that counsel's decision not to present additional evidence in the penalty phase was entirely reasonable. (Id. at pp. 699-700.) Much of the evidence was introduced in the guilt phase, which had occurred only one day earlier. In addition, the jury was told that the existence of mitigating circumstances could be based on the guilt phase mental health experts. (Id.) As to witnesses who were not called at the guilt phase, counsel expressed sound tactical reasons for his decision not to call them at the penalty phase. (Id. at pp. 699-701.) Similarly, the Court held it was "not unreasonable" for counsel to waive final argument in order to keep the state's lead prosecutor – "who all agreed was very persuasive, the chance to depict his client as a heartless killer just before the jurors began deliberation." (Id. at pp. 701-702.) In short, the Supreme Court in Cone found that counsel's conduct was well within the standard of care to be expected of competent counsel. Given the Court's conclusion that counsel's conduct did not fall below the standard of care to be expected of competent counsel, it follows that the Court

would reject any suggestion that this same conduct required reversal without a showing of prejudice. Put another way, in Cone there was no error; without an error, it is obvious that Cronic could not apply.

Mr. Williams' case is in sharp contrast. Defense counsel did not state any legitimate tactical reasons for his series of blunders. As discussed above, LeMieux (1) took a case which his experience did not warrant and his health did not justify, (2) failed to associate with more experienced counsel, (3) failed to seek discovery, (4) failed to inspect the physical evidence, (5) failed to interview and prepare witnesses, (6) failed to research the law and facts in connection with motions and objections to critical evidence, (7) failed to follow through on multiple promises made to the jury in his opening statement concerning evidence he would introduce and witnesses whom he would have testify, and (8) planned a defense based almost entirely on evidence that he did not bother to investigate or obtain. Under these circumstances, to say that counsel did not "subject the prosecution's case to meaningful adversarial testing" is an understatement.

Because of these repeated blunders, the trial in this case lost any semblance of an adversarial proceeding. Thus, under these unusual circumstances, Cronic applies, and Mr. Williams need not show case specific prejudice in order to establish a Sixth Amendment violation. Cronic, supra, 466 U.S. at pp. 656-657. Compare with Gideon v.

Wainwright (1963) 372 U.S. 335 and Chapman v. California (1967) 386 U.S. 18, 23 (denial of counsel at trial for criminal defendant is structural error requiring reversal without showing of prejudice); Vasquez v. Hillery (1986) 474 U.S. 254 (unlawful exclusion of members of defendant's race from grand jury is structural error requiring reversal without showing of prejudice); Waller v. Georgia (1984) 467 U.S. 39, 49 (violation of right to public trial is a structural error requiring reversal without showing of prejudice); Tumey v. Ohio (1927) 273 U.S. 510, 535 (trial before a judge with a financial interest in the outcome of the case is structural error requiring reversal without showing of prejudice); Sparf v. U.S. (1881) 156 U.S. 51 (judge directing jury to come forward with a conviction is a structural error requiring reversal without showing of prejudice.) See generally, Arizona v. Fulminante (1991) 499 U.S. 279.

The litany of blunders by defense counsel in this case resulted in resulted in structural error that requires automatic reversal without a showing of prejudice. But those very same blunders also preclude a showing of prejudice because the option of re-examining much of the State's evidence against Mr. Williams is no longer available. Specifically, as noted above, LeMieux failed to obtain and independently examine *any* of the physical evidence introduced by the State at Mr. Williams' trial. He did not examine – and never retained any ballistics or forensics experts to

review – the weapons found at and recovered from the crime scene, namely the .30 caliber rifle and clip (People's trial exhibit 29), the Titan .380 caliber rifle and clip (People's exhibit 30), and the .38 caliber revolver (People's exhibit 31). (See CT 274-275.) Nor did he examine the communications devices found at the scene that the prosecution relied upon to connect Mr. Williams to crime, including a cellular phone (People's exhibit 27), and pagers (People's exhibit 63). (CT 274, 277.) Yet these are the very exhibits that were subsequently lost or destroyed, through no fault of the Defendant.[84]

LeMieux's wholesale failures to investigate and prepare a defense, in short, deprive us of the ability to assess the prejudice of his errors in light of the fact that it is no longer an option to retrace the steps LeMieux should have taken to independently test the State's evidence and its case. Indeed, twenty of the original 149 exhibits admitted at trial in this case could not be located in preparing the record for appeal. (See Appellant's Status Report to this Court dated Feb. 20, 2001; Reporter's Transcript of Proceedings, Oct. 31, 2000 at 8-9). The trial exhibits which have gone

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[84] Notwithstanding the plain prohibitions against the destruction of capital trial exhibits before the completion of mandatory appellate proceedings – prohibitions set forth in state statutory law, state common law, the rules of court and agency regulations – state actors lost or destroyed many of Appellant's transcripts and trial exhibits. (See Supp. III CT 359-63.) Despite this fact, the Superior Court certified the record in this case over the strong objections of Mr. Williams' appellate counsel. (See Reporter's Transcript of Proceedings, August 28, 2002, at 6.)

missing include over 60% of the physical evidence admitted at trial.[85] In this manner, LeMieux's failures created a situation that closely resembles the structural error recognized in Cronic.

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[85] Among the items of physical evidence introduced as exhibits at Mr. Williams' trial that the State has lost include:

Trial Exhibit Number	*Description of Exhibit*
19	Envelope containing remote and keys purportedly for Jack Barron's truck.
27	Envelope containing cellular phone.
29	.30 caliber rifle and clip, #AA30014.
30	Titan .380 caliber rifle and clip, #MB2664.
31	.38 caliber revolver, #5D03410.
63	Brown bag containing Panasonic pager(s), at least one of which had serial number 835307, cap code 0905913, with phone number 871-3529.
113	Envelope containing 3 pieces of paper.
120	Bag containing 20 cassettes, 3 tape boxes, screwdriver, pliers, car door knob lock top, and 27 cents.
127	Driver's license of Jack Barron (victim).
132	Bag of cut-up yellow paper.
84	Orange plastic bucket.
133	Bag containing shoe lace and cut-up t-shirt.
135	Two black wallets.
D	Box containing telephone and cords.

(See Supp. III CT 359-63.)

C. Even if a Showing of Prejudice is Required Mr. Williams' Conviction and Sentence Must Still be Reversed.

Even if case-specific prejudice was required, such a showing can be made on the trial record of this case, which makes clear that counsel's errors undermine confidence in the outcome of trial. Strickland v. Washington (1984) 466 U.S. 668, 694. See Bell v. Jarvis, (4th Cir. 2000) 236 F.3d 149, 165, 180 (en banc), cert. denied (2001) 534 U.S. 830 ("the prejudice component of the Strickland analysis may be presumed if the nature of the deficient performance is that of a structural error.") (citing McGurk v. Stenberg (8th Cir. 1998) 163 F.3d 470, 475 (holding "that when counsel's deficient performance causes a structural error, we will presume prejudice under Strickland.") See also Miller v. Dormire (8th Cir. 2002) 310 F.3d 600 (presuming prejudice when counsel's ineffectiveness leads to structural error).

For purposes of appeal, we are limited to the Motion for New Trial and the resulting proceedings on that motion to demonstrate that counsel's blunders resulted in prejudice under Strickland. This is so because the Motion for New Trial is the only source where Strickland arguments were advanced. But even on this limited record, without the benefit of habeas corpus investigation, prejudice can be shown, at both the guilt and penalty trials. It can be shown by reviewing the multiple, important promises made by LeMieux to the jury in his opening statement, all of which were

broken, none of which was kept. Prejudice can also be shown by analyzing the testimony of Detective Anthony Moreno.

1. Guilt Phase Prejudice

a. LeMieux's Broken Promises

As discussed more fully above, in Part A5(a) i-vi, supra, LeMieux made multiple, important promises to the jury about the evidence he planned to present at the guilt trial that would prove Mr. Williams' innocence.

LeMieux told the jurors that Detective Moreno was a critical part of the defense case and promised them that they would "learn more about Tony Moreno, the L.A.P.D. detective." (16 RT 1330.) LeMieux then used his opening statement to "allude[] to Tony Moreno all over the place." (28 RT 3044.) LeMieux, however, never investigated, subpoenaed, or called Moreno to the stand.

LeMieux promised the jurors that he would provide them with evidence that would "orove to you that the beeper [found at the crime scene] did not belong to [Mr. Williams]. It belonged to Patrick Linton." (16 RT 1313.) LeMieux, however, never produced such evidence.

LeMieux promised the jurors that he would prove that Mr. Williams no longer owned the black BMW that neighbor Irma Sazo claimed to see parked at the crime scene on the night of the murders. (16 RT 1328.)

LeMieux, however, never put on the witness he had promised who could trace the chain of ownership and custody of the BMW.

LeMieux promised the jurors that "we're . . . going to prove to you that the .38 revolver [found at the crime scene] was not the murder weapon. The murder weapon was not found at the scene of this crime. We're going to show you that that .38 revolver . . . had not even been fired, had not even been shot." (16 RT 1329.) LeMieux then claimed that the murder weapon "escaped with other people who were involved in this killing. (Id.) LeMieux, however, did not introduce a single piece of physical or forensic evidence in support of these dramatic claims.

LeMieux promised the jurors that "we're going to prove to you that [Mr. Williams] loaned [the] three guns [found at the crime scene] to Dauras Cyprian and Patrick Lintonon January the 1st," the day before the crime. (16 RT 1329.) LeMieux, however, offered no such proof to the jury.

LeMieux promised the jurors that he would present "evidence [that] will prove" the State's claim that Mr. Williams fled to New York after the crime to be "all lies." (16 RT 1326.) LeMieux, however, presented no evidence to disprove this part of the State's case.

LeMieux promised the jurors that he would explain how the orange water bucket would help "prov[e]" and "persuade[]} them that Mr.

Williams was innocent. (16 RT 1320.) LeMieux, however, presented no evidence to this end.

Finally, and most importantly, LeMieux promised the jurors – as well as the prosecution and the court – that his client, Mr. Williams, would take the stand in his own defense and testify as to where he was and what he was doing before, during and after the crime. (See, e.g., 16 RT 1312-13, 1304-05, 11298, 1365.) LeMieux, however, never called Mr. Williams to testify.

Numerous courts have found ineffective assistance of counsel where counsel failed to present evidence or testimony after having emphasized its importance in opening statements. See, e.g., Ouber v. Guarino (1st Cir. 2002) 293 F.3d 19, 28; McAleese v. Mazurkiewicz (3rd Cir. 1993) 1 F.3d 159, 166-67; People v. Lewis (Ill. App. Ct. 1992) 609 N.E.2d 673, 677; People v. Davis (Ill. App. Ct. 1992) 677 N.E.2d 1340, 1346-47; State v. Zimmerman (Tenn. Crim. App. 1991) 823 S.W.2d 220, 225-26; Montez v. State (Tex. Ct. App. 1992) 824 S.W.2d 308, 311; People v. Ortiz (Ill. App. Ct. 1992) 586 N.E.2d 1384; Anderson v. Butler (1st Cir. 1988) 858 F.2d 16, 17; Wiggins v. Smith (2003) 539 U.S. 510, 526. Where the promises that are broken are of the magnitude of those found in Mr. Williams' case – including the promise that Mr. Williams himself would testify as to his innocence – prejudice is manifest. Such

broken promises inevitably "taint[] both the lawyer who vouchsafed it and the client on whose behalf it was made." Ouber, supra, 293 F.3d at p. 28.

LeMieux's failure to deliver what he had pledged in his opening was not lost on the prosecutor, who used his closing argument to seize on LeMieux's repeated failures. "Of course we cannot rely on defense counsel's opening statement," cautioned the prosecutor, because, as the prosecutor forcefully showed, defense counsel's opening statement was littered with broken promises. (28 RT 3105.) See, e.g., 28 RT 2980 (noting LeMieux's failure to make anything of the shoelaces); 28 RT 3086 (noting LeMieux's failure to show who other than Mr. Williams killed the victims); 28 RT 3087, 3104 (noting LeMieux's failure to show how evidence was planted at the crime scene); 28 RT 3099-3100 (noting that LeMieux did nothing to support his assertion that the murder weapon was not found); 28 RT 3105 (noting LeMieux presented "absolutely nothing to contradict" the State's claim that the weapons were Mr. Williams); 28 RT 3105-06 (stating that "one thing in life is free. They're called subpoenas" and noting that LeMieux failed to subpoena anyone to testify that Mr. Williams had an alibi, or that the State's evidence was in error.)

It is hard to imagine how LeMieux's numerous failings did not prejudice the outcome of his client's guilt phase trial, for at least two reasons. First, as discussed at length, above, the shear scope and

magnitude of his failings are breathtaking and led to a fundamental breakdown of the adversary system. Second, despite LeMieux's failure to present an adequate defense, all indications were that the jury regarded Mr. Williams' guilt to be a very close case. If the jury had simply accepted the State's case, it would not have requested the court to read back three separate pieces of testimony given by two of the State's witnesses, see CT 300, 29 RT 3116 (jury requests read back of testimony of Monique Williams and Dauras Cyprian); CT 301, 29 RT 3118 (jury requests further read back of testimony regarding Defendant's loaning of murder weapons to co-defendant Patrick Linton before the crime). Nor would it have deliberated for over 6 and one-half hours, spread out over three days' time (not including the weekend). Something about the State's case gave the jurors pause.

To be sure, it did not help matters that the defense presented the testimony of only four witnesses whose cumulative testimony, on direct and cross examination, lasted less than five hours – not even one full court proceeding. But the dearth of defense evidence served to place even greater importance on the credibility and integrity of defense counsel in the eyes of the jury. With few witnesses to present and only a handful of exhibits to introduce, LeMieux was left to do the heavy lifting in exposing the holes in the State's case. But to make so much from what little he

managed to unearth, LeMieux would have to argue his few points with integrity. LeMieux, however, destroyed his integrity in the jury's eyes when he failed to deliver at trial any of the many things he promised in his opening statement, including the testimony of his client.

Had LeMieux performed as an effective advocate, it is likely that the outcome of the guilt trial would have been different.

b. Tony Moreno's Testimony

Had LeMieux put Moreno on the stand to present the above evidence, it is likely that the outcome of the guilt trial would have been different. A competent attorney could have woven this information into a compelling argument casting considerable doubt on Williams' culpability.

The record is clear that LeMieux's failure to adequately investigate Moreno was prejudicial to his client's case. Had LeMieux successfully subpoenaed Moreno, the defense could have greatly capitalized on Moreno's testimony to inject reasonable doubt into the prosecution's theory of the case. As noted above, LeMieux told the jury during his opening statement that Moreno "had an active part in this case" and was "involved in framing" Mr. Williams. (16 RT 1268-69). To this end, the defense could have made powerful use of the facts to which Moreno testified at the hearing on the Motion for New Trial.

For example, Detective Moreno acknowledged that he had a professional relationship with Mr. Williams; that he first met Mr. Williams in late 1987; and that he began forming a close relationship with Williams in the middle of 1988. Moreno admitted to cultivating Mr. Williams as a confidential police informant on narcotics matters, a role that Mr. Williams had already been fulfilling for other LAPD officers for several years before Moreno met Mr. Williams (53 RT 3919-3920.)

Moreno's relationship with Mr. Williams was such that Moreno frequented Mr. Williams' home, knew Mr. Williams' home phone and pager numbers, and gave Mr. Williams his own personal pager number so Mr. Williams could contact him, day or night, using a special identifying code. (53 RT 3920-21.)[86] According to Moreno, Mr. Williams fully availed himself of this opportunity, paging Moreno as frequently as every day, for several days in a row. (53 RT 3921.) Moreno also knew where Mr. Williams' mother lived and may have visited that house as well. (53 RT 3920-21.) Moreno customarily cruised the streets with Mr. Williams in his unmarked police car (53 RT 3932), often driving in the vicinity of the crime scene in this case. (53 RT 3930.)

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[86] For reasons that are not clear, Detective Moreno gave Mr. Williams his personal beeper number, not the number for the official beeper issued by the Los Angeles Police Department. 53 RT 3939. A reasonable juror could view this fact as casting even further suspicion on the role Moreno might have played in framing Mr. Williams or covering-up Moreno's involvement in the crime.

In fact, the working relationship between Detective Moreno and George Williams was so close that Moreno may have helped Mr. Williams prepare and file forms to enable Mr. Williams to obtain financial compensation from the State's Victims of Crime fund for injuries that he had suffered. (53 RT 3924.) Moreover, in February 1990, when Mr. Williams learned that the police were looking for him, Mr. Williams contacted Moreno for advice. Moreno told Mr. Williams to voluntarily surrender himself to homicide detectives for questioning. Moreno further offered to serve as a go-between for the detectives and Mr. Williams. (53 RT 3941-42.) Shortly after Mr. Williams was taken in for questioning, Moreno, who was not an investigating officer on the case, visited Williams at South Bureau Homicide station, spoke with Mr. Williams, and remained at the station for several hours. (53 RT 3944, 4010.)

Moreno's testimony at the new trial proceeding bolstered Mr. Williams case in an even more direct and important way. When asked point-blank by attorney Otto whether he was at or near the crime scene on the evening of January 2, 1990, Detective Moreno could not recall, but states that he could have been.

> Q: So even if you were assigned to administrative duties . . . you might have been out for some period of time; is that right?
>
> A: *It's possible.*

(53 RT 3930.) (Emphasis added.)

Q: . . . [Y]ou could have been [with Mr. Williams in the vicinity of the crime scene on January 2nd, 1990] and you just don't recall it; is that right?

H: Yeah, *I could have been.*

(53 RT 3937.) (Emphasis added.)

When asked by Otto whether he drove around with Williams in his car on the night of January 2, 1990, Moreno responded that he might have done so. (53 RT 3932).[87]

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[87] Detective Moreno's inability to recall in 1992 his whereabouts at the time of the crime in 1990 is noteworthy; as is his purported inability to recall a whole series of job-related facts, including, but not limited to, the name of his commanding officer (53 RT 3883) or his direct supervisor (53 RT 3884), whether his partner was on duty the night of the crime (53 RT 3889), what kind of car he drove on January 2, 1990 (53 RT 3891), whether he attended a police Protective League Meeting on January 2 (53 RT 3892), what his assignment was on and before January 2 (53 RT 3893, 3904, 3930); what type of paperwork he spent 5 and one-half hours doing on January 2 (53 RT 3912-13); whether he had previously been subpoenaed in Mr. Williams' case (53 RT 3914); what assignment location he concentrated on in January 1990 (53 RT 3917); whether he ever picked up Mr. Williams at his mother's house (53 RT 3920); whether Mr. Williams served as an informant for him in a 1986 case (53 RT 3922); whether he met with Mr. Williams in the last three months of 1989 (53 RT 3931); whether he talked with Mr. Williams during January 1990 (53 RT 3940); whether he beeped Mr. Williams' pager in February 1990 (53 RT 3944); why he remained at Mr. Williams' police interview for two and one-half hours (53 RT 3946-47); and whether he ever saw Mr. Williams after he was taken into police custody (53 RT 3947-48).

Detective Moreno's inability at Mr. Williams' trial to recall salient facts of his job and work assignments that took place two years earlier stands in stark contrast to the testimony of Officer Carl Sims who, in 1991, did not hesitate to describe in great detail events which took place nearly eight years earlier. (See 33 RT 3278-3297.) The marked difference

Moreno's testimony thus left open the possibility that on the night of the crime, Moreno and Williams were together, a possibility which would have opened up a panoply of arguments for the defense had Moreno testified at trial. At the very least, the defense, *armed with nothing more than Moreno's testimony at the Motion for New Trial*, could have credibly contended in the guilt phase closing (consistent with LeMieux's opening statement) that Williams was with Detective Moreno at the time of the crime – a claim that a veteran law enforcement official, under oath, did not deny. Such an assertion, by itself, would have injected considerable doubt into the State's version of events and given a reasonable juror strong grounds to acquit.

As it was, even without this (and other) powerful evidence calling the prosecution's case into question, the jury struggled with its guilt deliberations, debating one and one-half days before reaching a verdict. The length of a jury's deliberation has long been viewed as an objective indicator of a close case. (See e.g., People v. Cardenas (1982) 31 Cal.3d

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between the quality of testimony between these two police officers could have been seized upon to great effect by competent trial counsel to argue that (1) Moreno was being evasive, and therefore was hiding evidence of his setting up or framing of Mr. Williams for the crime, or that (2) Sims' recollection of the shooting in December 1983 was implausible, and therefore that incident should not be given any weight in aggravation; or that (3) both Moreno and Sims lacked credibility. In short, Moreno's testimony could have made a dispositive impact on the course of trial, at both the guilt and penalty phases.

897, 907 (twelve-hour deliberation was a"graphic demonstration of the closeness of this case"); People v. Rucker (1980) 26 Cal.3d 368, 391 (nine-hour jury deliberation shows close case); People v.Woodard (1979) 23 Cal.3d 329, 341 (six-hour deliberation.).)

2. Penalty Phase Prejudice

If the Court instead reviews counsel's performance at the penalty phase under the Strickland standard, the record makes clear that reversal is also required. "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy. (Wiggins, supra, 539 U.S. at p. 523.) Where trial counsel's performance is deficient and there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different, the death sentence must be set aside. (Strickland v. Washington (1984) 466 U.S. 668.).

a. Informant Status as Mitigation

Even if the jury had convicted Mr. Williams of capital charges, his service on behalf of the LAPD would certainly have been a strong mitigating factor at the penalty trial. The prejudicial impact of LeMieux's failure at penalty phase to pursue and present Detective Moreno, to pursue or present any of the "several" Los Angeles County sheriff's deputies for

whom he stated his "client was an informant" (16 RT 1268), or to collect and introduce corroborating documentary evidence about Williams' status as a police informant, is manifest. Such evidence would have constituted both powerful mitigating evidence in its own right, and would also have supported the defense theory of lingering doubt about Mr. Williams' culpability.

As the appellate record reveals, had Detective Moreno taken the stand, he would have told the jury how George Brett Williams for several years had served as a confidential informant for him and other Los Angeles law enforcement officers in their efforts to disrupt dangerous drug and gun syndicates. Mr. Williams decidedly was not the run-of-the-mill drug offender who, when nabbed by the police for a drug crime, snitches on a "bigger fish" in return for more lenient treatment in charging and/or sentencing; such snitches are commonplace in the criminal justice system and their cooperation is so obviously self-serving that its value as mitigating evidence in a capital trial is minimal. Rather, Mr. Williams had worked as a valued informant for as series of senior, high ranking officers and detectives in the Los Angeles Police Department on an ongoing basis over a period of several years.

The media, the Hollywood film industry, and elected officials have often portrayed such informants as not merely courageous but even

patriotic citizens who risk their own safety in order to further the goals of law enforcement. If presented to the jury, the evidence of Mr. Williams' longstanding work on behalf of law enforcement and the substantial personal dangers to which Mr. Williams, an African American male in South Central Los Angeles, exposed himself by collaborating with law enforcement would not only have powerfully and poignantly countered the drug-related shootings of the victims in this case, but also offset the insubstantial and stale aggravating evidence that was presented by the prosecution and left largely unrebutted by the defense.

b. Lingering Doubt

Under California law, a jury deciding whether to order a defendant's execution is entitled to consider any lingering doubts about the defendant's guilt. People v. Fierro (1991) 1 Cal.4th 173, 242; People v. Terry (1964) 61 Cal.2d 137, 145-146. Thus, under the California death penalty scheme, the evidence of Mr. Williams' substantial work with law enforcement, if not enough to persuade a jury of Mr. Williams' innocence, would have been "highly relevant to a critical issue in the punishment phase of the trial." 442 U.S. at 97. Specifically, such evidence would have raised serious questions in the jurors' minds about Mr. Williams' actual culpability for the crime. As previously noted, from the outset of the case LeMieux's theory of the defense was that Mr. Williams was framed for the murders as

a result of his work as a police informant with Detective Moreno. Even had the jury convicted Mr. Williams of the crime – and they appear to have done so only with considerable difficulty, having deliberated for one and one-half days before reaching a verdict, even without the benefit of knowing about Williams' relationship with Moreno – the evidence of Mr. Williams' longstanding work as an informant and his exceptionally close relationship with Moreno could have tapped into any lingering doubts jurors had about the extent of Mr. Williams' culpability as they grappled with the issue of sentencing. Such lingering doubt, of course, would have meant the difference between life and death.

D. Conclusion

Capital defense counsel "must make extraordinary efforts on behalf of the accused", and must possess a "greater degree of skill and experience" than non-capital practitioners. ABA Death Penalty Performance Guidelines (2003) (History of Guideline). As discussed above, what was extraordinary about LeMieux's representation was that, time and again, he made little or no effort on behalf of his client, and that nothing in his background, experience or temperament prepared him for the demands of Mr. Williams' capital trial.

Separately and in combination, counsel's failures constituted a breakdown of the adversarial process depriving Mr. Williams of his Sixth

Amendment right to counsel and requiring reversal of his conviction. In the alternative, Mr. Williams was denied his constitutional right to effective assistance of counsel, as well as his rights to due process, to a fair trial, to equal protection, to be free from cruel and/or unusual Punishment, and to a reliable determination of guilt under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article I, Sections 1, 7, 15, 16, 17, and 24 of the California Constitution.

DECLARATION OF SERVICE

CASE: People vs. (George Brett) Williams

CASE NO: California State Supreme Court Case No. S030553
Los Angeles County Superior Court Case No. TA006961

I am employed in the City of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 101 Second St., Suite 600, San Francisco, California 94105. On December 17, 2004, I served the following document(s):

1. **APPELLANT'S OPENING BRIEF;**
2. **APPLICATION FOR LEAVE TO FILE OPENING BRIEF IN EXCESS OF 95,200 WORDS**; and
3. **APPELLANT'S APPLICATION TO FILE PORTION OF APPELLANT'S OPENING BRIEF (CLAIM XV) UNDER SEAL, TO SEAL PORTIONS OF THE RECORD, AND FOR A PROTECTIVE ORDER**

on each of the following, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of attorney Daniel N. Abrahamson for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By 2nd-Day Air Express Delivery: I am readily familiar with the practice of attorney Daniel N. Abrahamson for the collection and processing of correspondence using the following overnight / next-day delivery services: Express Mail with the United States Postal Service, Next-Day Air with United Parcel Service (UPS), and Overnight Express with FedEx. I caused each such envelope, with the proper postage or billing information used by the service chosen (Underline Service Used), to be deposited in a recognized place of deposit in Oakland, California, for collection and delivery to the office of the addressee on the date shown herein.

(C) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of this law office on the date last written below.

(D) By Messenger Service: I am readily familiar with the practice of attorney Daniel N. Abrahamson for messenger delivery, and I caused each such envelope to be delivered to a courier employed by **LIGHTNING EXPRESS MESSENGER SERVICE**, with whom we have a direct billing account, who personally delivered each such envelope to the office of the addressee on the date last written below.

TYPE OF SERVICE	**ADDRESSEE**
C	Supreme Court of California Office of the Clerk 350 McAllister St. San Francisco, CA 94102
A	George Brett Williams P.O. Box H-61000 San Quentin, CA 94974
B	Stephanie Miyoshi Deputy Assistant Attorney General Office of the State Attorney General 300 South Spring Street, Suite 500 Los Angeles, CA 90013
C	California Appellate Project Attn: Michael Millman 101 Second St., Suite 600 San Francisco, CA 94105
B	Clerk: Death Penalty Desk Los Angeles Superior Court — Criminal Division 210 West Temple, Room M3 Los Angeles, CA 90012-3210

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 17th Day of December, 2004, at San Francisco, California.

_____

Declarant

DECLARATION OF SERVICE BY MAIL

CASE: People vs. (George Brett) Williams

CASE NO: California State Supreme Court Case No. S030553
Los Angeles County Superior Court Case No. TA006961

I am employed in the City of Berkeley and County of Alameda, California. I am over the age of eighteen years and not a party to the within action; my business address is 819 Bancroft Way, Berkeley, California 94710.

On April 19, 2007, I served the following documents:

UNOPPOSED MOTION TO FILE CLAIM XV OF APPELLANT'S OPENING BRIEF AND DECLARATION THERETO

CLAIM XV OF APPELLANT'S OPENING BRIEF

on each of the following, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of attorney Daniel N. Abrahamson for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee on the date last written below.

TYPE OF SERVICE	ADDRESSEE
B	Supreme Court of California Office of the Clerk 350 McAllister St. San Francisco, CA 94102
A	George Brett Williams P.O. Box H-61000 San Quentin, CA 94974

A	Stephanie Miyoshi Deputy Assistant Attorney General Office of the State Attorney General 300 South Spring Street, Suite 500 Los Angeles, CA 90013
A	California Appellate Project Attn: Michael Millman 101 Second St., Suite 600 San Francisco, CA 94105
A	Clerk: Death Penalty Desk Los Angeles Superior Court - Criminal Division 210 West Temple, Room M3 Los Angeles, CA 90012-3210

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of April, 2007, in Berkeley, California.

Daniel N. Abrahamson
Declarant