1933). When Lindenmeyer and Stone arrived at the Staten residence, Deondre was standing with the Hartmans by their garage (8 RT 1939). Deputy Lindenmeyer entered the house, observed the bodies of Ray and Faye Staten, quickly inspected the house to make sure no suspects were inside, and exited the house to await the arrival of a back-up unit consisting of Deputies Reynolds and Andrade (11 RT 1946). These sheriff's deputies secured the house until the arrival of the homicide detectives. They also maintained a log of who entered the house and the time they exited the house (11 RT 1937; 12 RT 2181-88). The only individuals allowed in the house prior to the arrival of the homicide detectives were the paramedics, who confirmed that both Ray and Faye were dead (12 RT 2186-87). According to Lindenmeyer, when he arrived at the residence, the bedrooms were "extremely messy" while the rest of the house, including the kitchen and living room were "neat and clean" (11 RT 1946-49). Ronald George, a fingerprint examiner who arrived at the residence at 5:20 a.m. the morning of October 13, 1990, also noted that the condition of the living room was "neat and clean" (11 RT 1894).

51. Homicide Detective George Roberts, the case agent, and his partner Joseph Seeger arrived at the crime scene at 2:58 a.m. (13 RT 2234). They met with the deputies outside and then entered the residence. They observed the body of Ray in the master bedroom and the body of Faye in the hallway adjacent to the

dining room. They then exited the house and awaited the arrival of the crime scene specialists (13 RT 2237-38). Wayne Plumtree arrived at the residence the evening of October 13, 1990, and removed two bullets which had been fired into the walls of the guest bedroom and hallway (8 RT 1419-21). Ronald George found a latent palm print on the mirror in the living room which had been spray painted "ESD Kills" (11 RT 1866). Victor Wong collected blood samples from fourteen different locations outside and inside the residence (12 RT 2048-62).

52. Detective Roberts searched the residence after the homicide specialists had collected their evidence. Outside the residence he observed Ray's pickup and Faye's Cadillac. The security gate at the front of the residence was open and there were blood droplets in the alcove area. Inside the residence, there was a mirror in the living room which had been spray-painted "ESD Kills". Ray was found in the master bedroom lying on his back. Faye was found lying on the floor near the dining room table. In the den/computer room, he found a book on the coffee table opened to a page depicting a copy of an article about the Sharon Tate murder. Outside the residence in the rear patio he observed the letters "ESD" spray painted on the patio. A sliding glass door from the living room to the patio was open. Inside the residence, Roberts located three cans of spray paint. In Faye's purse, Roberts found $557 in cash and another $200 in traveler's checks. Roberts did not

find any weapons inside the residence but did locate a bag of bullets for the .22 derringer. Roberts did not find any remnants of potato or duct tape inside the residence (14 RT 2510).

53. When Deondre ran to the Hartman residence after discovering his parents, Michael Hartman described Deondre as "screaming" and "hysterical" (6 RT 830-31). Craig Hartman described Deondre in a similar fashion but qualified his impressions by stating he thought Deondre was "carrying on a little bit too much" (6 RT 876). Bertha Sanchez looked out her bedroom window when the officers arrived and observed Deondre "vomiting or crying" (6 RT 952). Raphael Sanchez observed Deondre "crying or going hysterical . . .sick, like he was vomiting" (7 RT 1046-47). Deputy Lindenmeyer described Deondre as "upset" when he first contacted Deondre after arriving at the residence (11 RT 1952).

7. **Scientific Analysis And Expert Opinions**

54. The murder weapons were not found and there was no evidence directly linking Deondre to the murder of his parents. Deondre's fingerprint was found on the mirror below the words "EDS Kills" (11 RT 1871-72), although it was conceded that Deondre's fingerprint on the mirror could have been there as long as six months prior to the murders (11 RT 1888-89). A can of white spray paint located in the Staten residence contained paint similar to that found on the graffiti

on the mirror and back patio, but that paint was "a very common white paint" (8 RT 1313). A fingerprint analysis of the spray paint can revealed several prints on the spray can, including those of Faye Staten (suggesting that the spray paint can had not been wiped clean to remove fingerprints) (11 RT 1897). Deondre's fingerprints were not on the spray paint can (11 RT 1889-90). Deondre's fingerprints were found on a page of a coffee table book containing old Los Angeles Times headlines which was located in the den. The page in question was an article about the Sharon Tate murder. The fingerprint examiner only took prints from this one page because the book was opened to that page. However, the fingerprint examiner did not recover this exemplar until October 17, 1990 (10 RT 1854), several days after the crime scene investigation and after a period of time in which several friends and relatives of Deondre had access to the residence and this book.

55. Dwight Van Horn, a ballistics expert, examined the two bullets recovered from the walls inside the residence and opined that the hollow point bullets could have been fired from any one of four different gun manufacturers (8 RT 1444). Van Horn could not match the bullets with any particular gun nor could he match them to each other (8 RT 1445-48). Van Horn admitted it was possible that the recovered bullets were fired from separate weapons (8 RT 1465).

Van Horn thought it was possible for a potato to muffle the sound of a bullet being fired from a gun, though he admitted he had no experience in this area and had never performed any test with a potato to determine if it could be used as a silencer (8 RT 1460, 1463-64). He thought it possible that potato residue would be found on hollow point bullets fired through a potato (8 RT 1464) and stated that he found no potato residue or duct tape residue on the bullets he examined (8 RT 1476). Detective Roberts, during his search of the residence, found no evidence of potato or duct tape residue (14 RT 2510).

56. The fourteen blood samples collected at the residence by Victor Wong were examined by Valerie Scherr. She compared it to blood samples taken from Deondre and his parents. When Deondre was interviewed during the early morning hours of October 13, 1990, he was observed to have a small cut on his right index finger (11 RT 1943-44). Deondre cut his finger earlier that day while doing yardwork (17 RT 2846-47). After cutting his finger, Deondre went inside the residence to find gauze or bandages for the cut (17 RT 2848). Ms. Scherr was able to identify certain blood samples recovered by Victor Wong as being those of Ray Staten, but she could not differentiate between the blood samples of Faye and

Deondre (12 RT 2157).[19]

57. Susan Selsa, the coroner, testified that Ray Staten died from the single gunshot to the rear of his head and that Faye died from multiple stab wounds. She did not find any remnants of potato or duct tape during her autopsy of Ray and didn't know whether or not she should expect to find such remnants if Ray had been shot by a gun equipped with a potato silencer (11 RT 1924-25). She performed a toxicology test on Ray and determined that he had a blood alcohol content of 0.126 % (11 RT 1926). The autopsy was performed on October 15, 1990 (11 RT 1905).

58. Donald Fandry, a questioned documents examiner, testified that he was of the opinion that the person who spray painted the graffiti "ESD" on the back patio probably spray painted the graffiti "ESD Kills" on the living room mirror (12 RT 2032). Fandry could not form any opinion whether the author was Deondre since he did not have any exemplars from Deondre (12 RT 2037). Victoria Mertes, a qualified handwriting expert, submitted a declaration in support of the

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[19] The parties eventually entered into a stipulation that none of the fourteen blood samples recovered by Wong belonged to Ray, that sample numbers VW 2-4, 6-8 and 14-16 did not belong to Faye but "could have been" from Deondre, that sample numbers VW 10, 11A and 11B did not come from Deondre and that no conclusion could be reached if Faye or Deondre were the donors of sample numbers VW 1AB, 1 and 5 (12 RT 2180).

state habeas petition in which she stated that she had compared exemplars from Deondre with photographs of the graffiti from both the living room and patio and she formed the opinion Deondre was not the author of either set of graffiti.

59. David Watkins, a Los Angeles Deputy Sheriff, testified as a gang expert. He was permitted to testify that, in his opinion, the graffiti was not authentic and the murders of Ray and Faye Staten were not gang-related (10 RT 1747-48, 1786). Gomelia Baker, the Assistant Principal at Nogales High School where most of the East Side Dukes gang members attended school, testified that he had taught at Nogales High School for the past fourteen years, had seen every bit of graffiti scrawled on school property and was of the opinion that the graffiti found on the mirror and the patio was authentic East Side Dukes gang graffiti (16 RT 2677-81). Dr. Armando Morales, a professor at UCLA, author of numerous studies concerning Hispanic gangs and a former Los Angeles County probation officer, submitted a declaration in support of the state habeas petition in which he opined that the murders of Ray and Faye Staten were typical of gang-related murders, including those committed by the East Side Dukes.

60. Deputy Sheriff Lindenmeyer remained with Deondre from the time he arrived at the residence shortly after 1:00 a.m. until Deondre was taken to the sheriff's station for questioning. Deondre did not have any opportunity to wash

his hands. Lindenmeyer did not notice any white paint on Deondre's hands and thought his hands were dirty (11 RT 1953). Lindenmeyer administered a gun shot residue test to see if he could detect any residue from gun powder on Deondre's hands (11 RT 1940-42). Phil Teramoto, who worked in the Scientific Services Bureau of the Sheriff's Office, testified that gun shot residue test can determine if a person fired a gun or came into contact with a gun for a period up to six hours after the fact (16 RT 2663). He examined the test Lindenmeyer performed on Deondre and formed the opinion that "no statement can be made as to whether the subject [Deondre] had handled or discharged a firearm" (16 RT 2668).

8. Events After The Murders

61. The murders of Ray and Faye Staten took place on either October 12 or October 13, 1990. One of the special circumstance allegations was that the murders were for financial gain. California Penal Code, Section 190.2(a)(1). The prosecution argued that Deondre murdered his parents to obtain the proceeds from the three life insurance policies under which he was a contingent beneficiary. However, from the time of the murders to the time of his arrest in March of 1991, Deondre never made any claim for any of the insurance proceeds. The only claim made against the policies was made by Betty Hibbler, who worked for Angela's Funeral Home. Ms. Hibbler contacted the insurance company and had them send

her a claim form for funeral expenses. After receiving the claim form, she called Deondre, who came to the funeral home and signed the claim form so that Hibbler could be reimbursed for funeral expenses (8 RT 1413-16). No other claims were made or authorized by Deondre.

62. After the murder of his parents, Deondre stayed with his aunt Judith McKay at the McKay residence on West 73rd Street for a few weeks before returning home (9 RT 1653). On October 14, 1990 his friend John Nichols was stopped by police while driving a car. The police discovered Faye's .22 derringer in Nichol's car. Because Nichols was on probation for a drug violation, he was arrested and taken to jail. In jail, he was contacted by Detective Roberts. Roberts asked Nichols to secretly record a conversation with Deondre in exchange for "help" with his probation violation (13 RT 2371-73). Nichols' recollection of the conversation was different. He claimed that Roberts made threats to implicate Nichols with the murders of Ray and Faye if he didn't agree to secretly record a conversation with Deondre (7 RT 1180). Eventually Nichols was released from jail and met Deondre outside the beauty salon on November 3, 1990. There, Nichols secretly tape recorded a conversation with Deondre.[20] The conversation

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[20] The tape of this conversation was played to the jury during the trial (7 RT 1191; trial exhibit 22). A transcript of the tape was marked for identification as exhibit 23 but not admitted into evidence (7 RT 1187). The transcript of the tape

lasted approximately fifteen minutes. In the tape, Nichols asked Deondre repeatedly whether or not he had anything to do with the murders and Deondre repeatedly denied any involvement (7 RT 1199). Nichols asked Deondre during the course of the conversation what had happened to Faye's .38 caliber revolver. Deondre told Nichols that he got rid of the revolver before his parents returned home (7 RT 1192).

63. Evidence developed during the state habeas proceedings revealed that three independent witnesses observed gang members from the East Side Dukes drive by the Staten family residence the morning of October 13, 1990. Robert Osegara, an adult neighbor, heard the gang members in the car say "yeah we got them" (Declarations, Vol. I, p. 5). His wife Pat Osegara also observed the gang members drive by the Staten residence the morning after the murders (Declarations, Vol. I, p. 3). Keith Taylor, a friend of Deondre, was standing on the corner of Faxina and Northern Avenues the morning after the murders, watching the police and the media. While standing there, he observed several members of the East Side Dukes drive by in a Chevy Monte Carlos, smiling and nodding their heads up and down. Taylor overheard the gang members say "yeah we got them" (Declarations, Vol. I, p. 18). Brian Ellis was also standing outside the Staten

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is contained in the Clerk's Transcript of Proceedings, pp. 98-112.

residence when these gang members drove by and also heard them say "yeah we got them" (Declarations, Vol. I, p. 19).

9. Penalty Phase Evidence

64. The prosecution offered into evidence seven photographs depicting stab wounds to Faye Staten which were taken during her autopsy (23 RT 3645-49) and a stipulation that Deondre was 24 years old at the time of the offense (23 RT 3781). The defense offered the testimony of twelve witnesses. Korea Staten, Ray's mother and Deondre's grandmother, testified to the close relationship between Deondre and his mentally retarded brother Lavelle (23 RT 3651-53). Lenard Staten, Ray's brother and Deondre's uncle, testified that Deondre was intelligent, supportive of his brother and still loved by the Staten family notwithstanding the verdict (23 RT 3662-66). Lindoria Horn, one of Faye's closest friends, described Deondre as intelligent and devoted to his younger brother (23 RT 3669-72). Sarah Wright, a close friend of both Ray and Faye, testified that she had observed Deondre grow up, that he was a good student, helpful person and a role model for his younger brother (23 RT 3673-81). Minnie Cole, one of Deondre's former employers, testified that Deondre graduated from high school, was intelligent, close to his family and close to his brother (23 RT 3682-87). Matthew Richardson was a bishop in the church attended by the Staten

family. He described Deondre as developing an interest and becoming involved with his church (23 RT 3690). Brian Ellis, a friend of Deondre, testified that Deondre was a high school classmate, that Deondre was a member of the football team, that Deondre graduated in 1984 and thereafter attended Rio Hondo Junior College and studied criminal investigation (23 RT 3695-97). Quincy Murphy, another friend, testified to a loving and protective relationship between Deondre and his brother (23 RT 3702). Robert Oseguera, his wife Patricia and his daughter Roberta testified that they were neighbors of the Statens, that Deondre helped keep neighborhood children, including their own, out of gangs and that Deondre had a loving relationship with his younger brother (23 RT 3707-08, 3712-15, 3720-21). Dr. John Mead, a board certified psychiatrist, testified that Deondre had a "triangular relationship" with his parents – close to his mother and distant from his father (23 RT 3756). He described Deondre as brighter and more verbal than the average prison inmate, able to get along with people and stated that Deondre would be a positive influence on others in a prison environment (23 RT 3756-58).

IV.

CLAIMS FOR RELIEF

65. Petitioner alleges that he is being unlawfully held in custody at San

Quentin State Prison in violation of the Constitution, laws and treaties of the United States, as well as the constitution and laws of the State of California.

66. Each of the claims which follows implicates the Eighth Amendment and the reliability of the death sentence imposed in this case. Each claim also implicates the due process clause of both the Fifth and Fourteenth Amendments, as well as petitioner's right to effective representation, as guaranteed by the Sixth and Fourteenth Amendments. Finally, claim number two implicates petitioner's right to equal protection of the laws under the Fourteenth Amendment. Petitioner is innocent of the crimes for which he stands convicted. His trial, the rulings rendered therein, the performance of his trial counsel, and his conviction and sentence to death constitute manifest and fundamental miscarriages of justice, in violation and contravention of both the Constitutions of the State of California and the United States of America.

Claim One: **Petitioner's Right To Due Process Of Law Under The Fifth And Fourteenth Amendments To The United States Constitution Were Violated By The Trial Court's Denial Of His Request For The Appointment Of A Second Counsel Under The Established Law Of The State Of California**

1) **Legal Predicate For Appointment of Second Counsel In California**

67. Pursuant to this Court's decision in *Keenan v. Superior Court* (1982) 31 Cal.3d 424, interpreting California Penal Code §987.9, in a capital case where the death penalty is being sought the defendant is entitled to seek the appointment of a second counsel at public expense to assist in his defense. Emphasizing the "constitutionally mandated distinction between death and other penalties," *Keenan, id.* at 434, this Court held that, although appointment of second counsel is not an "absolute right," the trial court must exercise its discretion guided by legal principles and policies that recognize that "death is a different kind of punishment from any other, both in terms of severity and finality" and that " [b]ecause life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed." *Keenan, id.* at 430.

68. Among the elements recognized in *Keenan* as peculiar to the need for a "complete and full defense" in a capital case is that the possibility of a death penalty raises unique issues requiring special attention to pretrial preparation during which "counsel must become thoroughly familiar with the factual and legal circumstances of the case." *Keenan, id.* at 431-432. Importantly, the *Keenan* decision recognizes the inherent problem present in "any capital case" of simultaneous preparation for a guilt and a penalty phase of the trial, and that "the issues and evidence to be developed in order to support mitigation of the possible

death sentence [are] substantially different from those likely to be considered during the guilt phase." *Keenan*, *id.* at 432. Finally, the *Keenan* decision stresses that the "constitutionally mandated distinction between death and other penalties, requires that the trial court apply a higher standard than bare adequacy to a defendant's request for additional counsel," and that, " if it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need . . . a presumption arises that a second attorney is required." *Keenan*, *id.* at 434.

2) <u>Denial Of Request For Second Counsel In This Case</u>

69. Following a preliminary hearing on March 20, 1991, petitioner was arraigned in the Los Angeles Superior Court on April 9, 1991, and the case was transferred to the master calendar court, Department A East (Pomona). John Tyre, who represented petitioner at the preliminary hearing, was appointed as trial defense counsel. This was Tyre's first representation in a death penalty case. (Volume 1, Declarations and Exhibits In Support of Petition for Writ of Habeas Corpus [original petition], Declaration of John D. Tyre, Vol. 1, p. 7).

70. Tyre's appointment was pursuant to a contract between the Pomona Contract Lawyers Association ("PCLA") and Los Angeles County. Under the

terms of that contract, Tyre and eight other lawyers had agreed that when the public defender was conflicted out, they would provide, for a flat fee, representation of criminal defendants in the East District of the Los Angeles County Superior Court (Pomona). PLCA's fee for each case was calculated at $991.67, and there existed no distinction between capital and non-capital cases. Accordingly, not only was Tyre inexperienced in capital case representation, but he was required to furnish that representation from the investigative stage through the penalty phase for less than one thousand dollars. (Pomona Contract Lawyers' Association Contract; Exhibit 3, pp. 7-29).[21]

71. On April 25, 1991, Tyre filed a "Confidential Application For Appointment of 2nd Counsel," supported by a one paragraph declaration and a half page memorandum of "Points and Authorities" (CT 901-905).[22] The motion stated that it was made "on the ground that such appointment is necessary to ensure the defendant of his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and

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[21] Exhibit references are to the separate volume of exhibits filed herewith pursuant to Rule 56(d), California Rules of Court.

[22] "CT" refers to the Clerk's Transcript of Proceedings. Volume numbers do not precede the citation because the volume numbers are confusing at best. For example, counsel for petitioner have three volumes numbered "1", two volumes numbered "2" and two volumes numbered "3".

Article I, Section 15 of the California Constitution." Mr. Tyre's declaration consisted solely of the following paragraph:

> "I am representing Deondre Staten in the above numbered case and it has become evident after the preliminary hearing that there are both serious issues for the guilt and penalty phases of this trial. It is therefore necessary for the court to allot funds to cover the cost of a second attorney to handle different parts of both phases of this trial" (CT 903) (emphasis added).

Tyre's "Points and Authorities" cite Keenan and refer to the "presumption in a capital case that the services of a second attorney are required." The memorandum also contains a quote from *Garner v. Florida*, 430 U.S. 349 (1977), a case cited in *Keenan*, together with the observation that, "In a capital trial, many complex factual and legal issues must be addressed prior to trial and penalty phase investigation must be completed prior to trial" (CT 901).

72. On June 5, 1991, Tyre filed a another confidential application for appointment of second counsel. This filing was identical to the previous one, which had not been ruled on, with the exception of now including the specific name of a proposed second counsel, one Gerald Gornik, who was, importantly, *not* a member of PCLA. (CT 906-910; Exhibit 4, p.32).

73. Petitioner is informed and believes that the reason Tyre modified his application for second counsel to specifically seek Gornik's appointment was for the express purpose of avoiding appointment of yet another PCLA attorney to representation in this case. This was essential because under the terms of the PCLA contract, appointment of another counsel under the contract would require that second PCLA attorney to provide representation without compensation .[23] Petitioner alleges that it is for this reason that Tyre sought the appointment of Gornik, *who was not a member of the PCLA*, coupled with the assertion in his application that it would be necessary for Judge Nuss to "allot funds" from some other source to pay for Gornik's services

74. Petitioner contends that these circumstances, under which second counsel fees would not only have been over and above the money already set aside by the County to pay the PCLA contract, but which also would have undoubtedly

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[23] Among the serious flaws in the PCLA contract was its failure to give any recognition whatsoever to the potential necessity–indeed the presumption under Keenan-- that a second counsel be appointed in capital cases. Instead, the contract expressly provided that a defendant could be counted only once as to any particular case for purpose of compensation under the contract. That provision was followed immediately with the proviso that should PCLA members be "required to provide services for a defendant under this contract for which the limitations in this contract precludes them from being compensated, [PCLA] members shall provide those services Pro Bono Publico without cost." (See, PCLA Contract, Exhibit 3 p. 16 [contract ¶¶ 3bii and 3c], p.18 [contract ¶5].

greatly exceeded the $991.67 for such representation under the contract, provided a powerful but improper incentive for the cost-conscious Superior Court in Pomona, under Presiding Judge Thomas F. Nuss's leadership, to deny the second counsel request.

75. Petitioner is further informed and believes that at the time of Tyre's appointment, the East District of the Superior Court, under Judge Nuss's leadership, was particularly determined to be in the vanguard of a county-wide effort to significantly reduce the cost of indigent defense counsel when the public defender is conflicted out, and, indeed, the East District may well have been the first to submit a legal defense services contract of this kind to the County Board of Supervisors for approval. Petitioner is informed and believes that other courts did not adopt the East District approach under which no distinction was made between capital and non-capital cases, and, to the contrary, provided separately for substantial flat fee payments for the defense of capital crimes. The PCLA contract under which Tyre was appointed to represent petitioner was itself discontinued after its first year. Extensions for following years expressly provided that capital cases were to be compensated separately, although even then at a rate of about one-half of that in virtually every other district of the Los Angeles County

Superior Court. [24]

76. On the same day that Tyre filed his application for the appointment of Gornik as second counsel, June 5, 1991, a hearing was held before Judge Nuss in Department A. During the hearing, a number of matters were discussed, and Judge Nuss observed that he also had "some *in camera* matters that should be handled outside the presence of the District Attorney" (1 RT 10). Tyre was instructed by the court to "make arrangements with the clerk or with the court to go over these in camera matters that you have" (1 RT 15).

77. The following Wednesday, June 12, 1991, another hearing was held before Judge Nuss in Department A. A motion to dismiss under Penal Code § 995 was heard and denied based upon the court's review of the preliminary hearing transcript. Inexplicably, notwithstanding the court's earlier reference to the need for an *in camera* hearing, Judge Nuss, in open court and with the District Attorney present, brought up for hearing the request for second counsel (1 RT

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[24] Exhibit 5, pp. 33-35, is a letter from the L.A. County chief Administrative Officer to the Board of Supervisors in which she discusses a Capital Case Memorandum of Understanding (MOU) apparently approved by the Board of Supervisors on November 17, 1992. That MOU called for capital cases to be compensated in four categories, *the lowest paying a base rate of $60,000* up to the fourth category calling for compensation of $200,000. Notwithstanding this, the PCLA's agreement for Pomona, in effect in 1992 and 1993, continued to provide only $35,000 for representation in any capital case, slightly more than one-half of the lowest amount called for in the MOU. (Exhibit 6, pp. 36-38.)

31).[25] The following colloquy then occurred:

> Mr. Tyre: Yes, your honor. Since the court has had a chance in reading the 995, going over the transcript, the court can see the people's case is strictly circumstantial evidence; that the burden of going through a guilt phase, the circumstantial evidence, the possible inferences, the possible investigation, the numerous people that were used at the preliminary hearing and all the investigation that would be necessary in a guilt phase, I just would request the assistance of a second counsel to help me prepare if in case a penalty phase is necessary. It's not a clear-cut guilt phase, your honor. There's a lot of work to be done.
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> The Court: No, it's not a clear-cut guilt case from the standpoint of the fact that it's a circumstantial evidence case, but it's a fairly straight-forward case with not [sic] tremendous legal issues,

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[25] It was clearly contemplated in *Keenan*, as well as in Penal Code §987, that application for second counsel should be confidential to "avoid undue disclosure of defense strategy." *Keenan*, *supra* at 430. Petitioner contends that even though his trial counsel did not object, the trial court demonstrated a rather cavalier approach to the question of second counsel by calling the application up to be heard in open court. Plainly, the court had no intention of engaging in any sort of detailed discussion about the need for second counsel, and had apparently already decided to deny the request.

complex issues involved, and the court finds that it is not a denial of due process for the court to refuse the appointment of second counsel. Based upon that, the application is denied" (1 CT 31-32).[26]

3) The Master Calendar Court's Denial of Petitioner's Application For Second Counsel Was Arbitrary And Capricious, Treated Petitioner Disparately From Others Facing The Death Penalty In California, And Was An Abuse of Discretion.

78. As noted above, Judge Nuss brought the second counsel issue up for

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[26] Although not spoken from the bench, the words "denied *without prejudice*" were written by someone , probably a court clerk, upon the face of the application. This Court's decision, affirming the conviction and rejecting Staten's appeal of the denial of second counsel ruling, stresses that the trial court denied the application "without prejudice," thereby implicitly suggesting that Mr. Tyre was expressly advised, or even encouraged, by the court to renew the motion at some later time. In this connection, this Court noted that, "Indeed, counsel, whose earlier application was denied without prejudice, did not renew the request for second counsel." *People v. Staten*, 24 Cal.4th 434, 447 (2000). Petitioner respectfully asserts that the record does not support the suggestion that the trial court denied the application "without prejudice" such as to invite counsel to renew the request later. Clearly, the trial court did not announce from the bench that the application was denied "without prejudice" and nothing in the record identifies who wrote the words "without prejudice" on the front page of the application, under what authority those words were written, or why they were placed there. Nor is there anything in the record to reflect that Tyre was ever made aware of the "without prejudice" notation on the application which was retained in the court clerk's file. To the contrary, the record demonstrates that the trial court made abundantly clear that his mind was made up that the case did not, and would not, warrant a second counsel.

decision in open court, in the presence of the district attorney, notwithstanding the customary procedure, recognized by the court in *Keenan*, that calls for such a hearing to be held *in camera* so that potential defense strategy, thinking, and tactics can be openly discussed between the court and trial counsel in making a determination as to whether second counsel is necessary. Petitioner alleges that this alone demonstrates that the trial court had already determined to summarily deny the application.

79. At the time he announced his decision, Judge Nuss's familiarity with the case consisted of having reviewed, presumably, the preliminary hearing transcript in connection with the motion to dismiss pursuant to Penal Code § 995. As is customary for a preliminary hearing, the prosecution put on a "bare bones" case sufficient to have petitioner held to answer in the Superior Court. Twenty-three witnesses were called consisting primarily of neighbors and family members of the victims and petitioner, friends of petitioner, police investigators, an insurance agent, and experts in gang behavior, pathology, ballistics, serology, and handwriting. This evidence essentially tended to established that petitioner was at home when his parents arrived back from vacation on the night of October 12, 1991, that three gunshots were heard by neighbors (one muffled) shortly after petitioner's parents arrived, that Ray Staten's truck was heard to be driven away

thereafter, and that shortly after the truck returned petitioner woke up neighbors shouting that his parents had been murdered. Investigators testified to finding two spent .38 caliber cartridges in the house and a further one in the head of Ray Staten, to the presence of the blood of either Faye Staten or possibly petitioner in various areas of the home, and to finding petitioner's finger print on the mirror upon which had been spray painted the graffiti message "ESD Kills." Also presented was evidence that petitioner had talked to friends about killing his parents for a large sum of money, that he had talked to another friend of his parents about "taking his father out," that petitioner was in possession of his mother's .38 caliber Smith & Wesson the day of the murders, that he had spoken with a friend about making a silencer using a potato and duct tape, and that he was aware of a change in his mother's will that removed his brother as a contingent beneficiary, making him the sole beneficiary if both his mother and father were dead. It was clear from the direct and cross-examination of witnesses, from the presence of gang type graffiti on a mirror in the house and on a patio floor in the back yard of the residence, and from the testimony of a purported prosecution "gang expert," that an essential component of the defense would likely be that the murders were committed by the Eastside Dukes gang, not the petitioner.

80. In his written application for second counsel and brief oral remarks to

the court, Tyre failed to present specifics to the court detailing the complexity or nature of the legal or factual issues he thought to exist, or the difficulty of the investigation he anticipated in preparing for both the guilt and penalty phases of the upcoming trial. However, Tyre did stress that the case was "strictly circumstantial," that there were serious issues in both the guilt and penalty phases, that a good deal of investigation was necessary, and that in order to prepare for both a guilt phase and possible penalty phase he needed a second attorney to assist him.

81. At the time of his decision denying second counsel Judge Nuss was aware from the preliminary hearing transcript that the prosecution would likely present not only prosecution experts in such traditional areas as ballistics and serology, but also unique opinions concerning the author of spray painted handwriting and gang behavior. He was, however, wholly unaware of what was anticipated by the defense by way of its own rebuttal experts or other expert opinion, or additional investigation and evidence to be developed and presented on the East Side Dukes third party culpability issue. Indeed, other than third party culpability, the court was totally uninformed as to anything that was intended by way of defense of the case.

82. More importantly, when making his determination to deny second

counsel in a case where the defendant was accused of brutally slaying both his father and his mother, Judge Nuss had no way of knowing anything whatsoever concerning the nature or complexity of evidence to be presented at a penalty phase should that be necessary.

83. Nonetheless, Judge Nuss summarily dismissed the application upon his view that this was "a fairly straight-forward case with not tremendous legal issues, complex issues involved," and, curiously, upon a finding that "it is not a denial of due process for the court to refuse the appointment of second counsel" (1 CT 31-32).[27] Notwithstanding the paucity of information available to him, the judge made no inquiry whatever so as to elicit further information from Tyre about the "serious issues" in both the guilt and penalty phases alluded to in his declaration, or the nature of "all the investigation that would be necessary in a guilt phase" as noted in Tyre's oral remarks to the court. Significantly, the judge made no reference at all to Tyre's justification, or lack thereof, in his application and argument, and offered no remarks concerning Tyre's assertion of need for a second counsel due to the difficulties in preparing for both a guilt and penalty

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[27] It is respectfully asserted that the court's primary concern should have been that of applying a higher standard than bare adequacy in determining whether a second attorney may lend important assistance in the case, as emphasized by the *Keenan* decision, and not merely whether refusal to appoint a second attorney could be accomplished without risking a denial of due process.

phase in this capital case.[28] Notably, the court did not advise Tyre that based upon the insufficient showing in his moving papers and argument second counsel could not be appointed, thus suggesting that another and more thorough effort could or should be made. Rather, the court's ruling made clear that its mind was set that second counsel was not going to be afforded. In short, Judge Nuss demonstrated no particular interest in the question of whether a second attorney was needed, other than his readily apparent determination to deny the request. The reasons stated for his decision are, petitioner alleges, "inadequate as a matter of law to justify denial of [the application]." *Keenan*, *supra* at 433.

84. Petitioner is informed and believes, and thereon alleges, that the denial of second counsel in petitioner's case was consistent with a then existing arbitrary policy of the Pomona branch of the Los Angeles Superior Court to deny second counsel in virtually all capital cases as part of a general policy of reducing public expense in the prosecution of criminal cases. Petitioner is informed and believes and thereon alleges that this policy is wholly inconsistent with those of other trial courts in the State of California, where denial of an application for second counsel

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[28] In *Keenan*, this Court found that the trial court had abused its discretion in failing to address the specific reasons advanced by defense counsel in support of his motion. *Keenan*, *supra* at 434.

in a capital case is extremely rare.[29]

4) Petitioner's Fifth and Fourteenth Amendment Right To Due Process Of Law Was Violated By The Arbitrary Denial Of His Application For Second Counsel

85. The master-calendar judge's denial of petitioner's application for second counsel was uninformed, arbitrary and capricious, and constituted an abuse of discretion that denied petitioner his right to fundamental fairness and to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

86. As with any other defendant facing the death penalty in the State of California, petitioner had a "substantial and legitimate expectation" that state created procedural rights in which he had a "liberty interest," such as entitlement to second counsel, would be fully and fairly employed. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Deprivation of this state law entitlement through the summary, arbitrary and disparate treatment of his application for a second attorney was, accordingly, violative not only of state law, but also of his due process rights

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[29] In this connection, it should be noted that in *Keenan* it was observed that funds for retention of defense experts, investigators and other ancillary services must be wholly provided by the state, whereas the state reimburses counties for no more than ten percent of the cost of appointed counsel. *Keenan*, *supra* at 429.

guaranteed under the federal constitution. *Hicks v. Oklahoma*, *id.* at 346; *LaBoa v. Calderon*, 224 F.3d 972 (9th Cir.2000); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1993)("[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.") See *Siripongs v. Calderon*, 35 F.3d 1308, 1323 (9th Cir. 1994)(assumes, *arguendo*, that appellant may have had a liberty interest in having the California courts apply its statutorily mandated procedures to him in the same manner as other defendants). As expressed by the court in *LaBoa v. Calderon*, *supra* at 979, "A state violates a criminal defendant's due process right to fundamental fairness if it arbitrarily deprives the defendant of a state law entitlement." Indeed, the State of California itself recognizes that the arbitrary withholding of a non-constitutional right provided by its laws implicates federal due process rights. *People v. Webster* (1991) 54 Cal.3d 411; *People v. Marshall* (1996) 13 Cal.4th 799; *People v. Moreno* (1991)228 Cal.App.3d 564, 573; *People v. Gastile* (1988), 205 Cal.App.3d 1376, 1382.

87. Although the *Keenan* decision holds that the appointment of second counsel is not an "absolute right," and that the decision rests within the sound discretion of the trial court, *Keenan*, *supra* at 430, throughout the opinion the court stresses the "constitutionally mandated" distinction between death and other

penalties, both in terms of severity and finality, which gives rise to the need for a second attorney in such cases. As expressed by this Court, "[I]n striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime," citing *United States v. See*, 505 F.2d 845, 853, fn. 13 (9th Cir. 1974), and *Powell v. Alabama*, 287 U.S. 45, 71, 53 S.Ct. 55, 84 (1932). Indeed, under *Keenan*, upon "a showing of genuine need *a presumption arises* that a second attorney is required. *Keenan*, *supra* at 434.

88. *Keenan* furnishes little guidance as to what is required to show a "genuine need" or what constitutes "complex" issues of fact and law, other than its repeated emphasis on the inherent difficulties extant in any capital case in which counsel must simultaneously prepare for both a guilt and penalty phase. That preparation places on counsel a unique responsibility to give special attention to pretrial preparation, and to become "thoroughly familiar" with the factual and legal circumstances of the case so that a "complete and full defense" may be accomplished in both the guilt and penalty phases.

89. In reference to the specific facts of the case before it, it was noted in *Keenan* that counsel had asserted that he would probably have to interview 120 witnesses, that he anticipated extensive scientific and psychiatric testimony, that

the defendant was charged with five other crimes in other courts that the prosecution intended to offer in some phase of the proceeding, that there would be "numerous" pre-trial motions (as it turned out "numerous" meant two), and an early trial date, seven weeks following appointment.

90. Tyre's application in the instant case, grounded on petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments, and noting the Keenan "presumption in a capital case that the services of a second attorney are required," asserted that there were "serious issues" for both the guilt and penalty phases, and that there was accordingly a necessity for a second attorney "to handle different parts of both phases of this trial." (CT 901-905). Tyre's oral argument on June 12, 1991 emphasized that the case was strictly circumstantial and that "the burden of going through a guilt phase, the circumstantial evidence, the possible inferences, the possible investigation, the numerous people that were used at the preliminary hearing and all the investigation that would be necessary in a guilt phase" required that he be given the assistance of another lawyer (1 RT 31-32).

91. Although certainly not artful, Tyre's application included the bulk of the elements cited by *Keenan* as justifying the appointment of a second lawyer. He did not, of course, speculate as to the actual number of witnesses or people