who needed to be interviewed, nor did he claim that he would be filing "numerous" pre-trial motions or make reference to "anticipated extensive scientific and psychiatric testimony," whatever that means. However, Judge Nuss was clearly aware from the preliminary hearing transcript that there would be scientific and other expert evidence, including, at a minimum, that pertaining to pathology, ballistics, serology, handwriting (or in this case spray paint can writing), and, uniquely, gang behavior with regard to residential murders. The judge was also well aware from the preliminary hearing transcript that an extensive pretrial investigation would be essential in connection with the defense that the East Side Dukes, and not petitioner, had committed the murders.

92. Nonetheless, Judge Nuss made no inquiry, and asked not a single question of Tyre.[30] Instead he summarily denied the application because, at least in his opinion, the case was "a fairly straight-forward case with not [sic] tremendous legal issues." Moreover, the judge added, it would "not be a denial of *due process* for the court to refuse appointment of second counsel." Under the circumstances, this terse statement furnishes little if any information upon which

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[30] "To be sure, the request is not a model of specificity; but, given the circumstances of the case, it was a request which, at the very least, required further inquiry by the court." *Bland v. California Dpt. Of Corrections*, 20 F.3d 1469, 1475 (9th Cir. 1994)(referring to appellant's request for substitute counsel).

to gain an understanding of the basis for the judge's exercise of his discretion. It is entirely unclear, for example, what was meant by "a fairly straight-forward case," or what would constitute, in the court' s view, "tremendous legal issues." [31] It is reasonable to inquire, as well, whether the court had any curiosity about, or gave any consideration whatever to that which might be expected by way of evidence at a penalty phase.

93. In its decision denying petitioner's appeal from the refusal to appoint second counsel, this Court, relying on its decision in *People v. Lucky* (1988) 45 Cal.3d 259, 279, held that "the initial burden . . . is on the defendant to present a specific factual showing as to why the appointment of a second attorney is necessary to his defense against the capital charges," and that petitioner's application, "consisting of little more than a bare assertion that second counsel was necessary," did not present "specific, compelling reasons " for the appointment, and thus did not give rise to the *Keenan* presumption.[32]

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[31] These conclusions were at least as abstract and non-specific as Tyre's assertions of reasons for needing second counsel.

[32] The facts of *Lucky* are strikingly dissimilar from those present here. In *Lucky*, the defendant was charged with multiple armed robberies, with accomplices, that ultimately led to two murders. At trial the armed robberies, including an information charging an armed robbery in Beverly Hills following the murders, were consolidated with the murder charges. Lucky, represented by attorney Braff with regard to the Beverly Hills robbery, waived jury on those

Accordingly, there was no abuse of discretion. *People v. Staten* (2000) 24 Cal.4th at 447.

94. Thus the presumption of entitlement to second counsel in capital cases announced in *Keenan*, as modified by the later decision in *Lucky*, and employed by

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charges and was convicted by the court on the transcript of the preliminary hearing. Sentencing was delayed until the conclusion of the trial of the remaining charges. Thereafter Braff was relieved from the case, and a second attorney, Shaw, remained as Lucky's sole counsel. Overwhelming evidence was presented by the prosecution at trial, including accomplice testimony. The only evidence presented by the defense was the defendant himself, who admitted to the robberies, but claimed that one of the accomplices had committed the murders while he was outside the store. Following his conviction and sentence to death, Lucky's appeal included the contention that the trial court's refusal to permit continued dual representation (Braff and Shaw) constituted reversible error, citing *Keenan*. However, attorney Shaw "*did not assert defendant's right to a second attorney under section 987.9* and made no attempt to present the trial court with specific facts and argument to establish a presumption of genuine need for dual counsel." *People v. Lucky*, *supra* at 279-280 (emphasis added). Based upon these facts and circumstances, one in which the defendant *didn't even seek a second counsel under 987.9*, the court expanded the requirements of Keenan to now include an "initial burden" on the defendant to present a specific factual showing as to why the appointment of a second attorney is necessary to his defense in capital charges. Lucky had not, of course, met this initial burden inasmuch as *he hadn't sought second counsel to begin with*. Most importantly, what the holding in Lucky actually stands for is the simple proposition that the "abstract assertion that consolidation in capital cases inherently imposes an undue burden on defense counsel cannot be used as a substitute for a showing of genuine need." *Lucky*, *supra* at 280.

this Court in petitioner's direct appeal, has come to depend not on the substance of the matter, but, rather, upon the form and content of the application itself. The test employed pursuant to *Lucky* is not whether a second lawyer is appropriate to the circumstances, but whether the defendant's counsel is skillful enough to articulate the need sufficiently to compel the trial court to make the appointment.

95. The refusal to appoint second counsel in this case was arbitrary, uniformed, fundamentally unfair, and caused petitioner to be treated disparately from others facing the death penalty in different courts throughout the State of California. Petitioner contends that entitlement to second counsel in capital cases in California cannot constitutionally be left to the unfettered discretion and caprice of the particular trial court in which the defendant finds himself facing the potential penalty of death. Accordingly, under the totality of the circumstances presented in this case, including the nefarious influence of the PLCA contract, the trial court's decision violated petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and requires reversal of the judgment of conviction.

5) Deprivation Of Petitioner's Due Process Right By Denial Of Second Counsel Requires Automatic Reversal Of The Judgment Of Conviction

96. As a "structural error," the deprivation of petitioner's due process

rights by the arbitrary denial of his entitlement to second counsel requires automatic reversal. See, *e.g., Brecht v. Abrahamson* , 507 U.S. 619, 629-630 (1993); *Sullivan v. Louisiana*, 508 U.S. 275, 380 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Structural errors impact "the framework within which the trial proceeds," affect "the entire conduct of the trial, from beginning to end," and are "defects in the constitution of the trial mechanism which defy analysis by 'harmless error' standards." *Arizona v. Fulminante*, *id.* at 309-310. Structural error is distinguishable from "trial error" which "'occur[s] during the presentation of the case to the jury,' and is amenable to harmless error analysis because it 'may be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" *Brecht v. Abrahamson*, *supra* (quoting *Arizona v. Fulminante*, *supra* at 307-308).

97. A variety of errors implicating the Sixth Amendment right to counsel have been held to be structural, requiring automatic reversal. See, *e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963)(denial of right to counsel); *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n.8 (1984)(denial of right to self-representation); *Bland v. California State Corrections*, 20 F.3d 1469,1479 (9th Cir. 1994)(denial of right to substitute counsel of choice); *Crandell v. Bunnell*, 144 F.3d 1213,1216. (9th Cir. 1998)(forced to choose between incompetent counsel or no counsel); But

see *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002)(violation of Sixth Amendment through denial of counsel of choice at sentencing not structural error because it impacted only the sentencing phase and did not affect the conduct of the trial from "beginning to end"). The entitlement to *Keenan* second counsel violated in the instant case not only implicates the Sixth Amendment right to counsel, but is directly founded on it. *Keenan*, in recognition of the unique challenges facing a defense of both guilt and penalty faces in a death case, essentially extended the Sixth Amendment right to counsel to include, in the State of California, a presumption of entitlement to a second attorney. Accordingly, with regard to employment of the structural error doctrine, the unconstitutional denial of that right must be found to require automatic reversal as in other cases of deprivation of the Sixth Amendment right to counsel.

98. "Unlike errors the Supreme Court has subjected to harmless-error analysis, it would be virtually impossible to determine whether the denial of [second counsel] was harmless enough to warrant affirming the conviction." *United States v. Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996). Second counsel's importance cannot be defined by reference to particular trial witnesses, exhibits, rulings, or argument, and its absence cannot be "quantified and assessed" in the context of events that occurred or tangible evidence that was presented at trial to

determine its impact on the jury verdict. The benefit to the defense of a second lawyer is wide-ranging and clearly affects "the entire conduct of the trial, from beginning to end." *Arizona v. Fulminante, supra* at 309-310. Conversely, its absence seriously disadvantages the defense during the entirety of the case, from beginning to end. Valuable assistance is afforded by a second attorney at every stage of the proceeding, beginning with pretrial investigation and preparation,[33] including interviewing witnesses, marshaling evidence for both guilt and potential penalty phases , drafting motions, and determining defense strategy for the upcoming trial. At trial, second counsel aids in the "trial mechanism" from jury selection to closing argument, including examination and cross-examination of witnesses, objections to evidence, and jury instructions. All of these aspects of pretrial and trial proceedings are subject to the influence of a second attorney's effort, and any one, or all, would be subject to change and improvement as a result of that effort. Reviewing for harmless error under these circumstances would require pure speculation of a kind that would render the exercise an absurdity. The impossibility of determining whether the denial of second counsel "had

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[33] *Keenan* emphasized the importance of second counsel to the simultaneous pretrial preparation for a guilt and penalty phase of trial, during which counsel must become thoroughly familiar with the factual and legal circumstances of the case. *Keenan, supra* at 431-32.

substantial and injurious effect or influence in determining the verdict," *Brecht v. Abrahamson*, *supra*, thus requires automatic reversal of the judgment.

99. Even assuming automatic reversal is not granted, the error in failing to appoint second counsel under the facts of this case was not harmless. The failure to appoint second counsel had a substantial and injurious effect and influence on the jury's verdict.

Claim 2: **The Appointment of Counsel Under the Defense Services Contract Between the Pomona Contract Lawyer's Association and the County of Los Angeles Violated Petitioner's Right to Counsel Under the Sixth Amendment, and Right to Equal Protection and Due Process of Law Under the Fifth and Fourteenth Amendments to the United States Constitution**

100. Petitioner incorporates and re-alleges herein the allegations contained under Claim 1 *ante.*

101. During the period November 1, 1990 through October 31, 1991, there existed a defense services contract between the so-called Pomona Contract Lawyers Association ("PCLA") and Los Angeles County whereby the PCLA agreed to provide representation of criminal defendants in the East District (Pomona) of the Los Angeles County Superior Court when the Public Defender was conflicted out. (Pomona Contract Lawyers' Association Contract; Exhibit 3, pp. 7-29).

102. The appointment of John Tyre on or about April 9, 1991 to represent petitioner was pursuant to the terms of the PCLA defense services contract, and any and all compensation he received for his attorney services to petitioner was under the contract.

103. Under the PCLA contract, nine attorney signatories, including Tyre, agreed to accept representation of up to 500 cases in the East District for the flat fee of $495,833, and $991.67 for each case in excess of that number. (Exhibit 3, pp. 14-15). In fact, during the period covered by this contract, PCLA was appointed to represent indigents in 644 cases, including petitioners, and received $991.67 per case.

104. The PCLA contract did not distinguish between capital and non-capital cases. Consequently, the cost to the County of furnishing attorney representation in a death penalty case in Pomona, and the compensation received by any attorney unfortunate enough to be appointed to a death penalty case in Pomona was, effectively, the total sum of $991.67. In this connection, PCLA members were required under the contract to accept appointment in all cases unless the court made a written finding that a conflict of interest or other legal disability precluded a member from being appointed. Indeed, to insure compliance, under the contract if PCLA had refused to accept an appointment, its

members would have been liable to the County for any fees required to be paid to a non-PCLA attorney. (Exhibit 3 ,p. 18 [contract ¶ 5, "Penalty"].

105. Importantly, the law practices of PCLA members were not restricted to representation in cases appointed under the Pomona defense services contract. They were free to handle other legal matters, and undoubtedly did so in order to supplement the income they received under the defense services contract.

106. The essential impact of the terms and conditions of the PCLA contract was to compel members such as Tyre, as a condition of receiving other appointments in Pomona, to accept representation in capital cases for a sum of money so inadequate that it amounted to no compensation. [34]

107. In *Rompilla v. Beard*, 125 S.Ct. 2456, 162 L.Ed.2d 360, 73 ULSW 4522 (June 20, 2005), the United States Supreme Court very recently gave renewed emphasis to the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases as furnishing authority and guidance to determining what is reasonable with respect

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[34] It has been estimated that an adequate defense in a capital case requires an average of 1200 attorney hours, including pretrial preparation and time spent in court. (Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences (1995)* 43 Buff.L.Rev.329, 376.) Had Tyre expended the average 1200 hours work on this case, he would have earned under 83 cents an hour for his efforts.

to trial defense attorney's performance. *Rompilla*, *id.* at 2466. As the title of the guidelines reflects, they cover not only attorney "performance," but "appointment" as well, and the guidelines in effect at the time of the present case provided that, "Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.1(A)(1989), p. 12 (emphasis added.)

108. The ABA guideliness give clear recognition to the natural relationship that exists between an attorney's compensation and the quality of representation, and the special importance of that relationship in death penalty litigation. Just as clearly, this relationship was wholly ignored and violated by the PCLA contract which provided for attorney compensation that was not "a reasonable rate of hourly compensation," which was not "commensurate with the provision of effective assistance of counsel," and which did not "reflect the extraordinary responsibilities inherent in death penalty litigation."

109. Tyre's representation under the PCLA contract created a per se conflict between his interests and those of petitioner. The "extraordinary

responsibilities inherent in death penalty litigation," (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.1(A)(1989), and the necessity that a "complete and full defense" be prepared and presented both in the guilt and penalty phases, *Keenan v. Superior Court*, *supra* at 431-432 , required the expenditure of substantial time and effort in order to afford the effective representation to which petitioner was entitled under the Constitution. Receiving only the paltry sum of $991.67 for his work, Tyre's pecuniary interests were directly adverse to petitioner's constitutional rights in that any time spent on petitioner's case was essentially without compensation while concomitantly depriving Tyre of time to give to other cases for which he could and would be fully compensated.

110. Petitioner is informed and believes that due to Tyre's appointment under the PCLA contract, which was unique to the East District of the Los Angeles Superior Court, petitioner received representation inferior to that of capital defendants in other districts in Los Angeles County where conflicts counsel were compensated on a wholly different and infinitely more fair and adequate basis.[35]

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[35] 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

111. Because of the appointment of counsel under the PCLA contract, petitioner was treated disparately from others facing the death penalty in courts throughout the State of California and Los Angeles County, in violation of petitioner's fundamental due process rights and right to equal protection of the law under the Fifth and Fourteenth Amendments.

112. Petitioner further alleges that California Penal Code and other statues and rules governing the appointment of counsel in a capital case, as construed by the Superior Court of Los Angeles County and the Los Angeles County Board of Supervisors such as to permit appointment of counsel in a death penalty case under the PCLA contract, violate his equal protection rights because these statutes and rules furnish insufficient specific standards that will ensure equal application and avoid arbitrary and disparate treatment of similarly situated capital defendants such as this petitioner. See, *Bush v. Gore*, 531 U.S. 98 (2000)(absence of specific standards violated equal protection with respect to voter recount mechanisms.)

113. The conflict of interest between Tyre and petitioner resulting from

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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.)

Tyre's appointment under the PCLA contract was of sufficient magnitude to effectively constitute a denial of counsel, to bring about a failure to subject the prosecution's case to adversarial testing, and to create a circumstance in which a fully competent attorney likely could not provide effective assistance. Accordingly, prejudice may be presumed for purpose of establishing a Sixth Amendment violation. *United States v. Cronic*, 466 U.S. 648, 658-669 (1984).

114. Petitioner further contends that the conflict existing by virtue of the economic hardship to his counsel of furnishing a constitutionally adequate representation was a "structural defect" that permeated "[t]he entire conduct of the trial from beginning to end" and "affect[ed] the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Reversal is automatically required.

115. The conflict of interest between Tyre and petitioner resulting from Tyre's appointment under the PCLA contract was actual as well in that it " "adversely affected" counsel's performance and caused petitioner's counsel to render ineffective assistance. *Mickens v . Taylor*, 535 U.S. 162, 174, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); *Campbell v. Rice*, 408 F.3d 1166, 1170 (9th Cir. 2005)(en banc). Counsel's deficient performance prejudiced petitioner and undermines the confidence in the verdict. But for trial counsel's ineffective

assistance, there is a reasonable probability the result of the trial would have been different.

116. The conflict of interest between Tyre and petitioner resulting from Tyre's appointment under the PCLA contract was actual as well in that it " "adversely affected" counsel's performance and caused petitioner's counsel to render ineffective assistance as is alleged in Claim 7 of petitioner's First Amended Petition For Writ of Habeas Corpus (pp.67-79) filed in United States District Court for the Central District of California, a copy of which has been filed concurrently herewith pursuant to Rule 60(b)(3), California Rules of Court. *Mickens v . Taylor*, 535 U.S. 162, 174, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); *Campbell v. Rice*, 408 F.3d 1166, 1170 (9th Cir. 2005)(en banc). Counsel's deficient performance prejudiced petitioner and undermines the confidence in the verdict. But for trial counsel's ineffective assistance, there is a reasonable probability the result of the trial would have been different.

1. WHEREFORE, petitioner prays that this Court:

A. Issue a writ of habeas corpus to have petitioner brought before the Court to the end that he might be discharged from his unconstitutional

confinement and restraint and/or relieved of his unconstitutional sentence of death;

B. Issue an Order to Show Cause directing Respondent to show cause why petitioner should not be relieved of the illegal restraint upon his liberty;

C. Order an evidentiary hearing at which proof may be offered to support the allegations contained in this petition;

D. Order discovery on behalf of petitioner to allow full investigation and presentation of these claims;

E. Permit petitioner reasonable opportunity to supplement and/or amend the petition to include claims which become apparent from further investigation and research and to develop fully the facts and law of all the claims raised herein;

F. Permit petitioner, who is indigent, to proceed without prepayment of costs or fees and grant him authority to obtain subpoenas without fee for witnesses and documents necessary to prove the facts alleged in this petition;

G. Take judicial notice of the record on appeal and the first habeas petition file in this case;

H. Grant petitioner the right to conduct discovery including the right to take depositions, request admissions, and propound interrogatories and the means to preserve the testimony of witnesses;

I. After full consideration of the issues raised in this petition, vacate the

judgment and sentence to death imposed upon petitioner in Los Angeles Superior Court;

J. Grant such other and further relief as this Court deems just and appropriate and as justice may require.

Dated: February 24, 2006

Respectfully submitted,

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JERRY L. NEWTON
Attorneys for Petitioner
DEONDRE ARTHUR STATEN

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **DEONDRE ARTHUR STATEN,** On Habeas Corpus.	**CAPITAL CASE** S141678

Los Angeles County Superior Court No. KA006698
The Honorable Alfonso B. Bazan, Judge

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **DEONDRE ARTHUR STATEN,** On Habeas Corpus.	**CAPITAL CASE** S141678

Pursuant to this Court's order under Rules of Court, rule 60, respondent informally responds to the Petition for Writ of Habeas Corpus.

I.
INTRODUCTION

This is petitioner's third habeas corpus petition in this Court, challenging his murder convictions and death sentence. A federal habeas petition is currently pending (U.S. District Ct. Case No. CV-01-9178-GHK).

In Los Angeles County Superior Court No. KA006698, petitioner was convicted by jury of the 1990 first degree murders of his parents, Arthur and Faye Staten, with the special circumstances of multiple murder and murder for financial gain. The jury returned a penalty verdict of death, and on January 16, 1992, the trial court imposed a judgment of death. On November 9, 2000, this Court unanimously affirmed petitioner's conviction and sentence on automatic appeal. (*People v. Staten* (2000) 24 Cal.4th 434.) The United States Supreme Court denied certiorari on October 1, 2001. (*Staten v. California* (2001) 534 U.S. 846 [122 S.Ct. 109, 151 L.Ed.2d 67].)

On May 30, 2002, petitioner filed his first habeas corpus petition in this Court (Case No. S107302.) On September 10, 2003, this Court denied that petition in an unpublished order rejecting all claims on their merits and alternatively rejecting all but one claim (ineffective assistance of appellate

counsel) on the basis of untimeliness.

On December 19, 2003, petitioner filed a habeas corpus petition in the United States District Court for the Central District of California. (*Staten v. Woodford*, U.S. Dist. Court No. CV-01-9178-GHK.) While the federal petition was pending, petitioner filed his second habeas corpus petition in this Court (Case No. S121789) on January 8, 2004. After informal briefing by both parties, this Court denied the petition on July 13, 2005 on various procedural grounds and alternatively on the merits for failure to state a prima facie claim for relief.[1/]

On July 25, 2005, petitioner filed an amended federal habeas petition in the district court (under the same case number, CV-01-9178-GHK). That petition is still pending.

The current petition was filed in this Court on March 8, 2006. The petition should be summarily denied. As shown below, the two claims presented in the petition are barred by the procedural defaults of untimeliness, and successiveness (failure to raise the claims in either of petitioner's previous habeas corpus petitions). Furthermore, petitioner fails to present a prima facie case warranting discovery, an order to show cause, or further proceedings on any claim.

II.

PROCEDURAL DEFAULTS

A habeas corpus petition is subject to certain well-grounded procedural rules which may bar relief in a given claim. The "imposition of procedural bars

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1. The Court found that some claims were barred because they had been raised and rejected on direct appeal, other claims were barred because they could have been raised on direct appeal but were not, and all claims were barred as successive because they could have been raised in petitioner's first habeas corpus petition.

substantially advances important institutional goals," and serves as a "*means of protecting the integrity of our own appeal and habeas corpus process*." (*In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1, italics in original.)

The current petition raises two claims, both of which focus on allegations regarding a contract between the Los Angeles County Superior Court and a group of lawyers known as the Pomona Contract Lawyers Association (PCLA), under which the PCLA agreed to represent indigent criminal defendants in the Pomona courthouse for a certain flat fee. Claim One alleges that the terms of the PCLA contract created a financial disincentive for the superior court to appoint two trial attorneys to represent a single defendant. As a result, petitioner claims the trial court denied his request for second counsel pursuant to an "arbitrary and capricious" policy of cost-cutting, in violation of due process. (Pet. at pp. 47-73.) Claim Two alleges that the terms of the PCLA contract provided inadequate compensation to petitioner's trial attorney, creating a conflict of interest which violated petitioner's Sixth Amendment right to counsel, and which also violated equal protection. (Pet. at pp. 73-80.)

As discussed below, these claims are procedurally barred because they are untimely, and because they are presented by way of a successive habeas corpus petition.

A. Untimeliness

This Court insists that "a litigant mounting a collateral challenge to a final criminal judgment do so in a timely fashion." (*In re Sanders* (1999) 21 Cal.4th 697, 703; *In re Clark* (1993) 5 Cal.4th 750, 782-783; *In re Swain* (1949) 34 Cal. 2d 300, 304.)

The timeliness requirement not only ensures that vital evidence will not be lost through the passage of time or fading of memories, but also promotes

society's interest in the finality of criminal judgments, the public's interest in the orderly and prompt implementation of the law, and victims' (and their survivors') psychological need for repose. (*Sanders, supra,* 21 Cal.4th at p. 703.)

Pursuant to rules adopted by this Court in 1989, and subsequently amended, a habeas corpus petition in a capital case is presumptively timely if filed within 180 days of the final due date for the reply brief in the petitioner's direct appeal. If filed beyond that period, it is untimely unless the petitioner meets his burden of proving (1) absence of substantial delay; (2) good cause for the delay; or (3) any one of four recognized exceptions to the timeliness rule. (*Robbins, supra*, 18 Cal. 4th at p. 780; see Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, § 1-1.1.) Those four exceptions are:

> (i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute.

(*Id.*, at pp. 780-781.) The first three of the above exceptions are to be applied exclusively by reference to state, not federal, law. (*Id* at p. 781.)

"Substantial delay" is measured from the time petitioner or his or her counsel knew, or reasonably should have known, of the facts and legal basis for his claims. (*Robbins, supra,* 18 Cal.4th at p. 780.) "That time may be as early as the date of conviction." (*Clark, supra,* 5 Cal.4th at p. 765, fn. 5.) A

petitioner bears the burden of establishing absence of substantial delay. (*Robbins, supra*, at p. 780.) To meet that burden, a petitioner must allege, *with specificity*, when the information offered in support of his claims was first obtained. He must further show that the information neither was known, nor reasonably should have been known, earlier. (*Ibid.*) A mere conclusory declaration that the claim was recently discovered and could not reasonably have been discovered earlier does not suffice. (*Ibid.*)

"Good cause" for delay may be established where, for example, the petitioner was *diligently* investigating at least one potentially meritorious claim. (*Ibid.*) Good cause is not established by prior counsel's uncertainty about his or her duty to investigate or file a habeas corpus petition. (*Ibid.*)

Here, the petition is not presumptively timely because it was filed more than 90 days after the final due date of the reply brief on direct appeal (May 14, 2000). In fact, the petition was filed nearly six years after the final due date of the reply brief, about five years after petitioner's current attorneys were appointed for purposes of investigating his federal habeas petition (November 5 and 21, 2001 [Ex. A]), more than ten years after this Court appointed attorney Jonathan Milberg on September 7, 1995, to represent petitioner on appeal *and to investigate and present any habeas claims* in state court, and fourteen years after petitioner was sentenced by the trial court. Certainly there has been "substantial delay" in presenting petitioner's current claims.

None of the four exceptions to the timeliness requirement applies. (*Robbins, supra*, 18 Cal. 4th at pp. 780-781.) Regarding the first exception, petitioner fails to show that either the denial of second counsel or the terms of compensation for his trial attorney had any actual impact upon his trial. He therefore fails to show that either of those matters rendered his trial "fundamentally unfair." As for the second exception, neither of the two grounds asserted in the petition are claims of actual innocence. Regarding the

third exception, petitioner again fails to show that either the denial of second counsel or the terms of compensation for his trial attorney had any actual impact upon the penalty phase of his trial; hence he fails to show that the sentencer had a "grossly misleading profile of the petitioner." Finally, regarding the fourth exception, petitioner does not make a facial challenge to the constitutional validity of the statutes under which he was convicted and sentenced.

Petitioner attempts to establish "good cause" for the substantial delay on the grounds that his current attorneys, Jerry Newton and Norman James, belatedly discovered the facts regarding the PCLA contract. (See Petr's Exs. 1, 2 [Declarations of Jerry Newton and Norman James.) But the inquiry here should not be limited to whether petitioner's *current counsel* were diligent. Rather, the issue is whether *petitioner*, as represented by various attorneys over the years since his trial and sentencing, can show good cause for his delay in presenting this claim.

Petitioner has been represented by attorneys, other than his trial counsel, for over a decade. This Court appointed attorney Jonathan Milberg on September 7, 1995 to represent him on automatic appeal and state habeas corpus. A federal court first appointed petitioner's current attorneys, Mr. Newton and Mr. James, on November 5 and 20, 2001, respectively. (Ex. A.) Petitioner has, thus far, filed a series of briefs on automatic appeal, two prior habeas corpus petitions in this Court, and an original and first amended habeas corpus petition in federal court. (U.S. District Ct. Case No. CV-01-9178.) *All* of those briefs and petitions challenged the effectiveness of trial counsel. Also, petitioner's appellate briefs and his second state habeas petition specifically challenged the trial court's denial of his request for second appointed counsel. Hence petitioner's various post-trial attorneys had every reason to investigate matters pertaining to the appointment of trial counsel. *All* of those attorneys had the assistance of investigators and *all* had access to trial counsel, trial

counsel's files, and the files and records of the trial court.

Petitioner's current counsel, Mr. Newton and Mr. James, acknowledge that at some unspecified time *before* November of 2003, an attorney from the State Public Defender's Office (whom counsel believe was probably Don Ayoob) called James.[2/] Ayoob purportedly told James that he was representing another death row inmate who had been tried in the Pomona courthouse. Ayoob mentioned that the State Public Defender's Office was investigating a contract for indigent representation by conflicts counsel which may have been in effect in Pomona in the early 1990s, allegedly resulting in "systemic ineffective assistance of counsel." (Petr's Ex. 1 at ¶ 2; Petr's Ex. 2 at ¶ 3.)

Although petitioner claims the information counsel received at that time was "vague," petitioner was at least on notice of the need to investigate the matter. But it appears the only thing petitioner did to investigate the PCLA contract at that time was to ask trial counsel John Tyre about it in a previously arranged November 2, 2003 interview. Tyre purportedly denied that his representation of petitioner was pursuant to the PCLA contract. (Petr's Ex. 1 at ¶¶ 2, 3; Petr's Ex. 2 at ¶ 3.)[3/] By that time, thirteen years had elapsed since Tyre was appointed to represent petitioner at trial. Tyre had likely represented numerous criminal defendants by appointment in Pomona. It would be reasonable to expect that Tyre's recollection of the circumstances of his appointment in petitioner's case might not have been accurate. Yet petitioner's

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2. Counsel's declarations do not indicate *how long* before November of 2003 counsel this occurred.

3. In candor to the Court, respondent notes that petitioner has recently submitted in federal court an April 12, 2006 declaration by appellate counsel Milberg. The declaration states that on an unspecified date, trial attorney Tyre similarly told Milberg that his appointment was not pursuant to the PCLA contract. Respondent anticipates petitioner will likely submit that declaration in his reply to this informal response.

current counsel did not follow up with any immediate further inquiry or investigation to verify whether Tyre had been retained pursuant to the contract Ayoob had referred to. (Petr's Ex. 1 at ¶ 4.)

Counsel's declarations further state that on September 25, 2004, petitioner's attorney Newton received an email from attorney Aundre Herron of the California Appellate Project which "suggested" that petitioner's trial attorney was retained under the PCLA contract. Herron (like Mr. Ayoob from the State Public Defender's Office) was not involved in petitioner's case, but rather was investigating another, unrelated capital case. According to counsel's declarations, the September 2004 email furnished details of the PCLA contract, provided a ready-made draft of a habeas claim based on the contract, and specifically referred to petitioner's case by name. James states that some time after receiving this information, he left two or three phone messages for Tyre, but Tyre did not return his calls. (Petr's Ex. 1 at ¶ 5; Petr's Ex. 2 at ¶5.)

Petitioner's attorneys Newton and James now also represent Dellano Cleveland, another death row inmate tried in Pomona in 1991, in Cleveland's currently pending federal habeas corpus action (U.S. District Ct. Case No. CV-05-2691-SVW). Counsel's declarations state that on July 14, 2005, one day after this Court denied petitioner's (Staten's) second habeas petition, counsel received a copy of Cleveland's state habeas petitions (filed by Cleveland's previous counsel) and the exhibits thereto, including a copy of the PCLA contract. Petitioner's counsel claim that those materials caused them to realize that Tyre's appointment to represent petitioner (Staten) was indeed pursuant to the PCLA contract. (Petr's Ex. 1 at ¶ 7; Petr's Ex. 2 at ¶ 5.)

But again, petitioner was already long on notice of any possible need to investigate a PCLA-related claim. Cleveland's state habeas petition and the exhibits thereto were public records which petitioner's counsel (or any other member of the public) could have examined at any time. Petitioner does not

allege that any governmental agency hid or suppressed evidence or records regarding the PCLA contract.

By referring to the *Cleveland* case, and to the information provided by attorneys Ayoob and Herron, petitioner seems to imply that he had a right to rely on other Pomona defendants' investigations of their own cases. To the contrary, petitioner had a duty to diligently investigate his own claims. Given that attorneys from the California Appellate Project and the State Public Defender's Office, having no direct involvement or connection to petitioner's case, purportedly knew about the PCLA contract and its relation *to petitioner's case*, and were able to supply a ready-drafted habeas argument on that issue (Petr's Ex. 1 at ¶¶ 2, 5; Petr's Ex. 2 at ¶ 5), then surely petitioner's *own* habeas counsel (either state or federal) could and should have discovered the same information sooner. In other words, petitioner had no right to wait for other defendants in other cases to discover his claims for him.

Notably, Cleveland managed to file a habeas corpus petition in this Court (Case No. S123149) *raising a claim regarding the PCLA contract* on March 8, 2004. (Ex. A [front page and excerpts from Cleveland's habeas petition].) Cleveland's co-defendant, Chauncey Veasley, amended his then-pending state habeas petition to add a claim regarding the PCLA contract on September 16, 2004. (Ex. B [front page and table of contents from Veasley's amendment to habeas petition].) The murder in the *Cleveland* and *Veasley* case occurred on October 12, 1990 (*People v. Cleveland* (2004) 32 Cal.4th 704, 716), coincidentally the same night as the murders committed by petitioner. Cleveland's and Veasley's trial commenced in September of 1991 (*id.* at p. 723), close in time to petitioner's trial. Hence, Cleveland and Veasley have had about the same amount of time as petitioner to investigate and present his claims. Petitioner fails to explain why he could not have discovered his PCLA claim on

or about the same time Cleveland and Veasley did.[4/]

Finally, assuming *arguendo* that none of petitioner's various habeas attorneys (nor petitioner himself) could have discovered the PCLA contract information through due diligence before September of 2004, petitioner reasonably could have attempted to present the claim to this Court at that point, either by amending his then-pending second habeas corpus petition (Case No. S121789) or by filing a new, separate state petition to be considered concurrently with Case No. S121789. Instead, petitioner waited until March 8, 2006, eight months after this Court denied his previous habeas petition, to file the current petition presenting his PCLA contract allegations.[5/]

In all, petitioner fails to show good cause for his substantial delay in presenting his current claim. The petition should be denied as untimely.

B. Successive Petition

Before a state court will consider the merits of a second or successive habeas corpus petition, the petitioner must justify the piecemeal presentation of his habeas claims, and must demonstrate diligence in pursuing potential claims. (*Clark, supra*, 5 Cal. 4th at 774-775.) A petitioner can show diligence only if (1) the factual basis of his claim was previously unknown to petitioner at the time of the prior petition, (2) petitioner had no reason to believe the claim might be made or was unable to present the claim at the time of the prior petition, *and* (3) petitioner has asserted his claim as promptly as possible. (*Id.* at p. 775.)

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4. Respondent does not intend to suggest that either Cleveland or Veasley were diligent by not presenting their claims until March of 2004 and September of 2004, respectively.

5. Petitioner first presented the PCLA allegations *in federal court* in a first amended habeas corpus petition filed on July 25, 2005, twelve days after this Court denied the petition in Case No. S121789.

As previously noted, petitioner has long been represented by various post-conviction attorneys with the ability and motive to investigate claims regarding trial counsel's representation of petitioner. Petitioner does not allege that any agency hid or suppressed evidence or records regarding the PCLA contract. He cannot successfully justify his failure to present the PCLA contract claim earlier. Again, it is noteworthy that other attorneys unconnected to petitioner's case allegedly knew of the possibility that petitioner's attorney was retained under the PCLA contract before petitioner's own habeas attorneys "discovered" this. Dellano Cleveland, another capital defendant tried in Pomona about the same time as petitioner, managed to discover and present to this Court a habeas challenge to the PCLA contract two years ago. (Case No. S123149.) It is also noteworthy that petitioner first raised his current PCLA claim in *federal* court in a petition filed on July 25, 2005, twelve days after this Court denied petitioner's previous state habeas petition; yet petitioner never attempted to amend his prior state habeas petition to add the PCLA claim, nor did he attempt to file a new state habeas in this Court raising that claim while his prior petition was still pending, so that all of his claims could be considered concurrently.

Petitioner fails to show diligence warranting the piecemeal presentation of his claim in a third state habeas corpus petition. For this reason, the petition should be denied.

III.

THE PETITION FAILS TO STATE A PRIMA FACIE CLAIM FOR RELIEF

Alternatively, the petition should be summarily denied for failure to state a prima facie claim for habeas corpus relief.

A habeas corpus proceeding is a collateral attack upon a criminal

judgment which is presumed to be valid because of societal interest in the finality of judgments. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 697, 703; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark, supra,* 5 Cal.4th at pp. 750, 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) Petitioner bears "a heavy burden" to plead and prove grounds for relief by a preponderance of the evidence. (*In re Visciotti* (1996) 14 Cal.4th 325, 351; *In re Sasounian* (1995) 9 Cal.4th 535, 546-547; *Duvall, supra,* at p. 474.)

To satisfy his burden, petitioner must state fully and with particularity the facts supporting his claim, along with reasonably available documentary evidence, including affidavits or declarations. (*Duvall, supra,* at p. 474.) Conclusory allegations are insufficient, particularly when a paid lawyer prepared the petition. (*Ibid; People v. Karis* (1988) 46 Cal.3d 612, 656.) "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them." (*Gonzalez, supra,* 51 Cal.3d at p. 1260, italics in original; accord *Duvall, supra,* 9 Cal.4th at p. 474.)

"The state may properly require that a defendant obtain some concrete information on his own before he invokes collateral remedies against a final judgment." (*Gonzalez, supra,* 51 Cal.3d at p. 1260.) Indeed, habeas counsel has a duty to investigate factual and legal grounds before filing a habeas petition. (See *Marks v. Superior Court* (2002) 27 Cal.4th 176, 179; *In re Robbins*, *supra*, 18 Cal.4th at pp. 770, 793, fn. 15.)

A petitioner who otherwise fails to state a prima facie case may not simply rely on the hope that discovery or further investigation will reveal grounds for relief. "[T]he bare filing of a claim for postconviction relief cannot trigger a right to unlimited discovery." (*Gonzalez, supra,* 51 Cal.3d at p. 1258.) A habeas corpus petition which fails to state a "prima facie case" for relief -- that is, set forth *specific* facts which, if true, would *require* issuance of the

writ -- must be summarily denied, and creates no "cause" which would confer discovery jurisdiction. (*Ibid.*) "[T]here is no postconviction right to 'fish' through official files for belated grounds of attack on the judgment, or to confirm mere speculation or hope that a basis for collateral relief exist." (*Id.* at pp. 1259-1260; see also *Clark, supra,* 5 Cal.4th at p. 783, fn. 19.)

In evaluating the sufficiency of the showing made in a petition, this Court bears in mind that appointed habeas counsel has a duty to investigate factual and legal grounds for habeas corpus relief. (*Robbins, supra,* 18 Cal.4th at p. 781.)

> This duty requires that counsel (i) conduct a follow-up investigation concerning specific triggering facts that come to counsel's attention in the course of, among other things, reviewing the reporter's and clerk's transcripts, reviewing trial counsel's existing files, preparing or reviewing the appellate briefs, and interviewing the client or trial counsel, and (ii) timely present to this court any resulting potentially meritorious habeas corpus claims. Counsel is not expected to conduct an unfocused investigation grounded on mere speculation or hunch, without any basis in triggering fact.

(*Ibid.*) In other words, "habeas corpus is not a device for obtaining postjudgment discovery on speculative claims." (*Gonzalez, supra*, 51 Cal.3d at p. 1241, fn. 38.)

A. Claim One: Impact Of The PCLA Contract On Petitioner's Request For Second Appointed Counsel

In Claim One, petitioner alleges that the trial court's denial of his requests for the appointment of second counsel violated his Fifth and Fourteenth Amendment right to due process. Although petitioner has made similar claims before, on automatic appeal and in his second habeas petition in

this Court (Case No. S121789), his current claim adds new supporting allegations.

Those new allegations can be summarized as follows:[6/] A group of nine lawyers, known as the Pomona Contract Lawyers Association (PCLA) formed a contract with Los Angeles County to represent criminal defendants in Pomona with whom the Public Defender's Office had a conflict of interest. Petitioner's trial attorney, John Tyre, was a member of the PCLA, and was appointed to represent petitioner pursuant to that contract. The terms of the contract provided for an annual flat fee calculated at $991.67 per case. The contract did not provide for additional compensation for the appointment of second counsel, nor did it distinguish between capital and non-capital cases. In one of petitioner's requests for second counsel, Tyre specifically sought the appointment of an attorney (Gerald Gornik) who was not a member of the PCLA, in order to avoid the compensation limits of the PCLA contract, and thereby obtain funding that would "undoubtedly have greatly exceeded" the amount allowed under the contract. This created a "powerful but improper incentive for the cost-conscious Superior Court" to deny the request for second counsel. (Pet. at pp. 49-54.) The court's alleged desire to cut costs resulted in an "arbitrary and capricious" decision to deny second counsel in petitioner's case, in violation of due process, according to the petition. (Pet. at pp. 61-62.)

These allegations do not state a prima facie claim for habeas corpus relief. First, regardless of the terms of the PCLA contract, the trial court simply did not err in denying petitioner's requests for second counsel. An indigent capital defendant does not have an absolute right to the appointment of second counsel. (*People* v. *Lucky* (1988) 45 Cal.3d 259, 279; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430.) A request for a second appointed attorney must be supported by "a showing of genuine need." (*Keenan, supra*, at p. 434.)

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6. Respondent does not concede that all of these allegations are true.

A mere conclusory or "abstract assertion" by trial counsel that a second attorney would be desirable, is insufficient to show genuine need. (*People v. Lucky*, supra, 31 Cal.3d at p. 280.) In *People v. Jackson* (1980) 28 Cal.3d 264, 287, this Court found an insufficient showing of genuine need where a capital defendant "failed to furnish any specific, compelling reasons" for appointment of second counsel, but instead, "without going into any detail," simply relied upon "the circumstances of the case."

As this Court has already held on petitioner's automatic appeal, petitioner failed to make a sufficient showing of genuine need at trial to support his repeated motions for second counsel. (*Staten, supra*, 24 Cal.4th at p. 447.) This Court implicitly reiterated that finding when it rejected petitioner's second state habeas petition challenging the denial of second counsel. (Case No. S121789.)

This Court's prior rulings on this issue were correct. Petitioner's case was not unusually complex for a capital trial. Trial counsel's declaration in support of his first application for appointment of second counsel stated only the following reasons:

> 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; see also 901-905 [entire application].) Trial counsel's declaration in support of petitioner's second application for second counsel was nearly identical, except that it specifically named Gerald Gornik as the intended second attorney. (CT 906-910.) At the live hearing of his second request, trial counsel stated merely:

> 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, 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.

(RT 31-32.)[7/]

These were the very sort of conclusory or "abstract assertions" of need which this Court found insufficient in *Lucky, supra*, 45 Cal.3d at p. 280, and *Jackson, supra*, 28 Cal. 3d at p. 287. As this Court held on petitioner's appeal,

> Defendant's application, consisting of little more than a bare assertion that second counsel was necessary, did not give rise to a presumption that a second attorney was required; he presented no specific, compelling reasons for such appointment.

(*Staten, supra*, 24 Cal.4th at p. 447.)

In any event, it is highly doubtful trial counsel could have made a stronger showing of "genuine need." For a capital murder proceeding, this trial was relatively unremarkable. Although this was a circumstantial evidence case, there was no actual dispute as to any of the elements of murder. The only genuinely controverted issue was identity. The case involved no unusually complicated expert testimony or scientific evidence. Also, for a capital murder proceeding, the present case did not involve (or appear to require) an unusually large number of pretrial motions, nor was the trial unusually lengthy.

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7. As petitioner notes (Pet. at p. 54), the hearing was held in open court in the prosecutor's presence. But petitioner never objected or asked that the prosecutor be excluded. This is not surprising, as absolutely nothing of a sensitive nature was revealed at the hearing anyway.

Because the denial of petitioner's requests for second counsel were not error, the allegations regarding the PCLA contract, and the trial court's alleged concerns with cost-cutting, are simply irrelevant.

Assuming the trial court erred, petitioner cannot show he was prejudiced by the lack of a second trial lawyer. Petitioner argues the denial of second counsel was "structural error" and thus reversible per se. (Pet. at pp. 69-73.) But he cites no authority which truly stands for that proposition. The denial of a *second* attorney plainly does not amount to a wholesale denial of the right to legal representation, as guaranteed by *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799]. Like any other claim of trial error, this claim is subject to harmlessness.

Petitioner fails to demonstrate any specific instance of inadequate performance by trial counsel which might have been prevented with the assistance of a second attorney. Petitioner has presented various claims of ineffective assistance of trial counsel on automatic appeal and in his previous two habeas corpus petitions. However this Court has rejected each of them on its merits.[8/] Of course, if petitioner could set forth a meritorious claim of

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8. On appeal, this Court rejected claims that counsel was ineffective for failing to conduct a public opinion survey or to conduct a more thorough jury voir dire (*Staten, supra*, 24 Cal.4th at pp. 450-451 & fn. 2, 452), failing to challenge certain jurors for cause or peremptorily (*id.* at p. 454), failing to renew his attempt to offer "Randy's" out-of-court statement into evidence (*id.* at p. 456), and failing to request a jury instruction on absence of flight (*id.* at p. 459). In petitioner's first habeas proceedings (Case No. S107302), this Court rejected claims that trial counsel inadequately investigated a third party culpability theory and mitigating penalty phase evidence. In petitioner's second habeas proceedings (Case No. S121789), this Court rejected claims that trial counsel was ineffective for failing to make a stronger showing of "genuine need" in support of his request for second counsel was ineffective assistance (obviously, a second attorney could not have assisted counsel in that matter), and failing to adequately investigate "time-line" evidence; crime scene evidence; and third party culpability evidence.

ineffective assistance of trial counsel, his current allegations regarding the denial of second counsel and the PCLA contract would be superfluous.

For all these reasons, Claim One of the petition should be summarily denied for failure to state a prima facie claim for relief.

B. Claim Two: Violations Of The Right To Counsel And Equal Protection Caused By The PCLA Contract

In Claim Two, petitioner alleges that the terms of the PCLA contract infringed upon his Sixth Amendment right to counsel. In essence, petitioner claims that because the contract provided what he regards as meager compensation per case, trial counsel's performance was adversely affected. Petitioner also claims the contract created a per se conflict of interest in violation of the Sixth Amendment, namely, a conflict between trial counsel's pecuniary interests and petitioner's interest in a vigorous defense. Additionally, petitioner claims that because his lawyer was not compensated at the same rate as capital defense lawyers in other areas, petitioner was denied equal protection. (Pet. at pp. 73-80.)

Claim Two fails to state a prima facie claim for relief. Petitioner alleges nothing more than that his attorney freely and voluntarily entered into a contract whereby he consented to represent criminal defendants for a certain, agreed upon fee, albeit a fee petitioner considers grossly inadequate. But it is not unknown, nor has it ever been held unconstitutional, for attorneys to agree to represent criminal defendants *pro bono*, even in capital or complex cases. *A fortiori*, there is nothing illegal or unconstitutional about an attorney's agreeing to work for low pay.

Petitioner assumes that low pay always, necessarily, leads to poor quality representation by counsel. Yet the petition points to no specific instance of deficient performance by petitioner's trial attorney. As previously noted, this

Court has rejected on the merits every claim of ineffective assistance of counsel, petitioner has tendered on automatic appeal and in his two prior habeas corpus petitions. Thus, he fails to show a violation of his Sixth Amendment right to counsel. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166 [122 S.Ct. 1237, 152 L.Ed.2d 291] ["As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"], citing *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

Evidently hoping to avoid the requirement of showing prejudice or an actual impact on counsel's performance, petitioner attempts to cast Claim Two as a "conflict of interest" claim. (Pet. at pp. 76-80.) That effort is meritless.

A criminal defendant has a Sixth Amendment right to representation by counsel free of conflicts of interest. (*Wood v. Georgia* (1981) 450 U.S. 261, 271 [101 S.Ct. 1097, 67 L.Ed.2d 220]; *People v. Bonin* (1989) 47 Cal.3d 808, 834).[9/] Under the Sixth Amendment, a defendant is entitled to a presumption of prejudice if he can demonstrate that his attorney "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 349 [100 S.Ct. 1708, 64 L.Ed.2d 333]; *People v. Dunkle* (2005) 36 Cal.4th 861, 914.) An "actual conflict of interest" means "a conflict that *affected counsel's performance*--as opposed to a mere theoretical division of loyalties." (*Mickens,*

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9. Claim Two alleges that the PCLA contract violated petitioner's *federal* constitutional right to conflict-free counsel. Claim Two contains *no assertion* that the contract violated a corresponding right under the *state* Constitution. In any event, for the same reasons explained here, petitioner's allegations do not amount to even a "potential conflict" of interest cognizable under the California Constitution, nor can petitioner show such a conflict adversely affected his attorney's performance. (See *People v. Frye* (1998) 18 Cal.4th 894, 998.)