

1 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
2 **FOR THE COUNTY OF ALAMEDA**

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7 **PEOPLE OF THE STATE OF**
8 **CALIFORNIA,**
9 Plaintiff,
10 vs.
11 ,
12 Defendant.

Case No.
Special Circumstances Case

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16 **EX PARTE, CONFIDENTIAL APPLICATION FOR APPOINTMENT OF**
17 **SECOND COUNSEL (PENAL CODE SECTION 987(d));**
18 **DECLARATION OF [Attorney];**
19 **[PROPOSED] ORDER APPOINTING SECOND COUNSEL**

20 **FILED UNDER SEAL**

21
22 Attorney Name
23 State Bar No.
24 Address
25 City, California 94000
26 Phone
27
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1 Attorney Name
Office
2 Address
3 City, California 94000
Phone number
4 Attorney for Defendant

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17 **SECOND COUNSEL (PENAL CODE SECTION 987(d));**
18 **DECLARATION OF [Attorney];**
19 **[PROPOSED] ORDER APPOINTING SECOND COUNSEL**

20 TO THE HONORABLE _____, PRESIDING JUDGE OF THE ALAMEDA
COUNTY SUPERIOR COURT:

21 Defendant, _____, hereby applies for the appointment of _____ as associate
22 counsel to represent him/her in this potential capital case. This application is made pursuant to
23 California Penal Code § 987(d) and *Keenan v. Superior Court*, 31 Cal.3d 424 (1982). The
24 grounds for this request are set forth in this application and in the attached declaration of
25 _____, which is incorporated as if fully set forth herein.

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1 **LEGAL AUTHORITY SUPPORTING APPOINTMENT OF SECOND COUNSEL**

2 In *Keenan v. Superior Court*, 31 Cal. 3d 424 (1982), the California Supreme Court held
3 that California Penal Code § 987(b) authorizes funds for co-counsel in a capital case. *Keenan* sets
4 forth guidelines for the Court to follow when exercising its discretion as to the appointment of
5 second counsel. It is essential to keep in mind that a defendant charged in a capital case has his
6 life at stake and must be afforded safeguards to guarantee him a full defense. *Id.* at 430-32. The
7 importance of pretrial preparation in providing the defendant effective legal assistance should also
8 be considered; counsel must become thoroughly familiar with the factual and legal circumstances
9 of the case, and in a murder prosecution which is factually and legally complex, the task of pretrial
10 preparation places a substantial burden on an attorney. *Id.* Therefore, in assessing the need for
11 co-counsel, the court should focus on the complexity of the issues involved in the case and the
12 importance of pretrial preparation. *Id.*

13 Subsequent to the decision in *Keenan*, the legislature added subdivision (d) to Penal Code
14 § 987, which states that the Court may appoint an additional attorney as co-counsel in a capital
15 case when the court is convinced that “the appointment is necessary to provide the defendant with
16 effective representation.” This section also provides that any application filed in connection with
17 an appointment for second counsel “shall be confidential and privileged.” *See also Gilbert v.*
18 *Superior Court*, 169 Cal.App. 148, 152 (1985).

19 Since *Keenan* was decided, the appointment of second counsel from the outset in potential
20 capital cases has become the standard of practice. In 1989, the ABA approved the first *ABA*
21 *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*
22 [hereafter *Guidelines*]. The ABA House of Delegates overwhelmingly passed a revised edition of
23 the *Guidelines* on February 10, 2003. *Guideline 4.1* states that “[t]he defense team shall consist of
24 no fewer than two qualified attorneys... .”

25 The 2003 *Guidelines*¹ are now recognized as the standard of care in the defense of death
26 penalty cases. The ABA Guidelines are regularly cited by state and federal courts, including the

27 _____
28 ¹ The 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases can be
found on the ABA Death Penalty Representation Project’s website at
<http://www.abanet.org/deathpenalty/resources/home.shtml> and at 31 Hofstra L.R. 913 (2003).

1 U.S. Supreme Court, to assess counsel performance and ensure adequate funding and resources for
2 the defense team effort.² Most notably, in 2003, the U.S. Supreme Court granted a new sentencing
3 hearing in the case of *Wiggins v. Smith* (2003) 539 U.S. 510, after finding that defense counsel’s
4 conduct “fell short of the standards for capital defense work articulated by the American Bar
5 Association (ABA) – standards to which we have long referred as ‘guides to determining what is
6 reasonable.’ ” *Wiggins v. Smith*, 539 U.S. 510 at 524. The Supreme Court concluded that
7 counsel’s performance in that case fell below the *Guidelines*’ “well-defined norms.” Similarly, in
8 2005, the U.S. Supreme Court reversed and remanded the case of *Rompilla v. Beard* (2005) 545
9 U.S. 374, for a new sentencing hearing after finding that Rompilla’s defense counsel was
10 ineffective. The Court cited to § 10.7 of the ABA Guidelines in reaching its conclusion that
11 counsel failed to render effective assistance. *Rompilla v. Beard*, 545 U.S. at 387. According to
12 the ABA, 65 other federal courts and 27 state courts have relied on the *Guidelines* in determining
13 the appropriate standard of care in death penalty cases.³ Several state jurisdictions, including
14 Texas, Arizona and Nevada, have also adopted the *Guidelines* as the standard for death penalty
15 defense in their state.⁴

16 In California, the bi-partisan California Commission on the Fair Administration of Justice
17 recently criticized the failure to adhere to the *Guidelines* in California’s trial courts. *See*
18 California Commission on the Fair Administration of Justice Report and Recommendations on the
19 Administration of the Death Penalty (June 30, 2008), pp. 39-43.⁵ The Commission included 22
20 highly respected members of California’s criminal justice community, including 11 law
21 enforcement officers or prosecutors.⁶ In its comprehensive analysis of the problems with
22 California’s death penalty, the Commission noted that 70% of California death penalty cases are
23 reversed in federal court, most frequently because of ineffective assistance of counsel. *Id.* at p. 27.
24 The Commission identified the failure to provide sufficient resources to the defense, and

25 _____
26 ² Visit <http://www.abanet.org/deathpenalty/resources/home.shtml> for a continually updated list of cases that cite to the
ABA Guidelines.

27 ³ Available at
http://www.abanet.org/deathpenalty/resources/docs/List_of_ALL_Cases_that_cite_to_GL_JUNE_2008.doc.

28 ⁴ See http://www.abanet.org/deathpenalty/resources/docs/Guidelines_Implementation_Fact_Sheet08.doc.

⁵ Available at <http://ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>.

⁶ See <http://ccfaj.org/membership.html>.

1 specifically the failure to appoint two attorneys from the beginning of every potential capital case,
2 as the cause of this high level of reversals for ineffective assistance. *Id.* at pp. 28-31. The
3 Commission noted that public defender offices normally appoint two attorneys from the outset of
4 the case, as is the practice in Alameda County. The Commission then stated:

5 Where private counsel is appointed, however, only one lawyer is ordinarily
6 appointed until the decision is made to file the case as a death case, which will not
7 occur until after the preliminary hearing, as much as one year later. This may
8 delay the mitigation investigation to the prejudice of the defendant. The results of
9 mitigation investigations are frequently employed to persuade the district attorney
10 not to seek the death penalty. If the investigation is delayed until second counsel
11 is appointed, the decision to seek the death penalty has already been made.

12 *Id.* at p. 29. The Commission unanimously recommended full compliance with the *Guidelines* at
13 the trial level, specifically *Guideline* 4.1. *Id.* at pp. 42-43. The Commission stated unequivocally
14 “[t]he Guidelines should be met in every potential capital case from the **outset.**” *Id.* at p. 43
15 [emphasis added]. Finally, the Alameda County Bar Association recently echoed the findings of
16 the Commission, adopting a resolution calling for full adherence to the *Guidelines* in all death
17 penalty cases.

18 Accordingly, appointment of second counsel in this case is warranted and necessary to
19 ensure that counsel meets the standard of care required of an attorney defending a capital case.

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DATED:

Respectfully submitted,

**DECLARATION OF _____ IN SUPPORT OF
APPLICATION FOR APPOINTMENT OF SECOND COUNSEL**

I, _____, declare and state as follows:

1. I am an attorney licenced to practice law in this Sate and I have been appointed by the Court to represent the defendant, _____.

2. _____ is, and at all times during the pendency of this case has been, without funds to conduct his/her own defense, “unable to employ counsel” within the meaning of Penal Code Section 987, and “indigent” within the meaning of Penal Code Section 987.9.

3. The complaint in this case charges _____ with [add charges]

4. The case is currently assigned to Deputy District Attorney _____. _____ has stated to declarant that the District Attorney’s Office may choose to seek the death penalty in this case. The District Attorney’s Office will not formally make a decision until after the preliminary hearing.

5. Prior to deciding whether to seek death, the District Attorney’s Office will request a submission from defense counsel, setting forth any reason why death would not be appropriate. Declarant is ethically obliged to conduct an extensive investigation into the facts of the case and the defendant’s life history immediately, prior to the preliminary hearing, in order to prepare a submission for the District Attorney that provides all relevant information that might mitigate against seeking death in this case.

6. Based on the discovery available to declarant, [brief statement of relevant facts].

7. This case presents complicated issues of fact and/or culpability, such as [statement of anything about the case making it more time intensive or complicated]. It would not be possible for counsel by himself/herself to competently perform the intensive investigation needed before the preliminary hearing and before the District Attorney makes a decision about whether to seek death in this case.

8. Declarant has represented defendants in [number] special circumstance cases. In each of them, the legal issues were extremely complex and the volume of paperwork has been extraordinarily large. It is anticipated that this case will run true to form and generate thousands of

1 pages of files. Although legal research has barely begun in this case, it is already apparent to
2 declarant that the following motions may have to be raised and briefed at the preliminary hearing:
3 (1) demurrer to complaint; (2) motion for discovery of charging policy and homicide data; (3)
4 motion to dismiss special circumstance allegation as discriminatorily, arbitrarily, and
5 disproportionately applied; (4) motion to exclude confessions for *Miranda* violations and
6 involuntariness; (5) motion for discovery pursuant to *People v. Memro* (1985) 38 Cal.3d 658; (6)
7 motion to suppress evidence pursuant to Penal Code Section 1538.5; and (7) motion to dismiss
8 special circumstance allegation for insufficiency of the evidence.

9 Other issues may become apparent after receipt by the defense of additional investigative
10 reports and documents. Given the extensive partial list of pretrial motions and case preparation that
11 is necessary, extensive legal research and writing will be required. In addition to motion work, it
12 will be necessary to spend a considerable amount of time organizing and maintaining the files. It
13 would not be possible for counsel to competently perform these enormously, time-consuming tasks
14 alone.

15 9. For these reasons, second counsel is needed in this case now.

16 10. _____ is willing to accept appointment as second counsel for
17 _____. He/she is extremely well qualified for appointment in this case. [brief statement
18 of qualifications]

19 11. I request that the court authorize _____'s services be compensated at the
20 standard rate used by the Alameda County Indigent Defense Panel to compensate attorneys
21 appointed in special circumstances.

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

23 Dated this ____ day of _____, at _____, California

24 Attorney Name
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14 **ORDER OF THE COURT APPOINTING SECOND COUNSEL PURSUANT TO PENAL**
15 **CODE SECTION 987(d)**

16 GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that _____ is
17 appointed as second counsel in the above-entitled case, said appointment to be effective forthwith.
18 Payment shall be provided on a monthly basis, pursuant to Penal Code section 987(d), consistent
19 with the standard of payment by the Alameda County Indigent Defense Panel for cases in which
20 special circumstances are charged.

21 DATED:

22
23 _____
24 JUDGE OF THE SUPERIOR COURT
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