No.

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

RAYMOND GARDNER

Petitioner,

vs.

SUPERIOR COURT, COUNTYOF CONTRA COSTA,

PETITION

To the Honorable Presiding Justice and Associate Justices of the Court of Appeal of the State of California:

Relief Sought in Petition

Petitioner respectfully petitions this court for a WRIT OF MANDATE directed to respondent court, requiring the court to set aside its order denying funding under Penal Code § 987 and Penal Code § 987.9 and requiring the Superior Court to entertain such applications as properly filed and to grant or deny such requests on their merits.

ISSUE PRESENTED

When a case is charged as a murder with special circumstances and qualifies for a daily transcript pursuant to *Abernathy v. Superior Court*, (2007) 157 Cal. App. 4th 642, is the defendant entitled to submit funding requests to the Superior Court pursuant to Penal Code § 987 et seq..

The Superior Court of Contra Costa County has taken the position that until the prosecution has specifically elected to seek death, the mere fact that the case is charged as murder with special circumstances does not trigger the funding provisions of § 987 et seq.

The Conflicts Program of Contra Costa County has taken the position that their contract does not provide for payment of investigators, paralegals, Keenan counsel, experts etc. once a case is charged as a capital case.

Defendant and Petitioner has taken the position that he needs an investigator and other services and he cannot go forward with this special circumstances case with without these services.

Defendant and Petitioner believe that the Superior Court is incorrect in its assessment and that funding pursuant to §§'s 987 et seq is now appropriate.

Procedural Status

1.

Petitioner is charged by a First Amended Complaint with premeditated murder. There are two special circumstances charged, 190.2 (a)(17) (felony murder robbery) and 190.2 (a)(17) (felony murder burglary). (Exhibit 1)

2.

Daniel Horowitz was appointed to the case on June 17, 2009. (Declaration of Daniel Horowitz)

3.

On June 22, 2009, Daniel Horowitz filed a Request for Investigative Funding and a Request for Paralegal Funding. On June 30, 2009 he filed a Request for Appointment

of Keenan Counsel. The cover page for these confidential filings are attached as Exhibit 2.

4.

Prior to Horowitz taking over as counsel, there had been no requests for funding made in the case by prior counsel. The appointment of Horowitz and prior counsel was through the Contra Costa County Criminal Conflicts Program. The Conflicts Program via its director, David Briggs does not pay for any costs, investigation, paralegals or experts in cases that are charged as murder with special circumstances. This is based upon their contract with the county and the belief of David Briggs that 987/987.9 funding applies to such cases. (Declaration of Daniel Horowitz)

5.

The Superior Court of Contra Costa County has taken the position that the funding provisions of *Penal Code* § 987 et seq do not apply in a capital murder case unless and until the prosecution has made a formal election to seek death. That decision of July 2, 2009 sets forth both the denial and the legal basis for the denial. It is attached hereto as Exhibit 3.

6.

On July 10, 2009, defense counsel asked the conflicts program director, David Briggs to provide the funding. He refused as the contract with the county did not provide

for this and as he (and defense counsel) believed that 987/987.9 funding should apply. (Declaration of Daniel Horowitz)

7.

Exhibit 4 is a document that defense counsel filed with the Superior Court disagreeing with the legal basis for the denial. It is titled "Renewed Request for Funding." It was filed on July 15, 2009.

8.

Exhibit 5 is a "Supplement to Renewed Request for Funding." This request attached *Abernathy v. Superior Court* 157 Cal App 4th 642 (2007). It was filed July 16, 2009.

9.

Exhibit 6 is a document filed in with the Superior Court and copied to the District Attorney. It is titled, "Motion for Stay of Proceedings; For Funding; Hearing on Constitutional Harms Caused by Failure to Fund Investigation and Ancillary Services. It was filed July 28, 2009 (and will be heard at the time of the preliminary hearing (October 13, 2009) It included copies of People v. Doolin and Abernathy v. Superior Court (these are not attached to Exhibit 6)

10.

On July 30, 2009 Judge O'Malley denied the renewed request and addressed the additional legal issues raised by defense counsel. (Exhibit 7)

NEED FOR IMMEDIATE RELIEF / IAC CONTENTION

11.

On October 13, 2009 Raymond Gardner's preliminary hearing is set. Because the disagreement between to funding "sources", he has an attorney but no ancillary services. As set forth in the Declaration of Daniel Horowitz, Raymond Gardner is receiving constitutionally ineffective assistance of counsel because of the inability to hire an investigator.

12.

The Declaration of Daniel Horowitz attached hereto, asserts that without investigation, he cannot provide constitutionally effective assistance of counsel at the preliminary hearing. He also indicates that if the case proceeds as a death penalty case, he will need funding for a paralegal and Keenan counsel. However, these claims are included herein not for the legal issues but to emphasize and make a record so that if there is a death verdict, all parties are on notice that the battle between the conflicts program and the courts does (and *has*) ultimately impact the quality of representation.

13.

Petitioner believes that this matter should be reviewed by writ. Defendant has suffered harm to his defense and if required to proceed to preliminary hearing will suffer

further harm. A post conviction review is unlikely to be a satisfactory way of determining what work should have or could have been done by an investigator, paralegal and Keenan counsel. Also, all parties likely agree that investigation is part of an effective defense. For example, in *People v. Ledesma* (1987) 43 Cal.3d. 171. In Ledesma, the court that a defendant "can reasonably expect that in the course of representation his counsel will undertake only those actions that a reasonably competent attorney would undertake. But he can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation."

14.

The Court of Appeal, First Appellate District is the proper court for this petition as all matters herein took place in Contra Costa County and the case is properly filed in the Contra Costa County Superior Court.

15.

This court granted review in *Abernathy v. Superior Court* (2007) 157 Cal. App. 4th 642 as it addressed the same issues in the context of daily transcripts. Petitioner respectfully submits that the issue in the present case is at least as compelling and immediate as the need for a daily transcript.

WHEREFORE, Petitioner prays that:

1. A peremptory Writ of Mandate be issued directing the respondent court to set aside its order denying funding under Penal Code § 987 and Penal Code § 987.9 and requiring the Superior Court to entertain such application as properly filed and to grant or deny such requests on their merits.

or

2. An alternative writ of mandate issue directing and compelling respondent court to show cause before this Court, at a specified time and place, why respondent court should not be required to vacate its order and thereafter entertain such application as properly filed and to grant or deny such requests on their merits.

3. For such other and further relief as the court deems appropriate and in the interests of justice.

Dated: August 22, 2009

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Daniel Horowitz
Attorney for Petitioner

DECLARATION OF DANIEL HOROWITZ IN SUPPORT OF PETITION

I, Daniel Horowitz declare as follows:

Qualification of Affiant

1. I have am an attorney, licensed to practice in the State of California since 1980.

2. I am certified as a criminal law specialist by the State Bar of California.

3. I have completed over 150 jury trials including several dozen murder trials.

4. I have tried five death penalty cases which included six penalty phase trials.

5. I have been on the capital case panel for Alameda County and the United States District Court, Northern District of California and I am presently on that panel for Contra Costa County.

6. I am admitted to and have submitted briefs in and/or petitions to, the United States Supreme Court, Ninth Circuit Court of Appeal, California Supreme Court and numerous California Courts of Appeal.

7. I have published articles in periodicals by California Attorney's for Criminal Justice, California Public Defender's Association, CEB and numerous other journals.

8. I have been a professor of trial law at Armstrong College of Law, and an Associate Professor teaching criminal law at Cal State Hayward (Paralegal program). I have lectured for the Alameda County Bar Association, Contra Costa County Bar Association, at the CACJ-CPDA Death Penalty seminar in Monterey, California, and at various seminars sponsored by the Federal Public Defender, Northern District of California. I also have lectured at other legal related conferences, including several SEAK National Expert Witness Conferences.

9. I am listed as a consultant in the CEB publication, Criminal Practice & Procedure. I have been a member of the liaison committee between the criminal defense bar and judges and a member of the technology committee for the U.S. District Court, Northern District of California. I was one of the committee members who developed the

protocol for computerized document exchange in federal “mega-cases” for the Northern District of California.

10. The nature of my practice has given me extensive experience in evaluating case budgets and litigation plans. Besides the death penalty jury trials referenced above, I have represented defendants in about 20 cases charged as capital crimes in addition to those that went to trial as death penalty cases. In each such case I charted out a plan of defense at both penalty and a potential guilt phase.

11. It is my opinion that without an investigator and without funding for reasonable additional services, I cannot render constitutionally effective assistance of counsel. Even at the preliminary hearing stage and in preparation for that hearing, the lack of funding for an investigator has left me unprepared for the hearing. I cannot provide constitutionally adequate representation without investigation. I understand that the prosecution could proceed by indictment. However, questioning of witnesses at a preliminary hearing has significant dangers. Witnesses may be unavailable for trial and the prosecution may attempt to read their preliminary hearing testimony at trial. At a grand jury the prosecution has an obligation to present exculpatory evidence, if we proceed by preliminary examination, I have that burden mitigated somewhat by Brady obligations.

12. I am appointed on this case through the Contra Costa County Conflicts

Program. I was appointed on June 17, 2009 after prior counsel declared a conflict. Prior to my taking over as counsel, there had been no requests for funding made in the case by prior counsel. The Conflicts Program as per a discussion that I had with its director, David Briggs, does not pay for any costs, investigation, paralegals or experts in cases that are charged as murder with special circumstances. This is based upon their contract with the county and the belief of David Briggs that 987/987.9 funding applies to such cases. I did ask David Briggs to authorize the Conflicts Program to pay for investigation in this case. This was on July 10, 2009 and David Briggs was unable to authorize payment for the reasons set forth herein.

13. I am paid an hourly fee for my work on this case and that fee is not impacted by the issues in this petition. I have paid for the investigation through late June, 2009 but have not paid for nor authorized investigation after that date. I have not yet been reimbursed for the expenses.

14. The panel does not pay for paralegal services. If this case were an LWOP only case, I would not receive funding for paralegal services. However in death cases, I have always (prior to this case), used a paralegal. In death cases I have used a database system (since about 1990). We are taught to use these databases at capital case training and I agree that they should be used. I use paralegals to do a significant portion of the database work. While using databases is not an absolute for the standard of care in death penalty cases, it is highly recommended by people who regularly do death penalty defense and it

is regularly taught at death penalty seminars. I have also conducted trainings in the use of databases. I have conducted these trainings several times for the federal public defender's office and for the Contra Costa County Bar Association.

15. A paralegal also handles routine interviews, review of medical and school records and other matters which are time consuming and are effectively dealt with by someone other than me. They are paid approximately 1/2 my rate so ultimately there is a cost savings to the county. In addition, I do not have the time to personally do work that is specialized but does not require a law degree. In non-capital cases that are conflict program cases, I simply pay for the paralegal services. In capital cases however, the amount of paralegal work is so large that using a paralegal without being compensated is simply not practical. The same is true for paying for an investigator out of pocket.

16. The use of Keenan counsel meets with some resistance at times and the reason I asked for Keenan counsel in the Gardner case must remain confidential. I am simply asking that the Superior Court be ordered to consider my requests for investigation, a paralegal and Keenan counsel. I am not asking that this Court of Appeal interfere with the Superior Court's exercise of discretion with respect to the merits of my request. (Although by my statement that the lack of an investigator is IAC, I understand that I am to some degree flagging that issue.)

17. I have personally prepared this petition. I know its contents and the facts set forth herein are true and correct.

I declare the above to be true and correct under penalty of perjury. Executed this August 22, 2009 at Lafayette, California.

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Daniel Horowitz

POINTS AND AUTHORITIES

ABERNATHY v. SUPERIOR COURT SHOULD GOVERN THE OUTCOME OF THIS PETITION

In *Abernathy v. Superior Court* (2007) 157 Cal. App. 4th 642 this Court of Appeal held that:

> We conclude that Penal Code section 190.9, subdivision (a)(1) requires the preparation and certification of daily transcripts of the preliminary hearing in this case which is one in which a death sentence may be imposed. On this record, defendant Abernathy's request for the transcripts must be granted. (*Abernathy v. Superior Court*, 157 Cal. App. 4th 642, 650 (Cal. App. 1st Dist. 2007))

This holding should be applicable to *Penal Code* § 987 et seq. The Superior Court distinguishes *Abernathy* because "...there was a statutory basis for the court's decision in Abernathy, unlike the present case." (Exhibit 7, p. 2) Absent the direct applicability of *Abernathy*, the Superior Court states that "...987.9 is limited to actual capital cases". (Exhibit 7, p. 2)

Petitioner respectfully disagrees. Footnote 5 of *Abernathy* seems to address whether *Penal Code* § 190.9 has a different definition of capital case from the 987 et seq

statutes.

> Section 987.9 (requiring funds for indigent defendants in capital cases), for example, does not require notice from the prosecutor. But the district attorney's voluntary formal notice declining to seek the death penalty precludes authorization of such funds. (Sand v. Superior Court, supra, 34 Cal.3d at p. 575.) ...
>
> (*Abernathy* fn. 5)

Since 987.9 does not require notice from the prosecutor, how then can the Contra Costa County Superior Court condition funding on notice from the prosecutor? While DA Kochly would never intentionally take unfair advantage of the local practice, absent the individual personalities and issues of trust, in the abstract a prosecutor could choose never to declare and we could be forced proceed to trial without an investigator, without a paralegal, no Keenan counsel and no funding for experts or other services.

As the court noted in the remainder of fn. 5 in *Abernathy*, "Subdivision (a)(2) of section 190.9 specifies certain procedures when the prosecutor gives notice of intention to seek the death penalty; however, it does not require such notice."

PETITIONER DISAGREES WITH THE SUPERIOR COURT'S INTERPRETATION OF THE CASES THAT IT CITES

Petitioner disagrees with the legal arguments of the Superior Court as well as its interpretation of the cases that it cites. The Superior Court relies on its interpretation of *Sand v. Superior Court* (1983) 34 Cal. 3d 567, making the point that funding is not

required when special circumstances are charged but death is not being sought. Petitioner has no quarrel with that point but *Sand* is distinguishable from the present case because in *Sand* "the prosecutor stated on the record that he would not seek the death penalty, but would ask for a sentence of life imprisonment without possibility of parole in the event special circumstances were proved." (*Sand* 481-2)

The issue in *Sand*, unlike Gardner's petition, was whether all special circumstance cases qualified for 987.9 funds or just those where death was possible. In petitioner's case, the prosecution has not taken death off the table. Petitioner has a different understanding as to what *Sand* held with respect to cases where death is a possible sentence. Petitioner believes that *Sand* supports the position that 987.9 funding is appropriate.

> Arguably the term "capital case" might be understood either to define the nature of the offense charged -- i.e., murder with special circumstances -- or to describe the **permissible** punishment -- i.e., that the death penalty **may be** imposed.
> (*Sand v. Superior Court*, 34 Cal. 3d 567, 569 (Cal. 1983), emphasis added)

The Superior Court also relies upon *Corenevsky v. Superior Court* (1984) 36 Cal. 3d 307, 317 but Petitioner also interprets *Corenevsky* in a different light than the Superior Court. Petitioner notes that in *Corenevsky* there is an emphasis on the fact that *Sand* applies when death "will not be sought".

> Moreover, our recent decision in Sand v. Superior Court (1983) 34 Cal.3d 567 [194 Cal.Rptr. 480, 668 P.2d 787], explicitly holds that "[in] those murder

> cases . . . **in which the death penalty will not be sought**, even though the offense charged is statutorily punishable by death, section 987.9 is inapplicable." (Id., at p. 572.)
> (*Corenevsky v. Superior Court*, 36 Cal. 3d 307, 317 (Cal. 1984), emphasis added)

This seems to underscore petitioner's point that when death is possible, 987 et al are triggered.

WARD IS NOT AUTHORITY FOR THE POINT CITED

The language (dicta?) in *People v. Ward* (2005) 36 Cal. 4th 186, 198 is the most favorable language for the Superior Court's position.

> Section 987, subdivision (d) provides for additional counsel only "[i]n a capital case," **i.e., one in which a special circumstance has been alleged and the prosecution seeks the death penalty**. Defendant's trial for the killing of Ronald Stumpf involved no special circumstance allegations.
> (*People v. Ward*, 36 Cal. 4th 186, 197 (Cal. 2005), emphasis added)

The literal reading of that sentence can be that the prosecution must "seek the death penalty". The Superior Court certainly feels this way as it stated that "...the law could not be clearer: funds ... are available only in actual capital cases." (Exhibit 7, Decision 7/2/09 p. 2, Par. 3)

The difficult is in defining "actual capital case". *Ward*'s literal language would require the prosecution to be seeking death in some affirmative manner. Does this mean that if Mr. Gardner pled guilty today, the prosecution could not seek death because it hadn't made this an "actual capital case" ? One doubts that the district attorney's

association would endorse that view.

The language in *Ward* is not a holding nor essential to the holding. It was part of a loosely worded overview of *Sand* to help explain why a simple murder case without special circumstances didn't qualify for 987.9 funding. This quick and almost offhand reference does not change the holding and meaning of *Sand*.

ABERNATHY IS NOT DISTINGUISHABLE

The 987 line of cases help ensure 6th Amendment compliance. As *Abernathy* notes at p. 649-650 there are several reasons that *Penal Code* § 190.9 was enacted. In part it facilitates prompt appellate review but the case also cites the benefits to the litigants noting that "a daily transcript will assist both the prosecution and defense in the presentation of their cases. It would enable the attorneys to concentrate on what the witnesses are saying, rather than taking notes..." (*Abernathy v. Superior Court,* 157 Cal. App. 4th 642, 649 (Cal. App. 1st Dist. 2007))

So while *Penal Code* § 190.9 has a slightly different purpose than the 987 provisions which are purely to benefit the defense, ultimately they both address the same issue, when should public money be directed toward a case where the charges permit a death sentence.

None of the differences between § 190.9 and the § 987 et seq statutes should require a variation in the definition of the term, capital case.

The legislature does not seem particularly concerned with the definition of a

capital case. There have been no amendments

since *Abernathy* (2007) or *Doolin v. Superior Court* (2002, Cal App 5th District) 99 Cal App 4th 1311 where a similar conclusion was reached. If the appellate courts were interpreting the statute more broadly than the Legislature intended, one would expect that an amendment would clarify this point. Instead, the statutes remain unchanged with respect to how they reference capital cases.

§ 987(d) simply states that "[i]n a capital case, the court may appoint an additional attorney". The meaning of "capital" case is not further defined. § 987.9 (a) simply states "In the trial of a capital case". The language in *Penal Code* § 190.9 is somewhat different reading, "[i]n any case in which a death sentence may be imposed". However, this is really the standard definition of a capital case.

Petitioner submits that the Superior Court's attempt to distinguish *Abernathy* on the differences in language between these statutes is not supported by any legislative intent or any meaningful differences between 190.9 and 987/987.9.

Conclusion

The county has to pay for the costs associated with this case. Whether the county pays via the Superior Court or via the Conflicts Program is a political issue that Raymond Gardner cannot effectively mediate. The county is paying for this writ and for all of the papers filed leading up to this writ. If the Superior Court prevails and the Conflicts Program doesn't pay, the only remedy would seem to be to file a motion for

funding pursuant to Penal Code § 987.3/987.8 which if granted would require funding by the county.

Petitioner recognizes that even though the same pocket ultimately pays the bill the legal issues are important to resolve. Petitioner asks that the issues be resolved in this proceeding and by the court accepting and ruling on this writ petition.

Dated: August 22, 2009

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Daniel Horowitz