SUPREME COURT COPY

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In the Supreme Court of the State of California

In re

KENNETH EARL GAY,

On Habeas Corpus.

CAPITAL CASE

Case No. S130263

SUPREME COURT
FILED

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Deputy

Los Angeles County Superior Court, Case No. A397702
The Honorable Lance A. Ito, Judge

RESPONSE TO PETITIONER'S OBJECTIONS

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INTRODUCTION

This brief responds to petitioner's Objections to the Referee's Report. No attempt is made to reply to every objection lodged by petitioner. The respondent addresses the Referee's Report at length in the previously filed Brief on the Merits.

The focus of this proceeding has been and remains defense counsel Daye Shinn, whose serious misconduct, unrelated to the adequacy of his trial defense of petitioner, was addressed both by his disbarment and in this Court's granting of penalty-phase relief to petitioner. In granting penalty relief, but affirming petitioner's conviction, this Court recognizes that petitioner needed to—but could not—demonstrate that the proof of petitioner's guilt was lacking, or that any of Shinn's alleged deficiencies played any role in the jury's determination that petitioner was one of the killers of Officer Paul Verna.

But petitioner continues to assail Shinn as a thoroughly disreputable character who, by implication, could not have adequately defended anyone in any case. The overarching theme of petitioner's arguments is that the untrustworthy and "disengaged" Shinn willfully failed to produce any evidence that would have exonerated petitioner at his original capital murder trial in 1985. In support of that claim, however, petitioner refers to the same evidence and theories evaluated by Shinn at the 1985 trial. And even after 31 years of post-trial investigation and a dozen different lawyers who have succeeded Shinn in advocating on petitioner's behalf over the last three decades, the evidentiary picture has remained the same. There is no "new evidence" casting doubt on petitioner's guilt, and never has been. Petitioner continues to rely exclusively on the investigation conducting in the aftermath of the murder in 1983. Try as he might to vilify Shinn and all of Shinn's work, petitioner produces nothing new that alters the evidentiary portrait of the crime. The jury was presented with varying eyewitness

accounts of the shooting, and Shinn capably focused the defense on the alleged lack of proof that petitioner was a shooter and that petitioner did not share the shooter's intent. The original trial eyewitnesses were aggressively questioned by new counsel for petitioner at his penalty retrial. A new jury imposed the death sentence on petitioner. A different group of attorneys for petitioner again challenged the testimony of the original trial witnesses at the 2014 Reference Hearing. The Referee appointed by this Court conducted a lengthy evidentiary hearing and heard testimony from 29 witnesses during proceedings that lasted for several months. But following the most recent evidentiary hearing, the Referee credited the original witnesses and made no findings supportive of any of the witnesses who were not called at the original trial. On the contrary, the Referee made numerous findings that are supportive of Shinn's original defense, and made no findings that would support granting relief to petitioner.

None of petitioner's Objections to the Referee's findings, whether considered individually or cumulatively, undermine confidence in the Referee's assessment or the judgment of conviction. The evidence continues to make clear that petitioner was the "second shooter" in the murder of Officer Verna.

I. PETITIONER HAS FAILED TO FULFILL HIS BURDEN TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL

A. *Question 1, Part 1.* What Actions Did Petitioner's Trial Counsel, Daye Shinn, Take to Investigate a Defense at the Guilt Phase of Petitioner's Capital Trial That Petitioner Did Not Participate in the Murder of Officer Verna?

1. *Petitioner's Objection to the Date Investigator Payne Began Working on Petitioner's Case*

Petitioner objects to the Referee's conclusion that Defense Investigator Douglas Payne became involved in petitioner's case in August

of 1983, and argues Payne did not begin investigating the case until May of 1984. (Petitioner's Objections ("PO") 6-7.) Petitioner seeks to downplay Payne's involvement by claiming that Payne's only work prior to May of 1984 was to "sit with Shinn at the preliminary hearing and, perhaps, assist with taking notes." (PO 6.) Stated another way, Payne was actively working on petitioner's behalf—even before he started billing on the case—by attending the preliminary hearing in 1983 and undoubtedly beginning to collaborate with Shinn long before the trial. The measure of Payne's work is not based on the date he became involved in the case. It is based on the nature and quality of his work. The Referee evaluated and credited Payne's extensive work, at length, in the Referee's Report. (RR 11-13.)

2. *Petitioner's Objection to the Referee's Conclusion That Payne or Shinn Developed a Witness List*

Petitioner claims there is "no evidence" that Payne formulated a witness list of guilt phase witnesses or interviewed those witnesses. (PO 7.) "No evidence" ignores Payne's testimony, at the first evidentiary hearing, that his duties included, among other things, formulating a witness list and interviewing potential witnesses, canvassing the crime scene for three days and creating a diagram of the scene and an analysis of the crime. (Referee's Report ("RR") 12.) Moreover, the record shows—and the Referee concluded—that Shinn "read the reports generated by the police investigation which included witness statements." (RR 9.) In other words, Shinn was familiar with the eyewitness accounts of the crime, and the potential witnesses. The Referee pointed to numerous examples of Shinn's trial cross-examination that demonstrated that Shinn had analyzed the witness statements produced by the police investigation. The Referee also pointed to Shinn's awareness of witness accounts as illustrated by his use of Grand Jury testimony at trial, his familiarity with preliminary hearing

testimony and his objections to evidence offered by the prosecution. Finally, as to Payne, the Referee found his testimony in the 2014 Reference Hearing (specifically on the subject of his duties and tasks) was consistent with his testimony at the 1996 hearing. (RR 9-13.) In short, there was ample evidence that Shinn, assisted by Payne, adequately evaluated potential witnesses and effectively cross-examined prosecution witnesses and otherwise challenged the prosecution's evidence in order to advance the defense theory that Raynard Cummings was the sole shooter.

B. *Question 1, Part 2.* What Were the Results of That Investigation?

1. *Petitioner's Objection to the Referee's Finding That Shinn Placed No Limits on Payne's Efforts*

The Referee found that Shinn placed no limits on Payne's efforts, but noted that Shinn did not request permission for out of state travel or Spanish language interpreters. (RR 12, lines 19-22.) Petitioner objects, speculating that if Payne had travelled to Mexico, that would somehow have rendered Martina Jimenez Ruelas an available and credible witness. But it would not. There were various reasons not to call her as a witness, as explained below and as recognized by the Referee. (PO 9-11.)

2. *Petitioner's Objection to the Referee's Finding That Shinn "Did Not "Disengage" from a Guilt Phase Investigation*

Without citing to the record, petitioner alleges the Referee made a finding that Shinn "did not disengage" from guilt phase investigation. (PO 13-15.) Petitioner portrayed Shinn at the Reference Hearing as completely disconnected and disinterested in the representation of petitioner at the guilt phase. The Referee obviously disagreed, and found that Shinn actively and adequately defended petitioner in the guilt phase. That Shinn may have recognized that a penalty phase was likely does not

constitute incompetence. As this Court has recognized, the evidence of petitioner's guilt was "overwhelming." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1324.)

C. *Question 2, Part 1.* What Additional Evidence Supporting The Defense, If Any, Could Petitioner Have Presented at the Guilt Phase of His Capital Trial?

1. *Eyewitnesses*

a. *Martina Jimenez Ruelas*

Petitioner, who claims that Martina Jimenez Ruelas (Martina) would have identified Raynard Cummings at trial as the lone gunman, objects to the Referee's "omission" that Martina identified Cummings as the shooter when she testified at the 2014 Reference Hearing. (PO 18.)

When discussing Martina, as well as other child witnesses who were not called as defense witnesses at trial, petitioner continues to ignore obvious potential impeachment of them, including their extreme youth and their limited view of the murder. Their age and fragility alone could cause a reasonable defense attorney to question their value as witnesses, particularly when combined with the damaging testimony (as explained below), and the easy impeachment of them based on other difficulties with their testimony. Martina was only nine years old when Officer Verna was murdered. (Pet. Exh. 43:1, 65.) When first interviewed by police a few hours after the murder, she told them that she did not see the suspect's face but described him as black, possibly in his mid-twenties, 5'10"-6'0", with a medium to thin build. (Pet. Exh. 43:1.) During that initial statement, she indicated that, while she did not see the suspect shoot the officer or who was driving the car from her distant location (125 feet from the shooting), she did see the suspect entering the *passenger* door of the car. (Pet. Exh. 43:1; 12RHT 1940-1942; Resp. Exhs. 771(d) and (e).) In other words, her initial description was harmful to petitioner, both in terms of her assessment

of the shooter's height and her statement that the shooter got out of the passenger door of the car.

On February 9, 1985, when re-interviewed by the prosecutor and detectives prior to the start of the guilt phase evidence, 11-year-old Martina stated that there were two black men in the car, one was the driver and one was the passenger. (Pet. Exh. 43:3.) She "observed a male black get out of the passenger side of the car, point the gun at the policeman and shoot." (Pet. Exh. 43:3.) She could not recall the shooter's clothing, but described him as "black, tall, young looking, thin and ugly." (Pet. Exh. 43:3.) Thus, neither of her initial statements was helpful to petitioner since Martina *twice* told police that the suspect either entered into or exited from the passenger side of the car at the time of the shooting. (Pet. Exh. 43:1-3.)

At the 2014 Reference Hearing, petitioner's current counsel showed (now-adult) Martina pictures of Cummings and petitioner. (12RHT 1379, 1382; Pet. Exhs. 101, 103.) Martina then selected Cummings (Pet. Exh. A-101) over petitioner (Pet. Exh. A-103) as having a similar skin color to the shooter. (12RHT 1382.) However, she recalled seeing those same pictures (Pet. Exhs. 101, 103) "way back" and giving a statement to a woman. (12RHT 1384-1385.) Petitioner's Exhibit 103 depicts petitioner with metal staples in both sides of his neck and abrasion injuries to the left side of his face. During the 2014 Reference Hearing, Martina's recollection was that she identified the shooter during one of the live line-ups. (12RHT 1389.) However, she was *unable* to identify anyone as the suspect in any of the three line-ups she attended on June 6, 1983, indicating to officers at that time that she "couldn't remember what the people looked like when the policeman got shot." (12RHT 1391-1394; Pet. Exh. 43:5-8; Resp. Exhs. 757, 758.)

Petitioner has failed to meet his burden that Martina would have assisted in petitioner's case in 1985 for the following reasons. She only

selected a photo of Cummings in favor of petitioner after 32 years, and after her recollection had been tainted by defense investigators—this type of statement would not have available to Shinn at trial. Shinn had ample reasons not to call a 9-year-old child whose inconsistent view of a murder 125 feet away from her incriminated petitioner.

b. *Walter Roberts*

Petitioner claims that the Referee "omitted" that Walter Roberts's (Walter) initial description to the police were consistent with Cummings's appearance and inconsistent with petitioner's appearance. (PO 18.)

When Walter testified at the 2014 Reference Hearing, he recalled seeing an officer lying on the street and only two people in the car: an African-American male driver and a Caucasian woman passenger. (10RHT 1270-1272.) Walter was 12 years old at the time of the murder. He saw only a few seconds of the shooting from where he was playing, approximately 235 feet east of the shooting; he would have been looking at the back of the shooter as the shooter stood firing the final two shots into the downed officer. (Resp. Exhs. 770-U, 771-C; RHT 1273, 1937-1940.)

Walter spoke to the police twice on the evening of the murder, when the event was fresh in his memory: first at 6:25 p.m. and later at 8:30 p.m. During his first interview, Walter told Detective Burrow that the driver got out of the car, pointed a small handgun at the downed officer with his right hand and fired two rounds. The female passenger got out of the car, walked to the back of the car where she removed the officer's gun, and then got back in the car. There was a passenger in the back of the car who got out of the car, ran westbound to Gladstone and then ran back to the car. In his first interview at 6:25 p.m., Walter described the driver/shooter as a male black, 6'0" tall, 170 pounds, 25-30 years old, wearing a multi-colored shirt, dark pants, tennis shoes, and sporting a 1-2 inch Afro. That description is consistent, specifically as to height, with petitioner and not Cummings.

Walter described the *rear passenger* as a male black, 18-20 years old, and wearing dark clothing. (Resp. Exh. 752.) Walter's description of the shooter was consistent with petitioner's tape-recorded admission that he was wearing a burgundy and gray jacket at the time of the shooting. Shinn was present when petitioner made that admission, and would have known that Walter's version incriminated petitioner.

Two hours later, Walter was re-interviewed by Detective Rock. Walter described the shooter/driver as a clean-shaven male black with a medium complexion, 6'0"-6'1" tall, 175 pounds, 25-30 years old, 3-4" Afro, wearing a dark blue long-sleeve shirt, blue jeans, and dark shoes. That description, specifically height, is consistent with petitioner rather than Cummings. Walter described the *rear seat passenger* as a male black, 6'0", 19-20 years old, 3-4" Afro, black long-sleeved shirt, and blue jeans. (*Ibid.*)

Walter later attended three in-person lineups. Petitioner was in Position No. 4 in Lineup 7. Walter selected the man in Position No. 2 partly "because he had the same kind of curls." (67RT 7382-7383 (Defense "H"); Pet. Exhs. A-104, A-44:3; Resp. Exh. 753.) While all the participants in Lineup 7 (with the exception of participant 3) had that kind of hairstyle, participants 2 and 4 (petitioner) also shared very similar body structure and facial features. (Defense "H"; Pet. Exh. A-104.)

Cummings was in the Position No. 5 in live Lineup 8. Walter failed to identify anyone in Cummings's lineup. (67RT 7395-7398 (Defense "I"); Pet. Exh. A-105, A-44:4; Resp. Exh. 754.)

Milton Cook resembled Cummings and was participant 6 in live Lineup 9. (59RT 6439 (People's 12); Pet. Exhs. A-106, A-44:5; Resp. Exh. 755.) On the preprinted witness card for Lineup 9, Walter wrote "4" where the preprinted form states "I am unable to make an identification." In the

remarks section of the lineup card Walter wrote, "I believe that it was [No. 4] because he looked the same." (Pet. Exh. A-44:5; Resp. Exh. 755.)

Walter's statements are more consistent with a description of petitioner than of Cummings. In particular, his description of the shooter as clean shaven and 6'0" or 6'1" describes petitioner, not Cummings. Shinn was aware of that incriminating description, and for that reason alone could validly decide not to call Walter as a witness. Shinn therefore had multiple tactical reasons for not calling Walter.

c. *Ejinio "Choppy" Rodriguez*

Petitioner contends the Referee failed to address the "additional evidence" that Ejinio "Choppy" Rodriguez (Choppy) saw a light-skinned man (different from the dark-skinned shooter) jump out of the car after the shooting to retrieve the gun. (PO 18-19.)

After the shooting, nine-year-old Choppy never provided a statement to police. (11RHT 1342.) He had no recollection in 2014 of having been subpoenaed to San Fernando Superior Court for petitioner's 2000 penalty retrial with his sister Irma. (11RHT 1703-1705, 1344, 1347-1348.) He had no recollection of speaking with anyone about what he saw. (11RHT 1343.) As for the shooting, he "saw people. I don't know how many I saw. One or two maybe. I would say two." (11RHT 1330.) He did not recall any descriptions of them in terms of sex or race. (11RHT 1330.) He did not recall seeing the two people doing anything to or with the police officer. (11RHT 1330.) In 2003, Choppy did not recall who was actually driving the car. (11RHT 1350.) At the 2014 Reference Hearing, Choppy testified:

> Q. And so if I'm understanding what your [*sic*] saying,
>
> Between the time you heard the first firecracker shot until the car stopped by the officer your [*sic*] aware there are some people there, but you don't recall now what happened between those two times?

A. No.

(11RHT 1331.)

Choppy was not interviewed by police after the murder. Twenty years after Officer Verna's murder, Choppy described the shooter to a defense investigator as a dark-skinned, male black who was standing over the police officer but Choppy unable to provide any type of clothing description for the lighter-skinned male. (Pet. Exh. A-24.) And he only saw the shooter's *back*. (11RHT 1351-1352.) The other man, with much lighter skin, was in the car and later jumped out of the car, after the car made a U-turn on Prager Avenue, to pick up a gun belonging to the officer. (Pet. Exh. A-24.) Over *31* years after Officer Verna's murder, Choppy testified at the Reference Hearing. He recalled that the cement pillars were at the front area of his lawn but the wrought iron had not been installed. (11RHT 1349.) Choppy did not move his position after shots were fired. (11RHT 1352.) Choppy observed the person getting back into the car, but did not recall where. (11RHT 1352.) Choppy did not recall seeing anyone else around. (11RHT 1352.) He could not see clearly inside the car. (11RHT 1351.) He could not see the lighter-skinned man clearly when he got out of the driver's side of the car to get the gun. (11RHT 1353-1354.) He believed that he could have been mistaken as to the whether the person standing over the officer had dark or light skin. (11RHT 1355.) Choppy's potential exposure to the "outside shooter" was very brief and from a vantage point over 200 feet to the east of the shooting and looking primarily at the shooter's back. He had only a second to observe the skin tone of the shooter as he turned around and re-entered the car. Shinn therefore had obvious tactical reasons for not calling him as a witness.

2. *Peace Officer Witnesses*

a. *Deputy William McGinnis*

Petitioner contends the Referee "omitted" that Cummings admitted to Deputy William McGinnis that Cummings shot Officer Verna three times rather than twice, and therefore Deputy McGinnis would have supported the claim that Cummings alone fired all the shots. (PO 22.) During an Evidence Code section 402 hearing, Deputy McGinnis testified that Cummings told him, "Yeah. Well, I put two in front of the motherfucker, and he wouldn't have got three in the back if he hadn't turned and ran. Coward punk-ass motherfucker." (65RT 7041.) Cummings never said he alone shot Officer Verna nor did he say that *he* shot Officer Verna in the back. In fact, Officer Verna suffered four gunshot wounds to the back, not three. If Cummings wanted to express that he alone shot Officer Verna in the back, he would have simply said, "I put three in the back." Cummings's actual statement is *not* inconsistent with shooting Officer Verna while in the car and then passing the gun to petitioner who got out and shot Officer Verna in the back as he attempted to flee.

And even if Deputy McGinnis's testimony incriminated Cummings alone, it was cumulative to the trial testimony of Deputies McMullan, McCurtain, and LaCasella.

3. *Impeachment Witnesses*

a. *Deborah Cantu*

Petitioner contends that the Referee "omitted" evidence that Deborah Cantu would have exculpated petitioner. (PB 24.)

Many of Cantu's statements would have implicated petitioner in the cover-up and creation of the false accusation of Milton Cook. Further, the attempt to falsely incriminate Cook was *petitioner's* idea. (Pet. Exh. 137, pp. 518-520.) The night before Cantu testified at the Grand Jury, Pamela

Cummings (Pamela) called Cantu and admitted that Cook had not been in the car and had nothing to do with the shooting. Pamela told Cantu, "'Kenny told me to say it was Milton.'" (Pet. Exh. 137, pp. 519-520.) Cantu's version did not exonerate petitioner. On the contrary, Cantu's version would have would only have corroborated Pamela Cummings' testimony that she had lied about Milton Cook's involvement in her initial statements to police.

b. *Celester Holt*

Petitioner maintains that Celester Holt, Marsha Holt's mother, would have testified that Marsha could not have been looking out a window and seen the officer being shot because she was lying on a bed with her mother watching television at the time. (PO 26.) Nowhere in Celester's June 2, 1983, statement to police (Pet. Exh. A-118, p. 1) or in her Grand Jury testimony does Celester state where in the room Marsha was standing or sitting when Gail Beasley entered the room. (2 Grand Jury ("GJ") 256-261.) After Beasley told them the officer was shot, Celester went into the family room, looked out a window and saw a *light-skinned* man holding a gun. (Pet. Exh. A-118, pp. 1-2; 2GJ 257-259.) At the Grand Jury, Celester looked at a photograph of petitioner and stated his skin color "could be the same color" as the man she saw with a gun. (2GJ 260.) Whether Celester learned of the shooting from Marsha or Beasley was a minor discrepancy. But if Shinn had presented Celester's testimony, the jury would have heard another witness testifying that a light or mixed-race man had a gun in his hands. Because Celester's statements would have bolstered the prosecution's case that petitioner shot the officer, and there was nothing in the statements which would have impeached Marsha, Shinn had a sound tactical reason for not calling Celester as a witness.

c. *Mackey Como*

Petitioner argues Mackey Como would have impeached Marsha's testimony by establishing that her view out of a window was obstructed. (PO 26.) But Payne, a very experienced investigator, had examined the crime scene and did not identify any obstruction on the window that would have conflicted with Marsha's testimony. Payne spent three days (January 14, 17, and 20, 1985) examining the vicinity of the shooting locations and eventually prepared a diagram reflecting witness locations. He did not identify any obstructions precluding observations from the Beasley residence. (4RHT 212-213.)

d. *Marsha Holt*

Petitioner complains that the Referee neglected to identify additional impeachment evidence of Marsha Holt (Marsha), and in particular claims Shinn should have recalled Gail Beasley, as a defense witness. (PB 26.)

Shinn would not have scored a tactical advantage by calling Beasley as a witness to impeach Marsha. The prosecution's introduction of Beasley's preliminary hearing testimony had already directly impeached Marsha's testimony that Marsha was standing at the bedroom window when Officer Verna was shot and killed. (2PHT 106.) Moreover, petitioner told Payne that he knew people who lived at the Beasley house. If Beasley had testified, the prosecutor could have asked her whether someone in the home had been threatened—a fact which could incriminate petitioner. (Resp. Exh. 709, pp. 799-801; 4RHT 258, 263-264.) By limiting the evidence to Beasley's preliminary hearing testimony, Shinn minimized petitioner's exposure to new testimony by Beasley regarding witness threats and intimidation, while still being able to argue that Beasley impeached Marsha's testimony.

Moreover, Beasley testified at the 2000 retrial about such threats. (2000 RT 2044-2046.) And there she again positively identified petitioner; she had no doubt that the light-skinned front seat passenger (not the dark skinned male in the back seat) was the outside shooter. (2000 RT 2035-2037.)

e. *Robert Thompson and the Composite Drawings*

Petitioner contends that Shinn could have presented evidence that Robert Thompson created three drawings, and also claims one of the three drawing "perfectly described" Cummings as the shooter but went missing. (PO 26.) There is no evidence of a third drawing. Petitioner never presented evidence that Thompson drew three drawings, there is no evidence of three drawings were ever created by Thompson, there was no evidence a third drawing that went missing, nor was there any evidence that a missing drawing described Cummings at trial, much less that the non-existent drawing "perfectly described" Cummings. Thompson did not identify a "third" drawing when he testified before the Grand Jury, at the preliminary hearing or at trial.

On the contrary, Thompson identified a composite drawing (Resp. Exh. 707; 1985 Trial (Cummings) Defense Exh. N; 1985 RT 7639) as a drawing of the outside shooter. The drawing does not include any rendering of clothing; it is a face in profile only. Furthermore, the drawing closely resembles petitioner. At the preliminary hearing, Thompson identified petitioner as the outside shooter, and described the shooter as light skinned—a description matching petitioner and not Cummings. Thompson similarly testified at trial that petitioner was the outside shooter. Petitioner equates three *descriptions* by Thompson (of the driver, the right passenger and the rear seat passenger) with three *drawings*, but there is no evidence there were three drawings.

f. *Gail Beasley*

Petitioner claims Shinn could have presented Gail Beasley's "prior, consistent identifications of the shooter wearing a dark-colored shirt. . . ." (PO 277.)

According to petitioner, Shinn could have presented testimony from Donald Anderson and Richard Delouth "that Gail Beasley was a heavy PCP and crack cocaine user at the time of the crime." (PO 27.) Both Anderson and Delouth were incarcerated at the time of the murder; neither of them could have presented admissible opinion evidence of Beasley's sobriety.

4. *Dr. Kathy Pezdek and the Alleged Failure to Call an Eyewitness Identification Expert*

Petitioner contends the Referee "omitted" additional expert testimony concerning the reliability of eyewitness identification, specifically that the Referee omitted the Reference Hearing testimony of Dr. Kathy Pezdek. (PB 31-32.) Dr. Pezdek, who had had made over $604,000 testifying for the defense in criminal cases (5RHT 499, 501-503), was shown to be an unreliable partisan. Dr. Pezdek could not identify any pre-1985 capital murder case in which she was called as an expert witness, and she was not listed in the 1984 California Expert Witness Manual. (3RHT 21.) Her interpretation of research and professional standards was shown to be skewed toward her preferred conclusion, and she opined she is "just being realistic about how the legal system works." (3RHT 119-120.) For example, on March 17, 2000, Dr. Pezdek submitted a letter to petitioner's counsel listing nine conditions that may affect the reliability of the eyewitnesses and mentioned that these factors may be used for jury selection and for cross-examination. (Resp. Exh. 713; 3RHT 119.) But in the current Reference Hearing, she identified 12 factors. (Pet. Exh. A-85; 3RHT 29-30.) In the 1995 case of *People v. Newborn, McClain, and Holmes*, Dr. Pezdek prepared a five-page outline with *25* topics for the

defense attorney that can be "use[d] to shape my testimony." (3RHT 120-122.)

When attacking the reliability of Marsha Holt and Gail Beasley based on alleged cocaine use, Dr. Pezdek testified on direct examination that cocaine affects selective attention and impairs one's ability to see what is happening and select what's important. (3RHT 44-47.) In essence, Dr. Pezdek testified that cocaine use made Marsha and Beasley inaccurate and unreliable eyewitnesses. (3RHT 108.)[1] However, on cross-examination, when confronted with her testimony in another case from 1985, she agreed that she had testified: "Actually, I don't consider drugs and alcohol as having a significant effect on the accuracy of eyewitness identification. . . ." (3RHT 112.) She continued, "Remembering what a person looks like does not seem to be affected by—by drugs and alcohol . . . So I actually don't think the drugs and alcohol have an effect on a person's memory." (3RHT 112.)

Dr. Pezdek conceded petitioner's case is a "sequence case" about "who did what" and not about who was in the car. (3RHT 140-141.) In order to bolster the "confusion" of witnesses with the sequencing, Dr. Pezdek testified on direct examination that the "unconscious transference" theory would "absolutely" explain how witnesses mixed up petitioner and Cummings. (3RHT 42.) Yet on cross-examination, when confronted that she described this theory in absolute terms compared to qualifiers like

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[1] Dr. Pezdek, apparently relying on the easily impeached testimony of Donald Anderson that Beasley and Marsha used alcohol and cocaine (3RHT 46; 16RHT 2140-2141), was likely unaware that Anderson could *not* possibly have known their intoxication level, or lack thereof, on the only relevant date of June 2, 1983, since he was in prison. (Resp. Exhs. 796-801; more specifically Resp. Exh. 800, p. 3.) Anderson was in prison custody and not paroled until June 23, 1983, 21 days ***after*** Officer Verna's murder.

"may" or a "possible explanation" when describing other factors that may affect reliability, she responded, "Gosh, that does not sound like anything I would have said." (5RHT 470.)[2]

Dr. Pezdek apparently forgot her own research findings. On direct examination, she testified that the *longer* in time *after* an event, the easier it is to suggest something that would contaminate a witness's memory (5RHT 434, emphasis added), yet on cross-examination, admitted she testified in a 1986 trial that "people are more suggestible if the two related events are suggested *closer* to one another rather than far apart." (5RHT 435-436, emphasis added.)

When discussing weapon focus on direct examination, Dr. Pezdek claimed eyewitnesses may focus on a weapon which is a "salient form of distraction." (3RHT 39.) Yet on cross-examination, Dr. Pezdek admitted that she agreed with Dr. Loftus that weapon focus was not a sound scientific fact yet (in 1979) and the "psychological community does not have a conclusive study about weapon focus." (3RHT 132-133.)

Dr. Pezdek claimed there were 300 to 400 studies on the double blind effect/procedures by the late 1970's and she testified about this and the "experimenter expectancy effect" prior to 1985 (10RHT 1190), yet she could not identify a *single* reference that used the term "double blind procedure" from 1976 to 1985. (5RHT 488-489.) Respondent's Exhibit 748 (Department of Justice Eyewitness Evidence, a Guide for Law Enforcement 1999) had no such reference or recommendation. (10RHT 1230-1237.)

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[2] Dr. Pezdek agreed that as an "objective, neutral, non-advocate scientist" using words like "never" or "absolutely" or "certainly" is not something she should do. (5RHT 470.)

As for whether Shinn contemplated calling an expert on eyewitness identification, Shinn and petitioner considered utilizing an eyewitness identification expert(s) in the 1985 trial. (March 7, 1985, *In Camera* Hearing, p. 14.) On March 7, 1985, Shinn explained to the trial judge that he was going to call two or three psychologists to discuss eyewitness identification issues. (March 7, 1985 *In Camera* Hearing, p. 14.) Shinn reasonably decided during the course of the trial that calling an eyewitness expert would have actually been detrimental to petitioner's best interests. And Shinn sought to have the jury view the scene, undoubtedly in an attempt to illustrate that unreliability of the eyewitness accounts.

Even Dr. Pezdek acknowledged that petitioner and codefendant Cummings are "remarkably different looking individuals" and "certainly look very different." (3RHT 144.)[3] She agreed that petitioner's case is about "event memory" and not about facial recognition. (3RHT 156.) Dr. Pezdek conceded that witnesses can discern general characteristics (like race and ethnicity) very quickly and that eyewitnesses looking at petitioner and Cummings would be able to easily distinguish between the two. (3RHT 143; 5RHT 480, 496.) Dr. Pezdek also repeatedly explained that witness memory is more accurate earlier in time and is more likely to be reliable early in time rather than later. (3RHT 29, 152.) Calling Dr. Pezdek, or any other purported eyewitness expert, would have highlighted the strongest points of the prosecution's case: that petitioner and Cummings are very

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[3] Dr. Pezdek testified that identification studies and research is about the accuracy of witnesses to distinguish between *similarly* looking individuals. (3RHT 141.) She also testified that "the more different two things are, the easier it is to distinguish between them." (5RHT 480.) She also agreed that it would be much easier for the average eyewitness looking at petitioner and Cummings to distinguish between them (5RHT 480) and that "dissimilar looking people are less likely to be confused." (5RHT 496.)

different looking and witnesses who described the outside shooter as mixed race or a light skinned black or with the same height as Officer Verna were necessarily describing and identifying petitioner and *not* Cummings. Dr. Pezdek herself testified that some of the case facts can be "very damaging to the defense theory" (3RHT 163) and that an attorney's investigation and research "may be detrimental in terms of calling an identification expert." (3RHT 167.)

D. *Question 2, Part 2.* What Investigative Steps, If Any, Would Have Led to this Additional Evidence?

1. *The Finding That Deputy Richard Nutt Was Unavailable*

While awaiting trial, Cummings made incriminating statements to Deputy Richard Nutt. Petitioner objects the Referee's finding that Deputy Nutt was unavailable at the time of petitioner's 1985 trial. According to petitioner, the fact that Deputy Nutt had not yet written a report documenting Cummings's incriminating statements did not render Deputy Nutt unavailable to testify about the statements in 1985. (PO 35-36.)

Deputy Nutt was unavailable; the report of his statements was not even made until just before petitioner's 2000 penalty retrial, after Deputy Nutt had been promoted to lieutenant and was again working in the jail. Finally, Deputy Nutt originally reported to the LAPD homicide investigators that it was *petitioner*, not Cummings, who had threatened his life. (Pet. Exh. A 161; 20RHT 2431.)

E. *Question 3, Part 1.* How Credible Was This Additional Evidence?

1. *The Credibility of the Child Witnesses*

Petitioner contends that, although the Referee found (and petitioner does not dispute) that the child witnesses were traumatized by the murder, the Referee fails to equate their trauma with a reasonable conclusion by a

defense attorney not to call them as trial witnesses. In petitioner's view, the trauma only rendered their accounts of the murder more credible. (PO 36-38.)

The trauma, standing alone, was only one reason potential child witnesses would not have been presented by the defense. Instead, as can be seen from the Referee's summary of the evidentiary hearing testimony of the children, each of them could have been substantially impeached and their testimony in other respects would have ultimately supported the prosecution's version of events. Generally, the accounts of the children varied both internally and amongst each other. Several parents opposed the participation of their children in a trial, further complicating their effectiveness as witnesses. Some of the children recalled there were four people in the car. That is incorrect. Many identified the driver as a black female. She was a white Caucasian. None of the children identify either petitioner or Cummings during a live line-up only days after the crime.

The children were, at best, problematic witnesses who had been traumatized by what they had seen. They were not credible or helpful witnesses and they would not have exonerated petitioner. That any of them would claim to identify the shooter almost 30 years after the fact when unable to do so only days after the event illustrates their testimony says nothing about the value of their contemporaneous accounts in 1983 or at trial in 1985.

2. *Donald Anderson*

The Referee found Donald Anderson was not a credible witness in light of his criminal record, his poor relationship with petitioner, and Marsha Holt's description of the shooter. (RR at 47.) But petitioner reasons that since the prosecution had called other witnesses who were subject to impeachment, that rationale cannot apply to the decision not to call Anderson. (PO 39-40.)

Of course, a prosecutor's decision to call particular witnesses in light of credibility concerns has no bearing on the question of whether defense counsel can properly consider a lack of credibility when deciding whether to call a witness for the defense. On the contrary, the decision whether to call a witness is based on relevant factors are considered in combination. Considering those factors, Anderson was a disaster, and only partially because of what the Referee termed his "horrifying" record of criminality. And the Referee's credibility evaluation is not subject to reconsideration in any event. Anderson was petitioner's close friend and a convicted, recidivist rapist. And as the Referee pointed out, Shinn expressed his misgivings about Anderson to Payne. (RR 47.) If Shinn had called Anderson, Shinn would have exposed the jury to petitioner's drug history and the type of reprobate friends with whom petitioner associated.

Finally, had Anderson been called to testify that Marsha Holt said she had not seen anything, the prosecution likely would have recalled Holt, to explain to the jury that neighborhood witnesses who testified against petitioner (specifically Gail Beasley) were subjected to harassment and retaliation for implicating petitioner.

F. *Question 3, Part 2.* What Circumstances, If Any, Weighed against the Investigation Or Presentation of This Additional Evidence?

1. *The Referee's Finding That Martina Jimenez Ruelas Made Inconsistent Statements*

Petitioner contends the Referee erred in finding there was a discrepancy between Martina's first and second statements to police. (PO 43-44.) The gist of petitioner's argument regarding Martina is that she described the shooter as a dark black man, and that this was more consistent with Cummings than petitioner. He overlooks significant reasons to doubt her identification: she was eight or nine years old at the time of the

shooting, and her identification came decades later. And her account of the shooting, as she recounted it at the 2014 Reference Hearing, was at odds with her statements at the time of the shooting.

When first interviewed a few hours after the murder, Martina told the police she did not see the suspect's face but described him as a black male, possibly in his mid-twenties, 5'10" to 6'0", with a medium to thin build. (12RT 1377; Pet. Exh. 43:1.) This height description is more consistent with petitioner than Cummings. During that initial statement, she indicated that, while she did not see the suspect shoot the officer or who was driving the car, she did see the suspect entering the passenger door of the car. (Pet. Exh. 43:1.)

On February 9, 1985, when re-interviewed by the prosecutor and police detectives prior to the start of the guilt phase evidence, Martina, then 11 years old, stated that there were two black men in the car; one was the driver and one was the passenger. (Pet. Exh. 43, p. 3.) Martina "observed a male black get out of the passenger side of the car, point the gun at the policeman and shoot." (Pet. Exh. 43:3.) It is undisputed that petitioner was in the right front passenger seat of the car, and there has never been any evidence that Raynard Cummings ever got out of the passenger seat of the car. Martina could not recall the shooter's clothing, but described him as black, tall, young looking, thin and ugly." (Pet. Exh. 43:3.) The Referee correctly identified the disparity in the two statements made by Martina.

2. *The Referee's Reference to a Cautionary Instruction*

The Referee observed that the testimony of child witnesses would have prompted the giving of a cautionary instruction (CALJIC No. 2.20.1). Petitioner points out that the instruction was not yet in use as of the time of petitioner's trial. (PO 44.)

The important point is that defense counsel could wisely decline to present a group of child witnesses, where testimony was problematic and inconsistent, *in part* because of their extreme youth. And while it is true the prosecutor called two children, these children were older than many of the proposed defense child witnesses, e.g., Ejinio ("Choppy") (8 years old) and Martina (8 years old). Further, the performance of defense counsel is not measured by decisions made by a prosecutor. There are countless decisions that a prosecutor might make in the circumstances of prosecuting a case that would be irrelevant to an assessment of defense counsel's performance.

3. *The Reluctance of the Parents of Martina Jimenez Ruelas, Irma Esparza, and Ejinio "Choppy" Rodriguez to Allow Their Children to Testify*

Petitioner takes exception to the Referee's finding that the parents of Martina, Irma, and Choppy may have been reluctant to allow their children to testify. (PO 46-47.) But the Referee did not conclude that the parents' reluctance was a factor upon which Shinn relied. Rather, the Referee noted that the opposition of a young child's parents was a factor that reasonable defense counsel could consider in evaluating whether to call that young child as a witness at trial.

The reluctance of the parents only added to the numerous other consideration that would militate against calling such young children. Martina was the youngest of the children to witness the murder. Her more recent version of events, while more favorable to petitioner, would be easily impeached with her inconsistent earlier account of the murder. Irma's original statements to the police were significantly different from her 2014 testimony. Irma's account is also at odds with other eyewitnesses and the physical evidence. First, her account of the traffic stop differed from several other witnesses. Second, her description of the driver was different

from other witnesses. Third, the physical evidence contradicted Irma's account of the murder. Finally, Irma's youth, as well as her emotional reaction, militated against calling her as a witness. Irma was only 13 years old at the time of the crime. (14RHT 1697.) She did not talk to police immediately because she was pregnant at the time and she was very upset by what she had witnessed. (14RHT 1709.) In sum, several factors could have impeached Irma's testimony. Given all these obstacles, Shinn would have been left to argue that Irma was correct in her memory of a dark-skinned shooter, but wrong in most of her other recollections and the great weight of the other evidence. If Shinn had called Irma as a trial defense witness, the prosecution would have easily challenged the accuracy and reliability of her testimony.[4] Thus, even assuming Irma could provide some favorable testimony, there were good reasons for not calling her at trial.

Like Irma, Choppy's memory would have been impeached by his age, the traumatic nature of the murder, the distance he was from the shooting, and the fact that he did not make a statement to police. The first statement he made was nearly 20 years after the murder, when he was interviewed by petitioner's investigator in 2003. (Pet. Exh. A, p. 24.) From his testimony at the Reference Hearing, it is doubtful that he would have provided favorable testimony in 1985. He has never provided a credible, reliable description of the shooter that would have benefited petitioner.

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[4] Petitioner's expert Burt agreed that a competent attorney would take into account several factors weighing upon witness credibility in deciding whether or not to call the witness at trial, such as the witness's age, the distance from which the witness observed an event, and the accuracy (or inaccuracy) of the witness's description of the event and its participants. (13RHT 1569-1570.)

The fact that the parents of extremely young children opposed having them testify only compounded the other factors rendering them unpersuasive and unhelpful defense witnesses.

4. *Douglas Payne's Opinion Regarding the Value of Martina Jimenez Ruelas's Potential Testimony*

Petitioner faults the Referee for concluding that Douglas Payne "opined Jimenez Ruelas's testimony was not helpful to the defense case." (PB 47-48, citing RR 40, line 21.) According to petitioner, Payne only "opined" that the 1985 police *report* of her account was not helpful to the defense. (PB 49.) That is a distinction without a difference. Payne never suggested that Martina should have been called as a witness and, in context, it is clear he concurred with Shinn's decision not to call her.

Martina, nine years old at the time of the murder, reported she did not see the suspect's face and she could not identify anyone at the 1983 live line-ups. She first identified Cummings—rather than petitioner—32 years after the murder, and only after her account was manipulated by a defense investigator.

5. *The Referee's Conclusion That Discrepancies in the Testimony of Irma Esparza Call into Question the Result of Her Testimony*

Asking this Court to reweigh the evidence, petitioner objects to the Referee's finding that Irma Esparza's testimony was inconsistent and ultimately not helpful to petitioner. The Referee's factual determination is based on his thorough evaluation of the evidence (PB 42-43) and therefore entitled to deference.

6. *Inmate Witnesses*

a. *Petitioner's Objection to the Finding That Deputy Sheriff McGinnis's Testimony Was "Lacking in Detail As to the Identity of the Shooter"*

Petitioner disagrees with the Referee's finding that Deputy McGinnis's testimony lacked detail as to the shooter. (PO 56.) The Referee correctly noted that Deputy McGinnis's testimony did not unequivocally incriminate Cummings. Deputy McGinnis testified that Cummings told him, "Yeah. Well I put two in front of the motherfucker, and he wouldn't have gotten three in the back if he hadn't turned and ran. Coward punk-ass mother fucker." (65RT 7041.) Cummings never said he alone shot Officer Verna. And Cummings never said he shot the officer in the back. These details were missing from Deputy McGinnis's account.

b. *The Referee's Findings Regarding Inmate Witnesses*

Petitioner disputes the Referee's conclusion that Shinn would have faced difficulties if he attempted to call four jail inmates as witnesses. (PO 56-59.) The Referee correctly noted the challenges that Shinn would have faced, leaving aside the obvious lack of value in presenting evidence from witnesses whose credibility was non-existent.

Inmate James Jennings was not available to testify in 1985 as there is no evidence that he would have received immunity to testify in 1985. Since Jennings was charged with murder and in the midst of prosecution, petitioner and respondent would have certainly questioned Jennings about his pending case and any promised or expected benefits as relevant to his credibility. (See Evid. Code, § 780; CALJIC No. 2.20.) His participation in a robbery-murder case, and the facts and circumstances of that case, would have been highly relevant. Jennings had a Fifth Amendment

privilege not to testify or answer questions that would have likely yielded incriminating responses. (See Evid. Code, §§ 914, 940.) There is no evidence that the trial prosecutor ever sought immunity for Jennings, nor is there any evidence that Jennings's attorney consented for Jennings to be interviewed or to testify. (See Cal. Rules Prof. Conduct, rule 7-103 effective January 1, 1975 until repealed by rule 2-100, effective November 28, 1988.)

Norman Purnell was not available to testify in 1985 as there is no evidence that he would have received immunity to testify in 1985. Since Purnell was charged with robbery and housed in the "high-power" section of Men's Central Jail from 1983-1985, and was in the midst of prosecution, petitioner and respondent would have certainly questioned him about his pending case and any promised or expected benefits relevant to his credibility. (See Evid. Code, § 780; CALJIC No. 2.20.) His participation in a robbery case, and the facts and circumstances of the case, would have been highly relevant. Purnell had a valid Fifth Amendment privilege not to testify or answer questions that would have certainly yielded incriminating responses. (See Evid. Code, §§ 914, 940.) There is no evidence that the prosecutor sought immunity for Purnell, nor is there any evidence that Purnell's attorney consented for him to be interviewed or to testify. (See Cal. Rules Prof. Conduct, rule 7-103 effective January 1, 1975 until repealed by rule 2-100, effective November 28, 1988.) Purnell received no deals for his robbery case (13RHT 1589) and thus he was not realistically available to testify.

c. *Raynard Cummings's Reference to Petitioner As Cummings' Crime Partner*

Norman Purnell testified that a fellow inmate ("Slim") told Purnell that he (Slim) had shot a police officer, and that if he were going down, his "crimie" was going down too. (RR 45, lines 10-12.) Petitioner asserts that

(1) "Slim" was petitioner, and (2) Purnell's reference to petitioner as Cummings's crime partner was *helpful* to petitioner's case. (PB 50-60.)

Obviously, assuming "Slim" was Cummings, his reference to petitioner as his crime partner would only damage petitioner's defense, not strengthen it. Petitioner cannot credibly assert that defense counsel is ineffective for failing to call a witness who *incriminates* counsel's client.

d. *The Referee's Finding That John Jack Flores's Testimony Would Have Been Evidence That Petitioner Was an Aider and Abettor*

Cummings admitted his guilt to John Jack Flores. The Referee found that Shinn could reasonably decline to call Flores as a witness because a statement made by Cummings, a non-testifying co-defendant, would have been inadmissible against petitioner under *Bruton v. United States* (1968) 391 U.S. 123, and *People v. Aranda* (1965) 63 Cal.2d 518. (PO 61.) But those cases preclude the *prosecution* from presenting inculpatory statements made by a non-testifying co-defendant who implicates an accomplice; petitioner cites no authority barring a defendant from presenting such evidence. Nor does petitioner address whether such statements would be admissible as non-testimonial hearsay, specifically as a statement against penal interest by Cummings.

e. *The Finding That Jurors May Be Skeptical of Inmate Witnesses*

Petitioner objects to the Referee's unremarkable observation that jurors can be skeptical of testimony from inmates. (PO 62.) In any event, the Referee did not find that juror skepticism of the credibility of inmates was a dispositive factor in not calling inmate witnesses. The Referee merely noted, unremarkably, that juror skepticism of the credibility of inmate witnesses was an additional consideration, in combination with numerous

other impeachment factors, that militated against calling inmate witnesses Jennings and Purnell.

G. *Question 3, Part 3.* What Evidence Rebutting This Additional Evidence Reasonably Would Have Been Available to the Prosecution at Trial?

1. *The Referee's Finding That Additional Evidence Would Have Been Cumulative*

Petitioner objects to the Referee's conclusion that proposed testimony of three police officers and four inmates would have been cumulative. (PB 63-66.)

The Referee explained, in detail, the factual bases for his conclusion that evidence was cumulative. (See, e.g., RR 45-47.) Moreover, petitioner did not acknowledge that the Referee's conclusion as to each witness was not based solely on the cumulative nature of their testimony, but instead was barred on a comprehensive evaluation and conclusion that their testimony was not helpful to the defense and was subject to extensive impeachment.

2. *Impeachment Witnesses*

a. *Petitioner's Exception to the Referee's Finding Regarding Reasons Why Defense Counsel Would Decline to Call Donald Anderson*

Petitioner indirectly alleges the Referee erred in finding that Shinn's decision not to call Donald Anderson as a defense witness was reasonable. (PO 66-67.) Anderson was a serial rapist who had married a witness who was testifying against his longtime friend, petitioner. (Resp. Exh. 778, pp. 189-190.) That alone would explain the decision not to call Anderson as a defense witness.

b. *Shinn's Explanation for Not Calling an Eyewitness Identification Expert*

Petitioner claims that Shinn's explanation for not calling an eyewitness expert is not credible. (PO 74-77.) Shinn specifically provided a tactical explanation for his decision not to call an eyewitness expert (RR 6-13), and his explanation was reasonably credited by the Referee. The Referee also noted—correctly—that this Court's then-recent decision in *People v. McDonald* (1984) 37 Cal.3d 351, did not purport to compel such evidence in all criminal cases, that defense counsel for Cummings likewise declined to present expert testimony in Cummings's defense and that Shinn validly argued contradicting identification as a clear and viable basis for reasonable doubt. (RR 50, lines 14-21.)

c. *Deborah Cantu*

Petitioner objects to the Referee's finding that Deborah Cantu could have impeached Pamela Cummings with Pamela's multiple inconsistent statements. (PO 69; RR 48.) The Referee correctly found that Cantu would have provided substantial impeachment of Pamela Cummings's testimony.

Pamela repeatedly lied to her sister about Cummings's role in Officer Verna's murder and falsely accused an innocent man of the crime. Pamela's scheme to shift the blame away from her husband began within hours of the crime. Shinn could (and did) impeach Pamela's testimony, e.g., highlighting the plea deal she made with the prosecutor when she had originally been charged with capital murder, having her admit her participation in 10 robberies, having her admit her abiding love for Cummings and hope that he would not be sentenced to the death penalty, and having tried to frame Cook for the murder. When Pamela finally told Cantu that Cummings was in fact present during Officer Verna's murder, she also told Cantu that petitioner killed the officer and that petitioner came

up with the plan to lay blame for the murder on a man who closely resembled Cummings. Shinn reasonably weighed the benefit of calling Cantu against the risk that her testimony would have provided additional evidence linking petitioner to the commission of Officer Verna's murder.

Significantly, at the 2000 penalty retrial petitioner called Cantu to impeach Pamela Gay with Pamela Gay's initial lies. The prosecution successfully established that Pamela had admitted her misstatements to Cantu, and established the evidence inculpating petitioner as the second shooter and identifying petitioner as the architect of the plot to frame Milton Cook.

d. *Robin Gay*

Petitioner claims the Referee erred in concluding that Robin Gay's Grand Jury testimony was inadmissible. (PB 70.)

A necessary condition for the admissibility of former testimony under Evidence Code section 1291 is that the "declarant is unavailable as a witness. . . ." (Evid. Code, § 1291, subd. (a).) Unavailability can be established if the witness's testimony is exempted or precluded on the ground of privilege. (Evid. Code, § 240, subd. (a)(1).)

Petitioner has failed to identify any controlling legal authority for the admissibility of Robin's Grand Jury testimony as former testimony, given that she was legally unavailable at the time of trial. Grand Jury testimony would not qualify as former testimony. "[W]e held in *People v. Hillery* (1965) 62 Cal.2d 692, 708, that the transcript of statements made by a witness before a Grand Jury was inadmissible as 'former testimony,' since there had been no opportunity whatever to cross-examine at such a proceeding." (*People v. Johnson* (1968) 68 Cal.2d 646, 653.) Even if such testimony qualified as former testimony, petitioner does not explain how statements made by Cummings, whether in the form of verbal expression or assertive conduct (see Evid. Code, § 225 ["'Statement' means (a) oral or

written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression"]), would have survived a hearsay objection. Evidence Code section 1201 requires for each level of hearsay attributable to a statement that the proponent of the statement provide a hearsay exception. Petitioner has provided *no* statutory authority for the admissibility of Cummings's verbal and/or assertive conduct statements over a hearsay objection, let alone provided a hearsay exception for each level of hearsay for Cummings's alleged statements testified to by Robin at the Grand Jury, testimony which is itself hearsay.

Because Robin's Grand Jury testimony would have been subject to a hearsay objection, Shinn acted reasonably in declining to call her as a witness. And petitioner forgets that he personally concurred in the decision not to call her.

3. *Additional Experts*

Petitioner objects to the Referee finding that Dr. Solomon's findings were inconclusive on the issue of who was the outside shooter. (RR 52.) Petitioner disagrees. (PO 77.)

The Referee fairly concluded that the testimony regarding biomechanical and human factors was inconclusive.

The Referee rejected all of Dr. Solomon's proffered expert testimony on the subject at the Reference Hearing, concluding that "[t]he act of getting in and out of an automobile is a common everyday experience." (RR 52, lines 2-4.) The Referee concluded "it might be difficult but not impossible for a large and highly motivated man to quickly exit out of the driver's door of the car from the rear seat of the two-door Cutlass Supreme. Likewise, it might be difficult but not impossible for a similarly motivated yet slightly smaller man to quickly exit from the front passenger seat out of the driver's door." (RR 52, lines 2-6.) The Referee also made the separate factual

finding that the witness descriptions varied "too greatly to merit much confidence in such experiments." (RR 52, lines 13-14.)

Petitioner's physical agility (he cut his throat even while handcuffed), coupled with the effect of adrenaline, could not have been reliably replicated to resolve how petitioner got out of the car and shot Officer Verna. As Dr. Young testified at the Reference Hearing, "When individuals become stressed, aroused or motivated, there are changes in the body that take place due to the release of hormones, like adrenaline, which physiologically affects how we respond and how we function." (18RHT 2210.) "Extremely stressful hyper-vigilant stages is a very difficult area for one to investigate." (18RHT 2211.)

H. *Question 4.* Did The Los Angeles County District Attorney's Investigation of Allegations That Petitioner's Trial Counsel, Daye Shinn, Had Engaged in Acts of Embezzlement Unrelated to Petitioner's Case Give Rise to a Conflict of Interest in Petitioner's Case? If So, Describe the Conflict of Interest

1. *The Referee's Finding that the Danes Reported a Fraud in Early 1984*

The Referee found that the Danes reported a fraud in early 1984. (RR 55.) Petitioner objects, claiming that substantial evidence shows the Danes complained sometime in 1983. (PO 85.) The distinction has no bearing on the issue of the alleged conflict, and petitioner does not argue the difference in dates as relevant.

2. *Whether Shinn's Embezzlement Constituted an Actual Conflict*

The Referee found that Shinn's embezzlement of the Kanes did not constitute an actual conflict of interest for Shinn. (RR 61.) Petitioner objects, citing cases he claims the Referee failed to consider.

Petitioner claims *People v. Gonzales* (2010) 52 Cal.4th 254, 308-310, establishes Shinn had an actual conflict. In *Gonzales*, trial counsel for a capital defendant became an unwilling drug courier after the defendant's relatives put his drugs in clothing that counsel brought to the defendant. This Court, in circumstances irrelevant to the present case, *rejected* a claim of conflict of interest. *Gonzales* is therefore factually and legally irrelevant.

People v. Mai (2013) 57 Cal.4th 986, 1002-1013, concerned a *potential* (not actual) conflict of interest arising from his counsel's connection with a federal criminal case against the defendant. This Court found there was only an arguable conflict and found that any arguable conflict had been waived by the defendant. *Mai* is therefore also irrelevant to this case.

Respondent has acknowledged that Shinn's failure to disclose that he was the subject of an investigation was unethical. (Respondent's Merits Brief, at p. 76.)

An ethical violation does not necessarily establish a violation of the Sixth Amendment. (*Mickens v. Taylor* (2002) 535 U.S. 162, 176, citing *Nix v. Whiteside* (1986) 475 U.S. 157, 165 [106 S.Ct. 988, 89 L.Ed.2d 123] ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel".).) Mere investigation by a prosecutorial agency does not create an inherent conflict of interest. Shinn was not being prosecuted by the District Attorney's Office when he represented petitioner. *Harris* is therefore inapplicable. Aside from the fact that being investigated and being charged are different, reliance on *Harris* in also misplaced because *Harris* found that an actual conflict existed based on a theoretical division of loyalties—an approach rejected by *People v. Doolin* and *Mickens v. Taylor*. (Compare, *People v. Doolin* (2009) 45 Cal.4th 390, 417 ["In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense

counsel labored under an actual conflict of interest 'that affected counsel's performance—as opposed to a mere theoretical division of loyalties.' [Citing *Mickens*]" with *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1140 ["It is the threat that the attorney's conduct might be affected by the conflicting interests that give rise to an 175 actual conflict"].)

Shinn should have disclosed to the superior court that he was the subject of an investigation by the same agency that was prosecuting petitioner. But his failure to do so does not constitute proof of a disabling conflict in the absence of the required showing of prejudice.

Nor can petitioner contend that this Court's earlier decision in his case provides a standard requiring relief. *In re Gay* was decided almost 20 years ago, in 1998, when the standard for finding an actual conflict involved determining whether there was a "potential conflict" and then performing an "informed speculation" analysis of counsel's performance. (*Doolin, supra,* 45 Cal.4th at p. 419.) Thereafter, in *Doolin,* this Court revisited the standard, and concluded that the concepts used under the prior analytical framework had "proven elusive" and had been "somewhat variously applied" by the courts. (*Ibid.*) Consequently, *Doolin* adopted the *Mickens* framework. In doing so, this Court expressly disapproved earlier cases that had employed a different standard. (*Id.* at p. 421.) The issue in this case, therefore, is whether petitioner's right to counsel was denied because Shinn was performing under an actual conflict of interest, i.e., a conflict that adversely affected his performance during the guilt phase of the 1985 trial. Petitioner has not met his burden to establish that a conflict of interest existed that adversely affected Shinn's performance.

This case involves a theoretical conflict. There is no indication that prosecutors were scrutinizing Shinn's performance in petitioner's case in order to determine whether to charge him with misappropriation of client funds. The Shinn investigation had nothing to do with the facts of

petitioner's case. Each case was prosecuted by lawyers who did not know each other, nor did they know of Shinn's involvement in both cases. There were no cross-over witnesses, no investigation performed by the same law enforcement officers, and no overlapping evidence. The prosecutors were different, never communicated with each other, and did not even know each other. (16RHT 2014-2015.) No causal link exists between Shinn's defense of petitioner in a murder case and his role as the subject of an unrelated investigation. Any conflicting interest on the part of Shinn was theoretical, and petitioner cannot establish by a preponderance of the evidence that Shinn believed that presenting a poor defense for petitioner would somehow benefit Shinn in his status as the target of an investigation. This is yet another of the Referee's findings that was overwhelmingly supported by the evidence. As for whether Shinn advised petitioner that Shinn was the subject of investigation in the Dane matter, the record is silent.

Nor did petitioner demonstrate how the criminal investigation of Shinn adversely affected Shinn's representation of petitioner, much less how petitioner was actually prejudiced. Under *Doolin,* to determine whether the Sixth Amendment was violated because of an adverse effect on counsel's performance, a court must examine the record to determine (1) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (2) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. (*Doolin, supra,* 45 Cal.4th at p. 418.) Thus, a finding of adversely affected performance necessarily includes a finding that unconflicted counsel would not have performed in the same way, as well as finding that there was no tactical reason for the deficient performance.

At the 2004 Reference Hearing, petitioner attempted to establish a link between anything that might be considered deficient performance by

Shinn and the investigation of Shinn. He was unable to do so, as found by the Referee. There were multiple tactical reasons for Shinn's strategy and the choices he made in defending petitioner during the guilt phase of the 1985 trial. As explained in detail in Respondent's Brief on the Merits (at pp. 79-85), petitioner has failed to meet his burden of establishing that the theoretical conflict adversely affected Shinn's performance.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court deny the petition for writ of habeas corpus.

Dated: September 16, 2016 Respectfully submitted,

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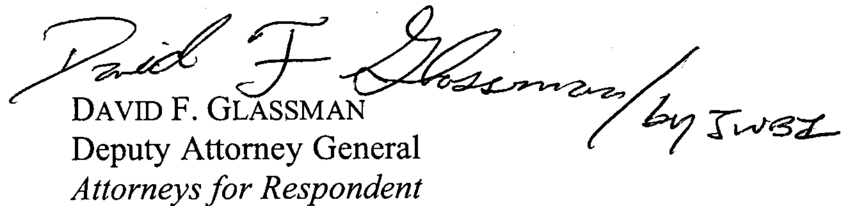

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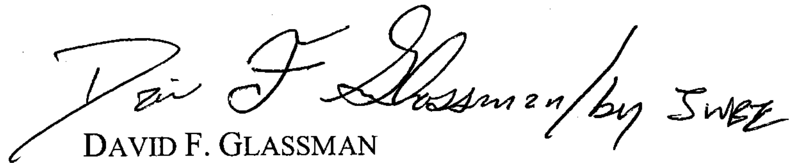
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONSE TO PETITIONER'S OBJECTIONS uses a 13 point Times New Roman font and contains 10,665 words.

Dated: September 16, 2016

KAMALA D. HARRIS
Attorney General of California



DAVID F. GLASSMAN
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DECLARATION OF SERVICE

Case Name: **In re Kenneth Earl Gay, On Habeas Corpus** No.: **S130263**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On September 16, 2016, I caused one electronic copy of the **RESPONSE TO PETITIONER'S OBJECTIONS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system. I also caused an original and eight (8) copies to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102 by Federal Express, with a Tracking Number 8071 1579 4093.

On September 16, 2016, I served the attached **RESPONSE TO PETITIONER'S OBJECTIONS** by transmitting a true copy via electronic mail to:

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On September 16, 2016, I served the attached **RESPONSE TO PETITIONER'S OBJECTIONS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Sherri R. Carter, Clerk of the Court
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San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 16, 2016, at Los Angeles, California.

Irene Rangel
Declarant

Signature

DFG:ir
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