In the Supreme Court of the State of California

In re **KENNETH EARL GAY,** On Habeas Corpus.	**CAPITAL CASE** Case No. S130263

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

~~**REPLY BRIEF**~~
Respondent's Brief on the Merits

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INTRODUCTION

This brief replies to particular claims raised in petitioner's brief on the merits. No attempt is made to respond to every point raised in petitioner's brief, as these claims have been addressed both in Respondent's Objections and Respondent's Brief. The specific focus of this reply brief is on petitioner's effort to portray the case as involving only unconvincing and equivocal evidence of petitioner's guilt, and to portray trial defense counsel as completely inept. A review of the trial record and the post-trial evidentiary proceedings, along with the Referee's recent findings, makes clear that petitioner's guilt of the murder was established, and that trial counsel adequately represented petitioner at trial.

Throughout his brief, petitioner ignores the "overwhelming evidence" of his guilt as found by this Court in its 1993 affirmation of his conviction for the execution murder of Los Angeles Police Officer Paul Verna. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1324.)[1]

The facts of the crime are depicted by petitioner in the introduction to petitioner's brief, but are viewed there in the light most favorable to petitioner. Viewed in the appropriate light, the facts showed that at about 5:40 p.m. on June 2, 1983, in the 12000 block of Hoyt Street in the Lakeview Terrace area of the San Fernando Valley, a suburb of Los Angeles, Los Angeles Police Department Motorcycle Officer Paul Verna stopped a two-door 1979 Oldsmobile Cutlass coupe being driven by Pamela Cummings for a traffic violation. The car stopped in front of 12124 Hoyt.

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[1] "The evidence of both guilt of the murder and the motive for it was *overwhelming*. The evidence of motive was not limited to evidence of the robberies of which petitioner was convicted, but included evidence of the joint commission of another robbery, evidence that the car used by defendants was stolen, and evidence of parole violation." (*People v. Cummings, supra*, 4 Cal.4th at p. 1324, emphasis added.)

Pamela's husband, Raynard Cummings, was in the rear seat. He had earlier stolen the car at gunpoint with an accomplice. Petitioner was in the front passenger seat. Pamela had removed the license plates on the car prior to the time it was stopped by Officer Verna, replacing them with plates stolen from another car.

Pamela, who had no driver's license, stepped out of the car and offered other identification to the officer. Officer Verna approached the car and asked the occupants for identification. He was shot six times by the occupants of the car, all shots coming from a single handgun. The first shot, fired from the backseat by Cummings, knocked him backward and he staggered back toward his motorcycle. The coroner later labeled that first shot "Number 6." The remaining shots hit him as he was falling and lay on the street. The car drove off, but quickly returned and stopped by the fallen officer. Petitioner stepped out, picked up Pamela's identification card and the murder weapon, which had been dropped or thrown down at the scene. The officer's gun was also picked up, either at this time or earlier when he fell. The field identification card that Officer Verna had completed when he questioned Pamela was found at the scene.

An investigation led police to petitioner, who was located on June 3, 1983, in San Diego on his way to Arizona with his wife, Cummings and Pamela. Petitioner was lying on the floor behind the front seat of the car and Cummings was lying on the back seat. Officer Verna's gun was found on the floor under petitioner. At approximately the same time, the abandoned Oldsmobile Cutlass was located in Los Angeles. Fingerprints of Cummings, petitioner, and Pamela were identified in that car. In the days before the murder, Cummings had told a companion twice that he was not worried about being stopped by police while in a stolen car because he would not give the officer a chance to ask him any questions. Petitioner was present on one occasion when Cummings made this statement.

Eyewitnesses observed the shooting. Eight testified at trial. Their versions of the events and identification of the participants varied, but they consistently identified petitioner. And the witnesses supported the prosecution theory that Cummings fired the first shot from the rear seat before passing the gun to petitioner, who stepped out of the car and fired the remaining shots into the wounded officer. Both defendants relied on some of the same evidence, as well as forensic evidence, in their efforts to persuade the jury that the other man fired all of the shots. Pamela testified she heard a gunshot, saw the officer grab his shoulder, and simultaneously saw the barrel of a gun point straight across the front seat of the car between the head rests. She could not see who held the gun as the 6'6" tall Cummings, sitting in the back, obstructed her view. Petitioner then got out of the car, approached Officer Verna, and fired three shots into his back as he attempted to return to his motorcycle. The officer turned back toward his motorcycle, walked a few feet, fell to his knees, and then turned and fell on his back. Petitioner stood over the wounded officer, shot him two more times, threw the gun on his body, and picked up the officer's gun. Pamela and petitioner reentered the car through the driver's side door. Petitioner drove up the street, made a U-turn, came back, got out of the driver's door and retrieved the gun.

The case against petitioner also included evidence of admissions and confessions by both petitioner and Cummings which supported the prosecution theory at trial that each defendant had used the same gun to shoot Officer Verna. Pamela testified that on the night of the murder, petitioner and Cummings each reenacted the shooting, bragging how they each had shot the officer. Petitioner extended his arm as if holding a gun and said, "Pow, pow, motherfucker. Take this," and said that he "got him good."

Gilbert Gutierrez testified that in June 1983, while incarcerated on a murder charge, he talked to petitioner about the murder of Officer Verna. On the first occasion, petitioner said that Cummings shot the officer with the first shot coming from the back seat of the car, the second shots after Cummings got out of the car when Cummings shot Officer Verna twice, after which Cummings emptied the gun. Petitioner also told Gutierrez that petitioner fired the first shot while in the car, the second one when he stepped out and shot twice, and then emptied the gun into the officer who was on the ground, saying, "Here's your identification, motherfucker."

Petitioner portrays himself in his most recent brief as a victim, not a perpetrator, wrongly convicted by an unethical prosecutor who "knew" Pamela was lying to protect her husband, but nevertheless maintained a meritless "pass the gun theory." As for the eyewitnesses, petitioner maintains that other witnesses (primarily young children) also witnessed the crime, but "incomprehensibly" were not called or even interviewed by defense counsel. Those potentially exonerating eyewitnesses and other important witnesses were not called by defense counsel, according to petitioner, only because defense counsel was thoroughly incompetent and corrupt, and was merely an "unsavory blowhard who would promise his clients anything just to make a dollar . . . [and was unaware of even] the rudimentary element of the law." (PB 6.)

The reality of this case is not as colorful as petitioner's version. The facts of this case have been repeatedly reexamined in numerous post-trial proceedings, both on appeal and during extensive habeas corpus proceedings. Those inquiries, including all of the efforts to develop new evidence made by numerous counsel for petitioner, have never altered the basic evidentiary record in this case, or undermined the overwhelming strength of the evidence. In petitioner's original appeal, *People v. Cummings* (1993) 4 Cal.4th 1233, this Court examined the trial record and

recognized that the eight independent eyewitnesses testified variously and observed that eyewitness versions of events "varied greatly." Acknowledging that differing accounts were presented, the Court nevertheless concluded that "there was overwhelming evidence of [petitioner]'s guilt." (*People v. Cummings, supra*, 4 Cal.4th at p. 1324.)

That evidence, which has been repeatedly evaluated by this Court during the last three decades, remains intact. With the benefit of 31 years of post-trial inquires into the evidence, the true portrait of the crime remains the same today as it was in 1985, as petitioner continues to debate the value of the same eye witnesses who were identified following the murder, and the eight trial witnesses.

Try as he might, even after three decades of challenges, petitioner cannot erase the clear evidence of his guilt. Nor can he (or does he attempt to) challenge all of the post-offense evidence that confirms his guilt. Specifically, the evidence showed that immediately after the shooting, petitioner retrieved the murder weapon from the street. He then fled with his crime partner Raynard Cummings, and remained at large until he was captured in San Diego. When apprehended, petitioner was lying on the slain officer's gun. While handcuffed with his hands behind him in a police interview room, petitioner managed to cut his own throat. Petitioner later made statements contemplating suicide. When transported by police, he made statements reflecting his consciousness of guilt. All of this evidence is in addition to the overwhelming identification evidence that confirmed that petitioner was the "outside shooter" who got out of the car and finished off the wounded officer.

If petitioner had not been guilty of the murder, it is inconceivable that he would have behaved as he did in the immediate aftermath of the killing. If, as he insists, he was only the unwitting witness to Cummings' unexpected crime, he would not have promptly taken the murder weapon

and continued to associate with Cummings. Instead, he would have immediately distanced himself from Cummings. Instead, the pair remained together. They were, as before, partners in crime. These facts, and not the alleged deficiencies of his lawyer, were the reason petitioner was convicted of capital murder.

Over three decades, multiple eyewitnesses continue to conform that petitioner was a shooter in the murder. Gail Beasley identified petitioner at the grand jury proceedings, the preliminary hearing (testimony which was read to the jury in 1985 following a finding that she was unavailable), the 2000 penalty retrial. Marsha Holt identified petitioner at the grand jury proceedings, at the preliminary hearing, at the 1985 trial, and at the 2000 penalty retrial. Robert Thompson identified petitioner at the preliminary hearing, the 1985 trial, and the 2000 penalty retrial, and Pamela Cummings identified petitioner at the 1985 trial and the 2000 penalty retrial. There was no question that petitioner was in the car stopped by Officer Verna. And petitioner re-enacted the shooting in a manner confirming his guilt.[2]

Even after being granted an evidentiary hearing and an opportunity to have his current counsel present his "better" witnesses to the Referee, petitioner fared no better, as the original trial witnesses reiterated their identification of petitioner. And following that extensive inquiry, during which the Referee considered the testimony of 29 witnesses, the Referee overwhelmingly rejected petitioner's theories and version of events relative to proof of guilt. The Referee's findings, in response to the five questions

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[2] Respondent is mindful that this Court granted relief following the 2000 retrial, finding that the "combination of the evidentiary and instructional errors" presented an "intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt." (*People v. Gay* (2008) 42 Cal.4th 1195, 1226-1227.)

posed by this Court, support the reliability of the original jury's determination of petitioner's guilt.

ARGUMENT

I. PETITIONER WAS NOT DEPRIVED OF THE ADEQUATE ASSISTANCE OF COUNSEL; THE REFEREE'S FINDINGS, WHICH ARE SUPPORTED BY THE RECORD, CONFIRM THAT COUNSEL ADEQUATELY INVESTIGATED THE CASE AND, EVEN ASSUMING OTHERWISE, ANY ERROR IS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE OF PETITIONER'S GUILT

Petitioner asserts that his allegations of defense counsel Daye Shinn's ineffectiveness as trial counsel in the guilt phase of the 1985 capital trial were endorsed by the Referee, who—according to petitioner—agreed with petitioner that Shinn performed virtually no meaningful investigation and thereafter performed incompetently throughout petitioner's trial. (PB 25-28.) Petitioner fundamentally misstates the Referee's conclusions.

The Referee explicitly found, following his lengthy analysis of the trial record and the evidence offered at the 2014 hearing, that petitioner's allegations that Shinn had completely disengaged from further guilt phase investigation and rested the defense theory entirely on an allegation that the prosecution evidence was lacking—were "*not supported by the record.*" (RR 25, emphasis added.) To the contrary, the Referee discussed at great length (RR 8-25), the extensive investigative efforts undertaken by Shinn and Shinn's adequate trial defense.

Shinn's trial strategy was more than just a basic denial of the prosecution's theory that Cummings fired first and then passed the gun to petitioner. Shinn knew there was no prosecution witness who saw Cummings pass the gun to petitioner. And it was clear to Shinn that some of the witnesses' initial descriptions of the outside shooter changed from their original statements to police, their testimony before the grand jury, and their testimony at the preliminary hearing. Shinn recognized the

prosecution's ability to prove its "pass the gun" theory was dependent upon the inconsistent and contradictory testimony of witnesses of varying ages,[3] from different distances, and different vantage points, including two witnesses who allegedly observed the shooting while traveling in cars through an intersection.[4]

Shinn's opening statement illustrates that prior to trial, he had reviewed the eyewitnesses' pre-trial statements and testimonies at both the Grand Jury proceedings and the preliminary hearing, and was prepared to challenge their accounts. As the Referee found, Shinn's opening statement "reflects his preparation of petitioner's defense that the petitioner did not participate in the shooting. . . ." (RR 19, lines 17-19.) In his introductory remarks to the jury, Shinn described how prosecution witnesses Gail Beasley, Marsha Holt, Robert Thompson, and Shannon Roberts had all failed to identify petitioner at the lineup and at other opportunities such as before the grand jury or at the preliminary hearing. (58RT 6295-6298.)[5] He noted how Beasley had impeached Holt's identification. (58RT 6296.)

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[3] Oscar Martin (67RT 7354-7437) was 12 years old in 1983 (*Cummings, supra,* 4 Cal.4th at p. 1259) and Shannon Roberts (69RT 7777-7821) was 13 years old when he witnessed Officer Verna's murder. (*Id.* at p. 1262.)

[4] Shequita Chamberlain (68RT 7512-7526) and Rose Perez (70RT 7836-7874) were in separate cars travelling quickly through the intersection.

[5] Beasley was in her home when she saw Officer Verna stop the car. She heard two gunshots and saw a Black man with very light skin, six feet tall, with a "gericurl," holding a gun, shoot Officer Verna four times. Another man was in the backseat. Holt was in her home when she saw Officer Verna issuing a ticket and heard three shots. She saw Officer Verna fall and she saw the shooter pick up Officer Verna's gun. She identified petitioner as the shooter. Thompson, another neighbor, also noticed Officer Verna giving a citation. Thompson testified that petitioner was in the front seat of the car and Cummings was in the back seat. Thompson heard a noise, saw Officer Verna clutching his chest, and saw a gun held in the

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The Referee specifically concluded that Shinn's familiarity with the grand jury transcripts was illustrated by his use of them at trial, and in so concluding the Referee cited the testimony of various prosecution witnesses. (RR 11.)

During Shinn's opening statement, he listed the prosecution witnesses' numerous misidentifications, and told the jury those misidentifications created reasonable doubt about petitioner's guilt. Shinn also described the prosecutor as desperately attempting to convict petitioner for the officer's murder, as illustrated by the prosecutor's deal with Pamela Cummings, an admitted liar who was originally charged with the same murder. (58RT 6294.) Shinn made clear to the jury that Pamela Cummings was testifying in order to save herself and to protect her husband, who the prosecutor already said had fired the first shot. Shinn explained how Pamela Cummings had fooled the prosecutor and made a deal to get out of custody, and warned that she would continually lie in her testimony. (58RT 6298-6299.) He told the jury that the evidence at trial would show Cummings was the sole shooter, firing the first shot and firing the last. (58RT 6299.)[6]

(...continued)
hand of the back seat passenger. Thompson saw petitioner get out of the front seat with a gun in his hand, walk toward Officer Verna, point the gun at him and stand over the officer, who was now on his back. Cummings remained in the back seat. Roberts, 13, saw petitioner shoot Officer Verna four times. The trial testimony of each of these witnesses is summarized by this Court. (See *People v. Cummings, supra*, 4 Cal.4th at pp. 1261-1263.)

[6] Michael Burt, who testified on petitioner's behalf at the reference hearing as an expert in capital litigation, acknowledged that Shinn's general tactical decision to point the finger away from petitioner to Cummings was a valid strategy. (13RHT 1632.) Burt also agreed that Shinn's efforts to attack Pamela Cummings's credibility and show that she was biased in favor of her husband was another valid defense strategy. (13RHT 1632.)

As the Referee recognized, Shinn's strategy of portraying Cummings as the sole shooter was also demonstrated by his cross-examination of the very first prosecution witness at trial, Gilbert Gutierrez.[7] In his cross-examination of Gutierrez, Shinn established that Cummings had confessed to being the sole shooter. (64RT 6995.) He also elicited testimony from Gutierrez that petitioner had denied involvement: "[Petitioner] said he had never shot." (64RT 6995.) Shinn then had Gutierrez describe in detail both

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[7] Gutierrez testified that in June 1983, while he was being held on an unrelated murder charge and was alone in a holding cell with Cummings, Cummings told him that he, [petitioner], and Pamela Cummings were on their way to "score some cocaine" at the time they were stopped by Officer Verna. When Officer Verna asked him if he had any identification, Cummings said he did, pulled out a .38 caliber revolver, and shot the officer in the shoulder. Cummings told Gutierrez that he then got out of the car from the driver's side, shot the officer twice in the back, and then when the officer turned over, shot him again, emptying the gun and said: "There's your fucking I.D." Gutierrez testified that Cummings was proud of shooting Officer Verna and bragged about it. Cummings told Gutierrez that he had thrown his gun down and picked up the officer's gun, and that [petitioner] had recovered the gun used by Cummings when they went back. That was why some witnesses thought [petitioner] did some of the shooting. It was all right with Cummings if the blame was put on [petitioner]. Although Gutierrez had sought special consideration for his testimony and had been told by another inmate how to earn favor by informing, he had not been promised any benefits. He testified even though he had already been convicted because Cummings had made death threats against Gutierrez and his family.

Before Gutierrez spoke to Cummings, he had talked to [petitioner] three times about the events. [Petitioner] said that Cummings shot the officer with the first shot coming from the backseat of the car, the second shots after Cummings got out of the car when Cummings shot Verna twice, after which Cummings emptied the gun.

(*People v. Cummings, supra*, 4 Cal.4th at pp. 1264-1265.)

petitioner's version of events (with petitioner jumping out of the car and getting behind the door in case the officer started shooting back) (64RT 6996), as compared to Cummings's detailed description of the shooting. Through Shinn's questioning, Gutierrez related that Cummings explained that as some of the witnesses saw petitioner pick up the gun, they mistakenly assumed he was the one that had done the shooting and "they were pinning it on Kenny, and that's cool." (64RT 6999.)

Shinn clearly recognized the need to impeach Pamela Cummings, in light of her vantage point from outside the car during the murder and her devastating testimony.[8] Shinn assailed Pamela Cummings's credibility from the outset of his cross-examination. He reminded her that his first question to her in the robbery trial had been whether she was an honest person—and that her answer had been yes. He then reminded her she had

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[8] Pamela Cummings testified [on direct examination at trial] that Officer Verna copied information from the check cashing card she gave him for identification onto a field interrogation card. After Officer Verna learned she had no driver's license or registration for the car, and she told him that the other occupants were her husband and her cousin, Verna returned to the car. He bent down, putting his hands on his knees, and leaned in. Pamela, who was then standing near the curb, with the car between herself and the officer, heard a gunshot, saw Verna grab his shoulder, and simultaneously saw the barrel of a gun point straight across the front seat of the car and between the head rests. She could not see who held the gun as Cummings, sitting in the back, obstructed her view. [Petitioner] then got out of the car, approached Verna and fired three shots into his back as he attempted to return to his motorcycle. The officer turned back toward his motorcycle, walked back a few feet, fell on his knees, and then turned and fell on his back. [Petitioner] stood over Verna, shot him two more times, threw the gun on his body, and picked up the officer's gun. She and [petitioner] reentered the car through the driver's side door. [Petitioner] drove up the street, made a U-turn, and retrieved the gun.

(*People v. Cummings, supra*, 4 Cal.4th at p. 1263, footnotes omitted.)

admitted stealing a license plate, she had admitted knowingly driving around in a stolen car, she had admitted her participation in approximately ten robberies, and she had lied when she falsely accused Milton Cook in the murder case—yet she still maintained she was an honest person. (73RT 8221-8222.) Shinn exposed her obvious bias. (73RT 8223.) He questioned her about her jail visits with Cummings in the year preceding her trial testimony. She admitted that she had made a deal with the prosecutor to testify and had visited her husband Cummings 10 or 12 times at the county jail before her trial testimony. Incredibly, she claimed they had never discussed the case. (73RT 8224.)

Before her deal with the prosecution, Pamela Cummings had also been charged, like Cummings, with all the robberies and the special-circumstance murder of Officer Verna. Shinn marked the grand jury indictment and had her identify it. She understood special-circumstance murder potentially triggered the death penalty. (73RT 8226.) Pamela Cummings denied Raynard Cummings ever got out of the car and shot the officer (73RT 8228), and also denied trying to help either Cummings or petitioner. Although she did not want to see either of them go to the gas chamber (73RT 8231), she admitted she had falsely accused Milton Cook of being the shooter.

Petitioner constantly dismisses Pamela Cummings as if she was not a vital part of the evidence against him. Simply claiming she was biased because she was attempting to protect her husband and therefore could not be a credible witness ignores the compelling and convincing force of her damning testimony against petitioner, not only in the 1985 guilt phase trial, but again in the 2000 penalty retrial. The 2000 penalty retrial judge made specific factual findings endorsing her credibility, including the finding that "Pamela Cummings, to my mind, is an exceptionally credible witness. . . ." (2000 Pen. RT 3441-3442.)

After the jury recommended death in the 2000 penalty retrial, the trial court denied the automatic motion for a new trial, concluding :

> I further find that the defendant personally used a firearm to murder Officer Verna. This is beyond a reasonable doubt. I don't even find any lingering doubt. There is absolutely no doubt in this case that [petitioner] was the one that is responsible for firing the last of the six shots. He fired five shots into this officer that was just doing his job, trying to help and protect the community.
>
> And as far as the credibility of witnesses is concerned, I have listened attentively to the evidence, and I will say it again: Pamela Cummings, although an accomplice as a matter of law in the robberies and the murder, was *breathtakingly credible,* and I think the jury could see it. I could see it. If they had not found her to be that credible, we might have had a different verdict in this case.
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> So I think that the witness' credibility—not just Cummings, but all of the witnesses who identify petitioner as the shooter—they were *highly credible.*

(2000 Pen. RT 4902-4904, emphasis added.)

Finally, taking into consideration of all of the evidence presented at the 2000 penalty retrial, including the identification witnesses against petitioner, the trial court reviewed the aggravating and mitigating circumstances present and stated unequivocally, "my view of the evidence is that [petitioner] was more culpable than Raynard Cummings." (2000 Pen. RT 4904.)

At the 1985 guilt trial, Shinn used his cross examination of Oscar Martin to demonstrate that Cummings was the sole shooter.[9] Shinn had

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[9] As this Court stated when summarizing 12-year-old eyewitness Oscar Martin's testimony, his trial and preliminary hearing testimony, and his statements to investigators, "differed in significant respects." (*People v. Cummings, supra*, 4 Cal.4th at p. 1259.) Those differences were identified and highlighted by Shinn on cross-examination at trial.

Martin admit to the jury that he had previously identified Cummings at both the grand jury and the preliminary hearing and that he had testified to seeing Cummings shoot Officer Verna four times. (67RT 7428.) Martin confirmed that no one else shot the police officer and Martin did not see Cummings pass the gun to anyone else. (67RT 7429.) In response to Shinn's questioning, Martin admitted there was no doubt in his mind that Cummings was the shooter. (67RT 7435.)

Shequita Chamberlain, who saw part of the shooting as she drove through an adjacent intersection in her car, testified about seeing a dark man next to the officer but said it was not Cummings. (68RT 7522.)[10] Shinn attempted to eliminate the possibility that petitioner was the shooter by having Chamberlain testify that the man she saw was darker skinned than petitioner. (68RT 7526.)

Shinn was aware that Marsha Holt (whose trial testimony is summarized above) had identified petitioner at the grand jury, the preliminary hearing and again at trial. During his cross-examination, Shinn challenged her identifications by reviewing her prior inconsistent statements. Shinn cross-examined Beasley (whose testimony is summarized above) at the preliminary hearing and knew Beasley had testified that Holt had not known of the shooting until Beasley told her.

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[10] Shequita Chamberlain was a passenger in a car which drove by the nearby intersection just after she heard a noise which she did not then recognize as a shot. She looked and saw a tall, dark-skinned Black man and a police officer. She thought they were talking. She saw a car stopped nearby and a police motorcycle. She then heard another shot, saw the officer fall on his back, and, after the car she was in turned and went back, she saw the man get into the car that was stopped next to the officer and drove off. Although Cummings's complexion, as depicted in a photograph, was close to that of the man she saw, Cummings was not that man. The complexion of petitioner, as depicted in a photograph, was lighter than that of the man she saw. (*People v. Cummings, supra*, 4 Cal.4th at p. 1261.)

(74RT 8330.) In response to Shinn's questions during cross-examination, Holt admitted she had seen petitioner's picture in the newspapers. (68RT 7564.) She conceded that her memory was "hazy" after so long and she could no longer remember some of the events. (68RT 7566.) She also conceded that she had been unable to identify petitioner in a live lineup only four days after the murder. (68RT 7568.)[11] Holt also testified that petitioner was not in the car when the female driver made a U-turn and came back and picked him up. (68RT 7572, 7588-7589.) A bush obstructed part of her view from the window. (68RT 7589.)

Shinn impeached Robert Thompson's testimony (whose testimony is summarized above) that petitioner was the outside shooter. Shinn confronted Thompson with his previous failures to identify petitioner at the lineup, before the grand jury, and at the preliminary hearing. Shinn introduced the theory that the police had gotten Thompson to change his mind about the identity of the outside shooter after a "walk through" of the scene with Detective Holder. Thompson admitted he had not identified anyone at the lineup, the grand jury or the preliminary hearing. (68RT 7642-7646.) He admitted his prior testimony at the preliminary hearing that the media had "distorted his mind (68RT 7647), and that he testified at the grand jury that the man who had exited the car with a gun was a "medium dark" and "medium shade black." (68RT 7649-7650.) He described the passenger in the front seat as Caucasian, not a "Negro with a light shade." (68RT 7651.) Thompson did not see anyone pass a gun and did not know if the gun he saw Cummings with was the same gun that petitioner had. (69RT 7738-7739.) Shinn effectively concluded his cross-

[11] Significantly, petitioner's appearance drastically changed within hours of the murder both due to his botched suicide attempt (resulting in conspicuous staples on his neck) and the lacerations on his cheek he sustained when struggling with police after his capture.

examination of Thompson by getting him to acknowledge his testimony at the preliminary hearing that what he had seen was destroyed by newspapers and television, and that his mind was "destroyed" by the media at the time of the live lineup. (69RT 7740-7741.)[12]

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[12] On direct appeal, this Court, repeatedly, albeit impliedly, recognized the degree of Shinn's efforts to discredit the prosecution's case. (See *People v. Cummings, supra*, 4 Cal.4th at p. 1259 [noting the "inconsistent physical and clothing descriptions given by the prosecution eyewitnesses," and that "[t]heir versions of the events and identification of the shooter or shooters varied greatly"].)

> Robert Thompson, for example, told police in the first few hours after the murder that the passenger in the rear seat had fired all the shots and that this man had a medium-to-dark complexion and was wearing a brown short-sleeved shirt and baggy jeans. Thompson gave the same account to the grand jury and to defense counsel a few months before the penalty retrial. Gail Beasley's description shortly after the murder of the shirt worn by the shooter—that it was burnt orange or red—was likewise consistent with Cummings's clothing and inconsistent with defendant's. Marsha Holt, who said she was in the bedroom talking to her mother when the shooting began, described the shooter as wearing a long-sleeved white shirt, but her account of the events was impeached by her mother's denial of being in the bedroom at the time as well as by her mother's testimony that she had been unaware of the shooting until Gail Beasley told her about it, by the testimony of the defense expert that Marsha's line of sight and field of view were limited, by Beasley's testimony that neither Marsha nor Celeste appeared to know that an officer had been shot, and by Marsha's inability to identify defendant in a lineup a few days after the murder. The remaining eyewitness to the shooting, Pamela Cummings, had an obvious interest in protecting her ex-husband.

(*People v. Gay, supra,* 42 Cal.4th at p. 1227.)

It is also significant, when assessing the reasonableness of Shinn's decisions as to the selection of witnesses (and expert witnesses) to consider additional information that was known to Shinn at the time of the trial. Shinn knew that when petitioner was interviewed by the police and the prosecutor, petitioner had described the clothing he was wearing during the murder. And Shinn knew

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In closing argument, Shinn stressed to the jurors that the prosecution's own evidence created reasonable doubt. As the Referee points out, Shinn's trial summation "reflects the development of the defense theory and also reflects Shinn's "adjustments for adverse and favorable developments." (RR 21, lines 12-14.)

During Shinn's closing argument, he produced a chart that listed 11 separate factors, or reasonable doubts, any of which would justify an acquittal. He proceeded to discuss each one, based upon the evidence developed in the trial. (95RT 10922-10923.) The Referee discusses the chart and the analysis underlying it at great length (RR 21-24), as will respondent, because the chart and Shinn's corresponding final argument make explicit the extensive defense theory of reasonable doubt based upon flaws in the evidence.

Shinn argued that the first fact raising a reasonable doubt about petitioner's role in Officer Verna's murder was created by the prosecution, namely, the conflicting evidence that "Mr. Cummings came out of the car and shot the police officer and in the same breath [the prosecutor] present[ed] evidence that [petitioner] got out of the car and shot the officer." (95RT 10923.) Shinn argued that Cummings fired the first shot from the backseat. (95RT 10924-10925.) He noted that if Officer Verna had seen a gun in petitioner's hands, he would have put his hands up or turned away, instead, "he was surprised from the back seat by Mr. Cummings." (95RT 10925.) Shinn noted how Robert Thompson told the

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petitioner's description of his clothing was consistent with eyewitnesses' descriptions of the shooter's clothing. (Peo. Exhs. 804(a) [tape recording of police interview] and 804(b) [transcript of the interview].) Had Shinn called those witnesses, or an expert on identification, he ran the risk that their testimonies would be undercut by petitioner's incriminating admissions regarding his clothing.

police two hours after the murder that "he saw a black man, a black person from the back seat g[e]t out and shoot the police officer." (95RT 10925-10926.)

Shinn reminded the jury that Oscar Martin had said, "I saw Mr. Cummings get out of the car and shoot the policeman." (95RT 10926.) Robert Thompson, Irma Rodriguez, Pamela Cummings and Walter Roberts told police that the shooter emerged out of the car from the driver's side. By contrast, Shannon Roberts, Gail Beasley and Marsha Holt told police that the driver exited the passenger side of the car. (73RT 8168 (P. Cummings); Pet. Exh. A-36, at p. 1; 4PHT 166-167 (Martin); Pet. Exh. A-45, at p. 2 (Thompson); Pet. Exh. A-13 (Rodriquez); Pet. Exh. A-44, at p. 1 (W. Roberts); Resp. Exh. 791 (S. Roberts); Pet. Exh. A-12:3 (Beasley); and Pet. Exh. A-42, at p. 2 (Holt).) Shannon Roberts identified petitioner after seeing him sitting in court before the jury came in, but did not identify petitioner as the shooter when he was in court at the preliminary hearing or at the grand jury. (95RT 10926-10927.) Shinn urged the jury that the conflicts in the evidence created by these witnesses, each of whom stated that Raynard Cummings got out and shot Officer Verna, raised a reasonable doubt about petitioner's guilt. (95RT 10928.) These discrepancies (and trial testimony from Thompson or either Roberts) could be explained by the prosecution as understandable given the rapidly-moving sequence of events around the car.

Shinn next argued there was no evidence that Cummings passed the gun to petitioner and that the absence of proof on that issue was sufficient to raise a reasonable doubt and cause the jury to render a not guilty verdict. Shinn argued that the evidence "conclusively prove[d] that the gun was never passed." (95RT 10925.) He reminded the jury of his opening statement, in which he had anticipated the shortcomings of the evidence. "I read all the police reports and didn't see anything. I said there is not going

to be one witness that is going to get up on the stand and testify that they saw a gun passed . . . . I knew there would be no witnesses. Not even one witness testifying." (95RT 10928-10930.)

Shinn asserted the third factor creating reasonable doubt was Oscar Martin's testimony that he saw Cummings—and no one else—get out of the car and shoot Officer Verna. Martin did not see Cummings pass the gun to anyone else. (95RT 10930-10933.)

The fourth reasonable doubt factor Shinn argued was the statement Robert Thompson made to Officer Lindquist two hours after the murder when the events were still fresh in Thompson's memory. Thompson said that Cummings (and not petitioner) got out of the car from the back seat and shot Officer Verna. (95RT 10934-10938.)

Shinn elicited testimony from Shequita Chamberlain that the person she saw looked darker than the picture of Cummings. (68RT 7525-7526.) The fifth reasonable doubt factor Shinn urged the jury to consider was Chamberlain's identification of the shooter, a dark Black person, unlike petitioner. (95RT 10938.)

Cummings's confession to various fellow jail inmates and sheriff's deputies was the sixth factor creating reasonable doubt that Shinn argued to the jury. Shinn told the jury Cummings's multiple inculpatory statements raised a reasonable doubt that petitioner shot Officer Verna. (95RT 10938-10942.)

Pamela Cummings's lack of believability was the seventh factor creating reasonable doubt about petitioner's guilt, according to Shinn. Shinn "forcefully" challenged her credibility and outlined all the reasons the jury should reject her testimony; she had tried to protect her husband, whom she admitted she still loved and wanted to save from the gas chamber. (95RT 10956-10957.) She had claimed she was in shock after the shooting, but two hours later she was sufficiently composed that she

could call the police to falsely implicate Milton Cook, who was dark-skinned and looked like her husband. She knew witnesses had seen the shooting and was afraid they would identify Raynard Cummings. She purposefully identified Cook to misdirect the police. (95RT 10957-10961.) After that, she made a deal with the prosecutor, was released from jail, and *then* identified petitioner as the shooter. (95RT 10962-10965.) Shin argued that seeing her testify, "with her answers and her 'I don't knows' and her 'I don't remembers'" created a reasonable doubt for the jury. (95RT 10965.)

Deborah Warren testified that she spoke with Pamela Cummings the day after the murder. Pamela admitted to Warren that Cummings shot Officer Verna. This was the eighth factor Shinn argued as establishing reasonable doubt. (95RT 10943.)

The ninth factor creating reasonable doubt in Shinn's formulation was Beasley's impeachment of Marsha Holt's testimony that Holt had seen the shooting. Beasley testified that when she entered the bedroom, Holt was watching television and not looking out the window. (95RT 10943-10945.) Shinn argued that Holt saw petitioner picking up the gun after the car returned and had simply assumed petitioner had shot Officer Verna. According to Shinn, she was just trying to fit the pieces together from what she had seen, the same way other witnesses who identified petitioner as the shooter had done. (95RT 10946-10951.)

The tenth and related basis for reasonable doubt Shinn brought to the jury's attention was Beasley's supposed identification of petitioner when she confused the color of the shirt she said petitioner was wearing with the color of the shirt that Cummings was actually wearing. Beasley had not identified petitioner at the preliminary hearing, and Shinn reminded the jurors that pictures she had seen on television and in newspapers subsequently had helped her identify petitioner. (95RT 10952-10956.)

The last reasonable doubt factor Shinn described to the jury was Shannon Roberts's tainted trial identification of petitioner. Shannon had not identified petitioner at the live lineup, when testifying before the grand jury or in the preliminary hearing. As Shinn's investigator Payne testified, Shannon was in court just before the jury came in and petitioner was there. Shannon looked right at petitioner; after that he identified petitioner before the jury after being unable to identify petitioner for about a year and eight months. (95RT 10965-10967.)

As the Referee recognized following the 2014 Reference Hearing, Shinn also used a second argument chart in his summation in 1985. (RR 24, lines 18-21.) The second chart compared the witness accounts and their varying identifications. (95RT 10974.) Using the chart, Shinn noted the consistencies and inconsistencies (95RT 10974-10976), and argued that "all of the evidence points to the fact that Mr. Cummings was the one that shot the officer, not [petitioner]." (95RT 10976.)

Shinn concluded his closing argument by reminding the jury of the reasonable doubts created by the prosecution, and the lack of evidence the gun was passed—"the missing link" (95RT 10989), and by emphasizing that "the most strong evidence . . . points in Mr. Cummings's direction that he is the killer. The gun never left his hand. He shot . . . [every] shot." (95RT 10989-10990.)

The Referee, citing extensively from the trial transcript, outlined at great length (RR 13-25) what the court described as Shinn's "multi-pronged defense." (RR 13, line 18.) The Referee described Shinn's defense as having five major components, each of which was documented by the Referee with factual findings. Those components were:

1. The witnesses who identified petitioner as the shooter made inconsistent statements, calling into question the credibility and weight of their testimony;

2. Percipient witnesses identified Raynard Cummings as the person outside the vehicle who shot Officer Verna or as the person who more resembles the shooter than petitioner;

3. No witness saw the gun pass from Raynard Cummings to petitioner, thereby undermining the prosecution's two-shooter theory;

4. Pamela Cummings was a liar who was trying to protect herself and her husband, Raynard Cummings;

5. Raynard Cummings had on several occasions claimed full responsibility for the shooting.

(RR 13-25.)

Having reviewed at great length the investigative steps taken by Shinn and the trial defense he presented, the Referee concluded his factual analysis by making the explicit finding that petitioner's contention—that Shinn had rested the entire defense theory on the fact that police reports contained no evidence that an eyewitness saw the gun passed but otherwise conducted no further investigation—was a contention that "is not supported by the record." (RR 25, lines 20-23.)

The applicable standards are well settled: "'An ineffective assistance claim has two components: A defendant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.' [Citations.] [¶] . . . [¶] 'To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness."'" (*In re Welch* (2015) 61 Cal.4th 489, 514.) In evaluating counsel's conduct, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) "In order to establish prejudice, a defendant 'must show

that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.] A defendant 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case.' [Citation.] Rather, he must show 'a probability sufficient to undermine confidence in the outcome.'" (*In re Welch, supra*, at p. 517; see also *People v. Kipp* (1998) 18 Cal.4th 349, 366 [prejudice shown if counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"].)

Shinn's performance complied with *Strickland*'s objective standard of reasonableness under prevailing norms. For that reasons, the Referee did not challenge—much less reject—any significant aspect of Shinn's representation at the guilt phase.

Petitioner faults Shinn for failing to conduct a prompt investigation, resulting in a belated evaluation of the crime scene by defense investigator Payne. But petitioner fails to allege, much less establish, how any alleged delay resulted in the loss of exonerating or impeaching evidence. As stressed elsewhere, with the benefit of more than 30 years of additional investigation and a variety of capable lawyers with ample resources, petitioner in 2016 identifies exactly the same cast of potential witnesses that were known in 1983 and evaluated by Shinn prior to the 1985 trial. Petitioner cannot point to any finding by the referee that Shinn delayed the investigation, or that a delayed investigation prejudiced petitioner, because no evidence supports that theory.

Petitioner contends he has shown that, but for trial counsel's allegedly deficient performance, petitioner would have been acquitted at trial. (PB 42-113.) But even assuming without conceding that counsel's performance was deficient, it is not reasonably probable the result of the guilt trial would have been different.

Petitioner points to this Court's decision granting *penalty* relief to petitioner as proof that the same rationale would apply when evaluating the guilt phase. (PB 42-43.) Of course, the issues are entirely distinct, and this Court's decision to grant penalty relief in no way affects—much less undermines—the jury's determination of guilt.

The 2014 Reference Hearing afforded petitioner the opportunity to present evidence contradicting the overwhelming evidence of his guilt. But at the hearing, petitioner failed to undermine the evidence that he was an active participant in the murder. At the hearing, petitioner was able to present the testimony of the four other eyewitnesses—Irma Esparza, Ejinio "Choppy" Rodriguez, Walter Roberts and Martina Ruelas—who petitioner claims should have been called by Shinn.

As the Referee's conclusion, and as the record of the Reference Hearing make clear, none of the additional witnesses would have substantially diminished the prosecution theory or significantly bolstered the defense theory. This Court earlier deemed the evidence of petitioner's guilt "overwhelming." Petitioner in his reply brief claims the child witnesses who Shinn did not call would have exonerated petitioner. The Referee made no such finding, for good reason.

A. Child Witnesses

1. *Irma Rodriguez Esparza*

Irma Rodriguez Esparza (Irma),[13] was 13 years old and pregnant at the time of the murder and was positioned more than 250 feet away from the location of the shooting of Officer Verna's on Hoyt Street. She was not

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[13] At the time of the reference hearing, the witness's married name was Esparza. Additionally, Irma's brother, Ejinio "Choppy" Rodriguez testified at the reference hearing. Other percipient witnesses refer to Ejinio Rodriguez by his nickname, "Choppy." (11RHT 1327.)

in a position to see the shooter's face. She initially reported to police that she did not see the shooting and her parents did not want her to cooperate.

During the 2014 reference hearing, more than 30 years after the murder, Irma recalled her brothers playing in the front yard on June 2, 1983, when a vehicle was pulled over. (14RHT 1700.) Irma testified that when she first saw the officer, she was in her front yard seated on the grass next to the garage of her residence. (Resp. Exh. 702; 14RHT 1705-1706.) She was watching her brother, Ejinio, who was then only eight, play with his friends. (Resp. Exh. 702; 14RHT 1705-1706.) Irma saw the driver of the vehicle shoot Officer Verna. (14RHT 1701.) Irma described the driver as a very tall Black male. (14RHT 1701.) Irma noticed there was also a passenger in the vehicle and she believed there to be someone else in the back seat. (14RHT 1701.) The passenger was lighter skinned than the driver. (14RHT 1701.) Irma did not recall where the vehicle went after the driver shot Officer Verna. (14RHT 1701-1702.) Irma believed they made sort of a circle and came back around after the shooting. (14RHT 1702.) Irma did not recall seeing the car when it came back. (14RHT 1702.) She did remember seeing the light-skinned man when the car returned. (14RHT 1702.)

Irma's original statements to the police were inconsistent with her 2014 testimony. In her initial statement to police on June 3, 1983, at 11:00 a.m., Irma told Detective A.R. Moreno, "I was outside about two houses away from my mom's house. She lived at 12097 Hoyt Street." (Pet. Exh. A-13.) She clarified her position by stating, "The car pulled over in front of the policeman about 20 feet from him. They were across the street from me and two houses over." (Pet. Exh. A-13.) This was approximately 250 feet from the shooting. (15RHT 1938-1939 [testimony of Detective Martinez measuring scene].)

The Referee made a factual finding that Irma's 2014 version "differs significantly" from that of other witnesses. (RR 42, lines 20-21.) In addition, her reference hearing testimony is at odds with the physical evidence. First, her account of the traffic stop differed from several other witnesses. The day after the murder, Irma told Detective Moreno, "As the car they were in came toward the policeman, who was standing next to his motorcycle, he waved at them to pull over to the curb." (Pet. Exhs. A-149, at pp. 1-2; A-13, at p. 1.) But Pamela Cummings, along with many of the eyewitnesses (including Robert Thompson, Gail Beasley, Shannon Roberts, and Petitioner's own witness, Martina Jimenez Ruelas) recounted that Officer Verna was riding his motorcycle when he initiated a traffic stop, using his lights and/or siren, and then parked his motorcycle behind the car. (Pet. Exhs. A-12, A-27, A-40, A-43, A-45; 2GJ 426, 485-488; 4PHT 54-56; 12RHT 13 77-13 79.)

At the reference hearing, Irma testified that after the grey car drove away, she stayed in the garage with her brother and his playmates (14RHT 1713), but Walter Roberts testified that he ran toward his house to alert his uncle or call 911 (10RHT 1272, 1277), and Ejinio testified that he went to where Officer Verna lay in the street and saw Oscar Martin's mother (Rosa Martin) trying to use the radio on the officer's motorcycle to call for help. (11RHT 1336.) At the reference hearing, Irma testified that she, along with Ejinio, were summoned to court in San Fernando in 2000 (14RHT 1703-1705), but Ejinio testified otherwise; he was unaware that there were two jury trials in this case and had no knowledge about a trial in 2000. (11RHT 1347.)

Second, Irma's description of the driver was different from other witnesses. Irma told detectives, "[t]here was a male Negro driving the car. He was dark skinned, about 25 years old with about a 3-4 inch afro." (Pet. Exh. A-13, at p. 1.) This is in direct contradiction to the great weight of

evidence showing that Pamela Cummings, a Caucasian female, was the driver of the grey car at the time of the traffic stop.[14] This includes statements made by eyewitnesses Robert Thompson[15] and Shannon Roberts.[16] Moreover, Officer Verna was documenting the vehicle driver's name and had written down the name "Pamela Cummings" before he was murdered. (1985 People's Exhs. 31 (field identification card); 32 (18x20 photo of People's Exh. 31).) Irma never provided any type of description for the male driver's clothing, nor did she ever see Pamela Cummings, a Caucasian female, get in or out of the grey car. (Pet. Exhs. A-13, A-149.) These very significant failures of observation would have damaged her credibility.

Third, the physical evidence contradicted Irma's account of the murder. On June 3, 1983, Irma stated that while Officer Verna was talking to the driver and writing something down on a white card, "the driver, with his right hand, punched the officer in the face. The punch made the officer stand straight up. The driver then pulled the officer's gun out of his holster and shot the officer in the neck with it." (Pet. Exhs. A-13, at p. 1; A-149, at p. 2.) However, Officer Verna was not shot with his own gun. A physical and microscopic examination and comparison conducted by Detective McCree of the bullets inside the body of Officer Verna to the bullet recovered from the wall of the Horizon's House West Hotel were all fired

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[14] Statements made by, or attributed to, petitioner in the 1985 un-redacted cassette tape of People's Trial Exh. 1; statements attributed to Raynard Cummings (Gutierrez); 64RT 6952-6953 (Flores); Pet. Exh. A-173, at p. 1 and (Jennings); Pet. Exh. A-5; RT Pamela Cummings's statement (9 page handwritten statement of Pamela Cummings 1985 Trial Exh. C); Debbie Cantu's statement and testimony. (Pet. Exh. A-134, at pp. 4-5 and 3 GJ 514-515.)

[15] Pet. Exh. A-45, at pp. 1-2; 2GJ 427-428.

[16] Resp. Exh. 791; 3GJ 488.

from a gun Cummings had prior to the murder. (3GJ 586-587 and 4GJ 696 (McCree); LAPD re-interview on 6/7/83 at 1330 hours, 3GJ 511-513 and 4PHT 40-42 (Cantu); 2GJ 332-335 (Norton); 64RT 6953-6954 (Gutierrez), Pet. Exh. A-5, at p. 1 (Cummings's confession to Jennings) and Pet. Exh. A-173, at p. 2 (Cummings's confession to Flores).)

Finally, Irma's youth, the resistance of her parents to her testifying, as well as her emotional reaction to the situation all militated against calling her as a witness. Irma was only 13 years old at the time. (14RHT 1697.) She did not talk to police immediately because she was pregnant and very upset by what she had witnessed. (14RHT 1709.)

In sum, several factors could have completely impeached Irma's testimony. For that reason, the Referee made the factual finding that "discrepancies call into question the value and weight of her testimony." (RR 43, lines 8-9.) Given all these obstacles, and even assuming she would have testified at trial in the same manner that she did in 2014, 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 defense witness in 1985, the prosecution would have easily challenged the accuracy and reliability of her testimony. 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.) Thus, even assuming Irma could provide some favorable testimony, there were good reasons for not calling her at trial.

Because Shinn had the LAPD investigation ("murder") book, which included the report of Irma's statement, he was aware of Irma's statements,

and that Irma's parents did not want her to cooperate with the police investigation. And petitioner failed to establish that Shinn would have been able to interview her during his pre-trial investigation. It was therefore reasonable for Shinn to decline to call this witness. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334 [decision whether to call a witness is tactical].)

Even 30 years later, Irma remained traumatized by the events and did not wish to speak about what she had seen. After observing Irma testify at the reference hearing, the Referee specifically concluded that her description of events differed significantly from the account of other witnesses, and was "problematic." (RR 42, line 20.) She remained upset by the experience. The Referee found that Irma's memory was affected by the passage of time (30 years). The Referee did not find Irma should have been called by the defense. On the contrary, his conclusion (that trial counsel "must exercise caution when contemplating calling young children as witnesses to traumatic events" (RR 44, line 6) only supports Shinn's decision not to call Irma or any of the other children discussed below. The Referee made no findings in support of a decision to call Irma as a witness.

In light of these facts, petitioner has failed to meet his burden of proving that Irma would have offered anything favorable to his defense if Shinn had called her as a witness at trial. Petitioner also fails the prejudice prong of *Strickland.*

2. *Ejinio "Choppy" Rodriguez*

During the 2014 reference hearing, Ejinio "Choppy" Rodriguez testified that he lived on Hoyt Street in Lake View Terrace in 1983. (11RHT 1326.) In 1983, he was eight years old, about to turn nine. (11RHT 1326.) Ejinio recalled an incident where a police officer was shot. (11RHT 1327.) At the time of the shooting, Ejinio was playing football with his neighbors Shannon Roberts, Walter Roberts and Lonnie Franklin. (11RHT 1327.) He became aware that a police officer pulled over a vehicle

while they were playing. (11RHT 1328.) He paid some attention to the event until he realized he did not recognize whoever was pulled over, at which time he went back to playing. (11RHT 1328.) Later on, he heard a sound like a firecracker that drew his attention back to the traffic stop. (11RHT 1329.)

Ejinio remembered seeing one or two people, other than the police officer, but did not recall any descriptions of them in terms of sex or race. (11RHT 1329-1330.) He did not recall what happened between hearing the sound like a firecracker and seeing the officer lying on his back. (11RHT 1331.) He remembered that, after the vehicle left the scene, he went over to the officer to see the body, and then went home. (11RHT 1336.) In 2003, twenty years after the murder, he gave a statement to a defense investigator that "the shooter was a black man who had dark skin and was wearing a dark shirt." (11RHT 1352.) He admitted he could be mistaken as to skin tone of the person who did the shooting and who picked up the pistol after the U-turn. (11RHT 1355.)

Like Irma, Ejinio's memory would have been impeached by his extreme youth, the traumatic impact of the murder on him, the distance he was from the shooting (235 feet away), and the fact that he did not make a contemporaneous 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. 24.)

As noted, the Referee agreed that Ejinio's parents did not want him to cooperate. He was not in a position to see the shooter's face. In 2003, he signed a declaration purporting to recall what he had witnessed 20 years earlier, as an eight-year-old child. The declaration was suspect on its face, due to the amount of time between the murder and the purported recollection. And a 2003 declaration was not available to Shinn in 1985, nor could one have been procured given the objections of Ejinio's parents.

Petitioner has failed to meet his burden of proving that Shinn could have obtained any statement from Ejinio in 1985. Petitioner therefore fails under the first prong of *Strickland.* Even when Ejinio testified as an adult before the Referee at the reference hearing, the Referee found him to be "anxious and distressed" three decades after the murder. (RR 41, line 20.) The Referee also found that Ejinio's parents would likely have objected to him testifying, and also found that trial testimony by Ejinio would have prompted a cautionary instruction to the jury. (RR 41, lines 16-21.) The Referee made no findings in favor of calling Ejinio as a witness.

Petitioner has failed to meet his burden of establishing that what Ejinio may have said in 1985 which would have been favorable to petitioner's defense. Thus, petitioner also fails the prejudice prong of *Strickland.*

3. *Walter Roberts*

Walter Roberts[17] was 11 years old at the time of the murder and 12 when he was initially interviewed. (10RHT 1268.) He saw the murder from a distance of at least 235 feet.

Walter initially reported to police that the shooter was the man in the front seat of the stopped car; the undisputed evidence showed petitioner had been sitting in the front seat. In Walter's first interview, he described the driver as shooting Officer Verna from inside the car, and then getting out and shooting Officer Verna twice more. (Resp. Exh. 751.) Walter described the driver as "male Negro, black, 6'0", 170, 25/30, Long sleeve multicolor shirt, dark pants, tennis shoes 1-2 inch afro." (Resp. Exh. 751.) But he also stated that the left-rear passenger got out, ran westbound to Gladstone Avenue, looked around, and then ran back to the car. (Resp.

[17] Both Walter Roberts and his brother Shannon Roberts testified at the reference hearing.

Exh. 751.) He described this passenger as "male, Negro, black, dark clothes, 18-20 years." (Resp. Exh. 751.) In his second interview, Walter reaffirmed that the driver was the sole shooter, and elaborated that the driver was "medium complexion," "clean shaven," and was wearing a dark blue long sleeve shirt. (Resp. Exh. 752.) He also reaffirmed that the rear passenger got out and ran to the corner, further describing this person as "black" and wearing a black long-sleeve shirt. (Resp. Exh. 752.) Both suspects had a "3-4 inch afro." (Resp. Exh. 752.)

Neither description identifies Cummings as the shooter while excluding petitioner. Both are described as "black," with Walter later describing the shooter as "medium complexion." Moreover, he also described the shooter as "clean shaven," but at the time of his arrest two days later, Cummings had a beard and moustache. (58RT 6316 (People's Exh. 2); Pet. Exh. A-101.) This evidence could easily have incriminated petitioner rather than Cummings. The clothing descriptions were almost identical and did not provide a means of distinguishing the two. Furthermore, no other witness in this case saw a man get out of the car and run down to the corner. This was a significant discrepancy, casting further doubt on Walter's accuracy.

Compounding these problems, Walter stated that a female got out of the car from the front passenger seat. (Resp. Exhs. 751, 752.) This would have to be Pamela Cummings. But, as already discussed, Pamela Cummings was the driver, not the front seat passenger.[18] This suggests that

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[18] Statements made by, or attributed to, petitioner in the 1985 trial, unredacted cassette tape of People's Trial Exh. 1; statements attributed to Raynard Cummings (Gutierrez) 64RT 6952-6953, (Flores) Pet. Exh. A-173 p. 1 and (Jennings) Pet. Exh. A-5; RT Pamela Cummings's statement (9 page handwritten statement of Pamela Cummings 1985 Trial Exh. C), (continued...)

Walter did not accurately observe or remember where the various people were in the car. In addition, three days after the murder, Walter was unable to identify either Cummings or his look-alike, Milton Cook, from their respective lineups. (Pet. Exh. A-44:4-5; Resp. Exhs. 754, 755.) He had an opportunity to identify Cummings as the shooter, but could not. Like Irma and Ejinio, he could have been impeached with these facts at trial. Irma also testified that she took the boys to the garage after the shooting, and that the boys were scared and screaming. (14RHT 1713.) Therefore, Walter may not have seen all that he claimed, and instead may have conflated his account with those of the other children.

None of the evidence from Walter at the reference hearing was new—he had previously given statements to the police, and participated in two live lineups with Cummings and petitioner without identifying either. These facts were included in the original murder book. Shinn would have no reason to call a witness who, on balance, incriminated his client more than helped him.

Following the reference hearing, the Referee noted that Walter's description of the female in the shooter's car (as emerging from the car to disarm the wounded officer) was "not shared by any other witness." The Referee also noted that Walter described both men (i.e., petitioner and Cummings) as the same height. (RR 42, lines 1-8.) In fact, Cummings was six inches taller than petitioner. (RR 7, lines 3-15.)

Calling Walter as a defense witness would have required Shinn to argue to the jury that Walter was accurate in one respect (a "black" man as the shooter), but inaccurate in all others, including his similar description of

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(...continued)
Debbie Cantu's statement and testimony (Pet. Exh. A-134, at pp. 4-5 and 3GJ 514-515.)

the other man who got out of the car. Putting on such testimony could easily have backfired: if the jury believed that Walter saw a Black man with medium complexion shoot Officer Verna from the front seat of the car, this could have incriminated petitioner, not Cummings. Unsurprisingly, neither side called Walter as a witness in 1985.

Because Walter's statements potentially pointed to petitioner as the shooter, petitioner has failed to meet his burden of proving that Shinn could have elicited evidence favorable to petitioner's defense if Shinn had called Walter as a witness at trial.

4. *Martina Jimenez Ruelas*

Martina Jimenez Ruelas was nine years old on June 2, 1983. She saw the events from approximately 125 feet away. Following the murder, in 1983, she told police investigators that she did not see the killer's face and she could not identify anyone at the 1983 lineups. Shinn was aware of this information from police reports, and knew that she had told him she did not want to testify in petitioner's presence. (RR 39, lines 23-24; 12RHT 1377.)

More than 30 years later, Martina testified at the reference hearing that on June 2, 1983, she was talking to Officer Verna in her front yard behind her fence. (12RHT 1377-1378.) He then left to stop a car. (12RHT 1378.) Martina was watching Officer Verna from between two palms on the side of the yard when the traffic stop took place. (12RHT 1378.) She recalled that, after the vehicle stopped, Officer Verna walked over to the car and was shot. (12RHT 1379.) When the vehicle passed by, she saw two individuals in the front of the vehicle. (12RHT 1379.) She did not remember anyone getting out of the car. (12RHT 1379.) She recalled hearing gunshots, but did not recall how many she heard. (12RHT 1379.) She did not recall what the shooter looked like other than that he was a dark-skinned, Black man. (12RHT 1379.) She also testified that she saw a

man driving the car, and that she could see the driver better than the passenger. (12RHT 1395.)

Martina's account of the shooting in 2014 at the reference hearing was at odds with her statements at the time of the shooting. 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 "Negro," possibly in his mid-twenties, 5'10" to 6'0", with a medium to thin build. (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 who shot Officer Verna or who was driving the car, she did see the shooter 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 age 11, stated that there were two Black men in the car: the driver and 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.)

Martina's 2014 account of the 1983 shooting is dramatically different than her initial statements to the police more than 30 years ago. At the reference hearing, Martina agreed that a picture of Cummings showed the same skin color as the man that she saw shoot Officer Verna. (12RHT 1401.) But her recollection was at odds with her inability to recall the shooter's appearance in 1983. At the time of the murder, she was unable to identify anyone as the suspect in any of the three lineups she attended on June 6, 1983, indicating to officers that she "couldn't remember what the people looked like when the policeman got shot." (12RHT 1391-1394; Pet. Exh. 43, at pp. 5-8; Resp. Exhs. 757, 758.) There

is no plausible reason to believe her more recent recollection is the more accurate one.

Martina never doubted that she gave truthful information to the police in 1983. She confirmed that when she was taken to the police station the night of the shooting, she truthfully told the officers "what [she] saw at the time." (12RHT 1388, 1396.) Additionally, when the prosecutor and some detectives came to talk to her in Tijuana in 1985, she told them, to the best of her ability, what she remembered. (12RHT 1389.)

Martina was the youngest of the potential witnesses who saw the murder. Her testimony could have been impeached at the time on that basis, to the extent it was even favorable to petitioner. In any event, it is not plausible to believe that the decades-long lapse enhanced her ability to identify Cummings as the sole shooter, while simultaneously severely diminishing her ability to recollect other aspects of the shooting.

Martina's first identification of Cummings as the shooter, made 31 years after the murder, was understandably accorded little weight by the Referee, who found that "she was anxious throughout her [reference hearing] testimony and in tears at the conclusion of her direct examination." (RR 39, lines 25-27.)[19] Just weeks after the shooting, her parents decided to move to Mexico as a result of what she had witnessed.

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[19] Martina's decades-delayed description of the shooter was tainted by defense investigators. In 2000, Public Defender Investigator Daniel Rose, working for petitioner in his penalty retrial, interviewed her for about half an hour. (12RHT 1398.) Rose did not identify himself until just before the interview ended. (12RHT 1398.) Martina was upset because Rose tried to tell her the description of people and put words in her mouth about what had happened. (12RHT 1399.) Later, in 2003, a "lady investigator" helped her to identify the shooter by showing her a picture. (12RHT 1400.) Her long-delayed recollection is more likely the result of defense prompting and contamination, not an accurate or reliable memory from her own independent observations of the crime.

Petitioner also maintains that the testimony of the eyewitnesses who testified at trial and identified petitioner as the shooter was marred by significant discrepancies. But the alleged discrepancies were known to the jury, and were considered by this Court when the Court affirmed the guilt phase conviction in 1993. The Referee also noted the varying testimony of prosecution witnesses.

Petitioner also alleges that Shinn's incompetence regarding the admission of petitioner's confession was not only prejudicial as to the robbery convictions, but undermines confidence in the murder verdict. (PB 46.)

The issues are entirely distinct. This Court determined, in *In re Gay* (1998) 19 Cal.4th 771, 827, that the defect regarding the confessions was remedied by reversal of the robbery counts. The disallowed robbery convictions have no bearing on the unrelated and overwhelming evidence that petitioner was a shooter in the murder of Officer Verna.

B. Peace Officer Witnesses

Petitioner alleges that a reasonably competent advocate would have presented evidence from "law enforcement witnesses" regarding Raynard Cummings's confession and admissions. (PB 57-63.) The claim is meritless for several reasons.

First, the jury knew that Cummings had made inculpatory statements, since three sheriff deputies testified in the prosecution case-in-chief regarding Cummings's inculpatory statements.

Petitioner complains that witnesses from the Los Angeles County Jail, both law enforcement officers and inmates, heard Cummings brag that he shot Officer Verna, yet were not called as defense witnesses at trial. But the jury heard substantial evidence at the trial that Cummings had bragged about killing Officer Verna. Deputies McMullan, McCurtin, and LaCasella, as well as inmates Gilbert Gutierrez and Alfred Montes, all

testified at trial that Cummings had bragged that he killed Officer Verna. As a result, additional witnesses would have been cumulative of the evidence actually offered at trial and excluded for that reason. For example, Deputies McCurtain and LaCasella testified during the guilt phase that Cummings bragged about shooting Officer Verna and made statements like, "I put six in him," "He took six of mine," and "Pow, Pow," "First two in the back, pow, pow and then walked up and four more. Pow, pow, pow, pow. That's the way it is done." (65RT 7148-7170, 7200-7228; see *Cummings, supra*, 4 Cal.4th at pp. 1265-1266.) Furthermore, inmates Gilbert Gutierrez and Alfred Montes testified at trial to similar statements made by Cummings. (See *id.* at pp. 1264-1265.) The question is what Deputy McGinnis, Sergeant Arthur, or Deputy Nutt would have added. As discussed below, the answer is nothing. The same is true as to potential inmate witnesses. The attempt to pin exclusive blame on Cummings did not fail because too few witnesses supported it.

1. *Deputy William McGinnis*

During an Evidence Code section 402 hearing prior to the 1985 trial, Deputy McGinnis testified that Cummings had 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 told Deputy McGinnis he alone shot Officer Verna nor did he say that he—rather than petitioner—shot Verna in the back. In fact, Officer Verna suffered four gunshot wounds to the back, not three. Cummings's statement is not inconsistent with him shooting Officer Verna while Cummings was in the car and then passing the gun to petitioner who got out and shot Officer Verna in the back as the officer attempted to retreat. And even if Deputy McGinnis's testimony incriminated Cummings alone, it was cumulative to the testimony admitted at trial.

The Referee found, as to Deputy McGinnis, that his testimony about the shooter lacked detail and "was also cumulative" to the testimony of both Deputies McMullan and McCurtain. (RR 46, lines 22-25.) Petitioner therefore fails to satisfy either prong of *Strickland.*

2. *Sergeant George Arthur*

Sergeant George Arthur was partnered with Deputy McMullan (who did testify at trial) and was with Deputy McMullan when Cummings made the statement about shooting Officer Verna. (65RT 7149-7150.) Sergeant Arthur's testimony, in the Referee's view, was cumulative to Deputy McMullan's testimony. Again, petitioner fails to meet either prong of *Strickland.*

3. *Deputy Richard Nutt*

Cummings told Deputy Nutt that he killed Officer Verna, and then he threatened to kill Deputy Nutt when he was released from prison. (19RHT 2423.) Deputy Nutt would have been easily impeached, since he initially told homicide investigators when first interviewed in 2000, that it was petitioner, and not Cummings, who made these statements. Even assuming Deputy Nutt had been available at the 1985 trial and Shinn could have reasonably obtained this information, it was cumulative of the trial testimony of the various inmate and peace officer witnesses who had testified that Cummings confessed that he had killed Officer Verna. Nonetheless, the Referee specifically found that Deputy Nutt's testimony would not have been available to Shinn in 1985 since it did not come to light for almost 15 years, or around 2000. (RR 47, lines 3-5.)

Thus, testimony of the peace officer witnesses not called at trial was cumulative or unhelpful to petitioner and/or not available in 1985. Petitioner cannot show error or prejudice from Shinn's decision not to call them.

C. Inmate Witnesses

Petitioner claims Shinn failed to present the testimony of inmate witnesses who heard Raynard Cummings boast that he had killed Officer Verna. (PB 64-73.) The Referee considered this claim, and emphatically rejected it, as follows:

> **James Jennings** had his own robbery and murder charges pending at the time of the 1985 trial and was later convicted and sentenced to 28 years to life in prison. Jennings stated he sought out police detectives in hopes of receiving help on his own case. Shinn would have faced difficulties calling Jennings as a witness. If Jennings' own charges were still pending and no plea bargain had been made with the prosecution, it is unlikely Jennings' trial counsel would have allowed him to testify and be cross-examined by the prosecution. Because Shinn could not offer Jennings any benefit from cooperating, Jennings would have the option to refuse to testify, to refuse to be sworn as a witness. Inmates who testify are labeled as "snitches," a pejorative term for persons who cooperate with authorities. Here, although Jennings' testimony might be of benefit to petitioner, it would be viewed negatively by Raynard Cummings and would earn Jennings a "snitch jacket." Wearing a snitch jacket in custody subjects an inmate to scorn, attack and worse. Informants must be housed securely while in custody which brings with it limitations. Defense counsel do not have the range of benefits to offer cooperative witnesses that are available to prosecutors such as charge or sentence reductions, housing assignments or recommendations to parole boards. Jennings would have no incentive to testify as a defense witness for petitioner. The prosecution clearly had no interest in calling Jennings as a witness.
>
> Jennings' testimony would be subject to scrutiny because he sought to speak to police detectives in search of some help on his own cases and his own prior felony criminal record. Adding to the normal level of skepticism inmate testimony receives is the prior relationship between Jennings and petitioner and petitioner's family and the bias that might suggest. Jennings' testimony would not have been reasonably available to Shinn if Jennings was uncooperative.

Norman Purnell testified that while in the showers a fellow inmate known to him as "Slim" stated he had shot a police officer, and that if he were going down for the crime, he was going to take his "crimie" down too. Assuming Shinn could establish "Slim" and Raynard Cummings were one in the same, the statement attributed to Raynard Cummings is vague and lacking in any significant detail as to who fired the shots that killed Officer Verna. As of 1985 Purnell had an extensive felony record with which he could be impeached. [RHT 1598] As with other inmate or snitch witnesses not called by the prosecution, Shinn had no incentive to offer Purnell in exchange for his testimony. The prosecution was proceeding on a theory both petitioner and Raynard Cummings shot and killed Officer Verna. Raynard Cummings designating petitioner as his crime partner is consistent with the prosecution theory and not helpful to petitioner's defense Raynard Cummings fired each and every shot. Purnell's statement was also cumulative to that of Gabriel Gutierrez. Gutierrez's testimony had the added advantage that it included petitioner's statement that he had not shot anyone and Raynard Cummings' statement he was "cool" with the fact the authorities were mistakenly pinning the shooting on petitioner.

John Jack Flores was interviewed by District Attorney Investigator Robert Tukua on 11 July 1983, approximately five weeks after the murder of Paul Verna. The five page single-spaced typewritten statement contains significant detail including conversations between the participants before, during and after the shooting. Raynard Cummings admits to Flores he fired each of the shots that struck and killed Officer Verna. Tukua's report includes a conversation between Raynard Cummings and petitioner during the traffic stop where Raynard Cummings asks petitioner whether petitioner wants to shoot the police officer, and petitioner responded, "Yes, if it comes to it." By agreeing to and encouraging the shooting of Officer Verna, petitioner made himself an aider and abettor.

CALJIC 3.01: "A person aids and abets the commission of a crime when he or she: 1) With knowledge of the unlawful purpose of the perpetrator, and 2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and 3) By act or advice, aids, promotes, encourages or instigates the commission of the crime."

> Shinn already had in hand the testimony of Gabriel Gutierrez. It would not make sense to call a witness who would present the District Attorney with a theory of prosecution independent of whether petitioner actually fired any of the shots that killed Officer Verna.

(RR 44-46.)

D. Deborah Cantu

Petitioner claims that if Shinn had performed effectively, he would have called Deborah Cantu as a defense witness. (RR 73-77.) Cantu would have provided additional evidence incriminating petitioner, as she would have related that Pamela Cummings had told her that petitioner killed Officer Verna and that petitioner had the idea of framing the murder on a man who closely resembled Raynard Cummings. (Pet. Ext. 137, pp. 518-520.) The night before Cantu testified before the Grand Jury, Pamela Cummings told Cantu that petitioner told her to falsely implicate Milton Cook was the shooter. (Pet. Exh. 137, pp. 519-520.) Shinn acted reasonably, and certainly cannot be deemed ineffective, for determining that Deborah Cantu could well have damaged the defense far more than helping it.

E. Shinn's Alleged Failure to Present Expert Testimony

Shinn did not present expert witnesses at the guilt phase. (PB 77-98.) The Referee addressed, at length, the question of whether Shinn should have called an expert.

As to eyewitness identification, the Referee correctly observed that petitioner's connection to Officer Verna's murder was confirmed by the eyewitness accounts, petitioner's fingerprints on items inside the stolen car, petitioner's possession of the officer's gun, Pamela Cummings's testimony incriminating him, and his own admissions. (RR 49-50.) The Referee also

noted that the trial court would have acted within its discretion in excluding proffered testimony of an eyewitness identification expert. (RR 50.)

Finally, the Referee concluded that "exploitation of the confusion amongst the various eyewitnesses was a valid trial strategy and Shinn argued contradicting identification as a clear basis for reasonable doubt. Based upon the unique facts and circumstances of the cases, it was a viable strategy to exploit the confusion rather than to explain it." (RR 50.)

II. PETITIONER FAILED TO ESTABLISH THAT SHINN'S UNRELATED MISCONDUCT GAVE RISE TO A CONFLICT OF INTEREST IN PETITIONER'S CASE AND, EVEN ASSUMING A CONFLICT WAS SHOWN, PETITIONER FAILED TO ESTABLISH PREJUDICE

Petitioner contends that this Court's prior holdings, respondent's admissions and the evidence developed at the 2014 Reference Hearing "reveal" that Shinn's representation of petitioner was "burdened by multiple conflicts of interest." (PB 116.) On the contrary, it is accurate to say that (1) this Court previously rejected the claim that a conflict of interest existed as to the guilt phase of petitioner's case; (2) respondent has never conceded any conflict warranting reversal of the guilt phase conviction; and (3) the Referee explicitly concluded that Shinn's unrelated misconduct in the case of the Korchins "did not constitute the basis of an actual conflict of interest. . . ." (RR 62.)

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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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 13,761 words.

Dated: September 16, 2016

KAMALA D. HARRIS
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David F. Glassman / by IWB

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 **REPLY BRIEF** 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 **REPLY BRIEF** by transmitting a true copy via electronic mail to:

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Hon. Jackie Lacey, District Attorney
John Colello, Assistant Head Deputy
Darren Levine
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(courtesy copy)

On September 16, 2016, I served the attached **REPLY BRIEF** 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:

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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
LA2005XH0001