IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	Case No. S130263
Kenneth Earl Gay,	**CAPITAL CASE**
On Habeas Corpus.	
	Los Angeles County Superior Court Case No. A392702

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO REPORT OF THE REFEREE AND BRIEF ON THE MERITS

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INTRODUCTION

The overarching issue framed by the parties' briefing is whether this Court can express its confidence in a capital murder conviction that was rendered against a defendant whose attorney: (1) perpetrated fraud on the trial court to secure his appointment in the case; (2) concealed from the court and his client the fact that he was under criminal investigation for embezzlement by the same agency that was prosecuting his client; (3) acted as a second prosecutor by misleading his client to confess to charged and uncharged robberies, which provided the state with its strongest evidence of motive, as well as the *mens rea* necessary to prove capital murder; (4) failed to call *any* affirmatively exculpatory witnesses, including four independent eyewitnesses who identified the co-defendant as the perpetrator of the homicide, and several law enforcement officers to whom the co-defendant confessed his sole responsibility for the murder; (5) was observed by his investigator and co-defendant's counsel to sleep during frequent portions of

the trial; (6) called a homicide detective to give otherwise inadmissible opinion testimony that the client truthfully admitted committing the robberies but lied when he denied committing the homicide; and (6) emphasized the disastrously prejudicial testimony in closing argument. Mr. Gay respectfully submits that the Sixth Amendment jurisprudence of this Court, as well as of the United States Supreme Court, requires the question to be answered in the negative.

Respondent's efforts to salvage the guilt-phase verdict might be understandable, if still inexcusable, as the desire to uphold the conviction of a guilty perpetrator by any means necessary, if there were any reliable evidence of Mr. Gay's culpability. But, there is not. The results of the reference hearing now show what a reasonably competent defense counsel would have made evident to Mr. Gay's jury at the time of trial. There was no logic and no reason to suggest that Raynard Cummings needed to "pass the gun" once he began shooting Officer Verna. Ingress and egress in and out of the car was something familiar to Cummings, and easily achievable by an adult male of even greater size than he. If properly presented, the testimony of no fewer than nine witnesses would have shown that the dark-skinned suspect (Cummings) rather than the light-skinned suspect (Mr. Gay) was the sole shooter: (1) Pamela Cummings's initial statements to Crimestoppers and Deborah Cantu that a dark, African-American "look-alike" of Cummings was the only shooter; (2) Irma Esparza's report to Officer Moreno the day after the offense detailing the actions of the dark-skinned shooter and light-skinned male passenger, who only retrieved the gun after the shooting; (3) Oscar Martin's description of the dark-skinned, African-American male, who emerged from behind the driver's seat and shot the officer 4 times; (4) Walter Roberts's statements to police describing the dark-skinned shooter, who shot the officer once from inside the gray car

and then got out and continued shooting; (5) Shequita Chamberlain's description of the dark-skinned suspect who was standing outside the car, by the falling officer, after she heard the initial shot, and then saw the same dark-skinned suspect get back into the car after all of the shots had been fired; (6) Martina Jimenez's description of the shooter as an ugly, young-looking African American male, who was outside of the car and shooting the officer; (7) Rose Marie Perez, who saw the officer falling on the driver side of the car and the light, "dusky" skinned suspect walking on the passenger side of the car with nothing in his hands, which were at his side; (8) Robert Thompson's initial descriptions of a dark-skinned black male in the rear passenger seat who shot the officer from inside the car and then got out to continue shooting the officer, and of a "White" passenger who remained in the right front passenger seat; (9) Raynard Cummings's multiple confessions to sheriff's deputies and fellow inmates that exculpated Mr. Gay. Minimal investigation also would have led to other exculpatory witnesses, such as Ejinio Rodriguez, who was named in the police reports, and described a black man with dark skin, wearing a dark shirt, as the outside shooter.

By contrast, in order to ensnare Mr. Gay, the prosecution had to rely on substantially weaker witnesses: Pamela Cummings's later, clearly self-serving versions of events; Robert Thompson's subsequent versions of events that were altered after his "walk-through" with the police; Marsha Holt's purported eyewitness testimony, which was impeached by prosecution witness Gail Beasley; and Beasley's and Shannon Roberts's internally inconsistent descriptions of the suspects' actions, which likely transposed the actions of Mr. Gay and Raynard Cummings.

Thus, as demonstrated at the reference hearing, the prosecution discovery alone disclosed voluminous exculpatory evidence that any

competent attorney could and would have used to prove Mr. Gay's innocence, and certainly to raise a reasonable doubt as to his guilt. The record, therefore, demonstrates that the failings and affirmatively prejudicial actions of Mr. Gay's attorney, Daye Shinn, show him to be an outlier even among attorneys whose performance would be deemed ineffective at trial. As set forth in Petitioner's Brief on the Merits and discussed below, neither the interests of justice nor the dignity of this State's criminal justice system would be served by endorsing Shinn's performance as meeting the standard necessary to permit the forfeiture of another individual's life or lifetime liberty.

I. MR. GAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO DAYE SHINN'S FAILURE TO INVESTIGATE AND PRESENT AVAILABLE EVIDENCE THAT MR. GAY DID NOT PARTICIPATE IN THE SHOOTING OF OFFICER VERNA.

At the reference hearing, the referee found that Daye Shinn could have, but failed to, investigate and present: (1) four eyewitnesses who described the physical appearance of the outside shooter as consistent with Raynard Cummings; (2) sheriff's deputies and inmate witnesses who heard Cummings admit sole responsibility for the shooting; (3) witnesses who would have impeached the prosecution's case; and (4) expert witnesses who would have given Mr. Gay's jury necessary tools to challenge the prosecution's "pass-the-gun" theory. Rpt. at 25-36. Respondent would have this Court hold that Shinn's failure to investigate these exculpatory leads, pursue impeachment evidence, or consult expert witnesses is unchallengeable because Shinn knew some rudimentary facts about the weaknesses in the prosecution's case. To the contrary, Shinn's knowledge about the additional evidence, which was provided to him in discovery, did

not support a reasonable professional judgment to forego guilt-phase investigation, but rather should have prompted further investigation. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (reasonableness of investigation depends on "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further"); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (failure to present favorable evidence cannot be justified as "tactical decision" where "trial counsel did not fulfill their obligation to conduct a thorough investigation").

Rather than confront the question of whether Shinn's failure to investigate and present additional compelling evidence of Mr. Gay's innocence undermines confidence in the jury's verdict, respondent advances facts that are not in the record, ignores parts of this record that support Mr. Gay's claims, and attempts to divert attention away from the complete lack of investigation by discussing selected aspects of Shinn's substandard performance at trial. Because Shinn's performance at trial does not absolve his failure to investigate in the first instance, and because Shinn failed to investigate or present whole swaths of additional, compelling evidence to Mr. Gay's jury, Mr. Gay is entitled to relief.

A. Respondent's Purported Examples of Shinn's Effective Performance Are Contradicted by the Factual Record.

Respondent relies on several factual assertions that are contradicted by the record. Although respondent's *Letter re Notice of Errata*, filed on June 27, 2016, corrected other errors, substantial factual errors remain:

1. Respondent represents that part of Shinn's approach at trial was to argue, *inter alia*, that Pamela Cummings "admitted to her sister Debbie [sic] Cantu that Cook had not been involved in Officer Verna's murder,

[and] she also admitted that petitioner had told her to falsely accuse Cook." Resp. Br. at 10. Shinn, however, never made any such argument or adduced any such evidence at trial. Deborah Cantu was called as a prosecution witness twice during Mr. Gay's trial about ancillary issues, including testimony about seeing stolen jewelry. *See* 61 RT 6685 *et seq.*; 78 RT 8886 *et seq.* She was never asked about Pamela Cummings's multiple statements exculpating Mr. Gay. Shinn's *failure* to present Deborah Cantu's powerful, exculpatory testimony is a significant part of Mr. Gay's claims before this Court. *See* Pet. Br.[1] at 34, 73-77 (argument regarding Shinn's failure to present Cantu).

2. Respondent also highlights Shinn's closing argument as purported evidence of his effectiveness, and avers:

> Shinn reminded the jury that Oscar Martin had said, "I saw Mr. Cummings get out of the car and shoot the policeman." [citation omitted]. 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 he driver exited the passenger side of the car. [citation omitted].

Resp. Br. at 20 (emphasis added).

Shinn never made any such argument synthesizing the witness statements about who exited which door. Neither did Shinn make any argument about Walter Roberts or Irma Esparza (née Rodriguez), nor could

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[1] "Pet. Br." refers to Petitioner's Brief on the Merits, filed on June 24, 2016. "Pet. Exceptions" refers to Petitioner's Exceptions to Referee's Report and Findings of Fact, filed on the same date. "Resp. Br." refers to Respondent's Exceptions to Report of the Referee and Brief on the Merits, filed on June 24, 2016. Post-hearing briefing in the Los Angeles Superior Court is cited as "Pet. Post-Hearing Br." and "Resp. Post-Hearing Br."

he have done so: Walter Roberts and Irma Esparza never testified in the 1985 trial. Rather, both witnesses testified for the first time in 2014, along with the other witnesses Shinn *should* have presented if he had acted competently since both witnesses saw a dark-skinned black man emerge from the driver side to shoot the officer. *See* Pet. Br. at 31-33, 49, 54-55 (argument regarding Shinn's failure to present this evidence).

3. In discussing eyewitness Martina Jimenez, respondent asserts that "Shinn was aware of this information from police reports, and knew that [Martina Jimenez] had told him she did not want to testify in petitioner's presence." Resp. Br. at 35. The record does not contain any support for respondent's assertion. Martina Jimenez never spoke with any member of Mr. Gay's defense team at the time of trial; indeed, respondent admitted this fact in the Return. *See* Return at 48-49, ¶ 108. Ms. Jimenez was anxious about testifying at the reference hearing and asked undersigned counsel – not Daye Shinn – if she could testify outside the presence of Mr. Gay. 11 EH RT 1372. The referee agreed, and Ms. Jimenez tearfully identified a photograph of Raynard Cummings as the man who shot Officer Verna. 11 EH RT 1382:18-19. Thus, Shinn's *failure* to speak with Ms. Jimenez is a basis of the ineffective assistance of counsel and conflict of interest claims before the Court. *See* Pet. Br. at 31-33, 51-52 (argument regarding Shinn's failure to present Martina Jimenez); *see also* Rpt. at 12:20-21 (Shinn did not request funding for out-of-state travel or interpreters).

4. Respondent bullets the trial witnesses who described the outside shooter as being a mixed race or light-skinned black man (Mr. Gay). Resp. Br. at 60, n.34. Two of these characterizations – attributed to Rosa Martin and Oscar Martin – are sharply contradicted by the trial record. Rosa Martin's observations of seeing a light-skinned man (Mr. Gay) pick up a gun was *not* a description of the outside shooter as respondent suggests, but

an innocuous fact upon which all parties agree: after the car sped away and U-turned, Mr. Gay got out of the car and retrieved a gun. *See also* 91 RT 10408:2-5 (prosecutor conceding that Rosa Martin only saw Mr. Gay retrieve the gun after the car made a U-turn); *see also People v. Gay*, 42 Cal. 4th 1195, 1224 (2008) (Rosa "looked outside only after the shooting had ended").

Perhaps even more critical, respondent's characterization of Oscar Martin's descriptions as "overwhelmingly" pointing to Mr. Gay and away from Raynard Cummings, is a serious mischaracterization of the record. *See* Resp. Br. at 60, n.34. At trial, Oscar Martin identified Raynard Cummings as the sole shooter, which forced the prosecutor to argue to Mr. Gay's jury in closing argument that Oscar Martin only identified "one man," Raynard Cummings, as the shooter, because he "never saw Mr. Gay [shoot] . . . he saw a dark black man shoot the officer." 95 RT 10886-87; *see also People v. Gay*, 42 Cal. 4th at 1224 (this Court recognizing the same).

Oscar Martin's multiple descriptions of the shooter "overwhelmingly" point to Raynard Cummings, not Mr. Gay. Hours after the shooting, Oscar Martin identified a black male in the backseat who exited the driver side as the shooter. *See* Ex. A36 at 1.[2] A few days later at the line-ups, Oscar

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[2] Respondent erroneously describes Officer Paniagua's testimony at the 1985 trial as stating that Oscar Martin agreed with Shannon Roberts's description of the shooter as a "Mexican or light-Black dude." Resp. Br. at 60, n.34. Paniagua (who was called as a *defense* witness for Raynard Cummings) was unequivocal in his testimony, 89 RT 10171:21-25:

> the way they said it wasn't exactly like they were in agreement on the man who shot the officer because they made it sound like – or the way it sounded to me – is that one of the guys who was there at the shooting was a light black dude or Mexican, as he put it.

Martin identified a dark-skinned black male #3 in Line-up #9 as a possible shooter. Ex. A36 at 4. The "erased" identification respondent highlights was Oscar copying off his mother's witness card at the lineups. As Rosa Martin testified, Oscar copied and then erased his identification of Mr. Gay because he was insistent that the shooter was not light-skinned, like Mr. Gay, but a "really dark" black man who shot the officer. 67 RT 7460-64; *see also People v. Gay*, 42 Cal. 4th at 1210 (Oscar Martin copied off his mother's card because he did not know what to do). At the grand jury, Oscar Martin affirmatively identified Cummings as the sole shooter, 1 Supp. CT 255, and was consistent at the preliminary hearing when he again identified Cummings, 3 CT 629-32. Respondent's suggestion that Oscar Martin's contemporaneous eyewitness statements "overwhelmingly" point to Mr. Gay as the outside shooter is flatly wrong.

5. Respondent cites a litany of ways in which the prosecution eyewitnesses were impeached, which respondent mistakenly attributes to Shinn: "On direct appeal, this Court, repeatedly, albeit impliedly, recognized the degree of Shinn's efforts to discredit the prosecution's case." Resp. Br. at 18, n.13. Respondent then summarizes how the prosecution witnesses were impeached, implying that Shinn's efforts to discredit the prosecution's case were evidence of his effectiveness. The examples respondent cites of this impeachment, however, were not the work of Shinn, but Ken Lezin, who represented Mr. Gay in his 2000 retrial. Resp. Br. at 18, n.13 (Daye Shinn never impeached Marsha Holt with her mother, Celester Holt's testimony; neither did Shinn impeach Holt's line of sight with a defense expert). Shinn's *failure* to impeach prosecution witnesses with this evidence is another basis of the claims before this Court. *See* Pet. Br. at 98-111 (argument on Shinn's failure to impeach prosecution witnesses).

6. Respondent urges this Court to find that Shinn performed effectively because Shinn highlighted how Robert Thompson's initial descriptions of the outside shooter changed between the time of his original statements to the police and his trial testimony. According to respondent: "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." Resp. Br. at 17. Shinn did no such thing. It was counsel for *Raynard Cummings* who uncovered information on cross-examination that Thompson's 180-degree change in testimony (from dark-skinned Cummings to light-skinned Mr. Gay) was a result of a "walk through" with Detective Holder shortly before trial. *See* 68 RT 7608:8-15. Because Thompson's newly manufactured memory identified Mr. Gay as the outside shooter (and was helpful to Cummings's defense), Cummings's counsel stopped eliciting details about the walk-through and transitioned back to Robert Thompson's testimony at the preliminary hearing. 68 RT 7611 *et. seq.*

Contrary to respondent's representations to this Court that Shinn "introduced" evidence of the walk-through, when it was Shinn's turn to cross-examine Thompson, he inexplicably asked Thompson *no* questions about his walk-through with Detective Holder. *See* 68 RT 7641-55 (cross-examination); 69 RT 7663-91 (cross-examination); 69 RT 7697-99 (Shinn voir dire); 69 RT 7737-41 (re-cross-examination). Shinn asked no questions about the details of the walk-through, no questions about what pictures the detective showed Thompson at the walk-through, and no details about what precisely happened at the walk-through that led Thompson to change his descriptions of the outside shooter from a dark-skinned black man to the white-skinned Mr. Gay. Therefore, it is Shinn's *failure* to ask Thompson a single question about the walk-through that

supports Mr. Gay's ineffective assistance of counsel and conflict of interest claims. *See* Pet. Br. at 99-103 (argument on Shinn's failure to competently cross-examine Robert Thompson).

B. Respondent Ignores the Referee's Finding of the Exculpatory, Readily Available Evidence that Shinn Unreasonably Failed to Investigate and Present.

Respondent asks this Court to find Daye Shinn performed effectively under the Sixth Amendment without addressing the serious ways in which Shinn failed to actually investigate a guilt-phase defense. Respondent's brief is striking in its almost total failure to address the magnitude of Shinn's errors in this case. Ignoring the referee's findings regarding the availability and ease in presenting the additional evidence detailed in Question 2, respondent regurgitates Shinn's performance at trial to argue Shinn did not perform deficiently. Respondent belabors this point by detailing Shinn's opening and closing arguments and Shinn's cross-examinations of prosecution witnesses at trial.

Mr. Gay does not dispute, and indeed, has never disputed that Shinn may have made attempts – albeit half-hearted ones – at trial to point out the inconsistencies in the prosecution witnesses' statements and highlight those inconsistences to Mr. Gay's jury. These efforts were limited to Shinn's use of information the prosecution handed to him in discovery. Indeed, Shinn's performance at trial was fully consistent with the observation of Douglas Payne, Shinn's investigator, that Shinn was just "going through the motions." 3 EH RT 299:25-300:4. Therefore, this performance cannot salvage Shinn's inept failure to conduct a guilt-phase investigation. *See Kimmelman v. Morrison*, 477 U.S. 365, 385-86 (1986) (attempt to "minimize the seriousness of counsel's errors by . . . urg[ing] defense

counsel's vigorous cross-examination, attempts to discredit witnesses, and effort to establish a different version of the facts" does not "lift counsel's performance back into the realm of professional acceptability"). By focusing nearly exclusively on Shinn's arguments at trial, respondent completely ignores Shinn's failure to undertake investigation of the readily exculpatory evidence in this case, which is the basis of Claim Three and the subject of this Court's Order to Show Cause.

Claim Three in Mr. Gay's Petition pled that beyond Shinn's desultory attempts to impeach prosecution witnesses with their prior statements, Shinn did little else. *See, e.g.*, Pet. at 60 (Claim 3). This Court has already found that Mr. Gay's factual allegations that Shinn failed to interview numerous exculpatory eyewitnesses, failed to interview witnesses who heard Cummings's custodial confessions, failed to consult and retain appropriate experts, and failed to interview critical impeachment witnesses established a prima facie case of deficient performance. This Court's first reference question sought precisely this information: what specifically did Shinn do (or not do) leading up to Mr. Gay's trial. Thus, the findings relevant to this question – including who Shinn interviewed and when – aid the determination of whether Shinn performed effectively. *Cf. In re Lucas*, 33 Cal. 4th 682, 699-700 (2004) (similar reference question and findings regarding the witnesses counsel interviewed, the topics of interviews, and nature of pre-trial contacts counsel had with potential witnesses).

The underlying record and the referee's findings confirm the factual allegations in Claim Three: Shinn never interviewed critical, exculpatory eyewitnesses, ignored impeachment evidence, failed to uncover other exculpatory evidence, did not consult any guilt-phase expert witnesses, and failed until mere weeks before trial to authorize a canvass of the crime scene neighborhood, which predictably yielded no guilt-phase witnesses.

See Pet. Br. at 29-42 (detailing Shinn's deficient performance). Given that the referee found that the sum of Shinn's "actions" in investigating a guilt-phase defense was limited to reading police reports and pre-trial statements of prosecution witnesses and a last-ditch effort authorizing Payne to canvass the crime scene, the deficient performance prong is easily met here. In addition to the arguments in Mr. Gay's Opening Brief, which he incorporates here with respect to Shinn's deficient performance, Pet. Br. at 27-42, Mr. Gay makes two brief points in response to respondent's arguments.

1. Respondent's Briefing Does Little to Dispute the Plain Fact that Shinn Conducted No Independent Guilt-Phase Investigation.

The substantial evidence and the referee's findings make it clear that Shinn failed to do minimal pre-trial investigation beyond reading police reports and pre-trial witness statements and authorizing Payne to canvass the crime scene four weeks before opening statements (and some eighteen months after the shooting). Courts have overwhelmingly held that counsel cannot rely on inconsistencies in the prosecution witnesses' statements alone; there is an independent duty to investigate the case, including interviewing witnesses with potentially favorable information. *See In re Hardy*, 41 Cal. 4th 977, 1020 (2007) (finding counsel was deficient because counsel, *inter alia*, failed to interview witnesses with favorable information who were reasonably available); *Avila v. Galaza*, 297 F.3d 911, 918-20 (9th Cir. 2002) (holding, in an attempted murder case in which the defendant was accused of shooting at two individuals, that the defense attorney rendered deficient performance because he failed to interview a number of potential eyewitnesses to the shooting); *Harris v. Wood*, 64 F.3d 1432, 1435-36 (9th Cir. 1995) (citing as deficiencies counsel's failure to retain an

investigator and failure to interview 29 out of 32 people identified in police reports); *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989) (a lawyer has a duty to "investigate what information . . . potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand"); *Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir. 1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); *see also Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) ("[a] lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.").

At the reference hearing, Mr. Gay conclusively proved and the referee found that Daye Shinn failed in this basic duty. No one on the defense team interviewed eyewitnesses Irma Esparza, Martina Jimenez, or Walter Roberts, who all described the shooter to the police in the hours and days after the shooting as a black man consistent with Raynard Cummings. Rpt. at 26-29; *id.* at 36:24-37:2; Pet. Br. at 31-33. No one on the defense team interviewed Ejinio Rodriguez, who described the outside shooter as a black man who had dark skin. Rpt. at 27:18-28:5; *id.* at 37:2-6. No one on the defense team interviewed Deborah Cantu, who heard Pamela Cummings's earliest accounts of the shooting in which she blamed a man, (Milton Cook) who closely resembled Raynard Cummings, as being the lone shooter. Rpt. at 32:24-33:11; *id.* at 37:19-22. No one on the defense team interviewed Sergeant Deputy William McGinnis, Sergeant George Arthur, James Jennings, Norman Purnell, Jack John Flores, or David Elliott, who all heard and reported Cummings's six, separate inculpatory admissions that he shot Officer Verna. Rpt. at 29:19-32:14; *id.* at 37:7-15.

Respondent does not mention and cannot dispute evidence that, in a

case dependent upon the vantage point and observations of nearly a dozen potential eyewitnesses, Shinn never even bothered to visit the crime scene. Pet. Br. at 37, n.8. Respondent does not, and cannot, offer any justification for Shinn's failings.

As the referee found in response to Question 2, the foregoing evidence would have been discovered through adequate, and even minimal investigation. Rpt. at 36:24-37:22. Indeed, several eyewitnesses "were each interviewed by police on 2 June 1983 . . . [and] their names and addresses were in reports of witness statements compiled by the investigating officers" and given to Shinn. *Id.* at 36:23-37:2 (Walter Roberts, Martina Jimenez, Linda Orlick, Irma Esparza). Witnesses who did not directly speak with the police were identified in other witness statements and were easily locatable. *See*, *e.g.*, *id.* at 37:2-7 (Ejinio Rodriguez).

The law enforcement officers and inmate witnesses who heard Cummings's custodial confessions were disclosed to Shinn by name. *Id.* at 37:7-17. The referee further found that some of the witnesses who were helpful to Mr. Gay's defense, including Deborah Cantu and Jack John Flores, actually testified as prosecution witnesses, but were not asked questions about their helpful observations. *Id.* In this context, the investigation Shinn needed to undertake was quite basic: he needed only to interview these witnesses to confirm the information relayed by each witness to the police and present their testimony to Mr. Gay's jury. In total, the referee found at least thirteen witnesses with potentially favorable information whom Shinn failed to interview, despite the fact that with nearly all thirteen witnesses, Shinn was given their names and identifying information, along with their exculpatory statements or observations. Rpt. at 36:24-37:22.

The same deficient performance extended to Shinn's failure to consult and retain experts. In a case where the prosecution's theory of events relied on the movements of two individuals alighting from the car in mere seconds, six gunshot wounds fired from varying distances, and nearly a dozen eyewitnesses who observed different portions of the two-sequence event (the shooting, the suspects' flight, and then their return to retrieve the gun), Mr. Gay's case compelled consultation with experts and introduction of expert evidence. *See Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (finding deficient performance in a case where counsel failed to seek funds to hire an expert where consultation with experts was critical).

The referee found at the time of Mr. Gay's trial in 1985, eyewitness memory experts, human vision experts, event reconstruction experts, gunshot residue experts, and forensic pathologists were all the types of experts available to Shinn for consultation and testimony. Rpt. at 37:23-39:9. Yet, Shinn failed to consult any of these experts, despite the referee's finding that there was no funding barrier for Shinn to consult and retain experts given Penal Code section 987.9. Rpt. at 39:10-11. The lone attempt at expert consultation was Shinn's mid-trial, untimely and thus ultimately futile request for Payne to locate a gunshot residue expert. 3 EH RT 303:21-304:4; Pet. Exceptions at 31.

Having spoken with none of the foregoing lay or expert witnesses and conducting no independent guilt-phase investigation (other than the eleventh-hour crime scene canvass), Shinn had insufficient facts on which to make any reasonable assumptions or on which to base any reasonable decision to forego investigation. *See Porter v. McCollum*, 558 U.S. 30, 40 (2009) (counsel's failure to "even take the first step of interviewing witnesses" and ignoring "pertinent avenues for investigation of which he should have been aware" constituted deficient performance); *see also*

Avila, 297 F.3d at 920 (citing *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994)) ("[c]ounsel can hardly be said to have made a strategic choice when s/he has not yet obtained the facts on which a decision could be made.").

Instead of forthrightly addressing these findings, respondent makes generic references to "witness interviews" that Payne purportedly conducted. Resp. Br. at 9. Respondent supports this assertion by citing Daye Shinn's statements given at his November 1995 deposition, taken after Shinn had been disbarred for acts of moral turpitude in State Bar proceedings, at which the State Bar judge repeatedly found Shinn lacked credibility and was attempting to "conceal his misconduct and/or to avoid criminal prosecution and culpability in these proceedings." Resp. Br. at 8; Ex. A33 at 54, 58-59. In the habeas corpus proceedings for which Shinn testified at his deposition, this Court found his testimony to be "evasive, inconsistent, and often nonresponsive." *In re Gay*, 19 Cal. 4th 771, 808 and n.17 (1998).

The notion that Shinn or Payne interviewed guilt-phase witnesses was manufactured years later on the basis of Shinn's self-serving deposition testimony, and cannot be squared with the actual record before this Court. It is no surprise that respondent cannot list the name of a single witness whom Shinn or Payne allegedly interviewed for the guilt phase, or that Shinn himself did not name a single witness in the 1995 deposition. It is even less surprising given that the witnesses who testified before the referee in these proceedings also testified that neither Shinn nor Payne ever contacted them at the time of trial. *See, e.g.*, 13 EH RT 1702-03 (Irma Esparza); 10 EH RT 1306 (James Jennings); 12 EH RT 1589 (Norman Purnell); Ex. A24 at ¶ 10 (Ejinio Rodriguez).

Just as there were no guilt-phase witnesses interviewed, there was also

no guilt-phase "witness list." *See* Rpt. at 12:4-8. As Mr. Gay explained in the Exceptions, the only support for the suggestion that Shinn and Payne formulated a witness list and interviewed those witnesses where possible, was cited directly from Payne's 1998 evidentiary hearing testimony concerning Shinn's *penalty*-phase preparation. *See also* Pet. Exceptions at 7-8. The evidence adduced at that hearing led this Court to conclude that "Shinn himself did no investigation," and failed to give Payne any adequate guidance. *In re Gay*, 19 Cal. 4th at 781. There is no evidence, let alone substantial evidence, that Payne formulated a guilt-phase witness list or interviewed any such witnesses. And even if there were, this Court has uncontroverted evidence in *this* record that the following guilt-phase witnesses were never interviewed, or placed on any witness list: Martina Jimenez, Ejinio Rodriguez, Irma Esparza, Walter Roberts, James Jennings, Norman Purnell, Jack John Flores, Sergeant Deputy William McGinnis, Sergeant George Arthur, any eyewitness memory experts, any experts on conditions of visibility, any experts on accident reconstruction, any wound ballistics experts, or any forensic pathologists. Rpt. at 36-37; Pet. Br. at 29-42.

Thus, respondent must rely on only Shinn's self-serving statement, which he gave in his 1995 deposition related to his incompetent penalty phase performance, to suggest that Payne and Shinn conducted witness interviews as part of the guilt-phase investigation. A search for any credible evidence to support the suggestion, however, reveals there is none. The witness list is not in evidence because it does not exist. Neither are any names of any purported guilt-phase witnesses whom respondent imagines Payne interviewed. This is likely because Payne did not locate any in his eleventh-hour canvass of the crime scene.

What is in evidence, and what the referee found, is that the

prosecution provided Shinn and Payne with abundant leads to exculpatory evidence. Shinn was given names and addresses of eyewitnesses who saw someone resembling Cummings as the outside shooter. Rpt. at 37. Shinn was given names and statements of inmates who heard Cummings confess to killing Officer Verna. *Id.* Shinn was given reports detailing the same from sheriff's deputies, and even sat in court when Sergeant Deputy McGinnis testified to Cummings's full confession in a 402 hearing. *Id.* Shinn received Deborah Cantu's tape recorded police statement detailing Pamela Cummings's earliest accounts of the shooting that exculpated Mr. Gay. *Id.* There was nothing remotely daunting in the effort needed to interview and present these witnesses. Because Shinn failed in this very elementary task, there cannot be any serious question that he performed deficiently under the Sixth Amendment.

Neither does respondent's summary of Shinn's billing records rebut the fact that Shinn failed to conduct an investigation of the exculpatory leads provided to him by the prosecution. *See* Resp. Br. at 9-10 and n.3. Rather, according to respondent's own summary, Shinn's billing records further reflect his detachment from the investigation of the case. Out of 655 hours attributed to "pre-trial work," respondent identifies a total of 557 hours (85%) billed to "preparation & research" and "motions." *See* Resp. Post-Hearing Br. at 29:3-8. These hours were almost invariably billed at the remarkably consistent rate of exactly 4.0 or 5.0 hours per day, day in and day out. *See, e.g.*, 7 CT 1831-32, 1871-75. The motions upon which Shinn purportedly expended such a considerable amount of hours, however, were unintelligible, cut-and-paste products. For example, Shinn's essentially boilerplate motion to suppress identification testimony did not name a single eyewitness, and a change of venue motion inexplicably referred to widespread publicity regarding the "method of penetration." 4

CT 1096, 1109. Similarly, as noted above, despite Shinn's expenditure of hundreds of hours on "motions," he failed to challenge the blatantly suggestive "walk-through" procedure that led Robert Thompson belatedly to identify Mr. Gay.

Respondent's billing summary attributes substantially all of the remaining 98 hours billed for pre-trial work to Shinn's reported participation in jail visits and conferences with Doug Payne. Resp. Post-Hearing Br. at 29:4-13. Yet, before Shinn destroyed his case file, it consisted of only five or ten "scraps of yellow paper," on which he had taken some notes "*during the trial*," and copies of some documents filed in the case. *In re Gay*, 19 Cal. 4th at 811 (emphasis added). Thus, there is no indication that even the "'little bits of notes'" Shinn claimed to have taken served to memorialize information he may have obtained during the alleged conferences and visits for which he billed. *Id.*

2. Shinn's Trial Performance Demonstrates Rather Than Dispels the Prejudice of His Failure to Conduct a Guilt-Phase Investigation.

Respondent suggests Shinn was not deficient in failing to investigate the guilt phase because his familiarity with discovery enabled him to use the prosecution witnesses' inconsistent statements, misidentifications, and ambiguities to Mr. Gay's benefit. Respondent supports this assertion by detailing Shinn's opening statement, Resp. Br. at 11-13, Shinn's cross-examinations of prosecution witnesses, *id.* at 14-19, and Shinn's closing argument, *id.* at 19-24. But familiarity with the pre-trial statements of witnesses is hardly the bar for effective assistance of counsel under the Sixth Amendment. *Strickland*'s bedrock requirement of effective performance obligated Shinn to actually *investigate* the case. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *Wiggins*, 539 U.S. at 527; *see*

also Kimmelman, 477 U.S. at 385-86 (counsel's trial performance does not lift his otherwise ineffective assistance of counsel "back into the realm of professional acceptability"). This Court affirmed this same principle in *In re Hall*, 30 Cal. 3d 408, 426 (1981) and in *People v. Ledesma*, 43 Cal. 3d 171, 215 (1987).

Respondent trumpets Shinn's trial performance as a basis to deny Mr. Gay habeas relief. *See, e.g.*, Resp. Br. at 7 (Shinn's trial performance "demonstrated that he was fully conversant with the weaknesses of the prosecution's case and was prepared to, and did, challenge the prosecution's case"). But an actual review of the trial record reveals that his performance deserves little fanfare. The following three examples are emblematic of just how incompetent Shinn's trial performance was, and thus, cannot be relied upon to demonstrate his effectiveness.

a. Shinn's Cross-Examination of Prosecution Witness Robert Thompson.

As this Court found, on the night of the murder, prosecution witness Robert Thompson told the police that the black man in the backseat, wearing a dark shirt (resembling Cummings) shot the officer, and then sprung from the car, and continued firing at the officer. *People v. Gay*, 42 Cal. 4th at 1202. According to Thompson, the white male (who resembled Mr. Gay) in the front passenger seat never exited the car at all. Ex. A45 at 1. At trial, however, Thompson made a 180-degree change in his description and identified Mr. Gay as the outside shooter. Respondent argues that Shinn's cross-examination of prosecution witness Robert Thompson reflects his effective representation and countenances against a finding of deficient performance. Resp. Br. at 17-18. There are two major flaws in this argument.

First, on cross-examination of Robert Thompson, Shinn never asked

Thompson about his initial descriptions to the police identifying a medium-complexioned black shooter. Shinn never confronted Thompson with his statements to Officer Eric Lindquist in which Thompson attributed *no actions* to Mr. Gay, who he simply described as the "male White" who remained in the front passenger seat. Ex. A45 at 1-3. Such questioning is textbook impeachment, particularly given the dramatic change in Thompson's descriptions. Shinn never confronted Thompson with his initial descriptions, never confronted Thompson with his composites, and never confronted Thompson with the diagrams he drew describing the shooter's exit from the backseat with the notation "def. a black man." Ex. A45 at 1-4. Any or all of the foregoing would allow Shinn to argue that Thompson, in his earliest account of the shooting, described Raynard Cummings as the sole shooter.

Instead, as respondent highlights, Shinn got Thompson to admit on cross-examination that he failed to identify anyone at the line-ups, and failed to identify Mr. Gay at the grand jury or preliminary hearing. Resp. Br. at 17-18. Respondent argues that Shinn's tact in getting Thompson to admit he could not identify anyone demonstrates how "fully conversant" Shinn was with the prosecution's case. *Id.*; *see also* Resp. Br. at 7. Respondent showcases Shinn's performance to this Court:

> Shinn effectively concluded his cross-examination of Thompson by getting him to acknowledge that . . . his mind was "destroyed" by the media at the time of the live lineup.

Resp. Br. at 18. But this tact is actually evidence of *in*competence.

Robert Thompson, who Shinn repeatedly referred to as "Mr. Johnson" in front of Mr. Gay's jury,[3] actually identified two dark-skinned black men

[3] Daye Shinn called Robert Thompson by the wrong name so many times that the prosecutor had to object. 69 RT 7681:19-20 ("I object to this man's

at the line-ups as possibly being the outside shooter. Ex. A45 at 10-11 (witness cards); Ex. A105-06 (lineups); *see also People v. Gay*, 42 Cal. 4th at 1203 ("Thompson did not identify [Mr. Gay] in a lineup four days after the murder and instead identified two *black males with dark complexions*.") (emphasis added). As with other witnesses' descriptions of the dark-skinned shooter, Thompson's tentative identification tended to inculpate Cummings and exculpate Mr. Gay for the homicide. Getting Thompson to "admit" that he did not identify *anyone* at the line-ups was not helpful to Mr. Gay, was misleadingly inaccurate, and prejudicially undercut the stronger, more exculpatory evidence (that Mr. Gay's jury never heard) that Thompson identified dark-skinned black men resembling Cummings at the lineups four days after the shooting.

Shinn made the same erroneous point with respect to Thompson's grand jury and preliminary hearing testimony. As the respondent notes, Shinn confronted Thompson with Thompson's failure to identify Mr. Gay "before the grand jury, and at the preliminary hearing." Resp. Br. at 17. But again, Shinn was wrong. First, Thompson *did* identify Mr. Gay at the preliminary hearing, but only after meeting with Detective Holder the day before to go over Thompson's account of the shooting. 3 CT 669; Ex. A107. Equally important, with respect to Thompson's grand jury testimony, the critical point was not that Thompson failed to identify Mr. Gay, but that he again described to the grand jury the shooter as a "medium shade black" man (consistent with Raynard Cummings). 2 Supp. CT 460. Any description of the shooter as a "medium shade black" man at the grand jury was lost on Mr. Gay's jury given Shinn's protracted efforts to get Thompson to admit he did not identify Mr. Gay at the grand jury. Shinn completely missed the point: it was not that Thompson failed to identify

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being referred to as Johnson. It is not his name.").

Mr. Gay at the grand jury that aided Mr. Gay's defense, it was that Thompson described the shooter as a medium-complexioned black man.

Shinn compounded the prejudice of his inept cross-examination by eliciting and emphasizing Thompson's testimony that he actually recognized Mr. Gay as the shooter all along, but was too afraid to "get involved" in the case by identifying him at the line-ups or the grand jury proceedings. *See, e.g.*, 69 RT 7664:14-20.

In short, Shinn's repeated emphasis that the only reason Robert Thompson did not identify anyone in the line-ups, or could not identify Mr. Gay at the grand jury and preliminary hearing is because he was afraid to do so effectively buried the exculpatory evidence that Thompson identified a dark-skin black man as the shooter in his initial statements to the police, the line-ups, and before the grand jury.

b. Shinn's Argument About Gail Beasley's Observations.

Next, respondent argues that Shinn's trial performance was effective because Shinn argued in closing argument that Gail Beasley (whose name Shinn repeatedly forgot, *see, e.g.*, 95 RT 10943-44) had not identified Mr. Gay in the live line-ups or at the preliminary hearing. Resp. Br. at 11, 23. Contrary to respondent's assertion, this characterization of Beasley's testimony did not demonstrate that Shinn was "fully conversant" with the facts of the case. Resp. Br. at 7. Shinn was wrong on both accounts. Gail Beasley identified Mr. Gay in the line-ups, Ex. A108, and at the preliminary hearing, 2 CT 540. Gail Beasley never testified at Mr. Gay's trial; instead, the prosecutor persuaded the trial court to deem her an "unavailable witness" and had her preliminary hearing transcript read into evidence. 74 RT 8272-73. Given that the transcript of Beasley's preliminary hearing testimony was read to Mr. Gay's jury in which she identified Mr. Gay as the

shooter, Shinn's argument in closing that Beasley had not identified Mr. Gay at the preliminary hearing made no sense. What is worse, after Beasley was located (after previously being found "unavailable") and brought into court to testify, Shinn elected not to even cross-examine her and let stand the reading of her preliminary hearing testimony – in which she identified Mr. Gay as the outside shooter. 79 RT 8950.

Similarly, as the Court recognized, the stronger impeachment with respect to Gail Beasley's observations was that her description of the events was a prime example of unconscious transference. *People v. Gay*, 42 Cal. 4th at 1226. Given that Cummings wore a dark-colored or maroon shirt, and Mr. Gay wore a white or gray shirt, Beasley's description of the shooter as wearing a red or burgundy shirt could have led jurors to conclude that Beasley had seen the shooter, but unconsciously transferred the roles of the two men. Instead, Shinn argued nonsensically in closing that Mr. Gay's jury should conclude based on Beasley's description of Mr. Gay in a red shirt that Beasley "probably didn't see the shooting" *at all*. Rpt. at 23:24; 95 RT 10953:9-10. Such conduct is clear evidence of incompetence, and not effective performance as respondent would have this Court believe.

c. Shinn's Damaging Opening Statement.

Respondent also highlights Shinn's opening statement as evidence of Shinn's adequate preparation. Resp. Br. at 11-13. Shinn's opening statement did anything but reflect his competence. After learning that Mr. Gay's robbery confessions would be introduced, thereby making it impossible for Mr. Gay to testify, Shinn told Mr. Gay's jury in opening statements that Mr. Gay would be testifying to "his version of what occurred on that date." 58 RT 6299-300. Of course, Mr. Gay never testified. Shinn then *reminded* Mr. Gay's jury in closing argument that they

were probably expecting Mr. Gay to testify. 95 RT 10920. Compounding the prejudice of that argument, Shinn had introduced testimony from Detective Holder that Mr. Gay was truthful when he admitted the robberies to police investigators, but lying when he denied committing the murders, thus making precisely the point the prosecution was trying to make. 58 RT 6254. In his closing argument, Shinn even endorsed Detective Holder's credibility. 95 RT 10929:12-17 (Shinn praising Detective Holder as a "very good officer" and opining that Shinn "like[s] the fellow"). Promising a client's testimony to his jury and failing to deliver is evidence of incompetence, not competence. *See, e.g.*, *Ouber v. Guarino*, 293 F.3d 19, 27 (1st Cir. 2002) (defense counsel's failure to follow through on promises in opening statement constituted ineffective assistance); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel.").

The remainder of Shinn's opening statement fared no better. He told Mr. Gay's jury that Gail Beasley did not identify Mr. Gay at the lineups, grand jury, or preliminary hearing, 58 RT 6295. As noted above, of course, Beasley had identified Mr. Gay at the line-ups, Ex. A108; identified a picture of Mr. Gay, who looked "very close" to the shooter, at the grand jury, 1 Supp. CT 207, and identified Mr. Gay at the preliminary hearing, 2 CT 540. Next, Shinn acknowledged that prosecution eyewitness Marsha Holt identified Mr. Gay at the lineups, but in the next breath incoherently told Mr. Gay's jury that Marsha Holt could not identify anyone at the lineups. *See* 58 RT 6295:26-6296:2 ("[Marsha Holt] identified him I believe at the – let me see here – at the lineup. The lineup was two or three days after, [Marsha Holt] couldn't identify Mr. Gay at the lineup.").

Instead of arguing that Robert Thompson in the hours, days, and weeks after the shooting identified the dark-skinned black man in a dark shirt in the backseat as the shooter, Shinn argued:

> Now, reasonable doubt No. 4 is Robert Thompson. He is going to testify he saw someone who looked like Mr. Gay.
>
> At the lineup the evidence is going to show that he couldn't identify Mr. Gay, and also at the grand jury – he went to the grand jury – and there were pictures of four suspects, including Mr. Gay, and he could not identify Mr. Gay at the time.

58 RT 6297. As stated earlier, focusing on Thompson's inability to identify Mr. Gay ignored the stronger evidence that Thompson's earliest and most consistent descriptions described a man matching Raynard Cummings's appearance. In Shinn's opening statement, he never even mentioned Shequita Chamberlain, a prosecution eyewitness who consistently and credibly described a dark-skinned black man wearing a dark shirt as the person shooting Officer Verna outside of the car.

These are but a few instances that exemplify Shinn's defective performance in the only area respondent avers Shinn was competent: being "fully conversant" with the prosecution's case at trial. Resp. Br. at 7. Rather than being full conversant, Shinn was barely literate. And that was when he was not sleeping in court. 3 EH RT 203-05 (Payne testifying Shinn frequently slept in court, causing Payne to devise ways to wake Shinn up during trial); 11 EH RT 1411-15 (Howard Price, counsel for Raynard Cummings, testifying that Shinn slept "often enough" in court and that Shinn's sleeping "was the butt of joke[s]").

But even if Shinn was always alert (which he was not) and his performance in court was competent (which it was not), his performance cannot be defended as objectively reasonable on the ground that Shinn had,

by virtue of cross-examining prosecution witnesses and noting some inconsistencies therein, done enough to defend Mr. Gay. As legions of courts, including this Court, have held, counsel's knowledge of rudimentary facts contained in the record does not discharge the duty to investigate in the first instance. *People v. Ledesma*, 43 Cal. 3d 222 (1987) ("Counsel's *first duty* is to investigate the facts of his client's case.") (emphasis added); *In re Lucas*, 33 Cal. 4th 682, 723 (2004). Rather, the discovery of inconsistencies and holes in the prosecution's case should *prompt* investigation, not end it. *Cf. Wiggins*, 539 U.S. at 526.

If, as respondent argues, the statements of prosecution witnesses like Robert Thompson or Gail Beasley showed them to be vulnerable to impeachment given inconsistencies in their observations, effective counsel would have taken those inconsistences as indicating the need for *prompt*, further on-the-ground investigation of other potential eyewitnesses, rather than foreclose such investigation. *See In re Thomas*, 37 Cal. 4th 1249, 1262 (2006) (citing American Bar Association Standards for Criminal Justice (2d ed. 1982 supp.)) (confirming counsel has a duty to conduct "a prompt investigation of the circumstances of the case and to explore *all avenues* leading to facts relevant to the merits of the case") (emphasis in original).

This principle is particularly true given Mr. Gay's defense theory at trial. Shinn's purported trial strategy was to exploit inconsistencies in the prosecution's case to argue that Raynard Cummings was the sole shooter. The additional evidence Mr. Gay presented in these postconviction proceedings is fully consistent with and complimentary of Shinn's theory. That is what makes Shinn's ineffectiveness so egregious: he had exculpatory evidence in his possession placing blame solely on Raynard Cummings and he did nothing with it. *See In re Hardy*, 41 Cal. 4th 977,

1020 (2007) (finding counsel ineffective for failing to interview several exculpatory witnesses given defense counsel's closing argument, because the evidence counsel failed to investigate would have bolstered the defense). As the capital litigation expert, Michael Burt, observed at the reference hearing, competent counsel would want the jury to hear repeated as often as possible from as many witnesses as possible that a dark-skinned suspect was the only shooter. 12 EH RT 1670:14-17.

Accordingly, when weighing any purported strategic choices that informed Shinn's investigation (or lack thereof), it cannot be said that Shinn forewent certain investigation in favor of some other, separate defense. Shinn's decision to not investigate the exculpatory evidence contained in these police reports, in light of his defense, is inexplicable.

Despite respondent's attempts to obfuscate the issue of Shinn's guilt-phase investigation with references to Shinn's performance in court, the granular facts are unavoidable: Shinn did not bother to interview several eyewitnesses who described a man resembling Raynard Cummings as the outside shooter to the police; Shinn did nothing after receiving six, separate reports describing Cummings's in-custody confessions; Shinn asked no questions on cross-examination of Deborah Cantu or Jack John Flores, both of whom would have aided Mr. Gay's defense; and absent Shinn's mid-trial request for Payne to find a gunshot residue expert, Shinn consulted no expert witnesses. As the Ninth Circuit found in a similar case, Shinn had "at [his] fingertips information that could have undermined the prosecution's case, yet chose not to develop this evidence and use it at trial." *Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999). Perhaps concerned with how little guilt-phase investigation was done leading up to trial, Shinn authorized Payne to canvass Hoyt Street for potential eyewitnesses in mid-January 1985, mere weeks before opening statements.

Unsurprisingly, no eyewitnesses were located. As the Court found regarding Shinn's penalty-phase performance in *In re Gay*, 19 Cal. 4th at 781:

> Although other potentially mitigating penalty phase evidence was readily available, Shinn himself did no investigation of the penalty phase evidence and the investigation undertaken by Shinn's investigator, who was given inadequate guidance, failed to discover that evidence.

Shinn's performance was equally deficient and prejudicial at the guilt phase.

C. Because of Shinn's Deficient Performance, Mr. Gay's Jury Did Not Hear and Consider Compelling Reasons to Doubt Mr. Gay's Participation in the Murder of Officer Verna.

The referee's Report detailed the additional exculpatory evidence that Shinn could have presented to show that Mr. Gay did not participate in the homicide, including: four additional eyewitnesses who reported seeing a dark-skinned black man as the shooter; at least six, separate inculpatory admissions by Raynard Cummings; Deborah Cantu's testimony about Pamela Cummings's earliest admissions that a stand-in for her husband, Milton Cook, was the sole shooter; and expert analyses that would have aided Mr. Gay's defense in compelling ways. *See* Rpt. at 26:1-36:20 (describing how the additional evidence would have assisted Mr. Gay's defense); *see also* Pet. Br. at 42-113. Respondent argues that Mr. Gay was not prejudiced by Shinn's failure to uncover the foregoing evidence because of ambiguities or discrepancies in the additional eyewitness statements, the cumulative nature of the inculpatory statements, supposed credibility issues with some of the additional witnesses, and the

unhelpfulness of the expert testimony. Respondent's analysis, however, is erroneous.

Preliminarily, respondent's prejudice argument relies on a fundamental misunderstanding of the *Strickland* prejudice standard. Respondent insists that to show *Strickland* prejudice Mr. Gay is required to show the additional evidence "*would have* exonerated [him] or probably caused the jury to render a different *verdict*." Resp. Br. at 25 (emphasis added). In other parts of respondent's brief, respondent formulates *Strickland* prejudice as requiring each individual piece of additional evidence to exonerate Mr. Gay. *See, e.g.*, Resp. Br. at 48 ("Purnell did not *exonerate* petitioner at all") (emphasis added). This formulation of *Strickland* prejudice – requiring a showing that all twelve jurors would have voted not guilty – is gravely flawed.

As this Court, and several courts, have repeatedly held, *Strickland* prejudice is not "outcome-determinative." *Strickland*, 466 U.S. at 693; *In re Hardy*, 41 Cal. 4th 977, 1018-19 (2007). Neither do petitioners have to show that counsel's deficient performance "more likely than not" altered the case. *Id.*; *see also In re Wilson*, 3 Cal. 4th 945, 956 (1992) (same); *In re Fields*, 51 Cal. 3d 1063, 1078 (1990) (same). Indeed, the United States Supreme Court cited the hypothetical preponderance of the evidence standard urged by respondent here as an example of a rule that would be contrary to clearly established federal law. *Williams*, 529 U.S. at 405-06 (employing the "preponderance of the evidence that the result of his criminal proceeding would have been different" standard would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to our clearly established precedent"); *see also Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998) (petitioner is not required to show by a preponderance of evidence that the result in his case would have been

different).

Rather, to establish prejudice in the context of guilt-phase claims, the question is whether there is a reasonable probability that, absent Shinn's errors, the factfinder would have had a reasonable doubt respecting Mr. Gay's guilt. *Strickland*, 466 U.S. at 695. A reasonable probability in this context is less than a "more likely than not" standard and certainly less than an "exoneration" standard; Mr. Gay need only to prove a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 693-94; *In re Lucas*, 33 Cal. 4th 682, 721 (2004).

Given Shinn's wholly incompetent performance, and the fact that Shinn could have presented Mr. Gay's jury with overwhelming evidence that Raynard Cummings was the sole shooter, there can simply be no confidence in the jury's verdict. As this Court held in 2008, after the trial court precluded consideration of much of the same evidence, and foreclosed the question of "lingering doubt" in Mr. Gay's penalty-phase re-trial, the additional eyewitnesses would have "substantially bolstered" the defense that Mr. Gay was not the shooter; Cummings's in-custody confessions would have been "powerful evidence that Raynard himself . . . had admitted firing all of the shots"; and exclusion of Deborah Cantu and Robin Gay's testimony was prejudicial. *People v. Gay*, 42 Cal. 4th at 1224-25. For the following reasons, this Court should not subscribe to respondent's formulation of *Strickland* prejudice or respondent's application of *Strickland* prejudice to this case.

1. The Weaknesses in the Prosecution's Case That Respondent Argues Shinn Exploited at Trial Weigh in Favor of a Finding of Prejudice.

A critical component of the prejudice inquiry considers the relative strength of the prosecution's case. "[A] verdict or conclusion only weakly

supported by the record is more likely to have been affected by [trial counsel's] errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696; *see also In re Thomas*, 37 Cal. 4th at 1265. As Mr. Gay stressed in his Opening Brief, the prosecution's case was marred by significant discrepancies. *See* Pet. Br. at 44-45 (Robert Thompson's description of the shooter flip-flopped three times, Marsha Holt's testimony was undercut by Gail Beasley, Gail Beasley's descriptions of the shooter's clothing identified Cummings, and Shannon Roberts reversed the roles of the suspects describing Mr. Gay as the shooter and a dark-skinned man as the one who picked up the gun).

Respondent's briefing reinforces this point. As respondent notes, even in the absence of an adequate defense investigation, the prosecution's case was vulnerable to impeachment. *See, e.g.*, Resp. Br. at 7 (Shinn exploited "inconsistencies in the eyewitnesses' identifications"); *id.* (noting the "absence of any evidence that affirmatively demonstrated codefendant Cummings [] passed the murder weapon to petitioner"); *id.* at 8-12 (emphasizing witness Rose Perez who was driving through an intersection had limited time to view the scene, other witnesses misidentified the suspects, and prosecution witnesses Oscar Martin and Shequita Chamberlain actually confirmed that a dark-skinned man was the outside shooter).

Respondent's brief acknowledges what this Court found in 1998 and 2008: the prosecution's case against Mr. Gay was relatively weak. *See People v. Cummings*, 4 Cal. 4th 1233, 1259 (1998) ("[Eyewitnesses'] versions of the events and identification of the shooter or shooters varied greatly."); *People v. Gay*, 42 Cal. 4th at 1226 (prejudice inquiry noting that the prosecution's case was marked by an "absence of physical evidence linking [Mr. Gay] to the shooting and the inconsistent physical and clothing

descriptions given by the prosecution eyewitnesses"). Respondent cannot claim that Shinn performed effectively in pointing out the obvious holes inherent in the prosecution's case, and then argue there is no prejudice because the prosecution's case against Mr. Gay was overwhelming. Thus, even without the additional evidence the referee detailed in response to Question 2, the prosecution's case against Mr. Gay was, at best, a close one.

2. Given the Conflicting Prosecution Eyewitnesses Testimony, the Addition of Four Exculpatory Eyewitnesses Establishes a Reasonable Probability the Jury Would Have Had a Reasonable Doubt About Mr. Gay's Guilt.

Because of Shinn's incompetence, the jury that convicted Mr. Gay of capital murder never learned that four eyewitnesses would have testified credibly that a dark-skinned black man wearing a dark-colored shirt got out of the car and shot the officer. The four eyewitnesses' testimony directly corroborated the testimony of prosecution witnesses Shequita Chamberlain and Oscar Martin who also described seeing a dark-skinned shooter. 95 RT 10886-87. Had Shinn presented these four eyewitnesses, he could have argued to Mr. Gay's jury that they would have had to find at least *six* eyewitnesses were either lying or mistaken when they described the shooter as a dark-skinned black man. *See Lord v. Wood*, 184 F.3d 1083, 1094 (9th Cir. 1999) (additional witnesses "with no reason to lie" could have provided "mutually reinforcing statements" to aid the defense). Given the inconsistencies in Gail Beasley and Marsha Holt's observations, and Robert Thompson's 180-degree change from describing a medium-complexioned black shooter to white-Mr. Gay, the prosecution's case would have crumbled. Thus, on a case dependent upon eyewitness testimony, Shinn's failure to present four exculpatory eyewitnesses most assuredly undermines

confidence in the jury's guilty verdict. *See Avila v. Galaza*, 297 F.3d 911, 922 (9th Cir. 2002) (finding prejudice after counsel failed to call four eyewitnesses who saw someone other than defendant kill the victim).

Respondent's reading of the referee's findings regarding the additional eyewitness evidence is completely at odds with the record, with the language of the referee's Report, and the legal conclusions reached by this Court in 2008. Relying on an incorrect legal standard that requires evidence exonerating Mr. Gay, respondent ignores the critical fact that all four eyewitnesses ultimately described a person resembling Raynard Cummings as the outside shooter. Instead, respondent picks apart atmospheric details in their testimony in an effort to absolve Shinn of his failure to even interview these witnesses in the first instance. Putting aside respondent's reliance on an erroneous legal standard, this Court should not endorse respondent's arguments for the following reasons.

a. Trial Counsel Can Call Young Witnesses and Exercise Caution at the Same Time.

Preliminarily, respondent misconstrues the significance of the referee's observation that the eyewitnesses remained deeply affected by the tragic events they witnessed over thirty years ago. The referee found that Shinn could have presented the testimony of Irma Esparza, Walter Roberts, Ejinio Rodriguez, and Martina Jimenez, who would have described the shooter's complexion as inconsistent with Mr. Gay's and consistent with Raynard Cummings. Rpt. at 26-28. In the referee's findings, the referee noted that each of the eyewitnesses was emotional and clearly affected by their observations from the day of the shooting. Rpt. at 43:21-44:6. As Mr. Gay argued in his Opening Brief, jurors likely would have regarded the emotional content of the testimony to be an indication of the witnesses' credibility. Competent counsel would have been able to argue – consistent

with the referee's recent finding – that each of the witnesses obviously had been traumatized "by *witnessing* the murder of Officer Verna." Rpt. at 43:21-22 (emphasis added); *see* Pet. Br. at 43; *see also People v. Gay*, 42 Cal. 4th at 1224 (even without observing the genuine and emotional demeanor of these four eyewitnesses, this Court found on mere proffer that their testimony would have "substantially bolstered" Mr. Gay's defense).

Because of the emotional process and their youthful age, the referee also noted that "as a matter of strategy, trial counsel must exercise caution when contemplating calling young children as witnesses to traumatic events." Rpt. at 44:4-6. Respondent takes this admonition as license for Shinn's failure to call any of these witnesses. Resp. Br. at 25. But counsel can do both: present the testimony of young witnesses after making a thoughtful, informed decision whether to call them. The two are not mutually exclusive. Indeed, that is precisely what the prosecutor did when he called fourteen-year-old Oscar Martin and thirteen-year-old Shannon Roberts to testify about their observations the day of the shooting. *See* 67 RT 7354:16-17; 69 RT 7777.

Equally important, Shinn could not have known what emotional impact witnessing the event had on these witnesses because he failed to locate and interview them in the first instance. Shinn deprived himself of any basis necessary to determine whether these witnesses appeared credible, incredible, or some combination given his failure to conduct timely, minimal follow-up of their initial police statements. Either way, respondent cites no evidence to suggest that these four eyewitnesses were not able to testify competently or that their observations were inherently incredible due to their age. Rather, the referee's findings regarding the additional evidence Shinn could have presented to Mr. Gay's jury demonstrates how beneficial these witnesses would have been. Rpt. at 26-

28.

b. The Additional Eyewitness Testimony Is Not Inconsistent, but Congruent With Other Credible Evidence.

Beyond the four additional eyewitnesses' descriptions of the outside shooter as a dark-skinned black man wearing a dark-colored shirt, Mr. Gay highlighted how other details in their accounts of the shooting were congruent with each other, with prosecution witness testimony, and with the forensic data. *See, e.g.*, Pet. Br. at 50-51 (Irma Esparza's testimony consistent with forensic evidence, with Cummings's own inculpatory statements, with Oscar Martin's testimony, and with trial exhibits); *id.* at 53-54 (Ejinio Rodriguez's testimony consistent with Pamela Cummings's statement to Cantu, with prosecution witness Shannon Roberts's testimony, and with the Martin family's testimony). The testimony of these eyewitness individually, and collectively, creates a reasonable probability sufficient to undermine confidence in the jury's verdict.

Respondent, however, myopically attacks each eyewitness in isolation by pointing to imprecisions in each statement to excuse Shinn's failure to investigate and present these four eyewitnesses. But respondent's arguments are wide of the mark for three reasons: first, *Strickland* prejudice does not require presentation of unimpeachable evidence; second, the purported discrepancies respondent identifies would have been overshadowed by equally, if not far more, significant discrepancies of prosecution witnesses' accounts; and third, the "inconsistencies" respondent identifies are not problematic at all, but actually strengthen the value and credibility of the eyewitnesses' observations.

1) Respondent Exaggerates the Significance of the Imprecisions in the Additional Eyewitnesses' Accounts.

First, respondent misreads courts' application of *Strickland* prejudice. Respondent argues that Shinn was reasonable for failing to call these four eyewitnesses (and reasonable for even failing to interview them) because the details of their recollection of events did not mesh perfectly with all the other witnesses, thereby enabling the prosecution to challenge their testimony on cross-examination. *See* Resp. Br. at 29 (arguing the discrepancies in Irma Esparza's account would have made her vulnerable to cross-examination); *id.* at 33-34 (Walter Roberts, same); *id.* at 36 (Martina Jimenez, same).

The prospect that the prosecution is likely to cross-examine favorable defense witnesses about purported discrepancies in their accounts of events is present in nearly every criminal case. The key here is that on the critical question of who exited the car to shoot the officer, all four eyewitnesses reported seeing a dark-skinned black man consistent with Raynard Cummings as the outside shooter. As this Court has observed, where independent eyewitnesses "agreed on the key point" of the identity of a shooter, their testimony is not discredited by "inconsistencies and discrepancies [that] are fairly minor, and seem to be the kind commonly found among eyewitnesses to an unforeseen and startling event." *People v. Contreras*, 58 Cal. 4th 123, 168 (2013).

Thus, courts have overwhelmingly applied *Strickland*'s reasonable probability standard without speculating on whether the jury would have fully subscribed to the additional evidence that competent counsel should have presented. In *Brown v. Myers*, 137 F.3d 1154, 1157-58 (9th Cir. 1998), when examining the additional evidence that counsel failed to

present, the Court reasoned that, notwithstanding the imprecisions in the witnesses' accounts and instances where the testimony was vague, the testimony on the "crucial point" of whether the defendant committed attempted murder buttressed the defense and created more equilibrium in the evidence the jury heard. The Court explicitly acknowledged that the jury may have grappled with the ambiguities in the additional testimony, but still found *Strickland* prejudice. *See Brown*, 137 F.3d at 1157-58 ("It is not certain, of course, that the jury would have chosen to believe [the defendant] and his witnesses and discredit the prosecution witnesses"). Indeed, *Strickland* began its prejudice analysis by rejecting this very "outcome-determinative" inquiry that respondent advances before this Court. *Strickland*, 466 U.S. at 693.

The discrepancies or imprecisions in ancillary details in the eyewitnesses' accounts are overshadowed by their observations on the crucial point of who shot the officer. Whether – as respondent highlights – Irma Esparza thought the officer was off his motorcycle (rather than on his motorcycle) when he pulled the car over, Resp. Br. at 26, or whether Walter Roberts thought the shooter was sitting in the driver seat (instead of just exiting out the driver's side), *id.* at 32, are minor inconsistencies that do not countenance against investigating and presenting their testimony. If all four additional eyewitnesses' observations were synchronized in every single detail, respondent would likely argue that the witnesses were coached. Instead, each additional witnesses observed the shooting from different vantage points and at different times, resulting in the minor inconsistencies "commonly found among eyewitnesses to an unforeseen and startling event." *Contreras*, 58 Cal. 4th at 168. Nevertheless, each witness, from their initial descriptions through their testimony at the reference hearing, was consistent on the fact that a dark-skinned black man was the outside

shooter.

2) The Discrepancies Respondent Points to Are Overshadowed by Chasms in the Prosecution's Case.

Respondent does not dispute the referee's findings that, at bottom, each additional eyewitness would have informed Mr. Gay's jury that a dark-skinned black man as the shooter. Rpt. at 26-28. Instead, respondent points to "inaccurate" atmospheric details in the witnesses' statements, such as how many people were in the car or how the officer effectuated the traffic stop, as reasons not to investigate and present the testimony. According to respondent, in the worst case scenario, Shinn would have been forced to argue to Mr. Gay's jury that each witness was accurate about seeing a dark-skinned black man as the shooter, but inaccurate in all other respects. *See* Resp. Br. at 34 (if Shinn had presented Walter Roberts, he would have been forced to argue Roberts was "accurate in one respect (a 'black' man was the shooter), but inaccurate in all others."); *see also id.* at 29 ("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").

Respondent ignores the fact that the case the prosecution presented at trial was far more fractured. The prosecution's version of events was marred by significant inconsistencies, not on atmospheric details, but on the critical issue of whether a dark-skinned or light-skinned man shot the officer. Even if the "worst case scenario" would have required Shinn to concede that while Irma Esparza, Walter Roberts, Martina Jimenez, and Ejinio Rodriguez were all accurate in their descriptions of a dark-skinned shooter, they were "wrong in most of their other observations," (which they were not) the prosecution's witnesses were weaker still. The prosecution

presented a group of witnesses who were inaccurate in their descriptions of the shooter *and* inaccurate in most of their other observations. The prosecution's six eyewitnesses at trial covered the waterfront on the critical issue of who shot the officer: two identified a dark-skinned black man (Chamberlain and Martin), three identified a light-skinned man (Holt, Beasley, Roberts),[4] and one flip-flopped between a black and white shooter three times (Thompson).

Their testimony describing collateral details fared no better. Prosecution witness Shannon Roberts described two separate suspect cars (a silver grey and a green one). 69 RT 7813-14. Marsha Holt described only two people at the scene, Pamela Cummings and Mr. Gay, the latter of whom she described as waiting in the middle of the street after the officer was shot for the getaway car to come back and pick him up. 68 RT 7572. And yet, the prosecution still presented these witnesses to Mr. Gay's jury, who ultimately credited their (inconsistent) testimony.

Given the pervasive inconsistencies in the prosecution's case, the relatively minor inconsistencies among the four eyewitnesses' recollections did not give Shinn any reason to reject out of hand their exculpatory testimony that a dark-skinned black man was the one who shot the officer outside the car. In turn, the four additional eyewitnesses would have been reinforced by Oscar Martin and Shequita Chamberlain's trial testimony that a dark-skinned black man shot the officer. Coupled with Robert Thompson's initial descriptions of the dark-skinned black shooter, Shinn

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[4] By comparison, the three witnesses who identified a light-skinned shooter were internally inaccurate: Gail Beasley identified a light-skinned man in the dark-skinned man's clothes, Shannon Roberts saw a light-skinned shooter but a dark-skinned man later retrieve the gun, and Marsha Holt likely did not see anything given reports she was watching television at the time of the shooting.

could have argued to Mr. Gay's jury that it had now had *seven* reasons to doubt the prosecution's version of events based on eyewitness testimony alone. This additional evidence, even indulging the "inconsistencies" respondent identifies, paints a drastically different picture from the one presented at trial and most certainly undermines confidence in the jury's guilt-phase verdict.

3) The Discrepancies Respondent Identifies Actually Bolster Each Witness's Credibility.

Finally, respondent's worst case scenario argument – that Shinn would have been forced to argue each eyewitness was correct in describing Raynard Cummings, but "wrong in most of their other observations" – is not true. As Mr. Gay explained in his Opening Brief, the details respondent discounts as "inaccurate" are actually substantially consistent with other evidence. *See* Pet. Br. at 50-51, 53-56; Pet. Exceptions at 43-44, 49-53. Many of these "inconsistencies" already have been addressed in previous briefing, and weigh in favor of a finding of credibility. For example, Irma Esparza's reported observation that the officer was punched in the face, and was shot with his own gun in the neck (Resp. Br. at 28) was consistent with both the autopsy findings that the first shot struck Officer Verna in the neck, and also consistent with the officer's sudden physical reaction, which led Oscar Martin to believe the officer had been struck by the driver's door. *See* Pet. Br. at 50-51 (detailing how Irma Esparza's observations bolster her credibility and were corroborated by other evidence); *see also People v. Lewis*, 26 Cal. 4th 334, 364-65 (2001) (despite discrepancies in eyewitness's testimony, identification of defendant was sufficient to support conviction where pathologist supported witness's description of murder and how it took place).

Respondent's most recent examples of "inconsistencies" are wholly

without merit. Respondent argues that Shinn was right to not call Irma Esparza because she may have lied about being summoned to testify in this case at the 2000 penalty-phase retrial. Resp. Br. at 27 (arguing said Ms. Esparza was "summoned to court in San Fernando in 2000 [to testify], but Ejinio testified otherwise."). Aside from the illogic of suggesting that events occurring in 2000 could have informed Shinn's purported tactical decisions made 15 years earlier, respondent's argument is foreclosed by the record before this Court. Ms. Esparza, and her brother Ejinio Rodriguez, were summoned to appear as defense witnesses in 2000, but ultimately did not testify after the trial court excluded their testimony. *People v. Gay*, 42 Cal. 4th at 1216. Respondent's argument grasps at straws.

Next, respondent emphasizes that Irma Esparza described the shooter – a "'male Negro,'" who "'was dark skinned, about 25 years old, with about a 3-4 inch afro'" – as also being the driver of the car. Resp. Br. at 27. As the referee found, Ms. Esparza's description of the dark-skinned suspect is consistent with Raynard Cummings. Rpt. at 28. Respondent nevertheless contends that Ms. Esparza's reference to Raynard Cummings as the driver is significantly impeaching in light of "the great weight of the evidence showing that Pamela Cummings . . . was the driver." Resp. Br. at 27. But Ms. Esparza's impression of Raynard Cummings's initial position in the car, although inaccurate, makes sense given that from her vantage point she would have seen the shooter emerged from the driver's seat to continue shooting the officer. Ex. A13. There is nothing unreasonable in her conclusion that the shooter was also the driver. Rather, her description inculpates Raynard Cummings.

Similarly, even though respondent acknowledges that Walter Roberts described the shooter as a "medium complexioned" "male Negro" in a dark-shirt (consistent with Cummings), respondent points to Mr. Roberts's

description of the shooter as being "clean shaven." Resp. Br. at 32-33. Because at the time of Cummings's arrest he had facial hair, respondent argues that this "clean shaven" description incriminates Mr. Gay, and thus excuses Shinn's failure to even interview Walter Roberts. Resp. Br. at 33. On the critical point, however, Walter Roberts saw and repeatedly described a medium-complexioned black man as the sole shooter (both inside and outside the car) to the police in the hours and days following the shooting.[5]

Respondent also argues that Shinn's failure to make any effort to interview Martina Jimenez can be justified on the ground that although she described the shooter as a "male Negro," she also described him as being 6'0" tall. Resp. Br. at 35. Mr. Gay is 6'0" and Raynard Cummings was 6'6" tall. Rpt. at 7. Respondent argues that because Ms. Jimenez's reported estimate of the shooter's height "is more consistent with [Mr. Gay] than Cummings," Shinn was not deficient in failing to interview her. Resp. Br. at 35. Respondent makes a similar hair-splitting argument with respect to Walter Roberts. *Id.* at 34.

Martina Jimenez was eight and a half years old and Walter Roberts was twelve years old at the time of the shooting. 9 EH RT 1268:22; 11 EH RT 1377; Ex. A43 at 1. The ability to differentiate between 6'0" and 6'6" at some distance away is difficult for the most discerning adult, let alone two pre-teenagers witnessing a traumatic event. A six-inch variance in an estimated height description by two witnesses, who otherwise describe

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[5] Respondent continues to emphasize Walter Roberts's failure to identify Raynard Cummings at the lineups as a reason Shinn was reasonable in failing to interview or call him as a witness. *See, e.g.*, Resp. Br. at 33. As Mr. Gay has repeated, Walter Roberts identified the person in position No. 4 in Line-up No. 9 as looking "the same" as the shooter. Resp. Ex. 755; Ex. A106. The person is position No. 4 is the most dark-skinned person in the lineup; he is darker than Milton Cook, who was in position No. 6. Ex. A106.

Raynard Cummings as the shooter, does not provide any justification for the failure even to investigate, let alone present their exculpatory testimony.

The significant factor distinguishing the suspects in this case was the difference between the "dark" or "black" suspect, (Raynard Cummings) and the "light" or "white" suspect (Mr. Gay); not their respective, similar heights. Innocent misrecollections about the placement of people involved in a sequence of events, or how tall a person appears to be, is no basis for rejecting otherwise believable testimony out of hand, particularly when the descriptions on the critical question of who shot the officer exculpates your client. If anything, any legitimate "doubts" in this regard would have required Shinn to investigate and assess the evidence. Instead, he did nothing, and Mr. Gay's jury never heard the testimony of these four eyewitnesses.

c. Respondent Mischaracterizes the Record Regarding Presentation of Irma Esparza and Ejinio Rodriguez's Testimony.

Respondent makes sweeping conclusions regarding Shinn's ability to interview and present Irma Esparza and Ejinio Rodriguez at the time of trial. Without citing to any portion of the record, respondent concludes that Mr. Gay failed to establish that Shinn would have been able to interview Irma Esparza or Ejinio Rodriguez prior to trial. Resp. Br. at 29, 32. There is uncontroverted evidence in the record that both witnesses would have cooperated with defense counsel and testified if called as witnesses. 13 EH RT 1702-03 (Irma Esparza); Ex. A24 at ¶ 10 (Ejinio Rodriguez); *see also People v. Gay*, 42 Cal. 4th at 1215-16 (both witnesses were also present at the 2000 retrial to testify to their observations that day).

d. Shinn's Failure to Investigate and Present the Exculpatory Eyewitnesses Was Prejudicial.

Respondent's isolated attacks on the value of each of the eyewitnesses overlooks the weaknesses in the prosecution's case, the details in the individual accounts that exculpate Mr. Gay, and the cumulative impact the testimony of four additional eyewitnesses would have had in the context of the case as a whole. In *In re Fields*, this Court found there was no *Strickland* prejudice because trial counsel gave the jury a "fairly accurate picture" of the defendant's story. *See In re Fields*, 51 Cal. 3d 1063, 1080 (1990). The addition of four eyewitnesses whose descriptions of the shooter exculpate Mr. Gay and provide details supported by the physical evidence, Cummings's own confessions, each other's statements, and even prosecution eyewitness testimony, Pet. Br. at 49-56, paint a dramatically different picture from the one Shinn allowed the prosecution to present at trial. For his part, Shinn presented testimony from seven witnesses, five of whom were recycled prosecution witnesses who essentially repeated their same harmful testimony from the prosecution's case. There is simply nothing in the record, aside from Shinn's incompetence, to explain Shinn's failure to investigate and present this testimony. In light of the foregoing, there is at minimum a reasonable probability that at least one of the twelve jurors would have doubted Mr. Gay's participation in Officer Verna's murder.

3. Raynard Cummings's Seven, Separate Inculpatory Admissions to Sheriff's Deputies and Inmates Were Not Cumulative, but Corroborative Evidence Exculpating Mr. Gay.

Due to Shinn's incompetence, Mr. Gay's jury never heard readily available testimony from both uniformed officers and inmates in custody

with Raynard Cummings that he admitted that he alone shot and killed Officer Verna. *See* Pet. Br. at 57-73 (detailing the prejudice of Shinn's failure to present Cummings's confessions). From the time of Cummings's arrest through the capital murder trial, Cummings openly, spontaneously, and voluntarily admitted to several deputies and other inmates that he shot Officer Verna. Many of Cummings's confessions were memorialized, both from inmates who came forward and from deputies who heard Cummings's confessions directly. As the referee found, the reports were so common that on at least one instance, Sergeant George Arthur, a supervisor, declined to take a formal report "due to the number of similar comments made by Raynard Cummings to other Sheriff's personnel." Rpt. at 32:11-14. As previously noted, this finding, and the government's failure to disclose the exculpatory evidence, supports an additional claim for relief under *Brady v. Maryland*, 373 U.S. 83 (1973). *See* Pet. Br. at 60-61.

Many of the memorialized reports were disclosed to Shinn in discovery, yet Shinn failed in even his basic duty to interview these witnesses. Rpt. at 37:7-15. If Shinn had presented these seven separate confessions, there is a reasonable probability that Mr. Gay's jury would have doubted the prosecution's version of events. *See Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (a confession is "powerful evidence of [petitioner's] innocence" and should be introduced at trial).

Respondent makes two arguments excusing Shinn's failure to interview and present these witnesses: one, Cummings's confessions via the new witnesses are cumulative to what was presented by prosecution witnesses at trial; and two, some of the witnesses to Cummings's confessions are not credible. Resp. Br. at 41-50. Preliminarily, respondent's arguments do not make practical sense. Respondent asks that this Court to excuse Shinn's failure to even interview these witnesses

because the evidence would have been similar to what the prosecution presented at trial, or the witnesses would have been less than believable. But no attorney in Shinn's position leading up to the trial could have known which, if any, witnesses to Cummings's confessions the prosecution intended to present, or what exactly those witnesses were likely to say on the stand. Nor could an attorney in Shinn's position reasonably assess the credibility of such witnesses without interviewing them, either personally or through an investigator.

Quite simply, Shinn could not see into the future and decide to forego interviews of these witnesses on a post-hoc rationale that it did not matter since the prosecution sponsored "similar" evidence. *See Kimmelman*, 477 U.S. at 387 ("At the time [petitioner's] lawyer decided not to [investigate], he did not – and, because he did not ask, could not – know what the State's case would be"). In any event, this Court should not credit the cumulative or credibility arguments for the following reasons.

a. The Additional Witnesses Who Heard Cummings's Confessions in Custody Corroborate Evidence That Cummings Alone Shot the Officer.

The referee found that evidence was reasonably available from Sheriff Deputy William McGinnis, Sergeant George Arthur, Lieutenant Richard Nutt,[6] James Jennings, Norman Purnell, John Jack Flores, and David Elliott that would have aided Mr. Gay's defense that he did not participate in Officer Verna's murder. Rpt. at 29:16-32:14. Respondent argues the additional evidence may have been cumulative to what the prosecution

[6] The referee found Lieutenant Nutt's statement, by virtue of being memorialized in 2000, would not have been known to Shinn in 1985. Rpt. at 37:15-17. As Mr. Gay noted in his Exceptions, while Nutt's written statement was not available, Nutt's testimony was reasonably discoverable if Shinn had actually investigated the case. *See* Pet. Exceptions at 35-36.

presented against Mr. Gay and Raynard Cummings at trial. *See* Resp. Br. at 41-42 (arguing that these seven witnesses would have "added . . . nothing" to Mr. Gay's defense). Given that the question of whether this additional evidence would have undermined confidence in the jury's verdict is a mixed question of law and fact, this Court should independently review the question given the respondent and referee's conflation of cumulative and corroborative evidence. *See In re Cordero*, 46 Cal. 3d 161, 180-81 (1988).

First, these additional confessions are not cumulative of what the prosecution presented at trial. At trial, Shinn allowed the prosecution to present evidence of Cummings's multiple, ambiguous statements to create the impression that *both* Raynard Cummings *and* Mr. Gay were guilty:

- Sheriff Deputy Rick McCurtain: Cummings said he fired two shots and "[t]hen *we* put four more" into the victim. 66 RT 7219 (emphasis added).
- Sheriff Deputy David La Casella: Cummings claimed responsibility for firing the first shot, and Mr. Gay failed to say anything in response to Cummings's comment that he only fired the first shot. 76 RT 8611.
- Sheriff Deputy Michael McMullan: only officer testifying that Cummings admitted to firing all six shots at the victim. 65 RT 7149-50.

The prosecution sponsored the foregoing evidence against Mr. Gay as evidence of both men's guilt. *See, e.g.*, 95 RT 10912 (prosecution exploiting Cummings's statement in closing argument to Mr. Gay's jury: "[Cummings's statement to La Casella] is very strong against Mr. Cummings, but it also says something by inference about Mr. Gay"). Shinn had at his disposal at least six separate admissions of guilt that Cummings made to various people in custody at various times that were not ambiguous and did not inculpate Mr. Gay. By respondent's reasoning, Shinn need not bother investigating these six separate confessions because the *prosecution*

intended on presenting similar evidence *against* Mr. Gay and Raynard Cummings. This Court cannot endorse such unreasonable decision-making.

Equally important, respondent conflates corroborative evidence with cumulative evidence. As this Court explained in *People v. Mattson*, 50 Cal. 3d 826, 871 (1990), evidence that is identical in subject matter to other evidence should not be excluded as "cumulative" when it has greater evidentiary weight or probative value. Similarly, the Ninth Circuit in *Liao v. Junious*, 817 F.3d 678, 695 (9th Cir. 2016) explained the difference between cumulative and corroborative evidence. Citing Black's Law Dictionary, the Court found that cumulative evidence is "additional evidence that supports a fact established by existing evidence (esp. that which does not need further support)." *Liao*, 817 F.3d at 695 (citing Evidence, Black's Law Dictionary (10th ed. 2014)). On the other hand, corroborative evidence, is "evidence that differs from but strengthens or confirms what other evidence shows (esp. that which needs support)." *Id.*; *see also People v. Mattson*, 50 Cal. 3d at 871 (evidence that is identical in subject matter to other evidence should not be excluded as "cumulative" when it has greater evidentiary weight or probative value.)

Articulating these definitions demonstrates how the referee and respondent improperly conflated the two standards here. The fact that Raynard Cummings confessed that he alone shot the officer was not an "established fact" that "[did] not need further support" at trial. *Id.* at 695. The seven, separate inculpatory statements Raynard Cummings made, on the other hand, would have "strengthen[ed]" the argument that Mr. Gay did not participate in Officer Verna's murder. *Id.* Unlike cumulative evidence, these were facts that "need[ed] support" or corroboration at trial. *Id.* The fact that these confessions came directly from Raynard Cummings are not

only corroborative, they are direct essential evidence that Mr. Gay did not participate in the shooting. *See Liao*, 817 F.3d at 692. More evidence favorable to the defense on a disputed fact is better than less.

Indeed, as respondent already has conceded, the additional information would have "added" persuasive, exculpatory evidence to the defense case. In the Return, respondent admitted that Deputy William McGinnis's testimony "affirmatively exculpated Mr. Gay" and would have been "reliable, credible and persuasive testimony" that Mr. Gay did not participate in Officer Verna's murder. Return at 41, ¶ 94; *see also id.* at 70, ¶ 168 ("The context and substance of Cummings's admissions made 'clear to [McGinnis] . . . that Cummings alone pulled the trigger and was the sole person responsible for killing Officer Verna.").

Thus, by definition, Deputy McGinnis's testimony would have been "persuasive" in leading Mr. Gay's jurors to conclude that Cummings was the only shooter. Given Shinn's failure to present this and six other instances of Cummings's confessions, the additional evidence makes it more likely that one or more jurors would have found a reasonable doubt, and Shinn's failure to investigate and present the evidence cannot be excused on the ground that the evidence was merely cumulative.

At bottom, respondent's attempt to justify the failure to investigate admittedly credible, exculpatory evidence on the ground that it was cumulative confuses informed, tactical decision-making with evidentiary objections. Disparaging evidence as being "cumulative" is the basis for an opposing party's objection designed to prevent the introduction of even more evidence that the proponent believes will help his or her case. There is no tactical reason for the proponent of the evidence to self-censor and preemptively sustain an objection that has not been made on that ground. On the other hand, the proponent may make a prospective assessment that

the evidence may add "nothing" to the defense, and decide for tactical reasons not to present it. Again, however, the ability to make a reasonably informed decision of that sort requires counsel to conduct minimal investigation, including witness interviews; which Shinn utterly failed to do.

b. By the Force of Respondent's Reasoning, the "Glaring Lack of Credibility" Of Inmate Witnesses Would Have Left the Prosecution Without Its Lead Witnesses.

Respondent cites the criminal histories of the additional inmate witnesses Shinn neglected to interview and present, and argues Mr. Gay's jury would not have credited their testimony.[7] The obvious flaw in respondent's argument is demonstrated by its extension to Jack John Flores, whom respondent characterizes as a "convicted felon and a professional informant with serious credibility issues," Resp. Br. at 49, even though Flores was a *prosecution* witness at trial who testified before Cummings's jury. *See, e.g.*, 103 RT 11543-46 (prosecutor recounting how Flores cooperated with Detective Holder).[8]

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[7] Respondent argues that James Jennings, who "provided no proof of anything at the hearing," was facing serious criminal charges, had a prior conviction for burglary, and admitted he reported Cummings's statement because he wanted help on his pending case. *See* Resp. Br. at 44; *but see* Rpt. at 29:19-30:6 (referee finding that Jennings would have testified that Cummings admitted to shooting Officer Verna twice in the upper body and again in the back). According to respondent, Norman Purnell and David Elliott had "serious credibility issues" given their criminal histories. Resp. Br. at 46 (Purnell) and 49 (Elliott).

[8] Respondent also repeats the same argument that Raynard Cummings's full confession to Jack John Flores may have implicated Mr. Gay as an aider and abettor. Resp. Br. at 48-49. As Mr. Gay has repeatedly noted, Cummings's hearsay statements inculpating Mr. Gay would have been inadmissible against Mr. Gay at trial. *Bruton v. United States*, 391 U.S. 123

None of respondent's arguments is persuasive in suggesting that the jury would have categorically rejected inmate testimony given the prosecution's reliance at Mr. Gay's trial on inmate witnesses, who had criminal records, pending criminal cases, and "snitched" to receive help on their pending cases. The prosecution's two lead witnesses at trial, Gilbert Gutierrez and Alfred Montes, were facing their own pending felony charges. 64 RT 6956 (Gilbert Gutierrez, pending capital murder); 64 RT 7022 (Alfred Montes, pending burglary case); *see also* 64 RT 7010-11 (Montes listing his prior felony convictions). These prosecution witnesses further testified that the reason they reported Cummings's statements was to get a break off their own pending charges. 64 RT 6957:11-16; *id.* at 6961:1-18 (Gilbert Gutierrez admitting that he "needed something to trade" to reduce his charge from capital murder to manslaughter, so he contacted the district attorney to try to make a deal); 64 RT 7023 (Alfred Montes admitting that he asked Detective Holder for "years off" his pending burglary charges in exchange for his information). If Shinn had performed competently by interviewing and presenting the four inmate witnesses, the prosecutor would have risked compromising his own case if he had argued – as respondent does here – that the jury should categorically discredit Norman Purnell, David Elliott, James Jennings, and Jack John Flores by virtue of these four witnesses' felon/inmate status, but that Cummings's statements to two *other* inmates – Gilbert Gutierrez and Alfred Montes – as well as Flores (in the role of prosecution witness), were

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(1968) (prohibiting such evidence because of the great "likelihood that the jury would believe [Cummings] made the statements and that they were true – not just the self-incriminating portions but those implicating [Mr. Gay] as well."); *People v. Aranda*, 63 Cal. 2d 518 (1965) (inculpatory extrajudicial statements of nontestifying codefendant are inadmissible against the other defendant in a joint trial).

credible. As such, this Court should not endorse respondent's internally inconsistent credibility argument.

Even despite the inmate status of these witnesses, the credible exculpatory force of Cummings's underlying confessions to Purnell, Elliott, Jennings, and Flores was reinforced and corroborated by prosecution witnesses, the sheriff's deputies (had Shinn presented them), forensic evidence, and eyewitness descriptions of the shooting. *See* Pet. Br. at 68-73 (detailing the numerous ways the additional evidence Shinn failed to present from inmates and sheriff's deputies would have had mutually reinforcing testimony from other, credible sources). Beyond the value of four separate exculpatory statements, Mr. Gay's jury would have stacked this testimony on top of the three additional sheriff's deputies who heard similar statements, the four additional eyewitnesses who described a man resembling Raynard Cummings as the outside shooter, the two prosecution witnesses who described a dark-skinned black man as the outside shooter, and the evidence Shinn should have presented to impeach the remaining prosecution witnesses. This lay testimony alone creates a reasonable probability that undermines confidence in Mr. Gay's jury's verdict. At a bare minimum, the presentation of the additional evidence Mr. Gay has amassed in these proceedings certainly paints a drastically different picture than the one presented to Mr. Gay's jury at the time of trial.

4. Shinn Failed to Investigate and Present Mr. Gay's Jury with Various Expert Testimony to Demonstrate Mr. Gay Did Not Participate in the Shooting of Officer Verna.

Caselaw is well-settled that where trial counsel deficiently fails to present an expert witness, a petitioner suffers prejudice "if there is a reasonable probability . . . [the] expert would have instilled in the jury a reasonable doubt" as to the petitioner's guilt. *Hinton v. Alabama*, 134 S. Ct.

1081, 1089 (2014); *see also Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008). Contrary to respondent's representations that Mr. Gay presented three expert witnesses at the evidentiary hearing, Resp. Br. at 54, Mr. Gay presented – and the referee found – that Shinn could have presented six expert witnesses to aid in Mr. Gay's defense. Rpt. at 33-36 (eyewitness memory expert, human vision expert, event reconstruction expert, and experts on gunshot residue analysis, and firearm ballistics,[9] as well as a forensic pathologist). Respondent's efforts to downplay the benefit of the additional expert witnesses have no merit. Respondent is asking this Court to adopt a finding that no expert witness would have helped Mr. Gay's case, and thus expert assistance was totally unnecessary for Shinn to explore, let alone present. To the contrary, in a capital murder case where the question of guilt or innocence hinged on inconsistent eyewitness testimony, multiple gunshots delivered from varying distances, and a logistically complicated "pass-the-gun" prosecution theory, expert testimony was not only beneficial, it was critical. *See also* Pet. Br. at 77-98. For the following reasons, this Court should not credit respondent's arguments that no expert witnesses would have assisted Mr. Gay's defense.

a. Respondent's Assertion That Raynard Cummings Did Not Present Expert Testimony Is Irrelevant and Inaccurate.

Preliminarily, respondent erroneously states that since Raynard

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[9] The referee found that a wound ballistics expert would have aided Mr. Gay's defense, but that Dr. Fackler personally would not have been available to Shinn at the time of trial because Dr. Fackler was in the military at that time. Rpt. at 53:10-16. For the reasons noted in the Exceptions, substantial evidence supports a finding that a gunshot wound ballistics expert with similar expertise to Dr. Fackler would have been available at the time of trial. *See* Pet. Exceptions at 81.

Cummings did not present "any such expert testimony," it was reasonable for Shinn not to do so either. Resp. Br. at 54. But Cummings did present expert witnesses: Dr. Paul Hermann, a forensic pathologist (80 RT 9051 *et seq.*) and Dr. Vincent Guinn, a chemist with expertise in gunshot residue analysis (81 RT 9277 *et seq.*). Given that the prosecution's theory of the case was that Raynard Cummings fired the first (and maybe second) shot from the backseat of the car, these two experts were retained by Cummings's counsel to create doubt as to whether the initial gunshot came from the backseat where Cummings was seated. More importantly, the actions taken by co-defendant's counsel in a case where each defendant was placing blame on the other is irrelevant to what Shinn should have done at trial.

b. Shinn's Failure to Present Available Eyewitness/Memory Expert Testimony Undermines Confidence in the Jury's Verdict.

Given the variations in the prosecution's eyewitnesses at trial, Mr. Gay's defense required consultation and presentation of an eyewitness memory expert. *See also People v. Cummings*, 4 Cal. 4th 1233, 1259 (1993) (finding that the "versions of the events and identification of the shooter or shooters varied greatly"). The record conclusively establishes that an eyewitness memory expert would have assisted Mr. Gay's jury in reconciling the critical question in this case: whether they should credit the eyewitnesses who saw a dark-skinned black man exit the car and shoot the officer (as seen initially by Robert Thompson, Oscar Martin, and Shequita Chamberlain) or whether they should credit the eyewitnesses who saw a light-skinned black man shoot the officer (Marsha Holt, Gail Beasley, Shannon Roberts, and arguably Rose Perez). Because none of respondent's arguments support a contrary view, Mr. Gay is entitled to relief.

1) The Record Demonstrates Shinn Was Untruthful When He Told the Trial Court that Payne Was Consulting with Three Eyewitness Experts.

Respondent asks this Court to find that Shinn's decision not to call an eyewitness identification expert was reasonable because he consulted with three experts and then decided against calling any. Resp. Br. at 54. To support this argument, respondent again cites Shinn's deposition. As mentioned earlier, this Court has already found Shinn's testimony to be "evasive, inconsistent, and often nonresponsive." *In re Gay*, 19 Cal. 4th 771, 808 and n.17 (1998).

Shinn never consulted with an eyewitness expert, nor did he authorize Payne to consult with one. In an in camera proceeding on March 7, 1985, the trial court inquired whether Shinn was prepared to proceed with Mr. Gay's robbery defense. Ex. A121 at 14. Resisting the pressure to start the defense case, Shinn represented that he was anticipating arguing the robbery and murder charges together, and that he could not proceed because he had directed his investigator, Douglas Payne, to consult with three eyewitness experts, but that he "didn't anticipate bringing them this early." *Id.* at 14:6-14. Because these experts' testimony was "essential," he could not proceed with their testimony by the following Monday. *Id.* at 14:26-28.

But the record shows that by March 7, 1985, there was no documentation, such as a request or an order for reimbursement pursuant to Penal Code section 987.9, reflecting either Shinn or Payne's consultation with experts. Payne's sworn, unrefuted testimony at the reference hearing was that he was never authorized to engage any expert services. The most he did was suggest avenues of investigation to pursue and await direction. 3 EH RT 207:24-208:8; *see also* 3 EH RT 200:16-201:21, 211:6-9 (Payne

suggested the name of eyewitness memory expert, Dr. Shomer, to Shinn, but Shinn never followed up).

To support Shinn's March 7, 1985 representation to the trial court, respondent cites the three hours Payne billed for "expert work." But the three hours Payne billed for "experts" were billed *after* the March 7, 1985 in camera hearing. Ex. A120 at 38-39 (3 hours for "experts" were billed on April 30, 1985 and May 14, 1985). There is no way that on March 7, 1985 Shinn could have represented to the trial court that Payne had consulted with three eyewitness experts, if the consultation had not yet happened. Further, Payne testified that the three hours he billed for "expert" work was not for an eyewitness expert, but an aborted effort in response to Shinn's mid-trial request to find a gunshot residue expert. 3 EH RT 200:16-201:21, 207:24-208:8, 209:8-211:9, 212:8-10, 288:8-13, 303:18-304:4.

Therefore, the record does not support any suggestion Shinn made a decision, informed or otherwise, to forego presentation of an eyewitness expert when there is no evidence that Shinn or Payne consulted with any such expert.

2) Respondent's Attacks on Dr. Pezdek Do Not Disturb the Conclusion That an Eyewitness Memory Expert Would Have Aided Mr. Gay's Defense.

Quite surprisingly, respondent implausibly argues that an eyewitness memory expert's testimony would have been *harmful* to Mr. Gay's defense. Resp. Br. at 61-63 (bulleting the detrimental impact an eyewitness expert would have had at trial). Respondent attacks Dr. Pezdek's general practice, highlights purported variations in her testimony concerning drug use, weapon focus and double-blind procedures, and bullet-points a list of factual assertions that an eyewitness expert would have been "forced to

admit" on cross-examination. Resp. Br. at 61. These arguments are untenable for the following reasons.

First, respondent's argument about Dr. Pezdek's practice contradicts itself. Respondent argues that Mr. Gay has failed to prove an eyewitness memory expert would have been available to Shinn because Dr. Pezdek could not name "a single criminal case [in which she testified] in 1983, 1984, or 1985." Resp. Br. at 57. Respondent later characterizes Dr. Pezdek as an eyewitness "pundit," who has been charging tens of thousands of dollars for her testimony since the mid-1980s. Resp. Br. at 57 n.29, 60. These two arguments are inconsistent: either Dr. Pezdek was not available at the time of Mr. Gay's trial in the mid-1980s, or she has been charging expert fees since the mid-1980s.

Moreover, Mr. Gay's argument is not that Dr. Pezdek personally would have testified in 1985, but that an expert with similar expertise and credentials would have been available to Shinn. *See also People v. McDonald*, 37 Cal. 3d 351 (1984) (at the time of Mr. Gay's trial, prosecutors and criminal defense attorneys routinely presented testimony from eyewitness experts). Further, Mr. Gay does not dispute that Dr. Pezdek, like many forensic experts, charges a fee for the time, research, and expertise she brings to a case. By respondent's logic, if an expert were found to be incredible every time it was revealed that she was compensated for her work, few, if any, experts would be available to offer an opinion in any case.

Next, respondent argues that an eyewitness memory expert would not have been able to opine on 1) the effect of drugs on memory, 2) weapon focus, and 3) double-blind procedures since they were not developed disciplines at the time of the trial. As Dr. Pezdek testified, there were studies explaining how drug use affects the "early stages of [visual]

processing" at the time of Mr. Gay's trial. 2 EH RT 112-14 (admitting that in the mid-1980s, the effect of cocaine was only studied in the limited capacity of perception, but not recall). Shinn could have used this expert testimony to cast further doubt on Marsha Holt's observations and explain why Gail Beasley may have unconsciously transferred the actions of Mr. Gay and Cummings. Similarly, an expert like Dr. Pezdek would have explained to Mr. Gay's jury that weapon focus was a salient form of distraction, which would have explained why several eyewitnesses like Shannon Roberts or Gail Beasley may have been distracted given the firing of a gun and later retrieval of a gun. *See* 2 EH RT 39:22-40:6.

Respondent also mistakenly argues that Dr. Pezdek would not have been credible to Mr. Gay's jury because she "could not tell us a single reference" that used the term "double blind" or "experimenter expectancy effect" prior to 1985. Resp. Br. at 59. That argument is contradicted by the record. *See* 4 EH RT 488:13-23 (testifying about Robert Rosenthal's *Pygmalion in the Classroom* (1968), Rosenthal & Rubin's 1978 study on experimental expectancy effect); *see also* 12 EH RT 1525:1-11 (Michael Burt) (Patrick Wall's 1965 *Eyewitness Identification* which contains a discussion about law enforcement practices, including blind lineups, and advising the segregation of witnesses to prevent contamination).

3) Respondent's Reasons to Doubt the Impact of Dr. Pezdek's Testimony Are Not Persuasive.

Respondent's primary argument to excuse Shinn's failings is that the unconscious transference theory is "very damaging" to Mr. Gay's defense. *See* Resp. Br. at 61-62. Respondent argues that an expert like Dr. Pezdek would have been forced to concede that 1) the unconscious transference theory assumes Mr. Gay and Cummings were outside the car at the same time, 2) "no witness except Gail Beasley" puts both Cummings and Mr.

Gay outside the car at the same time, and 3) the fact that Mr. Gay and Cummings look different makes this theory even less likely. *Id.* None of these arguments can excuse Shinn's incompetence.

First, there is no need to "assume" that Raynard Cummings and Mr. Gay were, in fact, outside of the car at the same time. The point is undisputed. Raynard Cummings, Pamela Cummings and Mr. Gay all made statements explaining that Mr. Gay took cover behind the right side passenger door of the car as Cummings shot the victim. This is precisely why, for example, Shequita Chamberlain saw the dark-skinned man by the officer as he was shot, while Rose Marie Perez saw a light-skinned man walking near the rear of the car with nothing in his hands. *See* 3 CT 851:7 (Shequita Chamberlain, preliminary hearing); 68 RT 7515-20 (Shequita Chamberlain, trial testimony); *see also* 1 Supp. CT 290:18 (Rose Perez, grand jury); 2 CT 598:20-599:4 (Rose Perez, preliminary hearing); 70 RT 7843 (Rose Perez, trial testimony).

Second, in addition to Gail Beasley, Shequita Chamberlain and Rose Marie Perez, three other witnesses put Cummings and Mr. Gay outside the car at the same time. Thus, a total of six witnesses put both Mr. Gay and Cummings outside the car at the same time during the shooting. Rose Perez, Gail Beasley, Pamela Cummings, Jack John Flores, Gilbert Gutierrez, and Walter Roberts all would have provided testimony that someone (or, specifically, Mr. Gay) was on the passenger side of the car while the officer was being shot. 70 RT 7868 (Rose Perez); Ex. A12 at 1-2 (Gail Beasley); Ex. A134 (Pamela Cummings to Cantu); Ex. A173 (Raynard Cummings to Jack John Flores); Resp. Ex. 751 (Walter Roberts); 64 RT 6996 (Raynard Cummings to Gilbert Gutierrez). These independent eyewitnesses therefore corroborated the accounts of Pamela Cummings, Raynard Cummings, and even Mr. Gay himself, describing Mr. Gay as

frightened and cowering outside the car while Cummings shot the officer.

Third, Dr. Pezdek did not concede that unconscious transference would occur only if both men were outside the car at the same time. To the contrary, she testified that it can occur in the context of two different sequences of events (the shooting and later retrieval of the gun) because there can be errors in the "tagging" of who did what, which affects how the eyewitness's memory is reconstructed. *See* 2 EH RT 41-43. Shinn could have argued that either the presence of the two men outside the car at the same time, or the two sequences of events could explain why Gail Beasley and Shannon Roberts switched the physical appearance and clothing of the shooter and the passenger who later retrieved the gun.

Fourth, the fact that the two men look dissimilar is therefore not relevant to the risk of unconscious transference. As Dr. Pezdek explained, unconscious transference does not refer to the ability to differentiate between suspects' physical appearances; it describes the phenomenon of confusing which person did what during a series of events. 2 EH RT 42:15-18. Shinn could have argued that Gail Beasley's and Shannon Roberts's recollections that a dark-skinned man wearing dark clothing retrieved the gun – when it is undisputed that the light-skinned man in light clothing actually retrieved it – unconsciously switched the actions of the two men. *See People v. Gay*, 42 Cal. 4th at 1226. An expert like Dr. Pezdek would have given Mr. Gay's jury the tools to support this argument.

The remainder of respondent's bulleted arguments are fanciful conclusions that cannot withstand the slightest scrutiny. For example, respondent argues that Dr. Pezdek is not credible because she did not consider the physical evidence in the case, including Mr. Gay's fingerprints on the glove box, his flight evidence, or his arrest while in possession of the officer's gun. Resp. Br. at 62. Dr. Pezdek explained the obvious: none of

that evidence would tend to prove that Mr. Gay, rather than Cummings, was the outside shooter since no one disputes that Mr. Gay was in the car that day. 2 EH RT 139:15-21. The question concerns who in the car – Mr. Gay in the front seat or Raynard Cummings in the backseat – exited the car to shoot the officer. *Id.* at 140:4-17 (also opining that an eyewitness memory expert focuses on the observations of the eyewitnesses and is reluctant to evaluate motive or flight evidence as both are outside her expertise).

Respondent also argues that because Dr. Pezdek identified only a dozen factors out of the 25 factors that potentially apply in eyewitness cases, the remaining 13 would "favor the accuracy of witnesses that identify Mr. Gay as the outside shooter." Resp. Br. at 62. This argument is completely illogical. Dr. Pezdek specifically testified that the remaining factors are *irrelevant* to the facts of this particular case. *See, e.g.*, 2 EH RT 30 (factors can include eyewitnesses who are mentally impaired). Respondent also opines that an expert like Dr. Pezdek would have been forced to concede that Marsha Holt saw the shooting, on the assumption that "[Holt] was in the room . . . and she would have seen what happened." Resp. Br. at 62. As Dr. Pezdek explained, respondent merely posed a tautological question: if the expert is asked to assume that Marsha Holt was in the room and could have seen the shooting, then, yes, the expert would also have to agree that the witness saw the shooting. At bottom, none of these bulleted "concessions" would have damaged Mr. Gay's case. On balance, the testimony of an eyewitness memory expert would have supported Mr. Gay's defense.

4) Respondent Makes Unsupported Assertions About Rebuttal Witnesses to Excuse Shinn's Incompetence.

Unable to rely on any referee findings regarding rebuttal evidence had

Shinn called an eyewitness memory expert, respondent is forced to improvise. Respondent represents to this Court that Shinn's failure to present an eyewitness memory expert was reasonable because the prosecution would have called "two different experimental psychologists, Dr. Ebbe Ebbesen . . . and Dr. John Yuille" as "powerful rebuttal witnesses." Resp. Br. at 56. This argument is completely unsupported by the record. Respondent did not call either of these "rebuttal" witnesses before the referee and there is no evidence in the record to support a finding that any such rebuttal evidence, including any rebuttal evidence from Ebbesen or Yuille, would have been "powerful." *See* 4 EH RT 445-46 (Dr. Pezdek mentioned these two names of experts who were testifying as rebuttal witnesses in the mid-1980s to support the argument that eyewitness experts were available at the time of trial).

c. The Simple, Yet Powerful Testimony of a Human Vision Expert Undermines Confidence in the Jury's Verdict.

Respondent's sole argument regarding Dr. Michel's conditions of visibility testimony is that Payne visited the crime scene prior to trial, and if there had been obstructions in Marsha Holt's line of sight, "it is reasonable to assume Payne would have notified Shinn." Resp. Br. at 63-64. Respondent's argument is circular. Respondent wants this Court to conclude that if Payne had seen something he would have said something to Shinn, and his apparent failure to inform Shinn means there was nothing to report. Respondent, however, did not question Payne at the reference hearing to elicit any testimony to support these speculative assumptions, and they do not have any other evidentiary basis. The record also belies the accuracy of respondent's suggestion that apparent inaction by Shinn means Payne must not have provided him with any action-worthy information.

Whenever Payne identified lines of further investigation, Shinn habitually failed to follow up. 3 EH RT 199:3-6, 200:21-22.

There is uncontroverted evidence in the record that from the best vantage point at the window at 12127 Hoyt Street, Marsha Holt had no vantage point of the crime scene. *See* Ex. A114 (showing a cinder block wall obstructs any line of sight to the staged car). Irrespective of whether the assistance of an expert such as Dr. Michel is necessary to "look out a window and render an opinion" about whether Marsha Holt saw what she claimed to see that day, Resp. Br. at 63, Shinn failed to take such basic investigatory steps. Dr. Michel, employing his skills as a human vision expert, staged the scene according to the distances and measurements memorialized on June 2, 1983, and documented the best possible vantage point a human eye could have observed that day. 4 EH RT 381. The photograph, Ex. A114, is the strongest evidence Daye Shinn could have used to cross-examine Marsha Holt: from that window, Marsha Holt could not have seen Mr. Gay exit the passenger side of the car, could not have seen Mr. Gay walk around the front of the car, and could not have seen Mr. Gay shoot the officer from the driver side front fender.

d. An Event Reconstruction Expert Would Have Undermined the Prosecution's "Pass the Gun" Theory at Trial.

Respondent argues that the referee "emphatically rejected" all of Dr. Solomon's conclusions. Resp. Br. at 67; *see also id.* at 67 (referee "thoroughly rejected Dr. Solomon's theories"). Respondent's characterizations are not supported by the referee's Report.

As the referee found, an event reconstruction expert like Dr. Solomon could have testified that using biomechanics and human factors principles, Raynard Cummings could have "fired the first shot from the backseat, then

fired again as he emerged from the rear seat via the driver's door, and then full exited and fired the remaining four shots in the very short period of time described by some of the percipient witnesses." Rpt. at 35:23-36:1. Additionally, the referee found Shinn could have argued that Mr. Gay's jury could doubt the pass-the-gun theory, given the startling effect the sound of the first gunshot would have had on Mr. Gay. *Id.* at 36:2-8. Had Shinn presented an event reconstruction expert, the referee found that Mr. Gay's jury would have learned that Mr. Gay likely suffered "momentary confusion and disorientation" after the first shot, slowing Mr. Gay's perception and reaction time, and thus, making it impossible to spring from the car and deliver the remaining shots in "just seconds" as the prosecution argued at trial. Rpt. at 36:2-8; 58 RT 6212, 6233.

While the referee did note that it was "common everyday experience" for someone to get in and out of a car, the utility of an event reconstruction expert would wed the eyewitness descriptions with the physical evidence and – by encouraging the jurors to use their "common everyday experience" – demonstrate that the prosecution's theory of the case was unsupported by the hard evidence. The only three witnesses to identify Mr. Gay as the shooter – Shannon Roberts, Gail Beasley, and Marsha Holt – said that Mr. Gay got out of the passenger door, walked around the front of the car at a normal pace, and stood at the front of the driver side of the car to shoot the officer. If, as the prosecution argued, the entire sequence happened in just seconds, and Mr. Gay would have been "momentar[ily] confus[ed] and disorient[ed]" from the first or second shot, there is no way he could have received the gun from Cummings, exited the passenger side, walked around the front of the car, and fired the remaining shots all in "just seconds." *See also* Pet. Br. at 92-98.

Similarly, as the referee noted, the distance between Mr. Gay and the

victim, as described by these three witnesses, "exceeds" the distance between the shooter and the officer that was indicated "by the gunshot residue analysis presented at trial." Rpt. 36:17-20.

Finally, respondent highlights the testimony of the prosecution's expert, Dr. Douglas Young, at the reference hearing that when individuals become "stressed, aroused or motivated" there are physiological changes in the body that affect how people respond and function. Resp. Br. at 67-68. As Mr. Gay highlighted in his Opening Brief, that very argument applies with equal force to Raynard Cummings, who could have exited from the backseat in this "motivated" and "hyper-vigilant" state to continue shooting the officer. Resp. Br. at 68. But if the prosecution would have used this expert testimony *against* Mr. Gay, Shinn could have credibly argued that there was no evidence Mr. Gay was in a "hyper-vigilant" state given that the four prosecution witnesses who purportedly saw Mr. Gay outside the car described him as "walking" at a "normal pace." Ex. A12 at 3 (Gail Beasley); 68 RT 7532:23 (Marsha Holt); 3 CT 715 (Shannon Roberts); 70 RT 7842-43 (Rose Perez describes a light-skinned man walking toward the rear of the car with his arms at his side).

e. Respondent's Isolated Attacks on the Additional Forensic Expertise Misses the Global Argument Shinn Could Have Made Regarding the Prosecution's Theory of Events.

Respondent's attacks on the additional forensic evidence fare no better. Respondent misreads the additional expert testimony as relatively unhelpful given that, in isolation, the evidence only proves the final gunshots were delivered at close range (Dr. Sherry), only estimates the amount of gunshot residue on the officer's jacket (Dr. Guinn), and only sequences the six gunshots in groups (Dr. Fackler), Resp. Br. at 64-65; *id.*

at 68. Respondent takes each set of forensic data and argues that the additional evidence, individually, "would not have established that Cummings murdered Officer Verna." *See, e.g.*, Resp. Br. at 68; *id.* at 66 ("Fackler could not tell the jury who the outside shooter was").

As the referee found, however, the three forensic experts would have all worked together to establish "hard scientific evidence" that "refute[d] or call[ed] into question some of the percipient witness accounts." Rpt. at 36:12-14. Specifically, as noted earlier, the referee found that Marsha Holt, Gail Beasley, and Shannon Roberts each described Mr. Gay exit the passenger door, walk around the front of the car, and shoot the officer from a distance at the front driver side fender. Rpt. at 36:15-17. Because the forensic data would have proven that the shots were fired from a foot or two of the officer, the description of events from Holt, Beasley, and Roberts that the shooter was over eight feet away (or that the officer was standing in the middle of the street) would have been contradicted by the scientific evidence. Rpt. at 36:17-18.

In sum, respondent has done little to disturb the referee's findings regarding the additional expert evidence. Respondent can point to no forensic evidence that supports the conclusion that Officer Verna was shot from over eight feet away (as Marsha Holt, Gail Beasley, and Shannon Roberts saw). Had Shinn presented expert forensic testimony that sequenced the shots, trajectories, and approximate distances, he would have been able to argue that the shooting happened exactly the way Cummings bragged about it happening – and how Oscar Martin, Shequita Chamberlain, Robert Thompson, Pamela Cummings, Ejinio Rodriguez, Walter Roberts, and Irma Esparza initially saw it – the backseat dark-skinned black man wearing a dark-colored shirt exited the driver door and delivered the remaining shots in close proximity to the officer.

5. Respondent's Characterizations of the "Serious Risks" In Calling Deborah Cantu Are Illogical Given That Cantu's Testimony Would Have Been Entirely Consistent with Shinn's Trial Strategy.

Respondent acknowledges that Shinn's trial strategy was to paint Pamela Cummings as a liar who would do anything to help her husband. *See* Resp. Br. at 14-16 ("Shinn assailed Pamela Cummings's credibility from the outset of his cross-examination"). Respondent argues that Shinn was right not to call Pamela's sister, Deborah Cantu, because Cantu's testimony would have been "one more piece of evidence linking [Mr. Gay] to the commission of Officer Verna's murder." Resp. Br. at 52. But, in addition to being a credible witness by virtue of the fact that Cantu was a *prosecution* witness, Cantu's additional testimony would have been entirely consistent with Shinn's trial strategy.

The timeline of Pamela Cummings's statements to Deborah Cantu is critical to understanding just how beneficial Cantu's testimony would have been had Mr. Gay's jury heard it:

- Statement #1 [Hours after the shooting]: Pamela calls her sister Deborah Cantu, and describes, through tears, that an officer had just been shot. She explained she was in the car with Kenneth Gay and a man named Milton Cook, who "she hope[d] to God that they didn't mistake for her husband [Raynard]." Ex. A134 at 5:15-23, 14:10-12. After an officer stopped the car, "Milton" shot the officer, and jumped out of the car and continued shooting the officer. Kenneth Gay was so scared, he jumped out of the passenger side and got on the ground. Ex. A134 at 5:15-23.
- Statement #2 [One day after the shooting]: Pamela calls Cantu again and repeats the same story, and again describes "Milton" as a "tall guy with a small Afro with a mustache and . . . the complexion of Raynard." Ex. A137 at 14:11-13; Rpt. at 33:6-7.
- Raynard Cummings, Kenneth Gay, Robin Gay, Pamela Cummings and Milton Cook are all arrested.

- Statement #3 [Post-arrest]: Pamela calls Cantu from jail. Cantu presses Pamela about whether Raynard Cummings was in the car. Pamela finally admits that Cummings was in the car along with "Milton" and Mr. Gay, but insists that "Milton" was the lone shooter. Ex. A137 at 15; Rpt. at 33:8-9.
- Milton Cook, who was at home with a broken leg, establishes an alibi. 95 RT 10959:23-26; 3 Supp. CT 784.
- Statement #4 [Post-arraignment for capital murder]: Pamela calls Cantu. Pamela now insists that Mr. Gay was the sole shooter, and says it was Mr. Gay who told her to say it was Milton Cook. Rpt. at 48:13-15; Ex. A137 at 15-16.

A review of the chronology of these statements demonstrates that Cantu could have provided substantial evidence that Mr. Gay did not participate in the murder of Officer Verna *and* evidence that Pamela Cummings is – as Shinn ineptly attempted to advance – a liar who would do anything to protect her husband.

Respondent attempts to excuse Shinn's failure to buttress this defense by interviewing and presenting Cantu's testimony on the ground there purportedly was a "serious risk []" the jury would have heard that Mr. Gay masterminded the Milton Cook alibi. Resp. Br. at 51-52. There was no such "risk."

First, Cantu would have testified only that Mr. Gay's alleged authorship of the plan to implicate Cook was what *Pamela Cummings* told her. The fact that Cantu was yet another person in the long line of people to whom Pamela Cummings lied on this score to protect her husband Raynard would not have harmed Mr. Gay. Indeed, the purpose of Cantu's testimony would have been to provide the jury with the context in which to evaluate Pamela's false testimony.

Second, Pamela Cummings already had testified to this preposterous story in front of Mr. Gay's jury. *See* 73 RT 8194:10-28 (Pamela Cummings) ("Kenny wanted to implicate Milton Cook as being at the

scene . . . that way blame could be put off on Milton Cook and not on him"). The most significant "risk" that the jury would believe it was created by Shinn's failure to call Cantu to explain the evolution of Pamela's lies in falsely implicating Cook and then falsely accusing Mr. Gay of suggesting they falsely blame Cook for Raynard Cummings's homicidal acts.

Third, as the prosecutor argued to Cummings's jury – and a competent attorney would have explained to Mr. Gay's jury – "Pamela Cummings's version" that Mr. Gay made up the plan to implicate Cook "would make sense if Milton looked like Kenny Gay, but he doesn't. He looks like Raynard Cummings. That is why that whole story . . . [about Mr. Gay devising the plan to blame Cook] is made up." 91 RT 104442:11-28.

That is precisely what Shinn could have demonstrated to Mr. Gay's jury. Pamela Cummings's earliest three accounts accurately described what happened, with the exception that she substituted Milton Cook for her husband Raynard as the dark-skinned suspect who fired all the shots. If Shinn had presented Cantu's testimony, Mr. Gay's jury would have had an accurate picture of events: in the hours and days after the shooting, Pamela Cummings falsely identified Milton Cook as being the dark-skinned, outside shooter because she was trying to protect her husband by identifying his look-alike. Only after she became aware of Cook's alibi did she place the blame on Mr. Gay for *both* the murder and the Milton Cook plan. There is no reasonable justification or excuse for Shinn's failure to present this evidence.

6. Respondent's Arguments Regarding the Prejudice Mr. Gay Suffered Due to Shinn's Failure to Investigate and Present Readily-Available Impeachment Evidence Are Unavailing.

Instead of addressing the additional evidence Mr. Gay's jury could have heard casting significant doubt on Robert Thompson's three flip-flopped identifications, Pet. Br. at 99-103, Shannon Roberts's reversal of the light-skinned shooter and the dark-skinned man who retrieved the gun, *id.* at 110-11, and Gail Beasley's questionable identification of Mr. Gay as the outside shooter, *id.* at 107-10, respondent cherry-picks responses to the additional evidence. Respondent argues neither Donald Anderson or Betty Boyd would have impeached prosecution witness Marsha Holt, and Robin Gay was not "available" as a witness to impeach Pamela Cummings. *See* Resp. Br. at 50-54. This Court should not credit these arguments for the following reasons.

a. There Were, at Minimum, at Least Five Compelling Reasons to Doubt Marsha Holt's Claim She Observed the Shooting.

At trial, the prosecutor emphasized to Mr. Gay's jury that Marsha Holt was a "very important" witness who saw Mr. Gay shoot Officer Verna. 95 RT 10893:25-26. Shinn did little to defend against Holt's testimony. *See* 95 RT 10946:3-4 (referring to Holt as "that kind of cute little girl"). However, Shinn had at his disposal at least five separate pieces of evidence to impeach Holt's claim she even witnessed the shooting (as opposed to Mr. Gay's later retrieval of the gun):

> (1) Gail Beasley could have testified that Holt was lying on a bed watching television and asked Beasley "what's happening?" when Beasley told her that an officer had been shot;

(2) Celester Holt (Marsha's mother) could have corroborated Beasley's testimony that she and Marsha Holt were watching television and only learned of the shooting from Beasley;

(3) Donald Anderson, Holt's husband, could have testified that Holt admitted to him prior to trial that she only heard gunshots but did not actually see the shooting;

(4) a conditions of visibility expert like Dr. Paul Michel could have testified that Marsha Holt could not have been able to see the events from the window at 12127 Hoyt Street as she described it; and

(5) Mackey Como (and Betty Boyd) could have testified about the layout of the house and the burglar bars and mesh grating on the window, which would have made it difficult for Holt to see the shooting as she described it.

Pet. Br. at 103-06 (detailing the foregoing evidence). Respondent wholly ignores address Mr. Gay's argument that Shinn could have impeached Marsha Holt with (1) Gail Beasley or (2) Celester Holt's testimony. Rather, respondent argues that Donald Anderson is not credible because of his criminal record, and Betty Boyd's testimony about the burglar bars and mesh grating was confusing. Resp. Br. at 52-53. Neither are persuasive.

First, respondent cites the referee's finding that Donald Anderson was not a credible witness due to his criminal record. *See* Resp. Br. at 50-51. In addition to the reasons detailed in the Exceptions regarding Donald Anderson, Anderson's conviction was not a circumstance that weighed against presentation of his testimony. *See* Pet. Exceptions at 39-40. Prosecution witnesses with serious criminal records were not foreign to Mr. Gay's jury. The prosecution's lead witnesses at trial were charged with capital murder and burglary and serving lengthy prison sentences at the time of their testimony. Further, to the extent the prosecutor at trial would have attacked Anderson's credibility using his criminal convictions, that

attack would also implicate the credibility of Marsha Holt, who was this "rapist['s]" and "heavy drug user['s]" wife. Resp. Br. at 50.

But more significantly, the argument that Shinn was aware of Anderson's testimony, had purported "misgivings" about Anderson (a fact that respondent does not support with a citation to the record), and decided not to call him after consultation with Payne, is contrary to the record. Resp. Br. at 50. As a previous referee has found, and this Court endorsed, Mr. Gay "wanted Anderson to testify" but Shinn did not call him because Shinn erroneously concluded that Anderson's testimony about Holt's admissions she did not see the shooting would be "hearsay and not admissible." *See In re Gay*, 19 Cal. 4th at 820. As such, this Court need not speculate about Shinn's purported "misgivings" about Anderson, because Anderson was not presented due to Shinn's misunderstanding of the hearsay rule.

With respect to the argument that Marsha Holt would have had a confounded line of sight from the window at 12127 Hoyt Street, Mr. Gay presented testimony at the evidentiary hearing from Betty Boyd, daughter of Mackey Como, who identified a photograph of the residence in June of 1983. 20 EH RT 2517 *et seq.* Boyd testified that there were both bars and mesh grating on the middle window that were installed prior to June of 1983, which was reflected on Petitioner's Exhibit A151. *Id.* Respondent characterizes Betty Boyd's testimony as "internally inconsistent" on whether there were bars and mesh grating on the middle window, or whether they were only on the right or left side of the window. Resp. Br. at 52-53. But it need not matter whether her descriptions were confusing, because she was clear that the photograph identified as Exhibit A151 (with a date stamp of June 1983) fairly and accurately reflected the way the house looked prior to June of 1983, which clearly shows there was mesh and bars

on the window Marsha Holt purported to stand at when the officer was shot. *See* Ex. A151; *see also* Rpt. at 51:13-15 (referee finding screens and security bars in some of the windows confounded Holt's view).

b. Respondent's Argument That Mr. Gay Has Not Met His Burden of Showing Robin Gay Was Available Misunderstands the Facts at Trial.

At the grand jury, Robin Gay testified, through tears, that on the night of the murder, Raynard Cummings admitted telling the officer, "Yes, I have I.D. for you, you MF so-and-so" before he shot him, and "the cop grabbed his neck, spun around and went down to his knees . . . Raynard got out of the car and shot the cop to death." 3 Supp. CT 718:4-10. Robin Gay also testified that Pamela Cummings knew Milton Cook and stated that because Cook was the "type of person that had been involved in all kinds of trouble," and because Cook was the "same height, same skin color, and the same attitude" as Raynard Cummings, that Pamela and Raynard devised the plan to "put the blame off" on Milton Cook. 3 Supp. CT 799-800.

At trial, however, the prosecution presented evidence from Pamela Cummings that "Kenny [Gay] reenacted [the shooting]" the night of the murder, and even highlighted in closing argument that Pamela's testimony about Mr. Gay's re-enactment was "important for you" and "very strong evidence" of Mr. Gay's guilt. *See* 95 RT 10901 (reading back Pamela Cummings's testimony to Mr. Gay's jury in closing argument). Mr. Gay submits that Shinn was ineffective for preventing Mr. Gay's jury from hearing Robin Gay's exculpatory testimony that it was not Mr. Gay who reenacted the shooting, but Raynard Cummings. Similarly, evidence that Pamela and Raynard Cummings devised the Milton Cook plan would have impeached Pamela's testimony that Mr. Gay masterminded the Cook plan. *See* Pet. Br. at 106-07.

Respondent argues that Shinn cannot be faulted for failing to present Robin Gay's version of events at trial because Mr. Gay has not proven that Robin Gay was available as a witness, given that she refused to testify even when promised immunity. Resp. Br. at 53-54. Respondent also argues that the prosecution would have impeached her with her participation in the robberies that preceded the murder, thereby making her an incredible witness, as well as implicating Mr. Gay in the robberies. *Id.* at 54. Respondent, however, misunderstands the nature and extent of Shinn's deficient performance.

Shinn did not need Robin Gay to *testify* at trial – or expose her to potentially harmful cross-examination at that stage. All he needed to do was present her *testimony* from the grand jury. Robin Gay's invocation of her Fifth Amendment privilege against self-incrimination rendered her an *un*available witness whose prior grand jury testimony could have been introduced on Mr. Gay's behalf. Cal. Evid. Code §§ 240(a)(1), 1291(a)(1).

At trial, the prosecution attempted to call Robin Gay as a witness, and when it became apparent that she was not going to answer any questions, the prosecutor advised the Court that he intended to introduce her grand jury testimony "because she is unavailable." 76 RT 8582. Understandably, Howard Price, who was counsel for Raynard Cummings, objected to the introduction of Robin Gay's prior testimony on the basis that he was not present at the grand jury, and he had a right to cross-examine her on any incriminating statements that she attributed to his client, Raynard Cummings. 76 RT 8583. But without any rational or logical reason, Shinn parroted Mr. Price's objection, stating that he too "didn't have a chance to cross-examine [Robin Gay]." 76 RT 8583:21.

Shinn had absolutely no reason to object to Robin Gay's testimony because it tended to exculpate Mr. Gay. Robin Gay's grand jury testimony

detailed Raynard Cummings's confession, in which he took credit for all the shots, supported the argument that it was Pamela and Raynard Cummings who devised the "Milton Cook" plan, and corroborated the testimony of several other potential defense witnesses. It is inexplicable that Shinn would object to the prosecution's reading of her grand jury testimony and insist on his right to "cross-examine" Robin Gay when her grand jury testimony exculpated Mr. Gay. Because it was the prosecutor – and not Shinn – who sought to offer Robin Gay's grand jury testimony at the trial, Mr. Gay is not required to meet any "burden of showing that Robin Gay was available as a witness" to demonstrate Shinn's ineptness in preventing the testimony from being presented. It was the prosecutor who intended to offer her grand jury testimony, and only Shinn's incompetence or desire to curry favor with the prosecution, led him to object to the admission of that very evidence. *See* Pet. Br. at 113-36 (conflict of interest).

Similarly, even if the prosecution did not wish to do so, Shinn could have introduced Robin Gay's exculpatory grand jury testimony while avoiding any additional, potentially prejudicial questioning of her by the prosecutor at trial. *See* Resp. Br. at 53-54. As respondent essentially concedes, Robin Gay's invocation of her Fifth Amendment privilege against self-incrimination rendered her "unavailable" with the meaning of the California Evidence Code. Cal. Evid. Code § 240(a)(1) ("Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant"). Mr. Gay was thereby entitled to introduce her grand jury testimony pursuant to Evidence Code section 1291(a)(1). Cal. Evid. Code § 1291(a)(1) (declarant "unavailable" and "former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion"). Although Raynard Cummings

had a meritorious objection to excluding Robin's adverse hearsay testimony pursuant to Evidence Code section 1291(a)(2), because he had not had an opportunity to cross-examine her at the grand jury proceedings, the prosecution, as the proponent of Robin's earlier testimony, did not have any such grounds to object. *See* Cal. Evid. Code § 1291(a)(1). While the prosecution may not use grand jury testimony from witnesses the defense had no opportunity to cross-examine, *see People v. Hillery*, 62 Cal. 2d 692, 708 (1965), here, the prosecution could not object to the testimony it previously introduced to obtain the indictment. *See* Cal. Evid. Code § 1291(a)(1). Respondent again fails to identify any conceivable explanation for Shinn's inexcusable failure to introduce this exculpatory evidence.

Therefore, for the foregoing reasons, and for the reasons stated in Mr. Gay's Brief on the Merits and the entire record in this case, Mr. Gay is entitled to relief on Claim Three of the Petition.

II. SHINN'S PREJUDICIAL FAILURE TO PROVIDE COMPETENT REPRESENTATION CONSTITUTED THE ADVERSE EFFECTS OF REPRESENTING HIS OWN INTERESTS AT THE EXPENSE OF MR. GAY'S.

The conflicts claim presents the question whether an attorney's pursuit of his own interests, which leads him to perpetrate fraud on a trial court to secure his appointment in a capital murder case, and to conceal the fact that he is also the target of a criminal investigation by the same agency that is prosecuting his client, offends this Court's standards for ensuring the conflict-free representation guaranteed by the Sixth Amendment. The answer clearly should be in the affirmative.

Respondent ignores Shinn's fraud on the trial court and says his failure to disclose the criminal investigation created no harm and no foul. This is so, respondent argues, because there was no explicit agreement or

memorandum of understanding pursuant to which the Los Angeles County District Attorney's Office agreed to show leniency in the investigation of Shinn's embezzlement of his other clients' funds in exchange for his catastrophically abysmal performance in Mr. Gay's case, which is outlined above in reference to Claim Two. *See* Resp. Br. at 75-79.

The absence of prosecutorial corruption, however, does not excuse Shinn's fraudulent, conflicted representation. The prohibition against conflicted representation is not limited to preventing conspiracies among dishonest attorneys on the opposing sides of the same litigation. It is designed to protect the due process rights of defendants and the integrity of the judiciary by avoiding an attorney's active representation of conflicting interests, including "the attorney's own interests." *People v. Gonzales*, 52 Cal. 4th 254, 309 (2010) (potential conflict of interest where defense counsel was implicated in family members' attempt to smuggle drugs to capital defendant); *see Wheat v. United States*, 486 U.S. 153, 160 (1988) (the rule against conflicts protects not only "the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases"); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (courts have "'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them'") (quoting *Wheat*, 486 U.S. at 160). In light of Shinn's tawdry misconduct in this case, validation of respondent's position would conflict with state and federal law, and disserve the legitimate interests of criminal defendants as well as the judiciary.

The record evidence demonstrating Shinn's compromise of Mr. Gay's rights, and the related affront to the integrity of the judicial system, begins with this Court's findings that Shinn was burdened by at least two

undisclosed, potential conflicts throughout his representation of Mr. Gay: (1) Shinn's illegal capping scheme and fraudulent appointment in Mr. Gay's case; and (2) the criminal investigation into Shinn's embezzlement of client funds. *In re Gay*, 19 Cal. 4th at 796, 828. Respondent ignores the capping-scheme conflict, and mistakenly contends that this Court's decision in *People v. Doolin*, 45 Cal. 4th 390 (2009) precludes consideration of the embezzlement conflict as part of any applicable "standard requiring relief." *See* Resp. Br. at 76-77. Although respondent concedes that Shinn had a professional obligation to inform the trial court of his pending criminal investigation (*id.* at 76), respondent fails to comprehend that Shinn's intentional failure to perform his duty constituted an adverse effect on his performance as Mr. Gay's attorney, and that such failure was a direct result of the conflict.

The current record also reveals additional conflicts based on: (1) Shinn's belief that he was being criminally investigated for the homicide of his law partner; and (2) the trial court's ruling permitting introduction of the confession Shinn incompetently mislead Mr. Gay to give the prosecution, which led Shinn to abandon Mr. Gay in closing argument to the jury by attempting "to explain *his own* conduct" in creating the devastatingly prejudicial evidence, and disavowing any confidence in Mr. Gay's truthfulness. Rpt. at 73 (emphasis added); 95 RT 10986.

In light of controlling state and federal constitutional law, the record before this Court – including respondent's admissions and the substantial evidence adduced at the reference hearing – clearly demonstrates that Shinn was burdened by multiple conflicts of interest that singly and cumulatively had an adverse effect on his performance to Mr. Gay's prejudice.

A. The Governing Legal Principles.

Respondent suggests that, in light of the Court's decision in *Doolin*, the potential conflicts of interest arising from the sordid fact of Shinn's misconduct – including his illegal capping scheme and the embezzlement of client funds previously identified by this Court in *In re Gay*, 19 Cal. 4th at 796 – no longer satisfy any applicable "standard requiring relief." *See* Resp. Br. at 76-77. Respondent is incorrect.

Doolin, and subsequent holdings, recognizes that a *potential* conflict of interest arises when it is reasonably foreseeable that counsel may be required to actively represent interests that are adverse to those of his or her client. Such conflicted representation is most readily foreseeable when the same attorney undertakes to represent multiple defendants in the same case, or a defendant and a prosecution witness in the same case; when counsel has a professional relationship with an adverse party; or when the attorney is under investigation by the same agency that is prosecuting his or her client. *See Doolin*, 45 Cal. 4th at 417 (potential conflict arises when "an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third party or by his own interests." (quoting *People v. Cox*, 53 Cal. 3d 618, 653 (1991)); *see also People v. Hung Thanh Mai*, 57 Cal. 4th 986, 1010 (2013) (trial court appointed independent conflict counsel where state defense counsel might have been involved or called as a witness in defendant's federal prosecution); *Gonzales*, 52 Cal. 4th at 308; *People v. Almanza*, 233 Cal. App. 4th 990 (2015) (prosecutor's scrutiny and threatened investigation of defense counsel created conflict of interest). Counsel have a duty to bring the existence of such potential conflicts to the attention of the trial court "at once," and trial courts have a corresponding duty promptly to inquire into the nature and probable impact of the potential conflict. *Holloway v.*

Arkansas, 435 U.S. 475, 485-86 (1978). The performance of these duties is required to protect the right of the defendant to a fair trial and the integrity of the judicial system. *Wheat*, 486 U.S. at 160.

When a potential conflict is evaluated before the conclusion of trial, the trial court is obligated to make a prospective determination whether the foreseeable threats to counsel's undivided loyalty can be eliminated or reasonably waived by the defendant. *See, e.g.*, *Wheat*, 486 U.S. at 164 (no abuse of discretion where district court found the likelihood of an insurmountable "ethical dilemma for" defense counsel prevented waiver of potential conflicts and representation of multiple defendants charged in a complex conspiracy to distribute drugs); *Gonzales*, 52 Cal. 4th at 309 (defense counsel's potential liability and conflict of interest arising from efforts by defendant's family to smuggle him drugs were resolved by the prosecution's assurance that counsel faced no legal consequences).

Although the conflict is characterized as a "potential" conflict at that juncture, the dispositive question is whether the known facts lead the court to conclude that the foreseeable risks to a fair trial will remain too great to permit counsel to continue in his or her conflicted role, even if the defendant is willing to waive the conflict. The court is empowered, indeed required, to prevent the "potential" conflict from playing out to become an "actual" conflict, which would deprive the defendant of a fair trial and undermine public confidence in the judicial system. That was the result, for example, in *Wheat*.

When a potential conflict is not evaluated until after trial, the reviewing court is required to make a retrospective determination whether it resulted in an *actual* conflict of interests: *i.e.*, whether "the defendant's counsel actively represented conflicting interests." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *Doolin*, 45 Cal. 4th at 418. Where such dual

representation is found to have occurred, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166. Rather, reversal is required if the "conflict of interest actually affected the adequacy of [counsel's] representation." *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980); *Mickens*, 535 U.S. at 168.

Because the harm to a defendant arising from conflicted representation usually results from what trial counsel refrains from doing, courts acknowledge that the record may not reflect counsel's omissions or "pulled punches." As the Court explained in *Doolin*, the reviewing court must conduct the necessary inquiry by examining the record to determine:

> (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and
>
> (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission.

Doolin, 45 Cal. 4th at 418. Thus, where counsel's deficient performance is otherwise inexplicable, it may be attributed to the effect of the conflict of interest. *Id.*

In turn, with the benefit of habeas corpus proceedings, and the results of a reference hearing, the Court is "able to extend [its] gaze" in assessing the nature of trial counsel's failings. *In re* Gay, 19 Cal. 4th at 831 (Mosk, Acting C.J., concurring).

The two-part inquiry set forth in *Doolin* replaced the use of "informed speculation," which the Court previously employed to assess whether a potential conflict adversely affected counsel's representation. *Doolin*, 45 Cal. 4th at 420-21 and n.22. Nothing in *Doolin*, however, altered the Court's long-standing formulation of a potential conflict of interest. To the contrary, as noted above, *Doolin* explicitly reaffirmed that

potential conflicts arise when an attorney's loyalty is divided between simultaneous representation of a client and other interests, including his or her own. *Doolin*, 45 Cal. 4th at 417. Nor has the Court signaled any retreat from the obligation of prompt disclosure by counsel and prompt inquiry by the trial court. *See, e.g., Mai*, 57 Cal. 4th at 1009-10 ("as the cases require," trial court "perceived a possible conflict of interest" raised by disclosure of counsel's potential involvement as a witness or target of federal investigation, and "it addressed the issue with considerable care").

Thus, *Doolin* did not alter the Court's recognition that *potential* conflicts may arise "when an attorney's loyalty to, or efforts on behalf of, a client are threatened by the attorney's own interests." *People v. Gonzales*, 52 Cal. 4th at 309. Nor did *Doolin* alter the Court's holdings that "the cases," such as *Holloway*, "require" prompt inquiry when the trial court is informed of a potential conflict arising even from the *threatened* criminal investigation of defense counsel. *See also Almanza*, 233 Cal. App. 4th at 1002 (defense counsel's fear of "possible criminal investigation and prosecution" created a "real, not theoretical" conflict of interest).

As demonstrated below, the record establishes that Shinn clearly had multiple conflicts of interest. Application of the two-part *Doolin* inquiry also shows that the conflicts had a direct, adverse impact on his representation of Mr. Gay.

B. Shinn's Multiple Conflicts, Individually and Cumulatively, Had Adverse, Prejudicial Impacts.

1. Undisputed Illegal Capping Scheme and Fraud on the Lower Court.

Respondent acknowledges that Claim Two of the Petition rests on the detailed allegations of Shinn's "multiple conflicts," (Resp. Br. at 69, citing

Pet. at 34-59) but respondent addresses only the conflicts arising from the criminal investigation of Shinn's multiple embezzlements, which were the subject of the reference hearing. *See* Resp. Br. at 70-85. Respondent fails to discuss the significance of the allegations in the Petition, which were admitted in the Return, that, *inter alia*, Shinn's involvement in an illegal capping operation and fraudulent acts in securing his appointment in Mr. Gay's case constituted another conflict of interest. *See* Pet. at 36-42; Return at 2, ¶¶ 1-5; 5, ¶¶ 11-12; 29, ¶ 78.

Because these material facts were undisputed, there was no need for the Court to resolve any related factual issues at an evidentiary hearing. *See People v. Duvall*, 9 Cal. 4th 464, 478-79 (1995). The existence of this overarching conflict of interest adversely affected Shinn's performance because – as this Court also found – the capping operation precluded Shinn from retaining any mental health experts other than the charlatans, Fred Weaver and Marcus McBroom. *See In re Gay*, 19 Cal. 4th at 796.[10]

a. The Conflict.

Respondent did not dispute the facts that (1) Shinn defrauded Mr. Gay and the lower court in securing his appointment in Mr. Gay's case (Return

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[10] Respondent also mistakenly contends that in *In re Gay*, 19 Cal. 4th 771 (1998), this Court identified two of Shinn's undisclosed conflicts of interests, which were limited to his embezzlement of his clients' money. Resp. Br. at 70 and n.38. Respondent says the "'first'" conflict identified by the Court purportedly arose from the State Bar's investigation of Shinn's embezzlements, and "the 'second'" conflict arose from the Los Angeles County District Attorney's criminal investigation of the same misconduct. *Id.* In fact, this Court found that the *first*, undisclosed conflict arose from Shinn's involvement in the illegal capping scheme, which limited his selection of purported mental health experts to Weaver and McBroom, who also participated in the enterprise. *See In re Gay*, 19 Cal. 4th at 796. Again, this conflict was separate from, albeit related to, the multiple conflicts arising from Shinn's criminal embezzlement activity.

at 2, ¶¶ 1-5); (2) Shinn perpetrated the fraud as part and parcel of the illegal capping scheme through which Marcus McBroom secured clients for Shinn (Return at 6, ¶¶ 13-16); (3) in return for McBroom's services, Shinn "funneled public monies" to McBroom and Fred Weaver (*id.*); and (4) pursuant to the capping scheme, "in cases in which he had been introduced to the client by McBroom, Shinn did not consider retaining experts other than Weaver." *In re Gay*, 19 Cal. 4th at 796. As indicated by the foregoing citations, these material facts reflect findings made by this Court, and admissions made by respondent.

Respondent also has conceded that the capping scheme "created a conflict of interest between the financial interests of" the scheme's participants "and the interests of petitioner," and "that Shinn 'was reasonably and actually aware that he was acting unethically, unprofessionally and contrary to petitioner's interests' by being involved in the capping scheme involving McBroom and Weaver." Return at 5, ¶ 11; 29, ¶ 78.

Even without considering Shinn's additional conflicts of interest, or the specific failings that comprised his incomprehensibly incompetent and prejudicial performance, the current record thus establishes Shinn's active representation of conflicting interests (*i.e.*, his and his capping scheme cohorts' financial interests against Mr. Gay's interests).

b. Adverse Effect.

The two-part *Doolin* analysis also shows that the conflict had a direct, adverse impact on his representation of Mr. Gay.

First, Shinn failed to do what any conflict-free attorney would not – and could not – have failed to do: he failed to make prompt disclosure of the potential conflicts that arose from his involvement in the fraudulent

capping scheme, as well as the ongoing criminal investigation, at the time he fraudulently secured his appointment in Mr. Gay's case. The conscientious, zealous performance by an attorney to which Mr. Gay was constitutionally entitled included the prompt reporting of any potential conflicts of interest. *Holloway*, 435 U.S. at 485-86. But, disclosure of Shinn's conflicts was in direct opposition to the goals of the capping scheme and Shinn's motives to obtain funds to pay off his embezzlement victims. Thus, Shinn's performance in this regard was adversely affected as a direct result of the conflicts.

Second, there could not have been any tactical reason that led to Shinn's omission and violation of his duty of disclosure, other than the conflict(s). As the referee and respondent acknowledge in the context of the embezzlement conflict, Shinn had "a professional duty to disclose [the conflict] to the client and the trial court." Rpt. at 60:4-5; Resp. Br. at 76. There can be no legitimate explanation, and no reason other than self-interest, for Shinn's failure to perform this duty.

Further, Shinn's failure to disclose this obviously disqualifying conflict[11] had a more pervasive, adverse impact. As this Court noted in the context of the penalty phase, Shinn's fraudulent maneuvering meant that "petitioner lost any possibility of a fully developed penalty phase defense," and "was saddled with an attorney who abandoned hope before any attempt to craft a penalty defense was undertaken." *In re Gay*, 19 Cal. 4th at 828. Similarly, Shinn's fraudulent behavior and failure to disclose his conflict also deprived Mr. Gay of any possibility that he would be represented by

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[11] In his testimony at the reference hearing, the trial prosecutor confirmed the fact that would have been obvious to all the parties: that the trial judge would not have tolerated the participation of counsel who obtained his appointment by perpetrating a fraud on the court. 14 EH RT 1895:23-1896:13, 1888:21-1891:1-9.

competent counsel in the guilt phase, and left him with an attorney who was unwilling or unable to conduct minimal investigation. As Shinn's investigator explained at the recent reference hearing, Shinn also proceeded on the assumption that *guilt* was a foregone conclusion. 3 EH RT 296:28-297:7. Thus, respondent concedes that Mr. Gay was saddled with "an unethical, unsavory blowhard who would promise his clients anything just to make a dollar," but who did not understand "the rudimentary elements of the law." Return at 28, ¶ 76.

A particular, discrete, adverse impact of the undisclosed capping scheme was Shinn's failure to consult or retain a qualified eyewitness expert. As the Court previously found, in cases such as this, where Shinn "had been introduced to the client by McBroom, Shinn *did not consider* retaining experts other than Weaver." *In re Gay*, 19 Cal. 4th at 796 (emphasis added). Respondent's attempts to undermine the Court's finding do not withstand analysis.

Respondent's artful suggestion that Shinn "declined" for tactical reasons to call an eyewitness expert carefully avoids any claim that Shinn actually contacted, spoke to or consulted any expert witness to assess the strength and helpfulness of their possible testimony. *See* Resp. Br. at 54. What the record indisputably shows is that Shinn lied to the trial court (again) in representing that he instructed his investigator to have three eyewitness experts prepared to testify in the guilt phase. *See* Ex. A121 (Aug. RT) at 14. Shinn, of course, had done no such thing. *See* 3 EH RT 208:3-4, 212:8-10. Neither does respondent's reference to Shinn's self-serving deposition testimony identify any informed tactical basis for failing to consult such experts. *See* Resp. Br. at 54. Putting aside the fact that Shinn has been found incredible by every fact finder before whom he

testified,[12] Shinn admitted in the 1988 deposition relied on by respondent that he was only "think[ing]" or "assum[ing]" he discussed the issue about a psychologist with his investigator, Douglas Payne. *See* Resp. Post-Hearing Br., Attachment B at 97:26-98:2; 99:22-23. Shinn did not claim that he personally spoke to a psychologist. Rather, he explained that Payne "does all the running around, talks to witnesses and so forth," and then added, "I *didn't have time* to talk to a psychologist. I was preparing for trial, getting ready for trial *the next day* and so forth." *Id.* at 98:6-21 (emphasis added). In turn, Payne's testimony at the reference hearing made it clear that Shinn did not direct or authorize him to consult with any eyewitness experts. *See* 3 EH RT 208:3-4, 212:8-10.

This record shows Shinn had no factual or reasonably *informed* basis for his post-hoc, speculative suggestion in 1988 that the failure to call an eyewitness expert might have been motivated by a concern that the defense experts would turn out to be "'weaker witnesses than the prosecution witnesses.'" Resp. Br. at 54. Shinn did nothing to determine how strong or weak a defense expert was likely to have been.

Nor is there any evidence to support respondent's fanciful claim that if an eyewitness expert had testified for Mr. Gay's defense at trial, the prosecution could have presented at least two "powerful rebuttal witnesses," Dr. Ebbe Ebbesen and Dr. John Yuille. Resp. Br. at 56. Significantly, although this Court's reference Question No. 3 specifically directed the referee to determine "[w]hat evidence rebutting this additional

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[12] In the proceedings leading to Shinn's disbarment, the State Bar judge repeatedly found Shinn lacked credibility and was attempting to "conceal his misconduct and/or to avoid criminal prosecution and culpability in these proceedings." Ex. A33 at 54, 58-59. Reviewing the record of the evidentiary hearing in the first round of habeas corpus proceedings here, this Court found Shinn's testimony to be "evasive, inconsistent, and often nonresponsive." *In re Gay*, 19 Cal. 4th 771, 808 and n.17 (1998).

evidence reasonably would have been available to the prosecution at trial," respondent did not call any witnesses at the reference hearing to rebut the expert testimony of eyewitness memory expert Dr. Kathy Pezdek, who described the type of scientific evidence that was reasonably available to Shinn at trial. The only reasonable inference to be drawn from respondent's profound silence on this score is that, having bandied about the specter of rebuttal from Drs. Ebbesen and Yuille at the reference hearing, respondent's consultation with these and perhaps other experts disclosed that there was no basis for challenging Dr. Pezdek's expert opinions.

Equally significant, in response to Question No. 3, the referee did not find any evidence that rebutted Dr. Pezdek's testimony, nor did he question her credibility. Rather, the referee concluded only that in light of Shinn's speculative concerns about the possible weaknesses in eyewitness expert testimony, and its potential inadmissibility under *People v. McDonald*, 37 Cal. 3d 351, 355 (1984), overruled on other grounds by *People v. Mendoza*, 23 Cal. 4th 896, 913-14 (2000), it would have been reasonable "to exploit the confusion" of the conflicting eyewitness testimony, "rather than to explain it." Rpt. at 50. As noted above, however, Shinn had failed to consult any experts and had no basis for making a reasonably informed determination of how helpful an expert explanation would have been.

Similarly, the referee mistakenly reasoned that the expert testimony would have been vulnerable to exclusion by the trial court under *McDonald*, because:

> Petitioner's connection to the murder of Officer Verna was corroborated by his fingerprints on items inside the glovebox of the stolen Oldsmobile, petitioner's possession of Officer Verna's police service revolver upon his arrest the next day, his identification by accomplice Pamela Cummings and his

own admissions.

Rpt. at 49:20-50:1 (footnote omitted). Contrary to the referee's analysis, the only "connection" forged by this purported evidence was Mr. Gay's connection to the scene of the shooting, a fact that was not in dispute. It was "the identity of the shooter" that "was the heart" of Mr. Gay's defense, *People v. Gay*, 42 Cal. 4th at 1223, and none of the evidence cited by the referee tended to show that Mr. Gay, as opposed to Mr. Cummings, was the outside shooter. Given "the absence of physical evidence linking defendant to the shooting," *id.* at 1226, evidence of Mr. Gay's undisputed presence at the scene and in the company of Raynard Cumming the next day did not serve to resolve the conflicts among the prosecution witnesses' "'versions of the events and identification of the shooter or shooters,'" which "'varied greatly.'" *People v. Gay*, 42 Cal. 4th at 1226 (quoting *People v. Cummings*, 4 Cal. 4th at 1259). On this record, an outside chance that the trial court might have exercised its discretion to exclude eyewitness expert testimony under *McDonald* does not provide any justification for Shinn's complete failure to make any effort to develop and proffer such evidence. Thus, consideration of the second part of the *Doolin* analysis demonstrates that Shinn failed to lift a finger to present an eyewitness expert because as a member of the capping operation he "did not consider retaining experts other than Weaver." *In re Gay*, 19 Cal. 4th at 796.

Accordingly, Shinn's capping scheme had the discernable adverse impacts of defrauding Mr. Gay; preventing Mr. Gay from having any chance of being appointed a competent, zealous attorney; and necessarily foregoing the assistance of a qualified forensic expert, such as an eyewitness expert. These facts conclusively establish the predicates of a conflict of interest claim under *Mickens*, *Sullivan*, *Holloway*, and *Doolin*. Whether Shinn's participation in the capping operation is viewed as a result

of his need for funds to cover his tracks in the embezzlement cases, or as an independent aspect of his ongoing, corrupt practices, the resulting prejudicial conflict of interest entitles Mr. Gay to relief from the conviction. Respondent's concessions in the Return and the current failure to address this aspect of Claim Two leave the factual and legal bases for relief undisputed.

2. The District Attorney's Simultaneous Prosecution of Mr. Gay and Criminal Investigations of Shinn.

Respondent contends, without citation to any supporting authority, that "[m]ere investigation by a prosecutorial agency does not create an inherent conflict of interest." Resp. Br. at 76. Respondent also fails to cite any authority for the further suggestion that there is an appreciable difference between a criminal prosecution and an investigation and, thus, there was no conflict here because "Shinn was not being *prosecuted* by the District Attorney's Office when he represented petitioner." *Id.* (emphasis added.)

Respondent's contentions are contrary to law. As made clear by this Court's holdings in *Gonzales* and *Mai*, even the prospect of a criminal investigation of defense counsel gives rise to a potential conflict of interest. *See also Almanza*, 233 Cal. App. 4th at 1002 ("possible criminal investigation" of defense counsel created conflict of interest).

Equally important, respondent's contention is squarely foreclosed by this Court's explicit holding in *In re Gay*, 19 Cal. 4th at 828, which recognized that: "Shinn labored under a second and undisclosed potential conflict of interest – he was *being investigated* for misappropriation of client funds by the same district attorney who was his adversary in the prosecution of petitioner." (emphasis added.) Similarly, contrary to respondent's suggestion – and the referee's mistaken belief – the ongoing

conflict of interest was not retroactively dispelled by the District Attorney's ultimate decision, made *after* the conclusion of Mr. Gay's trial, not to prosecute Shinn. *See* Resp. Br. at 72; Rpt. at 61; Pet. Exceptions at 86-93.

a. The Conflicts.

1) Embezzlement Investigation.

As respondent has conceded, throughout Mr. Gay's trial, Shinn pretended to cooperate with the District Attorney's embezzlement investigation, while simultaneously obstructing it, because he knew: "'that a reasonably minimal investigation would lead to conclusive evidence of his pattern and practice of fraudulent, criminal behavior toward his clients, which exposed Shinn to liability for successful criminal prosecution, imprisonment and disbarment.'" Return at 12, ¶ 30 (quoting Pet. at 43-44). Indeed, as the referee found, the fraud investigator assigned to the case, Los Angeles County Sheriff's Department Detective Charles Gibbons, credibly believed that Shinn should have been criminally prosecuted. Rpt. at 61.

The objective documentary evidence also unequivocally establishes that Shinn engaged in criminal behavior, which he had reason to believe would lead to his prosecution and conviction. In essence, Shinn violated the Superior Court's order that the monetary award in the Oscar and Marjorie Dane case be held in trust until the interests of all the parties and Shinn had been determined. Instead, Shinn arranged through "a friend at the clerk's office" to obtain a check payable only to himself, and immediately proceeded to misappropriate large sums of principal and interest. Respondent has admitted, and the record confirms, that an "'[i]ndependent investigation'" by Detective Gibbons and Hassan Attalla, the Supervising Investigative Auditor for the Los Angeles County District Attorney's Office, "'revealed in fact that Shinn had shifted the monies

through a labyrinth of accounts for no legitimate purpose, and no purpose other than to conceal his misappropriation of the funds, and that Shinn had consistently skimmed off the interest as it accrued in each account.'" Return at 15-16 (quoting Pet. at 46).

As respondent also conceded at the reference hearing, there was no question that "Daye Shinn is a thief." 7 EH RT 960:8-14, 10 EH RT 1056:12-16, 17 EH RT 2307:9-10. The only question was how much money he stole from the Danes. Martin Laffer, a forensic accountant who testified at the reference hearing, calculated that Shinn skimmed off over $125,000 in principal and interest. 8 EH RT 966:1-14.[13] The State Bar Court concluded that even "assuming, for the sake of argument," that Shinn was entitled to the $90,000 in attorney fees, as he dubiously claimed during the disciplinary proceedings, he still was guilty of misappropriating "*at least* another $90,000 from Dane's funds." Ex. A33 at 45 (emphasis added).[14]

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[13] Respondent's counsel conceded that the expert has "great credentials," and "deserves great respect." 7 EH RT 960:8-14, 10 EH RT 1056:12-16, 17 EH RT 2307:9-10.

[14] The State Bar judge used the $90,000 fee amount as a reference point to illustrate how much Shinn stole because Shinn repeatedly relied on ever-changing versions of his purported fee-agreement with the Danes to justify the unconscionable fee he claimed he was entitled to. The only documentary evidence of a fee agreement between Shinn and Dane is a retainer agreement, dated March 23, 1978, pursuant to which Shinn agreed to represent Dane in the eminent domain case, as well as in a police malpractice civil action, at the rate of $75.00 per hour. Ex. A33 at 5; Ex. A158. During the State Bar proceedings, Shinn claimed that the agreement was orally modified (because Dane allegedly refused to sign anything) to entitle Shinn to one-third of any recovery in excess of $100,000 in the eminent domain proceeding and a flat fee of $50,000 in the police case. Ex. A33 at 28. This purported modification conflicted with at least three other different versions that Shinn claimed in a letter to Dane in December 1980, provided in an "accounting" provided to Congressman Edward

Respondent's unseemly endorsement of Shinn's ad hominem attempts to discredit his elderly victims does not undermine the fact that Shinn knew he was the target of a viable criminal investigation for embezzlement. Respondent repeats Shinn's description of Oscar Dane as a "'nut,'" who refused to accept "the funds" Shinn attempted to give him. Resp. Br. at 71. Respondent omits the facts that Shinn did not proffer any "funds" until a year after he (1) took $190,000 out of the proceeds, (2) moved the funds between different accounts, and (3) diverted $2,000 to his wife, $50,000 to his former law associate, and $16,000 for unknown purposes. 7 EH RT 946-58; Ex. A33 at 12-15; Ex. A119 at 1-2. Respondent also fails to mention that, far from exhibiting any mental impairments, Oscar Dane declined to take the proffered funds from Shinn until Shinn provided a "full detailed accounting from the bank and [Shinn] including dates of deposit and withdrawal and daily interest earned." 7 EH RT 956:12-18, 957:1; Ex. A98 at 49.

Shinn did not comply with Dane's request and, instead, placed the money in one of his accounts and resumed his movement of funds. 7 EH RT 958:3-9, 7 EH RT 991:17-26; Ex. A119 at 2. Then, as respondent admits, four years later, in February 1985:

> In the midst of petitioner's trial proceedings, Shinn responded to the intensifying investigation, and the intervention of the offices of Congressman Edward Roybal, by providing a purported accounting of the money he owed Dane and the interest that had accrued. Shinn also tendered a check on behalf of Dane. Shinn's alleged *accounting was false and misleading*, and the proffered check was for *less than the*

Roybal's office in March 1985, and reported to Deputy District Attorney Mackenzie and Deputy Gibbons in March 1984. Ex. A33 at 29, n.20; *see also* Ex. A154 at 4 (detailing Shinn's changing versions of the purported fee agreements).

amount owed to Dane."

Return at 17-18, ¶ 50 (admitting allegations in Pet. at 48) (emphasis added).

The District Attorney did not close the criminal investigation until 1987, nearly two years after Mr. Gay's trial. It is beside the point whether the decision was based solely on the fact that Shinn had succeeded in running out the clock on the statute of limitations – as the Deputy District Attorney Albert MacKenzie testified during Shinn's disbarment proceedings – or whether, by then, the strength of the case also was affected by Oscar Dane's deteriorating emotional condition under the literally maddening effects of Shinn's evasive tactics – as MacKenzie testified at the reference hearing.[15] The record clearly demonstrates that throughout Mr. Gay's trial, Shinn knew he was the target of a viable criminal investigation, he was being questioned by criminal investigators about the embezzlement, his bank records were being subpoenaed, and he did everything he could to buy time and avoid prosecution. During that relevant period, Shinn's loyalties were thus divided between his duty to represent Mr. Gay and his motives to curry favor with the agency that was prosecuting his client; giving rise to a conflict of interest. *In re Gay*, 19 Cal. 4th at 828.

Likewise, respondent cites no authority – and there is none – for the proposition that establishing the existence of the conflict of interest

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[15] Respondent's discussion of this point has the potential to mislead by omission. Respondent cites only Oscar Dane's mental health as a reason influencing MacKenzie's failure to charge the case. Resp. Br. at 72. Respondent neglects to note that at the reference hearing MacKenzie acknowledged that in providing an extensive explanation at Shinn's disbarment proceedings for not prosecuting Shinn, he cited only the expiration of the statute of limitations as the reason for his decision. 15 EH RT 2100:2-6. Respondent similarly overlooks the referee's reference to MacKenzie's testimony that he would have prosecuted Shinn for the Dane embezzlement "had sufficient evidence been available within the appropriate statute of limitations." Rpt. at 60:24-26.

requires proof of a conspiracy among corrupt prosecutors and Shinn to provide him lenient treatment in the embezzlement investigation "as a reward" for Shinn's dismal failure to defend Mr. Gay in his capital trial. *See* Resp. Br. at 73, 75. A conflict of interest arises in such situations as a result of the common sense recognition that the targeted attorney has a subjective motive to "pull his punches," as a means of currying favor or avoid antagonizing the prosecutor's office. Thus, the prohibition is aimed at representation by "an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government." *Wheat*, 486 U.S. at 159. The embezzlement investigation created such an ongoing relationship between Shinn and the government office prosecuting his client.

2) The Jones Homicide Investigation.

As set forth in Petitioner's Brief on the Merits, and Petitioner's Exceptions to Referee's Report and Findings of Fact, it is clear that Shinn also believed he was a suspect in the Jones homicide investigation. *See* Pet. Br. at 123-26; Pet. Exceptions at 95-100. In the first place, Shinn said so; and, in the second place, respondent admitted it. Shinn testified that he was aware of the dual investigations into his embezzlement and the Jones homicide, which both involved Sheriff's Detective Gibbons, and refused to authorize Detective Gibbons to inspect his banking records because he was apprehensive that Detective Gibbons thought he (Shinn) "was involved with Linda Jones in killing her husband or something to take the money." Ex. A34 at 148:10-23. Based on these and other facts, respondent has expressly admitted "that Shinn thought the district attorney's office may have been investigating him in connection with the murder of Mr. Jones." Return at 18, ¶ 51.

The evidence presented at the reference hearing further revealed that Shinn had reason to fear that the homicide investigation would uncover evidence of the ongoing embezzlement schemes in which he and other members of the law firm were engaged. Just as Shinn stole money from one client to cover the thefts from another client, thereby "robbing Peter to pay Paul," (15 EH RT 2087:15-23) his law partner, Lewis Jones, repeatedly embezzled money from an insurance company by replacing money stolen from one case with money obtained in later cases. 14 EH RT 1828:15 1829:9. The evident connection between Lewis Jones's murder and the firm's embezzlement schemes was reflected in the assignment of Sergeant Rod Lyons of the Sheriff's Department Forgery Division to assist with the homicide investigation. Ex. A140 at 6. When Sgt. Lyons arrived at the law firm's offices, Shinn asked to speak privately with him. Ex. A154 at 17. Shinn was extremely nervous and told Sgt. Lyons that there was no need to check Shinn's bank accounts in the course of the investigation. Ex. A154 at 17. Sgt. Lyons thought Shinn's statement was strange because Sgt. Lyons had not indicated to Shinn in any way that he was interested in examining Shinn's accounts. *Id.* Thus, there is substantial evidence demonstrating Shinn believed he was being investigated in connection with the homicide of Mr. Jones.

b. Adverse Effects.

As to at least the embezzlement of the Danes' money, respondent concedes that Shinn should have informed the trial court that he was the target of a criminal investigation by the same District Attorney's Office that was prosecuting Mr. Gay. Resp. Br. at 76. Respondent thereby implicitly concedes that Shinn found "himself compelled to *refrain* from doing" his professional duty to disclose the facts of the potential conflict to the trial

court, as required under the Sixth Amendment. *Holloway v. Arkansas*, 435 U.S. at 490 (emphasis in original); *see Mai*, 57 Cal. 4th at 1009-10 (criminal defendant's right to be informed, and court's duty to inquire, when conflicts "may compromise the attorney's loyalty to the client"). This violation of Shinn's constitutional obligation, alone, constitutes an adverse impact on his performance, which stemmed directly from his self-interest in maintaining his fraudulent appointment in Mr. Gay's case as a way to obtain fees needed to repay his other defrauded clients.

Further, as with Shinn's fraudulent maneuvering to secure his appointment in the first place, his failure to disclose the embezzlement conflict meant that "petitioner lost any possibility of a fully developed" defense, and instead "was saddled with an attorney who abandoned hope" and proceeded on the assumption that both a conviction and death sentence were foregone conclusions. *In re Gay*, 19 Cal. 4th at 828. Because Shinn failed to perform his constitutionally-imposed duty of disclosure, the defense of Mr. Gay's life and liberty was consigned to "a thief," who had no understanding of "the rudimentary elements of the law." 8 EH RT 1056:12-16; Return at 28, ¶ 76.

The remaining question raised by Shinn's ensuing acts of stunning incompetence is whether they should be considered as the prejudicial, adverse effects generally attributable to his self-interested concealment of his conflicts, or whether they were the product of his efforts to curry favor with the prosecution. In either event, it is clear under the *Doolin* analysis that a conflict-free attorney would not have so thoroughly failed to defend his or her client as Shinn did.

1) Shinn Acted as a "Second Prosecutor" by Creating Mr. Gay's Confession to Charged and Uncharged Robberies.

As more thoroughly discussed in Petitioner's Brief on the Merits and Petitioner's Exceptions to Referee's Report and Findings of Fact, this Court previously found that Shinn "acted as a second prosecutor" in failing to protect Mr. Gay's rights against self-incrimination, and misleading him to give the prosecution a confession, which Shinn knew "the prosecution *intended to use*" against Mr. Gay "at trial." *People v. Cummings*, 4 Cal. 4th at 1318 (emphasis added); *In re Gay*, 19 Cal. 4th at 793; *see also* Pet. Br. at 133-35; Pet. Exceptions at 105-06. Respondent obliquely refers to the Court's finding, Resp. Br. at 81, but makes no effort to answer the dispositive questions posed by *Doolin*: (1) would conflict-free counsel likely have failed to preserve Mr. Gay's privilege against self-incrimination; and (2) could there have been any tactical reason, other than Shinn's conflict, that might have caused the omission? The answers to these questions are obviously in the negative. In short, there is no conceivable reason why conflict-free counsel would act as a second prosecutor. By definition, whatever motivated Shinn's actions in that role, they were adverse to his own client's interests.

In the context of the penalty phase, this Court observed that the prejudice of Shinn's actions in leading to the creation of Mr. Gay's confession "cannot be understated." *In re Gay*, 19 Cal. 4th at 793. The same conclusion is compelled by the record now before the Court, which reflects the extent of Shinn's failure to investigate and present readily available evidence of Mr. Gay's innocence, including exculpatory eyewitness testimony and Raynard Cummings's admissions of sole responsibility for the shooting. Instead of taking the minimal steps

necessary to present this substantial, exculpatory evidence, Shinn single-handedly created Mr. Gay's confession to charged and uncharged robberies, which "permitted the prosecutor to portray petitioner as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies," and thereby supplied the "circumstantial evidence of premeditation and deliberation, both of which are elements of first degree murder," as well as "an element of the special circumstance of murder for purpose of avoiding arrest." *Id.*; *People v. Cummings*, 4 Cal. 4th at 1284.

2) Introducing Homicide Detective Jack Holder's Testimony that He Believed Mr. Gay Truthfully Confessed to the Robberies but Lied in Denying Involvement in the Homicide.

Mr. Gay's current counsel are unaware of any precedent in the annals of incompetent trial performance to match Shinn's introduction of testimony from Homicide Detective Jack Holder offering his opinion that he and other members of the prosecution team *believed* Mr. Gay when he *admitted* the robberies, but thought he *lied* when he *denied* committing the homicide. 85 RT 9744:8-9745:28. Contrary to respondent's contention, the referee did not make any finding that the Shinn's actions did not prejudice Mr. Gay or were not the product of Shinn's conflict of interest. Resp. Br. at 84. As Mr. Gay explained in his Exceptions: "[t]he referee passively acknowledge[d] the basic facts of Shinn's introduction of this stunningly inculpatory, prejudicial and – but for Shinn's sponsorship – completely inadmissible evidence," but made "no findings as to whether there is any conceivably legitimate reason for Shinn's actions." Pet. Exceptions at 112 (citing Rpt. at 68:19-26, 69:1).

Nor did the referee find "that the trial record largely did not support petitioner's claim." Resp. Br. at 84. The referee merely noted that

petitioner erred in citing the record for Detective Holder's testimony, an error which Mr. Gay's counsel regret. Rpt. at 68.[16] The referee further acknowledged, however, that Shinn did in fact call Holder to testify about the prosecution's interview with Mr. Gay. Rpt. at 68-69. The referee further noted the existence of the record, which confirms that Shinn elicited Holder's testimony describing how Holder, his partner – John Helvin – and the prosecutor – John Watson – "first discussed the robberies" with Mr. Gay, and then "went all the way through" a discussion of "the murder aspect of it" with him; that Holder thought Mr. Gay "was telling the truth" about confessing to the robberies; but that Holder, Helvin, and Watson also agreed amongst themselves that on "part of the tape [Mr. Gay] was lying." 85 RT 9745:21-28. Thus, as this Court found, the record clearly shows that Shinn "elicited Holder's belief that in the taped interview Gay had been telling the truth when he admitted the robberies, but had lied about other matters. The murder was the other matter discussed in the taped interview." *People v. Cummings*, 4 Cal. 4th at 1269.

Neither the referee nor respondent has offered any tactical reason to explain why conflict-free counsel would have permitted such prejudicial testimony to be admitted in front of Mr. Gay's jury. Nor can there be any good reason for it. Again, the prejudicial impact of the testimony is either the adverse effect of Mr. Gay being saddled with a hopelessly incompetent attorney, who fraudulently engineered his appointment for self-interested motives; or it is the direct result of Shinn's efforts to curry favor with the prosecution. In either case, it is a prejudicial, adverse effect of Shinn's undisclosed conflicts of interests. *Doolin*, 45 Cal. 4th at 418.

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[16] The citation to Detective Holder's testimony in petitioner's post-hearing brief actually cited to the testimony of Homicide Detective John Helvin, Holder's partner. *See* Rpt. at 68.

3) Cross-examination of Robert Thompson.

As set forth in Petitioner's Exceptions, the record does not support any finding that Shinn conducted a minimally adequate cross-examination of Robert Thompson. *See* Pet. Exceptions at 113-17. Nor does respondent attempt to provide any analysis to support the referee's reading of the record to the contrary. Resp. Br. at 85. Rather, the presentation of Thompson's testimony demonstrates one of the clearest cases of Shinn pulling punches and acting as a "second prosecutor" in tandem with the first prosecutor: Shinn neglected to challenge the admissibility of Thompson's testimony as the product of clearly suggestive identification procedures; he "cross-examined" Thompson in a manner that blunted the impact of any prior inconsistent statements; and he exacerbated the prejudice of his failings by arguing to the jury that Thompson failed to observe Cummings physically pass the gun to Mr. Gay, thereby buttressing the prosecution's theory.

Within hours of witnessing the shooting, Thompson told Officer Eric Lindquist that the only shooter was a dark, African-American male, who shot the officer from inside the backseat of the car, then got out of the car and continued shooting until he fired the final round into the fallen officer. Ex. A45 at 1-2. At physical line-ups conducted within days of the shooting, Thompson tentatively identified two dark complexioned African-American males as looking like the shooter. Exs. A45 at 10-11; A105, A106 (lineups). At the grand jury proceedings, Thompson confirmed his description of the sole shooter as a "medium shade black [man]" in the backseat. 2 Supp. CT 460:27-28.

By the time of trial, however, Thompson's participation in a "walk-through" with police detectives led him to change his story 180 degrees, and identify the white Mr. Gay as the outside shooter. 68 RT 7593-97.

Shinn did not raise any objections or motions to exclude this dramatically altered version of events based on suggestive police identification procedures. Nor did Shinn *ever* cross-examine Thompson with his diametrically different statement to Officer Lindquist.

Instead, Shinn laboriously examined Thompson to establish the very unhelpful explanation that Thompson knew Mr. Gay was the shooter from the outset, but did not want to "get involved," so he falsely claimed he could not identify Mr. Gay. *See, e.g.*, 69 RT 7664:14-20 ("Q: Well, in other words, you are telling us *you could* and you could [sic] *identify somebody* that was at the scene on June 3, 1983? You *knew you could recognize people*. You *could identify* people, but *you didn't want to* do that? Is that what you meant? A: Yes") (emphasis added). The effect of Shinn's cross-examination of Thompson completely blunted the force of the witness's earlier, consistent descriptions of the only shooter as being a dark-complexioned African-American male, and reinforced the prejudicial notion that Thompson had withheld his accurate identification of Mr. Gay only because he was fearful. *See, e.g.*, 69 RT 7666:6-21 (insinuating that Thompson was a liar for knowing all along that the shooter was Mr. Gay but testifying at the grand jury that he could not identify Mr. Gay as the shooter).

Thompson's conflicting statements to Officer Lindquist were not introduced until the *prosecutor*, rather than Shinn, called the officer to testify. At that point, Shinn inexplicably objected on hearsay grounds to any testimony that Thompson said a suspect exited the driver's side of the car from the rear section, *i.e.*, exactly where Cummings had been located. 69 RT 7744. When Cummings's counsel understandably joined the objection, the prosecutor then represented that Shinn was prepared to withdraw his objection, and Shinn dutifully stated: "I think that Mr. Watson

is trying to rehabilitate him, so I will withdraw my objection." 69 RT 7746:21-22. But, the prosecutor was attempting to "rehabilitate" Thompson by showing that he described the dark-skinned person only *starting* to exit the driver's side while pointing and shooting at the officer. The prosecutor explicitly stated: "I'm going to leave out the fact that the suspect got out of the car." 69 RT 7750-51.

Only after the prosecutor and Cummings's defense counsel questioned Officer Lindquist about Thompson's statements did Shinn also question him about it. 69 RT 7771 *et. seq.* Although Shinn then later referred to the report in closing argument, he also argued that the significance of the impeachment of Thompson was that he did not see the gun passed to Mr. Gay and could not say it was the *same gun* that Cummings had used to shoot the officer. The natural impact of that argument was to concede that the only uncertainty in Thompson's belated identification of Mr. Gay as the outside shooter was whether he used a *different* gun to shoot the officer. Neither the referee nor respondent explains why such an argument would have been made by conflict-free counsel.

4) Promising the Jury that Mr. Gay Would Testify.

The referee and respondent confirm that there was no tactical reason for Shinn to promise the jury that Mr. Gay would testify. Rpt. at 67-68; Resp. Br. at 83 and n.44. Rather, all of the factors that made it tactically untenable to call Mr. Gay to testify were known to Shinn before he promised the jury that he would do so.[17] Neither the referee nor respondent

[17] Respondent and the referee note that prominent among the "extensive impeachment evidence" (Resp. Br. at 83) confronting Mr. Gay if he had testified would have been "his confessions to the numerous robberies." Rpt. at 67; Resp. Br. at 83, n.44. This was, of course, the evidence created by Shinn and which Shinn knew the trial court had ruled admissible before

explains why a conflict-free attorney would have inflicted the prejudice resulting from promising the jury a defendant's testimony which he or she reasonably would or should have known could not be presented.

Nor does respondent offer any justification for Shinn's further exacerbation of the prejudice resulting from this unreasonable conduct. In closing argument, Shinn reminded the jurors that Mr. Gay did not testify, vouched for the professionalism of Detective Holder, and professed himself uncertain whether Mr. Gay lied during his tape-recorded statement to the police. 95 RT 10929:12-17, 10983, 10986. Having assured the jurors that Mr. Gay would give them "his version of what occurred," 58 RT 6299:26-28, Shinn's closing argument underscored the fact that despite his promise, to the contrary, the defense had nothing to dispute the prosecution's theory.

3. Conflict Arising from the Admission of the Confession.

a. The Conflict.

Mr. Gay first became aware that Shinn had misled him about the admissibility of his robbery confessions when the prosecutor announced his intention to rely on the evidence, and play the recording of Mr. Gay's confession to the jury during his opening statement at trial. 58 RT 6250-51. At a hearing conducted during a break in the prosecutor's opening statement, Mr. Gay testified that in preparation for the interview with the prosecutor, Shinn had instructed him to lie by falsely admitting he had committed the robberies. Shinn warned Mr. Gay that if he did not admit the robberies, the prosecutor would not give him an opportunity to prove his

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Shinn promised the jury that Mr. Gay would testify. Other significant impeachment evidence, all of which should have been known to Shinn prior to opening statement, included Mr. Gay's "felony criminal record, his parole status" and – thanks to the Shinn-generated confessions – "the crime partner nature of his relationship with Raynard Cummings." Rpt. at 67.

innocence of the murder charge by taking a polygraph examination. 58 RT 6278-79.

Shinn then testified at the hearing, and in response to the prosecutor's question, claimed he did not recall Mr. Gay's testimony, which had occurred approximately "30 seconds" earlier; and that Shinn "never told anyone to lie." 58 RT 6282.

Shinn then advised the trial court that his conduct had created a conflict of interest between him and Mr. Gay, but did not articulate any cognizable grounds. *See* 58 RT 6278-79, 6282. While voicing self-serving complaints that the prosecution had not complied with discovery, that Shinn was being "sandbagged," and that the prosecutor did not disclose its intention to use the confession until the eve of trial, Shinn added "[t]here is a conflict between my client and myself now." 58 RT 6282:27-28

Shinn did not move to withdraw or request independent counsel to represent Mr. Gay. The trial court declined to inquire whether Shinn had a disabling conflict of interest, or to make any finding whether Shinn had instructed Mr. Gay to lie in purportedly confessing to the robberies. 59 RT 6336. Instead, the trial court treated the issue only as a motion by Mr. Gay for self-representation. As a result, at this critical juncture in the proceedings, Mr. Gay did not have the assistance of conflict-free counsel, meaning he essentially had no assistance of counsel. *See Mickens*, 535 U.S. at 167. Mr. Gay was left to fend for himself, or to rely on his conflicted counsel to persuade the trial court to remedy his predicament.

Mr. Gay repeatedly informed the court that he could "see no way possible to protect [himself] from past, present or future deceptions except" to have counsel relieved. Ex. A121 (Aug. RT) at 7. While Mr. Gay, as a layperson, erroneously concluded the only avenue open to him was to request self-representation, the trial court and counsel were reasonably

aware that he was entitled to the guiding hand of conflict-free counsel, including during the hearing on the question of Shinn's conflict. *See United States v. Gelders*, 425 U.S. 80, 89-90 (1976); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *People v. Mroczko*, 35 Cal. 3d 86, 110-11 and 114-15 (1983), overruled on other grounds by *People v. Doolin*, 45 Cal. 4th at 420-21 & n.22. Mr. Gay's further representations to the court that Shinn had "deceived" and "misled" him raised a number of red flags pointing to the existence of a pervasive conflict. Ex. A121 (Aug. RT) at 9. Rather than inquire into the specifics of the deceptions, or permit Mr. Gay to consult with independent counsel who could assist him to conduct such an inquiry, the court summarily ruled that no conflict arose from "what occurred," which would prevent "the parties [sic]" from "continu[ing] in a meaningful manner." 59 RT 6341. As a consequence of the trial court's peremptory response, no inquiry was conducted leading to disclosure of Shinn's other fraudulent behavior, including the capping scheme and the embezzlements.

Shinn's response to Mr. Gay's allegations gave rise to another conflict of interest, in which Shinn's failure to request and the trial court's failure *sua sponte* to appoint independent counsel left Mr. Gay wholly without the assistance of counsel during a critical stage in the proceedings. *See United States v. Gonzalez*, 113 F.3d 1026, 1029 (9th Cir. 1997) ("Whatever conflict may have existed between [defendant] and his attorney going into the sentencing hearing, the district court clearly created one when it questioned [defendant's] attorney in open court with [defendant] present. When the court invited [the attorney] to contradict his client and to undermine his veracity, [defendant] in effect 'was left to fend for himself, *without* representation by counsel . . . '") (emphasis in original); *United States v. Del Muro*, 87 F.3d 1078, 1079 (9th Cir. 1996) ("When [defendant's] allegedly incompetent trial attorney was compelled to produce new

evidence and examine witnesses to prove that his services to the defendant were ineffective, he was burdened with a strong disincentive to engage in vigorous argument and examination, or to communicate candidly with his client. The conflict was not only actual, but likely to affect counsel's performance."); *United States v. Sanchez – Barreto*, 93 F.3d 17, 22 (1st Cir. 1996) (disabling conflict found where counsel forced to contradict petitioner at hearing on counsel's ineffectiveness); *United States v. Levy*, 25 F.3d 146, 156 (2d Cir. 1994) (counsel's colloquies with the District Court revealed that his desire to avoid being called as a witness made him willing to sacrifice or compromise certain trial strategies and defenses); *United States v. Miskinis*, 966 F.2d 1263, 1269 (9th Cir. 1992) (noting that if attorney's potential testimony "would have been adverse to a defense that [defendant] might have offered, a conflict of interest existed"); *United States v. Ellison*, 798 F.2d 1102, 1108 (7th Cir. 1986) (disabling conflict found where counsel could not represent client's best interests because of concerns over counsel's own self-incrimination he was compelled to contradict his client in open court).

b. Adverse Effects.

1) Denial of Defense.

As Michael Burt, a capital litigation expert, explained at the reference hearing, Shinn's failure to withdraw from Mr. Gay's case effectively denied Mr. Gay the right to testify in his own behalf and present the only version of a viable refutation of his purported confession that was available under the circumstances. 12 EH RT 1540; 12 EH RT 1656-58. According to Mr. Burt, Mr. Gay would have to explain to the jurors that he falsely admitted the robberies because Shinn advised him to do so as a means of gaining credibility with the homicide investigators and being afforded the chance to

submit to a polygraph examination. Shinn could not be expected to act as Mr. Gay's counsel in presenting this explanation, however, because it would portray Shinn as the mendacious and corrupt attorney that he was. Nor would he be able to gain the trust and confidence of the jury while presenting evidence that he had instructed Mr. Gay to lie to the police and prosecutor. 12 EH RT 1656-58. The only recourse was to provide Mr. Gay new counsel unblemished by such unethical behavior.

Significantly, if Shinn's conflict-driven motives had not led him to "offer up" Mr. Gay "to the district attorney's office to further and protect his own interests," in the first place, the robbery charges would have been defensible. 8 EH RT 1095:6-12; *In re Gay*, 19 Cal. 4th at 792-93. In the face of Mr. Gay's confessions, they were not. Thus, having engineered Mr. Gay into this daunting predicament, Shinn was obligated to withdraw and ensure Mr. Gay had the benefit of conscientious, non-conflicted counsel. *See Comden v. Superior Court*, 20 Cal. 3d 906, 912 (1978) ("An attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate"); *see also* California Rules of Professional Conduct, Rule 5-210(C) ("Member as a Witness") (providing that an attorney shall not act as an advocate before a jury, which will hear testimony from the attorney unless the client gives informed and written consent).

2) Shinn's Abandonment of Mr. Gay in Closing Argument.

By closing arguments, Shinn continued to short-change Mr. Gay's interests in defense of his own. Shinn minimized his responsibility for creating the confession, and abandoned Mr. Gay altogether while attempting to "explain his *own conduct*" as justification for his devastatingly prejudicial actions. Rpt. at 73 (emphasis added). Shinn

suggested that he was duped into allowing Mr. Gay to give the confession, and then disavowed any ability to know "whether or not Mr. Gay was telling the truth on that tape." 95 RT 10986. Compounding this disparagement of his own client's honesty and veracity, Shinn expressly and repeatedly reminded the jurors that *law enforcement* officials had been able to determine whether Mr. Gay had been telling the truth on the tape; and they had concluded he was truthful in admitting the robberies and "lied" when "he said he wasn't involved in the murder." *Id.*

Neither the referee nor respondent has offered any rationale that could plausibly explain such an argument as the tactical decision-making of a conflict-free attorney.

4. Other Prejudicial Impacts of Shinn's Deficient Representation.

The pervasive nature of Shinn's breakdown in representation makes it difficult to tether particular prejudice to specific conflicts. There is no question, however, that Mr. Gay was prejudiced by being saddled with Shinn. *See supra* at 11-30; Pet. Br. at 24-42 (delineating the numerous ways in which Shinn performed deficiently in his representation of Mr. Gay). For example, there can be no tactical justification for Shinn sleeping in court. Contrary to respondent's contention, Mr. Gay introduced substantial evidence establishing the fact that Shinn frequently slept during Mr. Gay's trial. *See, e.g.*, 3 EH RT 203-05 (Payne testifying Shinn slept in court so often that Payne devised ways to wake Shinn up during trial); 11 EH RT 1411-15 (Raynard Cummings's counsel, Howard Price, testifying that Shinn's frequent slumbering made him "the butt of joke[s].)"

Although respondent relies on the absence of a remonstration by the trial judge or complaints by Mr. Gay to suggest that Shinn did not sleep, courts have found that a habeas proceeding – which allows for the

development of extra-record facts – is precisely the proper forum for the development and presentation of such evidence. *See, e.g., Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (developing and presenting claim that trial lawyer slept through petitioner's trial through state postconviction proceedings in the absence of any evidence on the trial record). Moreover, although the prosecutor, Watson, merely testified that he did not see Shinn sleeping, the testimony from Payne and Price affirmatively demonstrated that Shinn did so. 3 EH RT 203:21-205:13, 267; 11 EH RT 1411:14-28. In turn, the referee noted that Mr. Price and his co-counsel, Ed Rucker, "are both excellent lawyers." 3 EH RT 293:5-6.

Moreover, as this Court found, there were a number of unreported proceedings throughout Mr. Gay's trial, including bench conferences and conferences in chambers. *People v. Cummings*, 4 Cal. 4th 1233, n.70 (1993). The unreported conferences were not limited to one or two instances; dozens of proceedings were not transcribed. Accordingly, the absence of a record, which was due to the failure of the trial court to comply with Penal Code Section 190.9, cannot be taken as reliable evidence that Shinn was not sleeping, as reported by his investigator and an officer of the court testifying under oath.

This, and Shinn's lack of investigation, lack of consultation with expert witnesses, and otherwise abysmal performance at trial, are clear indications of just how the conflicts adversely affected his representation of Mr. Gay.

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioner's Brief on the Merits and Exceptions to Referee's Report and Findings of Fact, Mr. Gay respectfully submits that he has established his entitlement to

relief from the conviction rendered below.

Dated: September 19, 2016 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____

Jennifer Molayem
Gary D. Sowards
Attorneys for Petitioner
Kenneth Earl Gay

CERTIFICATE AS TO LENGTH

I certify that this Petitioner's Response to Respondent's Exceptions to Report of the Referee and Brief on the Merits contains 33,393 words, verified through the use of the word processing program used to prepare this document.

Dated: September 19, 2016 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____

Jennifer Molayem

PROOF OF SERVICE

1. I am over 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place.
2. My business address is: Habeas Corpus Resource Center, 303 Second Street, Suite 400 South, San Francisco, California 94107.
3. Today, I mailed from San Francisco, California the following document(s):

- **Petitioner's Response to Respondent's Exceptions to Report of the Referee and Brief on the Merits;**

4. I served the document(s) by enclosing them in a package or envelope, which I then deposited with the United States Postal Service, postage fully prepaid.
5. The package or envelope was addressed and mailed as follows:

David Glassman
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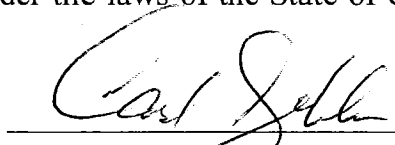
As permitted by Policy 4 of the California Supreme Court's *Policies Regarding Cases Arising from Judgments of Death*, counsel intends to complete service on Petitioner by hand-delivering the document(s) within thirty calendar days, after which counsel will notify the Court in writing that service is complete.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: September 19, 2016



Carl Gibbs