SUPREME COURT COPY

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 BRIEF ON THE MERITS

Gary D. Sowards (Bar No. 69426)
Jennifer Molayem (Bar No. 269249)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorneys for Petitioner Kenneth Earl Gay

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 BRIEF ON THE MERITS

Gary D. Sowards (Bar No. 69426)
Jennifer Molayem (Bar No. 269249)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorneys for Petitioner Kenneth Earl Gay

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules of Court

Other Authorities

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

INTRODUCTION

On June 2, 1983, Los Angeles Police Department Officer Paul Verna was shot to death after making a traffic stop of a car driven by Pamela Cummings. The other occupants of the car were Pamela's husband, Raynard Cummings, and petitioner, Kenneth Gay.

There is no dispute as to several key facts: the car Pamela Cummings was driving was a two-door 1979 Oldsmobile Cutlass. Mr. Gay was seated in the right front passenger seat and Raynard Cummings was in the rear passenger seat, behind his wife's driver's seat. After the stop, the officer took Pamela to the rear of the car to discuss her lack of a license and photo-identification. The officer returned to the driver's side of the car and asked the two men if they had identification. Raynard Cummings responded by shooting the officer at least one time in the neck. As the stricken officer moved away from the car he was felled by a barrage of five more shots. A single gun was used in the homicide, and the question of Mr. Gay's guilt or innocence turned on whether only Cummings had fired all six shots, or

whether Mr. Gay had fired some as well.

The prosecution proceeded on the theory that Cummings had fired one or two shots at most, attempted unsuccessfully to get out of the car and, when he was unable to do so, "passed the gun" back to Mr. Gay who got out of the car and continued to shoot the officer. The principal distinguishing feature between the two men's physical appearances was their skin tone. Mr. Gay was a relatively tall, thin mixed-race man whom witnesses described as either "light-skinned" or "White." Raynard Cummings was taller, also thin, and a dark-complexioned African-American. Mr. Gay was wearing a white or light grey long-sleeve shirt, and Raynard Cummings was wearing a dark-colored burgundy shirt. The dispositive issue at trial, therefore, turned on conflicting eyewitness accounts of whether the "dark-skinned" suspect fired the gun from both inside and outside of the car, or whether the "light-skinned" suspect was the one who got out of the car and continued shooting.

One person who knew the answer was Pamela Cummings. While standing at the rear of the car, she saw her husband – the "dark-skinned" suspect – shoot the officer from the back seat, then ragefully spring from the car and continue shooting before throwing the emptied weapon onto the officer's prostrate body. She also saw a panic-stricken Mr. Gay get out of his seat and crouch on the street behind the passenger door. Raynard ordered everyone back into the car and told Pamela to drive them from the crime scene. He then told her to make a u-turn and go back, where Mr. Gay complied with Cummings's instruction to get out of the car and retrieve the gun.

Pamela did not disclose all of these exculpatory facts at Mr. Gay's trial. Within hours of the crime, she reported what she had seen to the police, as well as to her sister, Deborah Cantu. But, instead of identifying

her husband, Raynard Cummings, as the lone shooter, she named Milton Cook. Pamela knew that Cook, a tall, thin, dark-complexioned African-American man who strongly resembled Raynard, would easily match the description of the shooter given by any neighborhood witnesses who might have seen Raynard outside the car, shooting the officer.

After Pamela's arrest she learned that Milton Cook had an airtight alibi: at the time of the shooting he was home with his broken foot in a cast. He could not have been the nimble, dark-skinned suspect who leapt from the car and shot the officer. Pamela agreed to become a prosecution witness and testify that Mr. Gay was the outside shooter. Even though the prosecutor knew Pamela was lying to exculpate her husband, he relied on her testimony to support the "pass the gun" theory.

Someone else also witnessed what Pamela had seen. Irma Esparza, a neighborhood resident, gave investigating officers a statement that tracked Pamela's initial report to her sister and the police: a dark-skinned suspect shot the officer once in the neck, then got out of the car and shot him repeatedly; the car left the scene and then returned, and a light-skinned suspect got out only to retrieve a gun near the officer's body before the car and suspects drove off again. Ms Esparza thus provided the information that Pamela, and the prosecution, refused to acknowledge – Raynard Cummings was the one and only shooter.

Naturally, given the detailed, exculpatory nature of Ms. Esparza's police statement, which convincingly disproved the "pass the gun" theory, the prosecution did not call her to testify at trial. Inexplicably, Mr. Gay's defense counsel did not even interview her.

Several other neighborhood residents corroborated Ms. Esparza's description of the crime and suspects. Walter Roberts told the police that the shooter outside the car was a "male Negro" with a dark-colored shirt,

and described the physical appearance of a dark-skinned black man who appeared in a line-up conducted days after the shooting as looking "the same" as the shooter. Martina Jimenez told the police and prosecutor that the shooter was a "male black, tall, young looking, thin and ugly." Ejinio Rodriguez also saw a "black man who had dark skin" shooting the police officer. He then watched as the suspect's car left the scene, returned and a "man with much lighter skin" who was "not the man who actually shot the officer" got out of the car to retrieve a gun.

Again, somewhat understandably, the prosecution did not call any of these witnesses to testify at Mr. Gay's trial. Again, incomprehensibly, although Mr. Gay's defense attorney was aware of each of these witnesses, he did not even interview them.

The record, including the evidence and findings made after the most recent reference hearing ordered by this Court, shows that Mr. Gay's attorney did not do many things typically done by counsel in capital cases. Viewed most favorably to defense counsel, his pre-trial "investigation" consisted, at most, of reading the discovery provided by the prosecution (or his investigators summaries), reviewing the prosecutor's file, attending the preliminary hearing and reading the transcript of that and the grand jury proceedings. He did not interview any witnesses, did not follow up on his investigator's suggestions, and did not consult, let alone retain, any guilt-phase expert witnesses. Even after listening to a Deputy Sheriff testify at an Evidence Code section 402 hearing that Raynard Cummings admitted that he was the one who shot and killed the officer, defense counsel neglected to call him to repeat his testimony to Mr. Gay's jury. As respondent has conceded, counsel thereby passed up the opportunity to "present the readily available, reliable, credible and persuasive testimony of" a law enforcement witness "who affirmatively exculpated petitioner,

and inculpated co-defendant Cummings." Return at 41¶ 94.

Compounding the harm of defense counsel's inaction, he also did things that capital defense attorneys typically do not do. Foremost among these was inducing Mr. Gay to make a tape-recorded confession to charged and uncharged robberies, after assuring him the tape would not be used against him at trial. The prosecution did, indeed, use the taped confession to devastating effect as evidence of Mr. Gay's purported motive for killing the officer to avoid arrest.

Mr. Gay's attorney, Daye Shinn was not a typical capital defense counsel. He perpetrated fraud on the trial court to engineer his appointment in Mr. Gay's case, apparently to obtain the funds he needed to repay money he stole from one set of clients to repay the money he had stolen from another set of clients. Among the things he did not disclose to the trial court when he fraudulently secured his appointment was that he was the target of an embezzlement investigation being conducted by the same District Attorney's Office that was then prosecuting Mr. Gay. Although Shinn ultimately avoided successful prosecution only because the statute of limitations on his criminal activity expired, he was disbarred for his "misappropriation" (*i.e.*, theft) of hundreds of thousands of dollars of his clients' money – but only after he had assisted the District Attorney as "a second prosecutor" in getting Mr. Gay convicted and sentenced to death. *In re Gay*, 19 Cal. 4th 771, 794 (1998).

There is abundant evidence that Shinn's abysmal, prejudicial conduct in the Los Angeles District Attorney's prosecution of Mr. Gay was an adverse effect of the conflict of interests he had in attempting to curry favor with the prosecutorial agency that also was pursuing his own criminal investigation. His failings also constitute the more conventional, if jaw-dropping species of prejudicially-deficient performance that is cognizable

as ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) and *In re Wilson*, 3 Cal. 4th 945 (1992).

In either or both events, as respondent also has conceded, Shinn's conduct "demonstrated the accuracy of his reputation in the legal community as an unethical, unsavory blowhard who would promise his clients anything just to make a dollar, and for not understanding the rudimentary elements of the law." Return at 28. As set forth below, knowledge of Shinn's disreputable and incompetent failings in this case precludes having any confidence in the verdict convicting Mr. Gay of capital murder and rendering him eligible for the death penalty.

PROCEDURAL HISTORY

First Automatic Appeal: *People v. Cummings*, 4 Cal. 4th 1233 (1993). Based on the record that defense counsel, Daye Shinn, allowed the prosecution to create at trial, this Court concluded on direct appeal that the evidence against Mr. Gay was so "overwhelming" that any errors were harmless. *People v. Cummings*, 4 Cal. 4th 1233, 1295 (1993). That record contained the testimony of only "four eyewitnesses" who collectively made it "clear . . . that Gay as well as Cummings took part in the shooting." *Id.* at 1288 and n.27. The charged and uncharged robberies to which Mr. Gay had confessed at Shinn's instigation provided evidence to prove the prosecution's theory "that fear of arrest for the robberies was a motive for murder," *id.* at 1257; and that such motive was also "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." *Id.* at 1284. The Court reversed the robbery convictions for instructional error, and otherwise affirmed the judgment of conviction and sentence of death. *Id.* at 1343.

In dissent, the late Justice Stanley Mosk concluded that the judgment nevertheless was infirm in light of "what trial counsel did not do." *Id.* In Justice Mosk's view, even the limited appellate record revealed that "[t]he failings of Gay's counsel were 'pervasive and serious,' and 'resulted in a breakdown of the adversarial process at trial,'" which mandated "'reversal of the judgment even in the absence of a showing of specific prejudice.'" *Id.* (citation omitted).

First Habeas Corpus Proceedings: *In re Gay*, 19 Cal. 4th 771 (1998). The evidence and findings adduced in an evidentiary hearing ordered by this Court limited to penalty-phase issues began to illuminate the extent of Shinn's incompetence and corruption. As a result of these proceedings, the Court learned that Shinn had "defrauded both the court and his client" and "engineered both his initial retention and subsequent appointment" to represent Mr. Gay "by fraudulent means." *In re Gay*, 19 Cal. 4th at 780, 795. After securing his appointment, "Shinn himself did no investigation of penalty phase evidence and the investigation undertaken by Shinn's investigator, who was given inadequate guidance, failed to discover" significant mitigation. *Id.* at 781. Following a familiar pattern, "[n]either Shinn nor his investigator ever interviewed [Mr. Gay's] parents," and Mr. Gay's "mother did not meet Shinn until the day she testified at the penalty phase of the trial." *Id.* at 782.

The evidence also confirmed that Shinn misled Mr. Gay to confess to charged and uncharged robberies by telling him "'that it would be in his own best interests to cooperate with the prosecution,'" and "'that the statement could not be used against him if the prosecutors decided not to use him as a witness.'" *Id.* at 791. The Attorney General conceded that "the evidence established that neither Shinn nor petitioner had any indication from the prosecutor or investigator that any agreement existed."

Id. at 792.

Respondent's counsel also acknowledged that Shinn's action constituted "incompetent performance." *Id.* at 792. The Court found that the prejudice of such incompetence "cannot be understated." *Id.* at 793. Shinn "acted as a second prosecutor," and enabled the prosecution to present a "devastating" portrayal of Mr. Gay "as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies." *Id.* at 793-94.

The factors that may have led Shinn effectively to join forces with the State were not clear. The Court noted that Shinn's purported representation of Mr. Gay was burdened by two undisclosed potential conflicts of interest: (1) he had fraudulently secured his appointment through a capping operation that required him to use the services of only an inept mental health professional; and (2) Shinn was being investigated for embezzlement of client funds by the Los Angeles District Attorney's Office at the same time that office was prosecuting Mr. Gay for capital murder. *Id.* at 783, 828.

On the record before it, however, the Court could not discern whether or to what extent either conflict led to Shinn's deficient performance and, therefore, concluded that the *per se* prejudice arising from an actual conflict of interest was not applicable. *Id.* at 828. The existence of the conflicts, however, were among the factors undermining the Court's confidence in the penalty verdict, and resulting in reversal of the death judgment.

Second Automatic Appeal: *People v. Gay*, 42 Cal. 4th 1195 (2008). Following the remand ordered in *In re Gay*, 19 Cal. 4th at 830, Mr. Gay was again sentenced to death after a penalty retrial. On the automatic appeal, this Court determined that the trial court had erroneously proceeded on the theory that Mr. Gay could not present evidence raising any lingering

doubt as to his guilt for the capital murder. *See People v. Gay*, 42 Cal. 4th 1195, 1228 (2008). As a result, the trial court limited eyewitness testimony to only those witnesses who had been selected by the prosecution to testify at Mr. Gay's first trial. The trial court also excluded the admissions of guilt that Cummings made to jailers and inmate witnesses, and precluded expert testimony proffered by the defense to explain discrepancies in eyewitness accounts of the events. *Id.* at 1214-16.

Because the defense made detailed proffers of the excluded evidence, this Court was able to determine its relevance and likely impact as mitigating evidence of lingering doubt. The Court was thereby apprised that there had been four additional eyewitnesses "who were also present" at the crime scene "and who would have described the shooter's complexion as inconsistent with defendant's but consistent with Cummings's." *Id.* at 1224. In particular, the Court noted that eyewitness Irma Esparza "would have testified that the man with Raynard's complexion shot the officer and that a light-skinned male subsequently retrieved the gun." *Id.* The likely "potency" of such testimony was clear "given the absence of physical evidence linking defendant to the shooting and the inconsistent physical and clothing descriptions given by the prosecution eyewitnesses." *Id.* at 1226.

The Court concluded that if the jurors had been permitted to hear the eyewitness testimony excluding Mr. Gay as the shooter, and explaining his actions in retrieving the gun, and to consider such testimony in the context of Cummings's statements that he was the sole shooter, there was a reasonable possibility they would not have voted for death. *Id.* at 1227. The judgment of death was again reversed and remanded. *Id.* at 1228.

Current Habeas Corpus Proceedings. Following the Court's decision in *People v. Gay*, 42 Cal. 4th 1195 (2008), it stayed penalty retrial

proceedings in the Los Angeles Superior Court pending resolution of Mr. Gay's companion petition for writ of habeas corpus challenging his underlying conviction of capital murder. *See Gay (Kenneth Earl) on Habeas Corpus*, California Supreme Court Case No. S130263, Amended Order to Show Cause, filed August 4, 2008.

The Court ordered respondent to show cause why Mr. Gay was not entitled to relief on the ground that trial counsel's conflict of interest prejudicially affected his representation at the guilt phase, and on the ground that trial counsel's failure to adequately investigate and present evidence tending to show that Mr. Gay did not participate in the murder of Officer Verna constituted ineffective assistance of counsel. *Id.* Following the parties' filing of the Return and Traverse, the Court ordered an evidentiary hearing at which the Honorable Lance Ito was requested to take evidence and make findings in answer to five questions:

> 1. What actions did petitioner's trial counsel, Daye Shinn, take to investigate a defense at the guilt phase of petitioner's capital trial that petitioner did not participate in the murder of Officer Verna? What were the results of that investigation?
>
> 2. What additional evidence supporting that defense, if any, could petitioner have presented at the guilt phase of his capital trial? What investigative steps, if any, would have led to this additional evidence?
>
> 3. How credible was this additional evidence? What circumstances, if any, weighed against the investigation or presentation of this additional evidence? What evidence rebutting this additional evidence reasonably would have been available to the prosecution at trial?
>
> 4. Did the Los Angeles County District Attorney's investigation of allegations that petitioner's trial counsel, Daye Shinn, had engaged in acts of embezzlement unrelated to

petitioner's case give rise to a conflict of interest in petitioner's case? If so, describe the conflict of interest.

5. If this conflict of interest existed, did it affect trial counsel Daye Shinn's representation of petitioner? If so, how?

Beginning on September 15, 2014, the referee conducted a hearing at which the parties presented 29 witnesses. The referee thereafter requested post-hearing briefing and heard oral argument on August 17-19, 2015. On November 16, 2015, the referee issued the Referee's Report and Findings of Fact.

As discussed below, Mr. Gay presented, *inter alia*, all four of the additional, exculpatory eyewitnesses discussed by this Court in *People v. Gay*, 42 Cal. 4th 1195 (2008), each of whom testified consistently with the proffers summarized in this Court's opinion. *Id.* at 1224.

I. FACTUAL BACKGROUND.

A. What Actually Happened at the Scene of the Shooting.

At different times and in different settings, the three participants in the events of June 2, 1983 – Pamela Cummings, Raynard Cummings and Kenneth Gay – gave remarkably similar accounts of what actually happened, with all three confirming that Raynard Cummings was the only shooter and that Mr. Gay did not participate in committing the homicide.[1]

[1] Before Pamela became a prosecution witness, she described the events to the police and her sister, Deborah Cantu, but substituted a man named Milton Cook in the role of her husband Raynard as the dark-skinned, lone shooter. In all other respects Pamela's description accurately reflected the events. Raynard Cummings confirmed Pamela's version of events, and admitted his role as the lone shooter, in multiple statements to other inmates in the Los Angeles County Jail. Mr. Gay recounted the events, and his innocence, during a statement to the prosecutor, which Daye Shinn misled

According to all three, Officer Verna stopped their car and then directed Pamela to accompany him to the rear of the vehicle when she was unable to produce a valid driver's license. Pamela Cummings, who was 5' 4" tall, drove with the seat in an extreme forward position. Once she got out of the car, the empty driver's seat would have enabled Raynard Cummings easily to exit the back seat of the two-door car merely by pushing the back of the driver's seat forward.[2]

While Pamela Cummings remained standing at the rear of the car, Officer Verna returned to the driver's side and asked Raynard Cummings and Mr. Gay if they had identification. Raynard Cummings, who was hiding a .38 caliber pistol between his legs, said words to the effect "here's your I.D.," and began shooting the officer. Raynard continued shooting as he got out of the car. Officer Verna had managed to turn and take steps in the direction of his motorcycle before one of Raynard's shots severed his spine, causing him to drop to the pavement.

The murderous assault terrified Mr. Gay. At the sound of the initial shots he scrambled out of his seat and took refuge on the street behind the passenger-side door. After shooting the officer, Raynard angrily ordered everyone back in the car so they could flee the scene. As they pulled away Raynard Cummings realized he left the murder weapon – with his fingerprints – next to Officer Verna's body. He told Pamela to make a u-turn and ordered Mr. Gay to get out and retrieve the gun. Mr. Gay complied, walked over to the fallen officer, picked up the gun and returned to the car.

---

him to believe might result in his being used as a prosecution witness. Rpt. at 5-6.

[2] The movement was particularly easy because "there was no latch or locking mechanism obstructing the free movement of the back of the driver's seat." *People v. Gay*, 42 Cal. 4th at 1207.

B. The Eyewitness Accounts and Prosecution's Theory.

Consistent with the three principals' description of events, any eyewitnesses who accurately observed the shooting and its aftermath would have seen four individuals in different positions at different times: a uniformed police officer, a white adult female, a dark-skinned adult male and a light-skinned or "white" adult male. When the first shot was fired, the officer was at the driver's side of the car, then proceeded to turn and attempt to walk in the direction of the rear of the car. The adult female was standing outside of the car. The dark-skinned adult male was in the back seat of the two-door car, on the driver's side, and then got out through the driver's door as he continued to shoot at the officer. The light-skinned adult male was in the right-front passenger seat and got out of the passenger side of the car, where he remained during the shooting.

After the shooting, the dark-skinned adult male threw the gun at the officer and then he, the adult female and the light-skinned adult male got back into the car and drove away. When the car returned, the light-skinned adult male got out of the car and picked up the gun next to the slain officer before getting back into the car.

The difficulty for the prosecution was that any witness reporting this version of events would tend to prove the guilt of only Raynard Cummings as being the shooter. Lacking evidence of a conspiracy or that Mr. Gay aided and abetted Cummings, the prosecution needed to show that both men had actually shot the officer – a necessity that gave rise to the "pass the gun" theory.

1. Prosecution's Selected Eyewitnesses at Trial.

At the guilt phase trial in 1985, the prosecutor presented seven eyewitnesses, four of whom identified Mr. Gay as the shooter, but none of

whom was without vulnerability from the prosecution's perspective.

Oscar Martin. Martin, a twelve-year-old neighborhood resident saw the shooting from his living room window and consistently identified *only* Raynard Cummings as the person who shot the officer and then emerged from the backseat of the car to continue shooting. The prosecutor argued that Martin had seen only the first part of the shooting, when Cummings *attempted* to get out of the car, but missed seeing Mr. Gay because Martin had run to report the shooting to his mother.

Rose Perez. Perez was riding in a passing car through the intersection of Hoyt Street and Gladstone Avenue when she looked up Hoyt Street and observed Mr. Gay on the passenger side walking around the back of a car while the officer was falling on the driver side of the car, but did not see anything in Mr. Gay's hands.

Shequita Chamberlain. Chamberlain was also a passenger in a car that drove through the same intersection. She heard a shot, saw a dark-skinned black man near a police officer on the driver side of the car, and saw the officer fall. Then the dark-skinned man got into a car and drove off. She did not identify Cummings because she thought the shooter may have been more dark-skinned than Cummings, but admitted his complexion was close to that of the person she saw. Mr. Gay's complexion was lighter than the suspect she saw.

Robert Thompson. Thompson was working on a nearby house when he heard a shot and saw the medium-black complexioned arm of the rear seat passenger holding a gun. After hiding behind a bush he saw Mr. Gay get out of the car via the driver door and approach the fallen officer with a smoking gun. His testimony was diametrically opposite to his statement on the night of the offense when he told police that only the dark-skinned passenger in the rear seat shot the officer, and got out of the car to continue

shooting.

Shannon Roberts. Roberts, an eleven-year-old neighborhood resident identified Mr. Gay as the shooter, but identified Cummings as the person who picked up the gun after the suspects returned to the scene.

Gail Beasley. Beasley was a neighborhood resident who saw the traffic stop from inside her home. She heard two shots and looked up to see a tall, thin light-skinned black man in a burgundy shirt shoot the officer four times. She reported to the police that while the suspect was shooting the officer, she saw a black man in a white shirt get out of the car and then get back in the car. Beasley's description of the two men's clothing transposed the clothes that were worn by Cummings and Mr. Gay at the scene.

Marsha Holt. Holt was in the same house as Beasley at the time of the shooting and testified to seeing Mr. Gay shoot the officer and then pick up his gun and get into the suspect vehicle. Gail Beasley, however, testified that Holt was unaware there had been any shooting until Beasley informed her of it. Holt also testified that she did not see Mr. Gay get into the car after the shooting until after the car had left the scene and then returned.

Thus, only Robert Thompson's trial testimony unequivocally supported the prosecution's pass the gun theory and conflicted with the exculpatory version of events described by Pamela and Raynard Cummings, and Mr. Gay. Oscar Martin and Shequita Chamberlain actually identified the dark-skinned suspect as being the shooter; and Martin explicitly identified Cummings. Rose Perez's brief observations were consistent with Mr. Gay being on the opposite side of the car from the officer with nothing (including a gun) in his hands. Shannon Roberts and Gail Beasley identified Mr. Gay as the shooter, but evidently transposed the roles of the two men at the scene: Beasley had them wearing each other's

clothes, and Roberts had Raynard Cummings retrieving the gun after the car returned to the scene. Marsha Holt was impeached by Beasley's testimony that Holt could not have seen the shooting at all because she had been lying on a bed watching television.

Further, although Robert Thompson's *trial testimony* unequivocally supported the prosecution's theory, his statement to the police had been just as unequivocal in identifying Raynard Cummings as the one and only shooter. He told Officer Lindquist hours after the shooting that the suspect – "male Negro, black hair, finger wave (short) 6-2/3, 150, (thin build) 25-30 years . . . Medium to dark complexioned" – got out of the rear seat "shooting weapon at officer." Ex. A45 at 1. Thompson described the front seat passenger as "White." *Id.* At Thompson's direction, Lindquist drew a diagram showing the dark-skinned suspect's exit from the driver's side of the car, with the annotation: "Thompson says that susp. was firing while he was exiting the veh. also stated that the susp had gun in his right hand and was forcing car door open with his left hand." *Id.* at 3. According to his police report, Thompson was explicit that "[a]s officer dropped to knees and fell back onto his back this smae [sic] suspect continued to fire while exiting and walking up to officer and firing last round while standing over officer while officer is down on back at point blank range." *Id.* at 2.

Thompson's initial statements matched exactly the version of events as described by Pamela and Raynard Cummings, and Mr. Gay. In the live line-ups, and at the grand jury over a month later, Thompson continued to identify a dark-skinned black man as the sole shooter. It was only after follow-up interviews and a "walk-through" of the crime scene with the prosecutor's investigator before trial that Thompson's recollection changed 180-degrees to both the dark-skinned backseat passenger and Mr. Gay

shooting the gun. These factors were potentially fruitful areas of investigation and expert analysis.

As this Court later observed, even though the prosecution strategically selected the eyewitnesses who would most favor its theory of the case, "[t]heir versions of the events and identification of the shooter or shooters varied greatly." *People v. Cummings*, 4 Cal. 4th at 1259.

2. The Eyewitnesses Disclosed in Discovery.

The prosecution did not call four other eyewitness who would have refuted the theory that Mr. Gay was the outside shooter. The prosecution did, however, provide the defense with the witnesses' names and any statements they made to the police.

Irma Esparza. Ms. Esparza was a 13-year-old neighborhood resident who voluntarily went to the police station the morning after the shooting where she gave Officer A.R. Moreno a statement that, with minor variations, matched the description of events reported by Pamela and Raynard Cummings, and Mr. Gay. A reading of her statement as reported by Officer Moreno would have revealed Ms. Esparza made the following observations:

> I was outside about two houses away from my mom's house. She lives at 12097 Hoyt Street. I saw the motorcycle policeman who had just given someone else a ticket on Hoyt Street, standing by his motorcycle. The yellow car that he had given a ticket to wasn't [gone] five minutes when a newer model car came up the street. The car was gray in color, medium sized, and had a high back. The rear end was slanted toward the front of the car and looked longer or higher than most cars. It had a blue California license plates with yellow numbers and letter. There was a male Negro driving the car.
>
> He was dark skinned, about 25 years old with about a 3 to 4

inch afro. The passenger in the front seat was a male Negro, about 20 to 25 years old with light skin. He was wearing a white, long sleeved shirt, gray pants with pleats in the front, and black shoes. There were two other persons in the back seat. I think that they were Negros, but I couldn't tell if they were men or women. As the car they were in came toward the policeman who was standing next to his motorcycle, he waved at them to pull over to the curb. The car pulled over in front of the policeman about 20 feet from him. They were across the street from me and two houses over.

The policeman walked up to the driver's side of the car holding a little white card and a pen in his left hand. The officer turned and faced the driver's door and bent forward toward the driver and started talking. The officer was talking to the driver and writing on the white card when all of a sudden, the officer held his right hand out and started to place it in the open window like if the driver was going to give him something. The driver with his wirght [sic] hand, punched the officer in the face. The punch made the officer stand straight up. The driver then pulled the officer's gun out of his holster and shot the officer in the neck with it. The officer was still standing and the driver shot him two (2) more times. The officer then fell backwards onto the street.

The car started to leave and made a right turn at the corner. (They were just about at the corner when they were pulled over by the policeman that they shot). As the car was turning the corner, someone in the car threw the gun out of the passenger's window and it landed about three (3) feet away from where the officer was laying. The car went down the street – it had turned on and made a right turn into the first driveway, it then backed out and came back toward Hoyt Street. They made a left turn on Hoyt Street and pulled aover [sic] across the street from the policeman. The light skinned passenger of the gray car, got out, ran around the front of the grey car and over to where the policeman was. He jumped over the policeman on the ground and picked up the gun they

had thrown out of the car. He jumped over the policeman again and ran back to the grey car and got in with the gun. The car left real fast and made a left turn on Gladstone. That's the last time I saw it.

Ex. A13 at 1-2.

Martina Elizabeth Jimenez Ruelas. The police statement by Ms. Ruelas (whose birth name is Martina Jimenez) explained that she had been speaking with Officer Verna moments before the fatal traffic stop. Ms. Jimenez watched the officer walk up to the car, and saw a "male black, tall, young looking, thin and ugly," shoot the officer. Ex. A43. As the referee found, her description of the shooter "strongly points towards Raynard Cummings." Rpt. at 26:12-17. When asked to view booking photographs of Raynard Cummings and Mr. Gay at the reference hearing 32 years later, Ms. Jimenez affirmatively identified Raynard Cummings as the person who shot and killed the officer. 11 EH RT 1401:6-9. Prior to trial, and following her initial descriptions of the shooter as looking like Cummings, the prosecutor and lead homicide detectives re-interviewed her, and decided against calling her to testify.

Walter Roberts. The discovery provided to the defense included the statements and police reports for Walter Roberts, a twelve-year-old who was in a front yard driveway at 12097 Hoyt Street playing with his brother (and prosecution witness) Shannon Roberts and neighbor Ejinio Rodriguez. Rpt. at 26:19-22. Mr. Roberts saw the shooter holding a gun as he got out of the driver side of the car and continued to shoot at the downed officer. Rpt. at 27:5-8 (citing Walter Roberts's two police reports made hours after the shooting). Mr. Roberts's statements to the police on the night of the shooting consistently described the shooter as looking like Raynard Cummings: a "male Negro, black . . . long sleeve multicolor shirt, dark pants"; and a "male Negro, black . . . medium complexion, 3-4 inch afro . . .

wearing a dark blue long sleeve shirt, blue jean pants, dark shoes." Rpt. at 27:4-13. A few days after the shooting, Walter selected a dark-skinned black man in a line-up as appearing "the same" as the shooter. Resp. Ex. 755; 9 EH RT 1286:17-18.

Ejinio Rodriguez. The police reports and grand jury testimony disclosed the identity and presence at the scene of Ejinio Rodriguez, the neighborhood resident who was playing with the Roberts brothers. Rpt. at 27:18-21. Mr. Rodriguez saw a "black man who had dark skin and wearing a dark shirt" shooting the officer. Rpt. at 28:2. He watched as the car drove up the street, made a u-turn at Prager Avenue, and returned, at which point a lighter-skinned man got out and picked up a gun. Rpt. at 27:22-25; 10 EH RT 1331:1; Ex. A24 at ¶ 8. In contrast to Mr. Rodriguez's description of the dark-skinned shooter, which "points more strongly" to Raynard Cummings, Rpt. at 28:4, the person who jumped out to retrieve the gun had "much lighter skin" and was "not the man who actually shot the officer." Ex. A24 at ¶ 8.

3. The Eyewitnesses Interviewed and Called by the Defense at Trial.

The defense did not interview any of the eyewitnesses whose identities were disclosed in the discovery. At trial, defense counsel re-called prosecution eyewitness Rose Marie Perez to restate her testimony that she did not see anything in Mr. Gay's hands at the crime scene. 86 RT 9785.

C. Defense Counsel, Daye Shinn.

The parties agree, and this Court has found, that Mr. Gay's "'[t]rial counsel, Daye Shinn, knowingly used fraudulent means to secure his

appointment as petitioner's attorney prior to the guilt phase of his capital trial.'" Return at 2, ¶ 1; *see In re Gay*, 19 Cal. 4th at 828. The process began with Shinn making fraudulent representations directly and through surrogates to convince Mr. Gay that Shinn was being retained on Mr. Gay's behalf by a non-existent group of businessmen. Return at 2-3, ¶¶ 2-7. Shinn later instructed Mr. Gay to falsely represent to the court that Shinn was retained by his parents, who would be unable to pay Shinn's fees, and that Mr. Gay was prepared to represent himself if Shinn were not appointed. Return at 3-4, ¶¶ 8-9. Shinn even provided a typed motion for Mr. Gay to copy verbatim in his own handwriting and then submitted it to the court. *Id.* at 4, ¶ 9.

Shinn was initially introduced to Mr. Gay through one Marcus McBroom who, along with Shinn, was part of "an illegal capping relationship" that the participants used to obtain court appointments and split attorneys' and expert fees. *Id.* at 5, ¶ 11. Respondent concedes that the scheme "created a conflict of interest between the financial interests of said individuals, by virtue of their involvement in the illegal arrangement, and the interests of petitioner to whom Shinn owed constitutional, professional and ethical duties to provide minimally adequate representation." *Id.*; *see also In re Gay*, 19 Cal. 4th at 796-98.

By the time Shinn first began defrauding Mr. Gay he was under investigation by the State Bar for swindling his former clients, Rebecca and Alexander Korchin, out of more than $90,000. *See* Rpt. at 61:11-26; Ex. A33. In an unsuccessful effort to stave off the Korchins' State Bar complaint, Shinn had stolen over $70,000 from other, elderly clients, Oscar and Marjorie Dane to repay the Korchins. Rpt. at 61:12-13; 17 EH RT 2286:18-2287:8. In the latter part of 1983, the Danes complained to the Major Fraud Unit of the Los Angeles District Attorney's Office, and Deputy

District Attorney Albert MacKenzie launched a criminal investigation. Rpt. at 55:22-24.

MacKenzie telephone Shinn, informed him of the nature of the investigation, and asked him to come to the District Attorney's Office for a meeting. Shinn did not wish to meet at the District Attorney's Office. On or about March 1, 1984, MacKenzie and his investigator, Los Angeles County Sheriff's Detective Charles Gibbons, interviewed Shinn at the Criminal Courts building in downtown Los Angeles. Rpt. at 56:15-17. At that meeting, MacKenzie asked Shinn to provide a full accounting of the Danes' funds, and Gibbons requested authorization for the release of Shinn's banking records. Rpt. at 56:19-23. Shinn agreed to prepare an accounting for MacKenzie, but declined to release his bank records. *Id.*

On or about the same day, Shinn contacted Deputy District Attorney John Watson, the prosecutor in Mr. Gay's capital murder case, and offered to bring Mr. Gay in for a tape-recorded statement. 58 RT 6257-60. Watson was frankly "baffled" by the proposal and needed to consider the potential disadvantages. 58 RT 6257. Watson pondered the matter with his chief investigators, and then approximately three weeks after Shinn's meeting with MacKenzie and Gibbons (and Shinn's offer to bring Mr. Gay in to make a statement), Watson arranged for Mr. Gay to be transported to the prosecutor's office to give the statement. 58 RT 6260:7-10 (the prosecutor "puzzled for weeks" with the detectives to figure out what Shinn was going to do); Return at 32, ¶ 81. In the meeting with Watson, at Shinn's urging, and after being advised that the statement could be used against him, Mr. Gay admitted his commission of the robberies, including robberies with which he was not criminally charged.

When the prosecution sought to play the confession in its opening statement to the jury, Shinn objected that he had understood the tape would

not be used if the prosecution did not agree to present Mr. Gay as a prosecution witness. When asked for the source of this "understanding," Shinn declined to answer. *See People v. Cummings*, 4 Cal. 4th at 1316. After the trial court ruled the statement would be admitted, and the prosecutor was allowed to play it as part of his opening statement, Shinn assured the jury in his opening statement that Mr. Gay would testify and tell his side of the story, including "his version of what occurred" at the scene of the homicide. 58 RT 6299-6300. As the referee at the reference hearing found, calling Mr. Gay to testify was hardly a viable strategy given the prosecution's ability to impeach him with, among other things, his "felony criminal record, his parole status, his confessions to the numerous robberies," and "the crime partner nature of his relationship with Raynard Cummings." Rpt. at 67:15-17.

Despite Shinn's assurances to the jury, he did not call Mr. Gay to testify and, instead, began his closing argument by reminding the jury that Mr. Gay had not testified. 95 RT 10920. Shinn later devoted a lengthy portion of his argument to justifying his actions in arranging for the police interview, and telling the jury that he did not know whether Mr. Gay "told the truth in that meeting that was taped." 95 RT 10983. As the referee noted, "Shinn's tactical motivation at this point in the trial is evident, namely to clearly to [sic] explain his own conduct." Rpt. at 73:19-20.

Respondent admits that throughout Shinn's representation of Mr. Gay in the capital proceedings, he "continued to obstruct and delay the investigation" of his embezzlements by appearing "cooperative with [the] District Attorney's investigation while simultaneously taking all steps available to him to frustrate the legitimate aims" of the criminal investigation. Return at 17, ¶ 48. During this time, Detective Gibbons obtained a series of search warrants to examine "the number and

complexity of accounts and transactions Shinn utilized to misappropriate" client funds. Return at 17, ¶ 49. During the same period, Shinn was "actually aware that he was acting unethically, unprofessionally and contrary to petitioner's interests" by virtue of his participation in the illegal capping scheme. *Id.* at 29, ¶ 78.

Shinn's stalling tactics with the District Attorney's embezzlement investigation worked. He managed to string Deputy District Attorney MacKenzie along until the criminal statute of limitations expired. Rpt. at 60:24-26; 15 EH RT 2100. The related State Bar proceedings, however, resulted in his disbarment. The State Bar Court judge who presided at the hearing noted that Shinn "displayed a lack of candor and cooperation" throughout the proceedings and that his "inconsistent and contradictory" explanations for his actions demonstrated "that his primary effort was to conceal his misconduct and/or to avoid criminal prosecution and culpability in these proceedings." Ex. 33 at 53-54. This Court, in turn, observed that when Shinn subsequently testified at the first reference hearing, before the Honorable J. Stephen Czulegar, "his answers were evasive, inconsistent, and often nonresponsive." *In re Gay*, 19 Cal. 4th at 808, n.17.

II. DAYE SHINN'S PREJUDICIALLY DEFICIENT PERFORMANCE DEPRIVED MR. GAY OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

To establish a claim of ineffective assistance of counsel in violation of the Sixth Amendment, Mr. Gay must show both that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's deficient performance, the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). Mr. Gay is not required to show that counsel's deficient performance more

likely than not altered the outcome of the case; rather, the result of the proceeding can be rendered unreliable "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694 ("a reasonable probability is a probability sufficient to undermine confidence in the outcome").

As Justice Werdegar noted: "This case is not an ordinary one." *In re Gay*, 19 Cal. 4th 771, 833 (1998) (Werdegar, J., concurring). The record, including the referee's findings and supporting evidence adduced in response to this Court's Questions 1-3, compel the conclusion that from the moment Daye Shinn defrauded the lower court to obtain his appointment, he failed to provide effective assistance throughout the guilt phase.[3] The evidence and referee's findings show that Shinn's passive "investigation" consisted essentially of simply reading police reports, other discovery and grand jury transcripts, sitting through the preliminary hearing, and agreeing to send his investigator one month before trial (and some eighteen months after the shooting) to canvass the neighborhood for potential guilt-phase witnesses. *See* Rpt.[4] at 9-11; 12:8-9. If Shinn had performed competently, the jury would have understood that although Mr. Gay was present at the scene he had not participated in shooting Officer Verna; and that all of the conflicting evidence was reconcilable with a finding of Mr. Gay's

---

[3] As noted above, this Court appointed the Honorable Lance Ito, Judge of the Los Angeles Superior Court, to take evidence and answer five questions related to Shinn's performance at the guilt phase of Mr. Gay's trial. Shinn's ineffective assistance is demonstrated by the evidence and the referee's findings regarding the first three questions. *See Gay (Kenneth Earl) on Habeas Corpus*, California Supreme Court Case No. S130263, Amended Order to Show Cause, filed August 4, 2008.

[4] For purposes of briefing, Mr. Gay will cite the Referee Report using the "Rpt." designation, cite the 2014 reference hearing as "EH RT" and cite the 1985 trial using the "RT" or "CT" designation.

innocence, or at least reasonable doubt as to his guilt.

The referee found that substantial evidence, including the following, was available to show that Mr. Gay did not participate in shooting Officer Verna:

- Four eyewitnesses who saw a dark-skinned black man – like Cummings but unlike Mr. Gay – exit the car and shoot the officer (Martina Jimenez, Irma Esparza, Walter Roberts, Ejinio Rodriguez);
- At least two Los Angeles County sheriff deputies who heard Cummings confess that he alone killed the officer (Deputy William McGinnis, Sergeant George Arthur);
- Four Los Angeles County inmate witnesses to whom Cummings confessed he killed Officer Verna (James Jennings, Norman Purnell, John Jack Flores, David Elliott);
- Evidence to impeach various prosecution eyewitnesses;
- Five expert witnesses who would have assisted the jury in understanding how the totality of the evidence either affirmatively demonstrated or could be reconciled with the fact that Raynard Cummings acted alone (Dr. Kathy Pezdek, an eyewitness memory expert; Dr. Paul Michel, a conditions of visibility expert; Dr. Kenneth Solomon, an event reconstruction, biomechanics and human factors expert; Dr. Martin Fackler, a wound ballistics expert; Dr. William Sherry, a forensic pathologist).

What is worse, the referee found, and respondent's counsel agreed, that virtually all of this exculpatory eyewitness testimony and other favorable evidence presented at the reference hearing was known thirty-two years ago at the time of trial, and was identified and disclosed to Daye Shinn in discovery. *See, e.g.*, Rpt. at 37: Rpt. at 37:1-15 (finding the "names and addresses" of additional witnesses were disclosed and known to Shinn); 22 EH RT 2768:7-19 (respondent conceding at oral argument that all the additional evidence was known and "already presented in the murder books and ongoing discovery" to Shinn). Much of the same had already been admitted by respondent even before the reference hearing. *See, e.g.*, Return at 41, ¶ 94. ("[Daye] Shinn made no effort to interview or

present the readily available, reliable, credible and persuasive testimony of [McGinnis] who affirmatively exculpated [Mr. Gay] and inculpated co-defendant Raynard Cummings"); *id.* at 62, ¶ 152 (Daye Shinn "failed to call any of the witnesses to co-defendant Raynard Cummings's confessions and admissions made soon after he was arrested").

This evidence constituted the proverbial low-hanging fruit, which required only routine steps for Shinn to investigate and present. Yet Shinn did nothing. Because nothing was done, Shinn's decisions (or lack thereof) were not the product of strategy, but rather of ignorance caused by his failure to interview lay witnesses or consult with experts in the first instance. The evidence at the reference hearing and the referee's findings clearly establish Shinn's ineffectiveness and Mr. Gay's entitlement to relief in this Court.

A. The Evidence and Findings at the Reference Hearing Demonstrate that Daye Shinn Failed to Conduct Any Constitutionally Adequate Guilt-Phase Investigation.

In light of the current record, there cannot be any serious question that Daye Shinn performed deficiently under the Sixth Amendment. The referee found that the full extent of Daye Shinn's investigation consisted of: reading police reports, Rpt. at 9:21-10:4; examining the prosecutor's file, *id.* at 10:4-5; reading the grand jury transcripts, *id.* at 10:23-24; appearing at the preliminary hearing, *id.* at 9:5-9; interviewing Robin Gay, *id.* at 13:11-12; and hiring investigator Douglas Payne, *id.* at 11:18. The referee found that Payne reviewed and organized discovery materials, *id.* at 11:18-12:4; canvassed the crime scene approximately one month before trial, *id.* at 12:8-9; drew a crime scene diagram, *id.* at 12:9-10; and calculated the time period prosecution witness Rose Perez could have observed the

shooting, *id.* at 12:11-13.

Beyond Shinn's mid-trial interview of Robin Gay, no other guilt-phase witnesses were identified, located and interviewed, no experts were consulted and retained, and no follow-up was conducted on Payne's suggested avenues of investigation. It is extraordinary how much basic investigation Shinn did not do, failing to perform such obvious tasks as interviewing the eyewitnesses named in the police reports who said it was the dark-skinned black man (Raynard Cummings) who shot the officer. *See, e.g.*, Rpt. at 37:1-6 (finding the exculpatory eyewitnesses "names and addresses" were in police reports given to Shinn); *id.* at 37:7-10 (inmate witnesses, same); *id.* at 37:12-15 (sheriff deputies, same); *id.* at 37:19-22 (impeachment witnesses, same). As such, Daye Shinn's representation fell well below the objective standard of reasonableness guaranteed by the Sixth Amendment.

1. The Standard of Performance Prevailing at the Time of Mr. Gay's Trial.

As this Court has cautioned, the Sixth Amendment guarantees Mr. Gay was entitled to not merely "some bare assistance but rather to *effective* assistance." *In re Gay*, 19 Cal. 4th 771, 789 (1998) (citation omitted) (emphasis in original). To prove counsel performed deficiently, Mr. Gay must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 668, 688 (1984). Reasonableness is viewed in the context of prevailing professional norms, and courts have endorsed various guides to aid in the reasonableness determination. *See People v. Pope*, 23 Cal. 3d 412 (1979) *overruled on other grounds in People v. Berryman*, 6 Cal. 4th 1048 (1993) (citing favorably the American Bar Association (ABA) guidelines on the role of defense counsel in criminal cases); *see also Strickland*, 466 U.S. at 688 (citing the ABA's 1980

guidelines "The Defense Function" to assess reasonableness, in the record here at Ex. A144 (1979 ed.)); Ex. A145 (1984 California Attorneys for Criminal Justice California Expert Witness Manual and Directory); *see generally* 12 EH RT 1494 *et seq*. (Michael Burt, standard of care expert). Thus, these "well-defined norms" governed the reasonableness of Shinn's guilt-phase investigation from 1983 to 1985.

Daye Shinn's overall performance during the guilt phase of Mr. Gay's trial fell far below *Strickland*'s objective standard of reasonableness under prevailing professional norms for the following reasons.

2. Shinn's Performance Was Sub-Standard in All Respects.

a. Shinn failed in his duty to begin a prompt guilt-phase investigation.

Adequate representation at the time of Mr. Gay's trial required that Daye Shinn conduct a "prompt investigation" of the circumstances of the case against Mr. Gay. Ex. A144 at 53 ("The Defense Function"). The crime occurred on June 2, 1983, and Shinn became involved in Mr. Gay's case two months later in August of 1983, which was around the time of the preliminary hearing. Rpt. at 9:5-7. As the referee found, Douglas Payne's billing records reflect he began working as an investigator about nine months later on May 1, 1984, and was officially appointed on July 18, 1984. Rpt. at 11:20-24.

Despite the duty to conduct a prompt investigation, it was not until mid-January 1985 – approximately eighteen months *after* Mr. Gay's arrest, and one month before opening statements – that Shinn allowed Payne to begin canvassing Hoyt Street for potential eyewitnesses whose reported locations at the time of the offense were noted by Payne on a crime scene diagram he created. Rpt. at 12:8-10; 3 EH RT 212:13-19 (Payne

testimony); Ex. A120 at 17-18, 25-26 (Payne's billing reflecting investigation "re wits" weeks before opening statements). Payne made three neighborhood visits within a space of six days. It is therefore not surprising that investigation did not result in interviews with any of the several eyewitnesses who, in the hours and days following the shooting, gave the police descriptions of events that placed Raynard Cummings shooting Officer Verna outside of the car. There is no evidence in the record that Payne's 11th-hour canvassing produced any evidence to support Mr. Gay's defense that he did not participate in the murder of Officer Verna. Thus, Shinn's 11th-hour request for Payne to canvass Hoyt Street fell well below prevailing professional norms.

b. Shinn failed to supervise Payne's guilt-phase investigation.

Shinn delegated responsibility to Payne for the guilt-phase investigation. *See, e.g.*, Rpt. at 11:24-26 (Shinn requested funds for Payne's case investigation on seven occasions); Ex. A25 at 58 (Payne "would do all the investigations"); 1 EH RT (1996) at 80:25-26 (Payne "did all the investigations, I myself did not"). In turn, Shinn failed to follow up on Payne's suggested avenues of investigation, including consultations with potential expert witnesses. 3 EH RT 199:3-6; *id.* at 200:21-22. Shinn's lack of follow-up was one of the most obvious indications to Payne that Shinn was just "'going through the motions'" at the guilt phase of the trial. 3 EH RT 299:25-300:4. Shinn's own file, which he later destroyed, consisted only of "little bits of notes" he had taken during trial on five or ten scraps of paper, and copies of some filed documents in the case. Ex. A9 at 56; *In re Gay*, 19 Cal. 4th at 811.

Because Shinn failed to supervise Payne's investigation, favorable witnesses were not interviewed, impeachment evidence was ignored, and

evidence that would have led to further exculpatory evidence was undiscovered. *See In re Gay*, 19 Cal. 4th at 791 (finding deficient performance when counsel, *inter alia*, failed to "give specific directions to and monitored his investigator"); *see also Duncan v. Ornoski,* 528 F.3d 1222, 1234 (9th Cir. 2008) ("This court has repeatedly held that a lawyer who fails adequately to investigate and introduce [evidence] that demonstrate[s] his client's factual innocence, or raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance").

1) Favorable witnesses were not interviewed.

Prevailing professional norms at the time of Mr. Gay's trial required that counsel investigate evidence and interview witnesses with "obvious exculpatory potential" who would have buttressed a guilt-phase defense. *Baylor v. Estelle*, 94 F.3d 1321, 1324 (9th Cir. 1996). In *People v. Shaw*, 35 Cal. 3d 535 (1984), trial counsel did not interview numerous witnesses who supported an "arguable, but not meritorious" claim of innocence. This Court found that even though there were "various uncertainties" in the witnesses' testimony, trial counsel was ineffective because trial counsel failed to interview these witnesses in the first instance. *Shaw*, 35 Cal. 3d at 541. Thus, by failing to investigate the facts surrounding the additional evidence, "'counsel deprived himself of the reasonable bases upon which to reach *informed* tactical and strategic trial decisions.'" *Id.* (emphasis in original; citation omitted); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("[a]bsent a reasonably thorough investigation, there cannot be any 'tactical' reason to justify counsel's ultimate failure to uncover and present available" evidence). As this Court found with respect to the penalty-phase investigation in this case, Shinn "gave his investigator no specific

instructions regarding the evidence to be sought." *In re Gay*, 19 Cal. 4th at 810. Shinn's failure to direct Payne to pursue these possibly exculpatory leads constituted deficient performance.

Here, the record developed before the referee demonstrates that numerous witnesses reported information to police that cast doubt on the prosecution theory of the case, were willing to be interviewed and testify on behalf of the defense, and were not interviewed nor called at trial. Irma Esparza, Martina Jimenez, Walter Roberts and Ejinio Rodriguez all would have testified that the only shooter was a dark-skinned man; *i.e.*, one whose complexion was "inconsistent with [Mr. Gay's] but consistent with Cummings's." *People v. Gay*, 42 Cal. 4th at 1224; *see also* Rpt. at 36:24-37:2 (finding names and addresses of eyewitnesses who reported seeing dark-skinned shooter (Cummings) were in the police reports or grand jury testimony).[5]

Similarly, Shinn did not conduct any interviews or follow-up, either personally or through Payne, of multiple, clearly identified witnesses to whom Cummings confessed while in the Los Angeles County Jail, including Deputy Sheriff William McGinnis, Sergeant George Arthur, James Jennings, Norman Purnell, Jack John Flores and David Elliott. *See id.* at 37:7-10 (finding four inmate witnesses who heard Cummings's inculpatory statements were in custody and known to Shinn)[6]; *id.* at 37:14 (finding McGinnis was known to Shinn).

That Shinn was put on notice that several people had potentially exculpatory evidence, but failed to direct Payne to interview them or

---

[5] Respondent admits the same: "Minimal investigation" would have revealed Ejinio Rodriguez's presence that day. Return at 48, ¶ 105.

[6] Respondent admits the same: "[Shinn] . . . failed to call any of the witnesses to co-defendant Raynard Cummings's confessions and admissions made soon after he was arrested." Return at 62, ¶ 152.

present them in court was deficient performance. *See Harris By & Through Ramseyer v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995) ("approximately 32 persons [had] knowledge of the murder . . . [ineffective trial counsel] interviewed only three" of them).

2) Impeachment evidence was ignored.

Prevailing standards of practice at the time of Mr. Gay's trial dictated that trial counsel had a duty to investigate and present evidence that may impeach prosecution witnesses. *See Reynoso v. Giurbino*, 462 F.3d 1099, 1113 (9th Cir. 2006) (trial counsel's failure to investigate possible sources of impeachment rendered her performance deficient under *Strickland*); *see also Larsen v. Adams*, 718 F. Supp. 2d 1201, 1228-29 (C.D. Cal. 2010) ("counsel has an obligation to investigate possible methods of impeachment and the failure to do so may in itself constitute ineffective assistance of counsel"). As the ABA cautioned in 1979, effective investigation is required for competent representation at trial, "for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment" of witnesses. Ex. A144 at 55.

Shinn failed in his duty to investigate – or direct Payne to investigate – obvious sources of impeachment for prosecution witnesses. As the evidence reflects, and the referee found, Shinn and Payne reviewed all police reports and discovery. *See* Rpt. at 9:3-5 (Shinn), *id.* at 12:1-4 (Payne). Accordingly, Shinn reasonably knew of – but failed to investigate – Celester Holt, who would have contradicted her daughter Marsha Holt's testimony that she saw the shooting. *See* Ex. A118 (Celester Holt police report); *see also* 1 Supp. CT 281 (grand jury). If Shinn and Payne reviewed all discovery, then they both knew – but failed to

investigate and present – Deborah Cantu, who would have provided powerful evidence that, at the first opportunity to tell someone what happened on June 2, 1983, Pamela Cummings exonerated Mr. Gay. *See* Ex. A134; *see also* Ex. A137 (Cantu grand jury). If Shinn and Payne reviewed all discovery, then they both knew of – but failed to investigate – the missing composite Robert Thompson gave of the "medium to dark complexion" shooter, which would have pointed to Cummings and exculpated Mr. Gay. Ex. A45. Thus, Shinn's failure to investigate and present evidence that impeached prosecution witnesses fell well below prevailing professional norms.

3) Further exculpatory evidence that went undiscovered.

Prevailing professional norms at the time of Mr. Gay's trial required counsel to follow up on favorable evidence, because those sources may lead to a range of other leads that no other source previously identified. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *see also Wiggins v. Smith*, 539 U.S. 510, 527 (2003) ("[i]n assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further"). Shinn and Payne failed in this respect. For example, if Shinn or Payne had interviewed Sergeant George Arthur, who heard Raynard Cummings boast that Officer Verna took "six of mine," they would have learned that other deputies, including Deputy Lieutenant Richard Nutt, had reported other inculpatory statements made by Raynard Cummings while in custody. Ex. A161. Shinn could have then presented that additional testimony. Shinn's failure to investigate obviously exculpatory evidence constitutes deficient performance.

c. Shinn failed to conduct any independent guilt-phase investigation beyond reading police reports and pre-trial transcripts.

As a corollary to Shinn's failure to supervise or follow up Payne's limited investigative efforts, he also performed deficiently by failing to engage in any "investigation" other than reading the discovery (or Payne's summaries of the discovery), the prosecutor's case materials, and the transcripts of the preliminary hearing and grand jury proceedings. *See* Rpt. at 9:21-10:4, 10:23-24. As this Court found in *In re Hall*, it is inappropriate for defense counsel to rely on police investigation and interviews alone to conduct an adequate defense investigation. 30 Cal. 3d 408, 426 (1981) (establishing an "independent obligation" for a defense attorney to determine the usefulness of witnesses located by police investigation). It is from these initial sources that investigation begins, not ends. Ex. A144 at 54. As this Court explained, it is unrealistic to assume that once charges are filed against a specific individual that "police will search as zealously for exculpatory evidence" as they will for information that might lead to conviction. *In re Hall*, 30 Cal. 3d at 425. As such, it is an "inexcusable delegation of [] duty" for counsel to adopt the results of a police investigation "without attempt to contact" any potential defense witnesses. *Id.* at 426.

But that is exactly what the referee found Shinn to have done. The referee's detailed recounting of Shinn's opening statement, cross-examination and closing argument at trial, *see* Rpt. at 13-25, reveals that they were not based on any independent investigation. Shinn instead relied only on the limited exculpatory or impeachment information that could be salvaged from police reports and prior testimony of prosecution witnesses as his guilt-phase defense. *See* Rpt. at 9:21-22 ("Shinn read the reports

generated by the police investigation") *id.* at 10:4-5 ("Shinn []examined the District Attorney case file four times"); *id.* at 10:10-11 ("Shinn read and analyzed the witness statements produced by police investigation"); *id.* at 10:23-24 ("Shinn appears to have read the transcripts from the grand jury proceedings"); *id.* at 11:10 ("Shinn was present at the preliminary hearing").

The scavenging of police reports in lieu of a substantive investigation on Mr. Gay's behalf was reflected in Shinn's performance in court. The referee found the "results" of Shinn's guilt-phase "investigation" were that he took the limited impeachment evidence he found in his review of the police reports and pre-trial transcripts and used it to cross-examine prosecution witnesses. The referee found that Shinn cross-examined Marsha Holt using her grand jury testimony, Rpt. at 13:22-26, cross-examined Robert Thompson using his grand jury testimony, *id.* at 14:1-6, cross-examined Shannon Roberts using his police report statements and grand jury testimony, *id.* at 14:7-12, and made arguments about inconsistencies in each prosecution witness's testimony compared with earlier statements, *id.* at 20:6-25.[7] Of the seven witnesses who testified in Mr. Gay's case in chief, five were prosecution witnesses whom Shinn recalled to give effectively the same testimony as in the prosecution case, which actually *hurt* Mr. Gay's case. *See generally* 85 RT 9705-86 RT 9827 (remaining two were Billy Sims [a robbery witnesses] and Douglas Payne [who observed a law enforcement agent influencing Shannon Roberts to identify Mr. Gay]). Beyond these findings, there is no evidence in the referee Report or the underlying record that Daye Shinn did anything else to prepare a guilt-phase defense.

---

[7] As will be laid out *infra*, even Shinn's efforts to impeach prosecution witnesses with their prior statements were botched.

d. Daye Shinn failed in his duty to familiarize himself with conditions at the scene.

Prevailing professional norms at the time of Mr. Gay's trial instructed that with respect to eyewitnesses, it was necessary for counsel to know the conditions at the scene that may have affected the witness's opportunity and capacity to observe the scene. Ex. A144 at 55. As the referee noted, "a visit to the actual location" would assist the factfinder in assessing the quality of observations made by the witnesses on Hoyt Street. Rpt. at 51:2-4.

While Payne conducted a belated canvass of the neighborhood on his own, Shinn's billing records indicate that he did not make his own visit to the crime scene.[8] His actions in this regard produced embarrassing results at trial. The houses from which Marsha Holt and Rosa Martin made their reported observations at the time of the offense were both single-story homes. *Cf.* Ex. A111, A117 (photographs of Hoyt Street). Marsha Holt, a critical eyewitness, testified she was purportedly standing at a window at 12127 Hoyt Street when she observed Mr. Gay exit the passenger door and walk around the car to shoot the officer. 68 RT 7527-29. The house at 12127 Hoyt Street is unmistakably a single-story house. Ex. A111-C. Yet, Shinn asked Holt on cross-examination at the preliminary hearing whether she was "on the second floor or third floor" when she first looked out the window. 2 CT 337-38. Similarly, at trial, Shinn inquired on cross-examination of Rosa Martin whether she had looked out her "first story or second story window?" 86 RT 9779. Rosa Martin had to correct Shinn, explaining that it is a single-story house, a fact that is obvious to anyone visiting the Martin residence on Hoyt Street. 86 RT 9779.

---

[8] *See* 04 CT 1119, 07 CT 1827, 07 CT 1871, 07 CT 1976, 09 CT 2389, 10 CT 2727,10 CT 2776 (collecting billing).

Also, during Shinn's cross examination of Marsha Holt at trial, he revealed his mistaken belief that there was a stoplight at the intersection at Gladstone and Hoyt Street:

Q: Then there was a stoplight there, wasn't there?

A: No. A stop sign.

Q: A stop sign?

68 RT 7572. Thus, Shinn's failure to familiarize himself with the crime scene on Hoyt Street, given the importance of the eyewitness testimony, fell well below prevailing professional norms.

Reasonably competent counsel inspecting the crime scene would have been alerted to the "factors impacting the quality of the observations of the trial witnesses," which "were apparent: Full late afternoon summer lighting, distances from 50 to 250 feet, foliage and fences obstructing line of sight, screens and security bars in some of the windows and a traffic stop in a busy suburban neighborhood." Rpt. at 51:11-15. In particular, observation of the obstacles to impeding lines of sight would have led reasonable counsel to consult a vision expert such as Dr. Michel to photographically document and explain why Marsha Holt would not have been able to witness the shooting given her vantage point from her location. The evidence at the reference hearing demonstrates that window mesh, security bars and a fence obstructed the view from the room in which Holt was watching television to the location of the shooter. *See* 14 EH RT 1950 (testimony from Los Angeles Police Department officer agreeing that there appears to have been bars on the window as depicted in Ex. A151); Ex. A114; Ex. A151, A152 (photographs). This evidence shows that even if Holt had been looking in the direction of the shooting at the time it occurred (which she was not) she would not have been able to see the perpetrator given the limited vantage point from that window. 68 RT

7529:6-16; Ex. A114; *see also* 5 EH RT 521 (counsel for respondent stipulating that parts of Holt's testimony are "not correct" and "a wrong fact"). Rather, the evidence demonstrates that Holt's ability to describe Mr. Gay was due to her observing him retrieve the gun and get back into the car before driving off. 68 RT 7530:26-7531:8.

e. Shinn failed his duty to independently investigate the prosecution's physical evidence and subject the prosecution case to meaningful adversarial testing via expert evidence.

Prevailing professional norms at the time of Mr. Gay's trial required counsel to engage with, interact with, and present expert witnesses in criminal trials. Ex. A144 at 60-61 (Standard 4-4.4 "Relations with expert witnesses"); Ex. A145 at 3 (listing publications that publish national registries of forensic experts, litigation consultants, local and state bar association referral lists for experts, trial lawyers' association lists, or legal book sales agency lists for experts). Further, it was the standard of care at the time to consult and present relevant guilt-phase experts, including but not limited to ballistics experts, crime scene reconstruction experts, and eyewitness identification experts. Ex. A145. Defense attorneys were not tasked with seeking out these experts entirely on their own; in 1984, there were publications such as the "California Expert Witness Manual and Directory" (Manual) that listed over 45 different areas of expertise for defense attorneys to explore. Ex. A145 at 5-6. As the referee found, the experts presented at the reference hearing were all of the type available to Daye Shinn at the time of Mr. Gay's trial. *See* Rpt. at 37-39 (finding on availability of experts); *see also* Exceptions at 81 (excepting to the referee's finding on Dr. Fackler's unavailability, noting that a gunshot wound ballistics expert would have been available at the time of trial). Further, as

the referee noted, California Penal Code Section 987.9 provided financial assistance to a defense team for expert assistance upon a showing of relevant need. Rpt. at 39:10-11.

Despite these prevailing professional norms, the referee found that Daye Shinn failed to consult with any expert witnesses in Mr. Gay's case, notwithstanding the lone three-hour notation Payne made in his billing for "dealing with experts." *See* Rpt. at 34:13-14. As Mr. Gay explained in the Exceptions, substantial evidence supports the finding that the three hours Payne expended on "experts" happened at the end of the guilt phase and concerned a last-ditch request for a gunshot residue expert (which ultimately was fruitless). *See* Exceptions at 30-31. For the reasons explained *infra*, Shinn's failure to consult any expert witnesses deprived Mr. Gay's jury of several powerful tools in which to challenge the prosecution's "pass-the-gun" theory and reconcile the various eyewitness accounts of the shooting.

f. Shinn failed in his duty to prepare for plea discussions.

Prevailing professional norms at the time of Mr. Gay's trial required a thorough investigation before defense counsel could properly advise a client to cooperate with the prosecution or admit culpability in exchange for a plea deal. Ex. A144 at 70 ("The Defense Function") ("Under no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including an analysis of controlling law and the evidence to be introduced at trial.").

Investigator Payne's file reflected that he did not begin even the initial review of materials in this case until May of 1984. Rpt. at 11:20-22. Nevertheless, nearly two months earlier in March of 1984, Shinn misled

Mr. Gay to give the prosecution a full confession to charged and uncharged robberies. This Court already has decided that Shinn's actions were "incompetent" and tantamount to acting "as a second prosecutor by creating the evidence that led to [Mr. Gay's] conviction of the robberies." *In re Gay*, 19 Cal. 4th at 792-93. That conclusion remains sound.

Shinn induced Mr. Gay to make the confession by representing to Mr. Gay that a confession to the robberies might persuade the prosecutor to strike a bargain for his testimony at trial; and if not, the prosecution would not use the confession as evidence against Mr. Gay. Unbeknownst to Mr. Gay, the prosecution never had entered into such an understanding with Shinn. There is not and cannot be any legitimate explanation for Shinn's stunning "failure to preserve petitioner's privilege against self-incrimination in the interview with police investigators at which he persuaded petitioner to admit the commission of the robberies." *In re Gay*, 19 Cal. 4th at 829. That Shinn induced Mr. Gay to make these statements without even having an investigator appointed to the case at that point in time is inexplicable.

In sum, Mr. Gay was entitled to an attorney "acting as his diligent and conscientious advocate." *In re Gay*, 19 Cal. 4th at 790. At the time of Mr. Gay's trial, that included an advocate who promptly conducted investigation, protected the client's interests at all stages of negotiations with the prosecution, conducted independent guilt-phase investigation, familiarized himself with the crime scene, interviewed favorable witnesses, pursued impeachment evidence, followed up on favorable leads, and independently investigated and subjected the prosecution's case to meaningful adversarial testing via expert witnesses. But Shinn failed in all these respects. Shinn's failure to present the additional evidence listed below cannot be excused as strategic because he did not have sufficient

information from which to make that informed decision. *Thomas v. Chappell*, 678 F.3d 1086, 1104 (9th Cir. 2012); *see also Correll v. Ryan*, 539 F.3d 938, 951 (9th Cir. 2008) ("Counsel's ineffective assistance . . . cannot be excused as strategic. He failed to conduct an investigation sufficient to make an informed judgment. To the extent that his decisions reflected any tactical considerations, his approach . . . cannot be considered an objectively reasonable strategy, even when viewed under the highly deferential *Strickland* standard.")

Accordingly, in light of the standard of performance prevailing at the time of Mr. Gay's trial, the record and referee's findings demonstrate that Daye Shinn's conduct fell well below the level of reasonable performance for defense counsel in a capital case between 1983 and 1985.

B. But For Daye Shinn's Constitutionally Deficient Performance, There Is a Reasonable Probability that the Result of the Proceeding Would Have Been Different.

Mr. Gay is entitled to relief if he can show that, but for Daye Shinn's deficient performance, there is a "reasonable probability" that the "result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. As the United States Supreme Court cautioned, a reasonable probability does not mean a preponderance of the evidence, but requires a lesser showing of a "probability sufficient to undermine confidence in the outcome." *Id.* at 694. In the context of a guilt-phase ineffective assistance of counsel claim, the question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

In 1998, this Court concluded that it was "unable to put confidence in a verdict of death" when Mr. Gay was "represented by [Daye Shinn]

who[se] incompetent conduct . . . [deprived the jury] the opportunity to consider a substantial amount of mitigating evidence that competent counsel would have presented." *In re Gay*, 19 Cal. 4th 771, 829-30 (1998). Later consideration of a proffer of the additional evidence that Shinn neglected to investigate and present in the guilt phase, coupled with the "absence of physical evidence linking [Mr. Gay] to the shooting and the inconsistent physical and clothing descriptions given by prosecution eyewitness," led this Court to conclude there likely would have been at least lingering doubt as to Mr. Gay's guilt. *People v. Gay*, 42 Cal. 4th at 1226.

Having been afforded the chance to present that evidence, Mr. Gay has shown there was overwhelming proof that he did not participate in Officer Verna's murder. *See* Rpt. at 25-36. This additional evidence, which was readily available to any competent attorney who bothered to look for it, included four eyewitnesses who saw someone matching Raynard Cummings's description shoot the officer; three sheriff deputies and four inmate witnesses who heard Cummings's repeated confessions that he alone killed the officer, compelling impeachment evidence of prosecution eyewitnesses, and a wealth of expert witness testimony that would have led the jury to discount the prosecution's "pass the gun" theory. In particular, the compelling nature that the eyewitness testimony would have had at trial was evidenced by the referee's observation of the emotional impact witnessing this shooting had on the four eyewitnesses, even thirty-two years later. *See, e.g.*, Rpt. at 43:21-44:6.

At bottom, the evidence would have shown the jury that Cummings never "passed" any gun to Mr. Gay for the simple reason that he did not have to do so. There was nothing preventing Cummings from quickly getting out of the car and completing his rampaging, murderous assault on

the officer. That is why *Raynard Cummings* said that was the way it happened. That is why Pamela Cummings (at first) said that was the way it happened. And, that the why Mr. Gay said that was the way it happened. That is also why, in addition to Oscar Martin and Shequita Chamberlain (who *were* called at trial by the prosecution), and Irma Esparza, Walter Roberts, Ejinio Rodriquez and Martina Jimenez (who were *not* called), also would have testified that the shooter was a black male, *not* Mr. Gay. This also explains why prosecution witness Rose Perez saw Mr. Gay walking on the passenger side of the car, over thirteen feet away, with his arms at his side and nothing in his hands when the officer was shot. *See, e.g.*, 70 RT 7843.

Even though Shinn left the prosecution an open goal, the testimony of the four eyewitnesses who ultimately identified Mr. Gay as the shooter was marred by significant discrepancies. Prosecution eyewitness Robert Thompson's description of the shooter flip-flopped three different times in pronounced ways. *See People v. Gay*, 42 Cal. 4th at 1226.[9] Marsha Holt's "eyewitness" testimony was significantly undercut by another prosecution witness, Gail Beasley, who testified that Holt was inaccurate (or even lying) about even witnessing the shooting. *See* 74 RT 8332.[10] In turn, Beasley's reports of the shooter's clothes consistently identified Raynard

---

[9] In contrast to his testimony at trial that Mr. Gay shot the officer, Robert Thompson "told police in the first few hours" that the "passenger in the rear seat had fired all the shots" and was a "medium-to-dark complexion and was wearing a brown short-sleeved shirt and baggy jeans." Ex. A45; *see also* Ex. A107 (chronology of Robert Thompson's statements in relationship to his additional interviews with law enforcement).

[10] Holt was on the bed "facing [the television]" and asked, "what? what's happening?" when Beasley came into the room to tell her an officer had just been shot. 74 RT 8332.

Cummings.[11] Similarly, Shannon Roberts reversed the roles of the suspects, describing Mr. Gay as the shooter and the dark-skinned suspect as the one who picked up the officer's gun. 69 RT 7815-16. The fact that the prosecution's case was weakened by conflicting internally inconsistent eyewitness testimony only bolsters the value of the additional testimony. *See Strickland*, 466 U.S. at 696 ("A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

In light of the exculpatory evidence summarized above, which the referee found that Mr. Gay could have presented, and the weak prosecution case, there is a strong probability of a different result in the absence of Shinn's incompetence.

The central question Mr. Gay's jury had to answer was whether Mr. Gay *in addition* to Cummings shot the officer. The additional, exculpatory evidence that the referee found was available at trial serves to identify three sources of prejudice that individually and cumulatively demonstrate Mr. Gay's entitlement to relief. First, the additional evidence illuminates the devastating prejudice of Shinn's incompetence in securing Mr. Gay's confession to the charged and uncharged robberies. Second, the evidence provides multiple, individualized bases to doubt the prosecution's case at trial, any one of which undermines the confidence of the jury's verdict. *See Smith v. Cain*, 132 S. Ct. 627 (2011) (undisclosed statement that contradicted one eyewitness's trial testimony would have undermined confidence in the outcome of the entire trial). Third, the additional items of

---

[11] *See* Ex. A12 at 1 (police report) ("burgundy short sleeve shirt"); Ex. A12 at 2 (police report) ("burgundy tank top"); 1 Supp. CT 208:17 (grand jury) ("I know [the shooter's] shirt was red."); *People v. Gay*, 42 Cal. 4th at 1226 (finding that Beasley's description of the shooter's shirt was "likewise consistent with Raynard Cummings's clothing").

evidence work collectively to mutually reinforce a conclusion that no one but Raynard Cummings shot the officer that day. *See Lord v. Wood*, 184 F.3d 1083, 1094 (9th Cir. 1999) (additional defense witnesses provided "mutually reinforcing statements" that exonerated the defendant, particularly because their statements were "consisten[t] . . . and steadfast[].").

For the following reasons, this Court should find that absent Shinn's pervasive incompetence, there is a reasonable probability that the result of Mr. Gay's guilt phase would have been different.

1. Shinn prejudicially created the confession, thereby providing motive for the murder.

The current record now shows that, as with the penalty phase, the prejudice of Shinn's manifestly "incompetent performance" in failing to protect Mr. Gay's "privilege against self-incrimination in the interview" at which he "persuaded petitioner to admit commission of the robberies" simply "cannot be overstated." *In re Gay*, 19 Cal. 4th at 792-93, 829. As the record now reflects, and the Court now knows, several of the robberies were quite defensible, including one that was dismissed for insufficient evidence. *See id.* at 792-93. It was thus "Shinn's incompetence in persuading petitioner to make the statement," that "led directly to petitioner's conviction on *all* of the robbery counts," except the one dismissed by the trial court. *Id.* at 827 (emphasis added).

As the Court also observed, by "creating the evidence that led to petitioner's conviction of the robberies," Shinn "permitted the prosecutor to portray petitioner as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies." *Id.* at 793. This compelling evidence of motive, which was created by Shinn alone, provided "circumstantial evidence of premeditation and deliberation, both of which

are elements of first degree murder," as well as supplied "an element of the special circumstance of murder for the purpose of avoiding arrest." *People v. Cummings*, 4 Cal. 4th 1233, 1284 (1993).

The profound impact of the confession in creating a motive for the murder and special circumstance allegation was readily apparent to, and exploited by, the prosecutor. It served as the cornerstone of his guilt-phase opening statement and closing argument, during which he played the confession in its entirety. He urged the jurors to "bear in mind motives," argued that "[p]erhaps the most damning piece of corroborative evidence is Mr. Gay's confession," and told the jurors "[h]e confessed, that is really all you need." 95 RT 10858, 10871, 10885. Absent the Shinn-created proof that unfairly "led directly" to the robbery convictions, "that motivation argument would not have been as strong as applied to petitioner." *In re Gay*, 19 Cal. 4th at 827.

The current record also demonstrates that there was a strong "possibility that the jury was improperly influenced by the evidence of the robberies" to find Mr. Gay guilty of the murder because Shinn also incompetently failed to present *any* of the several eyewitnesses who would have testified that Mr. Gay did not participate in the shooting. *Cummings*, 4 Cal. 4th at 1285. In the absence of a fabricated confession to being a "serial robber" motivated to kill police officers, and buttressed by exculpatory eyewitness testimony to refute the identifications that "varied greatly," there is a strong probability that Mr. Gay would have received a more favorable result in the guilt phase.

2. Shinn prejudicially failed to investigate and present four eyewitnesses who "described the shooter's complexion as inconsistent" with Mr. Gay's "but consistent with Raynard Cummings's."

The referee found that on June 2, 1983, a light-skinned Mr. Gay was wearing a light grey long-sleeved shirt and sitting in the front passenger seat of a two-door car. Rpt. at 7. The medium- to dark-skinned black male, Raynard Cummings, was wearing a maroon short-sleeved shirt and sitting in the backseat. *Id.* It is undisputed that Raynard Cummings fired the first shot from the backseat as Officer Verna was leaning into the car. *People v. Gay*, 42 Cal. 4th at 1202. At trial, prosecution witnesses Oscar Martin and Shequita Chamberlain testified that Cummings exited through the driver door and continued firing at the victim. 95 RT 10886-87. Other prosecution witnesses testified that a light-skinned Mr. Gay exited the car, but were conflicted as to whether he climbed over the driver seat and exited the driver door (Robert Thompson) or exited the passenger door and walked around the front of the car (Marsha Holt, Gail Beasley, Shannon Roberts) before shooting. It was from these two sets of witnesses that the prosecution argued Cummings fired the first and maybe second shot, and then Cummings, after trying to get out of the car to continue shooting (but perhaps finding himself stuck in the seatbelt), suddenly disarmed himself and handed the gun back to Mr. Gay in the passenger seat, who then exited the car and continued shooting. 58 RT 6233 (opening argument); 95 RT 10992 (closing argument).

It is undisputed that after the officer was shot, the car drove off, made a U-turn and drove back to the scene where Mr. Gay exited the passenger door and went around the car to retrieve a weapon on the ground by the officer before getting back into the car. *See People v. Gay*, 42 Cal. 4th at 1224 ("the defense never disputed that [Mr. Gay] had gotten out of the car

to retrieve a weapon after the shooting"). The central question concerns who in the car – Mr. Gay in the front passenger seat or Raynard Cummings in the backseat – exited the car after the first or second shot to continue shooting the officer.

As this Court observed, and the referee so found, there were four additional eyewitnesses never called at trial – Irma Esparza, Ejinio "Choppy" Rodriguez, Walter Roberts, and Martina Jimenez – who were present that day and would have described the shooter's complexion as inconsistent with Mr. Gay's but "consistent with Raynard Cummings." *People v. Gay*, 42 Cal. 4th at 1224. As this Court acknowledged, such testimony could have had "particularly potency in this case" given the inconsistencies of the prosecution eyewitnesses. *Id.* at 1226. In a case fraught with inconsistencies – whether the shooter emerged from the driver or passenger door, whether the shooter was the light- or dark-skinned male – Shinn's failure to interview and present the testimony of the following four eyewitnesses who identified a person matching Raynard Cummings's physical appearance as the shooter was prejudicial.

a. Irma Esparza identified the shooter as a "dark-skinned male negro," and described the man who retrieved the gun after the shooting as a light-skinned man.

The referee found that Shinn could have presented the testimony of Irma Esparza, who was thirteen years old at the time and was watching her younger brother, Ejinio Rodriguez, and Shannon and Walter Roberts play in the front yard of 12097 Hoyt Street when the officer was shot. Rpt. at 28:6-8. The morning after witnessing the offense, Ms. Esparza went to the police station and was interviewed by Officer A.R. Moreno. Rpt. at 28:8, 42:17-22.

The referee found that Ms. Esparza recounted specific details about the shooting: the shooter was a "dark skinned male negro, about twenty-five years old with a three to four inch afro" and the front-seat passenger "male negro" had "light skin, wearing a white long sleeved shirt." Rpt. at 28:8-11. She recalled, both at the time she gave the report and at the reference hearing thirty-two years later, the vivid image of the officer being shot in the neck. *Id.* at 28:17-21. Ms. Esparza also described the light-skinned passenger as the person who "got out of the car and retrieved the gun" after the car made a U-turn. Rpt. at 43:5-6. Her descriptions, if presented to Mr. Gay's jury, would have "more strongly" pointed towards Raynard Cummings, according to the referee. Rpt. at 28:21-22.

As the referee noted, Ms. Esparza's descriptions had the added benefit in that she differentiated between the shooter (dark-skinned black male, Raynard Cummings) and the front seat passenger (light skinned with white long-sleeved shirt, Mr. Gay) and their respective actions (shooting the gun versus retrieving the gun). *Id.* at 28:22-25.

Ms. Esparza's description of the shooting was also substantially consistent with other evidence. Ms. Esparza's distinct and vivid recollection that officer was shot first in the neck is reinforced by the forensic evidence. Ex. A78 at 3561:11-13 (the first shot entered the neck). If Shinn had presented James Jennings and Robin Gay's testimony, Ms. Esparza's account also would have been further corroborated by Raynard Cummings's admissions to them. Rpt. at 30:3 (Raynard Cummings to James Jennings) ("[I] pulled the gun from between [my] legs and shot Verna twice in the upper body, once in the neck or shoulder area, and once in the upper body"); 3 Supp. CT 718:4-10 (Raynard Cummings to Robin Gay) ("the cop grabbed his neck, he spun around and went down to his knees."). This congruence made Ms. Esparza's (and Mr. Jennings's and

Ms. Gay's) testimony more credible and given Mr. Gay's jury a reason to doubt the prosecution's version of events.

Similarly, Ms. Esparza's impression that the driver "punched" the officer in the face as he was writing on a white card, or that the shooter pulled the officer's gun out of his holster to shoot him in the neck was corroborated by similar recollections of other prosecution witnesses and the physical evidence. For instance, Oscar Martin testified at the grand jury that when the officer was standing on the driver's side of the car, it appeared as if the person in the backseat hit the officer back by pushing open the car door. 1 Supp. CT 252. That both prosecution witness Oscar Martin and Irma Esparza recalled seeing the officer being "pushed" back or "punched" back after the first shot is mutually reinforcing testimony that makes their overall observations more credible. *See Lord*, 184 F.3d at 1094.

Likewise, Ms. Esparza's recollection that the officer "holding a little white card and a pen in his left hand" before being punched was corroborated by trial exhibits of the crime scene on June 2, 1983, depicting a white card on the ground next to the officer's motorcycle. 1985 Trial Exhibits KKK-1, KKK-2. Further, Oscar Martin and Irma Esparza both recall seeing the dark-skinned black man, upon exiting the car, reach in the area of the officer's holster. *Compare* 13 EH RT 1717:2-15; Ex. A13 at 1 (Esparza recalling the driver reaching for the officer's gun) *with* 1 Supp. CT 252 (Martin testifying that the man may have "unhooked his belt of the gun").

b. Martina Jimenez also identified the shooter as a "male black with a dark complexion."

The referee found that nine-year-old Martina Jimenez observed the shooting from the front yard of her house at 12133 Hoyt Street. Rpt. at

26:6-8. She watched as Officer Verna walked up to the car and was shot, and described the shooter to police as a "male black, tall, young looking, thin and ugly," which the referee found "strongly points towards Raynard Cummings" as the shooter. *Id.* at 26:12-17. At the reference hearing, she described the shooter as a "male black with a dark complexion." *Id.* at 26:13. When shown booking photographs of Raynard Cummings and Mr. Gay side-by-side at the reference hearing, Ms. Jimenez affirmatively pointed to Raynard Cummings as the person who shot and killed the officer. 11 EH RT 1401:6-10.

Despite her "initial descriptions given to police [that] more strongly point to Raynard Cummings," Shinn never interviewed her even though her name and address was known to him. Rpt. at 26:16-17; *id.* at 37:1-2. Significantly, after interviewing her, the prosecutor did not call her to testify. This should at least have led the defense to follow up to determine why the prosecutor had decided to pass on a percipient witness. At minimum, it demonstrates why the independent defense investigation that this Court prescribed in *In re Hall* is necessary given that when shown both suspects photographs, Ms. Jimenez identified Raynard Cummings as the shooter. Rpt. at 26:12-13, 11 EH RT 1401:6-10.

c. Ejinio Rodriguez also would have identified the shooter as a "black man, who had dark skin and was wearing a dark shirt," and a light-skinned man who retrieved the gun.

The referee found that eight-year-old Ejinio Rodriguez was playing in the front yard of his family home with Shannon Roberts and Walter Roberts. Rpt. at 27:18-21. His attention was drawn down the street when he heard the gunshots, and saw a "black man who had dark skin and wearing a dark shirt" shooting the officer. Rpt. at 28:2. The car then drove

up the street, made a U-turn at Prager Avenue, and sped back down Hoyt Street and someone jumped out and grabbed the officer's gun.[12] Rpt. at 27:22-25. As the referee found, Ejinio Rodriguez's description of the shooter "points more strongly" to Raynard Cummings. Rpt. at 28:4. In contrast to the dark-skinned shooter, Ejinio Rodriguez described the person who jumped out to retrieve the gun as a "man with much lighter skin" who was "not the man who actually shot the officer." Ex. A24 at 1, ¶ 8.

If Shinn had interviewed and presented Mr. Rodriguez's testimony, Mr. Gay's jury would have heard yet another eyewitness describing the outside shooter as a dark-skinned black man. Mr. Rodriguez's descriptions of the actions of the dark-skinned shooter and of the light-skinned man who alighted from the car to retrieve a gun was fully consistent with other witnesses who were called by the prosecution, including Pamela Cummings's initial report hours after the shooting to her sister Deborah Cantu; and Raynard Cummings's confessions to other inmates. Similarly, Mr. Rodriguez's testimony would have been corroborated by prosecution witness Shannon Roberts, who testified at trial he saw Mr. Rodriguez was looking down Hoyt Street when the officer was shot. 69 RT 7811:25; *see also* 10 EH RT 1351:16-18 (Ejinio Rodriguez testifying that he moved to the front of the lawn area to get a better view of Hoyt Street).

The testimony from prosecution witnesses Rosa, Sabrina, and Hans Martin that it was Mr. Gay who exited the car to pick up the gun were similarly consistent with Mr. Rodriguez's observations, thereby tending to show that Ms. Esparza's and Mr. Rodriguez's accounts of the entire shooting could have been reconciled with the accounts of all the

[12] Although the referee did not make this finding, substantial evidence supports a finding that Ejinio Rodriguez also described the person who jumped out to retrieve the gun as a "man with much lighter skin" who was "not the man who actually shot the officer." Ex. A24 at 1, ¶ 8.

prosecution witnesses' in the Martin household. *Compare* 10 EH RT 1330-3, 1353-54; Ex. A24 at 1, ¶ 8 (Ejinio Rodriguez testifying that the man with much lighter-skin jumped out of the car and picked up the officer's gun) *with* 67 RT 7460 (Rosa Martin testifying that Hans Martin, Sabrina Martin and herself all saw a light-skinned man exit the car and pick up the officer's gun). But for Daye Shinn's deficient performance, Mr. Gay's jury would have heard this additional evidence.

d. Walter Roberts identified the shooter as "male negro . . . medium complexion . . . dark blue long sleeve shirt."

The referee found that twelve-year-old Walter Roberts was present in a front yard driveway at 12097 Hoyt Street playing with his brother (and prosecution witness) Shannon Roberts and neighbor Ejinio Rodriguez. Rpt. at 26:19-22. At the sound of what Walter Roberts believed to be fireworks, he looked down the street and saw the shooter holding the gun and getting out of the driver-side door as he continued to shoot at the downed officer. Rpt. at 27:5-8 (citing Walter Roberts's two police reports made hours after the shooting). In his police statements on the night of the shooting, Walter Roberts consistently described the shooter as looking like Raynard Cummings. In his initial report, Walter described the shooter as a "male Negro, black . . . long sleeve multicolor shirt, dark pants." Rpt. at 27:9. Hours later he again described a "male Negro, black . . . medium complexion, 3-4 inch afro . . . wearing a dark blue long sleeve shirt, blue jean pants, dark shoes" as the shooter. Rpt. at 27:11-13. Within a few days of the shooting, Walter Roberts again consistently identified a dark-skinned black man in line-up No. 9 as the one who looked "the same" as the shooter, thus excluding the light-skinned Mr. Gay as the shooter. Resp. Ex. 755; 9 EH RT 1286:17-18.

This materially exculpatory evidence described a medium-complexioned black male, single shooter wearing a dark colored shirt, who fired from both inside and outside the car, and who emerged from Cummings's position on the driver's side of the car. *See* Rpt. at 27:14-16 (these initial shooter descriptions "more strongly point to Raynard Cummings than [Mr. Gay]").

Additionally, the referee's findings regarding Walter Roberts's testimony corroborates prosecution evidence at trial. The referee's finding regarding Walter Roberts's description of the shooter's clothing closely matches the physical description of Raynard Cummings's clothing given by prosecution witnesses at trial. *Compare* Rpt. at 27:9-13 (Walter Roberts describing shooter's "dark blue long-sleeve" or "long-sleeve, multi-color shirt" with "dark pants") *and* 74 RT 8378 (prosecution witness Eula Heights: Cummings wearing a burgundy sweat-suit top); 68 RT 7523 (prosecution witness Shequita Chamberlain: shooter wearing a "dark-colored shirt"); Ex. A12 at 1 (prosecution witness Gail Beasley, shooter wearing a "burgundy" shirt). Walter Roberts's testimony would have further corroborated prosecution witness Oscar Martin's description and identification of Cummings as the sole shooter, as well as prosecution witness Robert Thompson's initial, uncontaminated description of the black suspect in the dark-colored shirt firing from the driver's side and then continuing to fire as he got out of the car. *See* Ex. A135 (Oscar Martin); Ex. A45 (Robert Thompson).

Walter Roberts consistently described a single, black male wearing a dark-colored shirt who did all the shooting, from inside and outside of the car. *See* Rpt. at 27:4-13 (reaffirming twice in the hours after the shooting that it was the black male driver in the dark shirt who was the sole shooter). But because Shinn failed to interview and present Walter Roberts, the jury

heard none of this additional evidence.

For the reasons detailed above, each individual eyewitness provides a separate reason to doubt Mr. Gay's guilt. But aggregated, the set of additional eyewitness evidence provides this Court with an even greater probability that the result of Mr. Gay's guilt phase would have been different. Because Shinn failed to interview and present these eyewitnesses, there is the larger point that they could have, collectively, provided an effective overall defense theory that Shinn utterly failed to see: the presence of these four additional eyewitnesses (in combination with Shequita Chamberlain, Oscar Martin, and arguably Robert Thompson and Pamela Cummings) would have allowed Shinn to argue that the jury could not be confident enough in the testimony of Gail Beasley, Marsha Holt, or Shannon Roberts to find Mr. Gay guilty of Officer Verna's murder beyond any reasonable doubt. *People v. Gay*, 42 Cal. 4th at 1224 (the four additional eyewitnesses would have "substantially bolstered" any residual or lingering doubt of Mr. Gay's guilt). Or, conversely, Shinn could have argued that Mr. Gay's jury would have to find that at least six eyewitnesses were either lying or mistaken when they identified a dark-skinned black man as the outside shooter. *See Lord*, 184 F.3d at 1094 (additional defense witnesses with "no ties to [defendant] and with no reason to lie" could have provided "mutually reinforcing statements" that exonerated the defendant, particularly because their statements were "consisten[t] . . . and steadfast[].").

Accordingly, this Court should find that the testimony of these additional eyewitness was credible and that, but for Shinn's errors, the factfinder would have had a reasonable doubt respecting guilt.

3. Shinn prejudicially failed to investigate and present sworn peace officers who heard Raynard Cummings's confessions and admissions made soon after his arrest.

If Shinn had performed as a reasonably competent advocate, he would have presented the testimony of numerous law enforcement witnesses who would have testified to Raynard Cummings's confessions and admissions made soon after his arrest. As respondent admitted, Raynard Cummings made confessions and admissions soon after he was arrested, and Daye Shinn failed to call any of the witnesses to these statements in Mr. Gay's defense. Return at 62, ¶ 152. The referee made similar findings. *See* Rpt. at 31:12-32:14. There is no dispute that testimony from a law enforcement officer would have given greater credibility to the other inmate witnesses who also described Cummings's confessions to them. *See* Return at 71, ¶ 171 (admitting the same). On the whole, because there was no reason to keep these witnesses off the stand, and because Mr. Gay's jury would have heard powerful exculpatory testimony from law enforcement witnesses, there is a reasonable probability the result of Mr. Gay's guilt phase would have been different.

At trial, the prosecution presented three sheriff deputies who heard some of these statements in their case-in-chief: Rick McCurtain, David La Casella, and Michael McMullan. They did not, however, unequivocally exonerate Mr. Gay. Only McMullan's report solely inculpated Cummings, and the remainder of the testimony left it ambiguous as to whether Cummings alone shot the officer. *See* 76 RT 8611 (David La Casella) (Cummings, in Mr. Gay's presence, referred to Gunshot No. 6 as "That's the one I put in the motherfucker"); 66 RT 7219 (Rick McCurtain) (Cummings said, "This is how it was done. First two in the back . . . then we put four more" into the victim). Thus, it was critical that Shinn present

Cummings's admissions to deputy sheriffs whom the prosecution chose not to present, particularly because these three other statements exonerated Mr. Gay.

a. The testimony of Deputy Sheriff William McGinnis would have given Mr. Gay's jury a significant reason to doubt the prosecution's case.

Daye Shinn made no effort to interview or present the testimony of Deputy Sheriff William McGinnis, to whom Cummings confessed he was the one who shot Officer Verna. Rpt. at 31:13-20; 37:12-15; Return at 41, ¶ 94. (respondent admitting McGinnis's testimony "affirmatively exculpated" Mr. Gay).

Los Angeles Sheriff's Deputy William McGinnis worked at the Los Angeles County jail at the time Raynard Cummings was in custody awaiting trial. Rpt. at 31:13-14. While he was escorting Raynard Cummings to the court line in jail, McGinnis instructed Cummings and the other inmates to follow the "no talking" rules. *Id.* at 31:14-15. Cummings shot back, "I can't wait to get back on the street so I can run into one of you punk-ass motherfuckers." Rpt. at 31:16-17. When McGinnis responded, "Well, I never shot anybody in the back," Raynard Cummings boasted, "Yeah, well, I put three in front of the motherfucker, and he wouldn't have got two in the back if he hadn't turned and ran, coward punk-ass motherfucker."[13] Rpt. at 31:17-20. Because the prosecution's theory at trial depended on the argument that Cummings shot the officer "once and

[13] As Mr. Gay explained in the Exceptions, the Report cites McGinnis's 402 hearing testimony, where he mistakenly testified that Cummings said he put "two" shots in the front. Exceptions at 21-23. McGinnis's contemporaneous report, written on the same day Cummings made his statement, documented the fact that Cummings admitted firing "three" shots before Officer Verna turned around. Ex. A167.

maybe twice" before handing the gun to Mr. Gay, and that all the shots were fired in "just seconds," Cummings's admissions to McGinnis necessarily exculpates Mr. Gay. 58 RT 6212 ("Paul Verna was shot in a very, very short period of time"), *see also* 58 RT 6233. Because of Shinn's deficient performance, Mr. Gay's jury did not hear this critical testimony.

Respondent has admitted key facts to establish that Shinn's failure to present Deputy McGinnis's testimony was prejudicially deficient as a matter of law. Respondent admits that Deputy McGinnis's testimony would have "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.'"). The parties also do not dispute that this testimony from a uniformed law enforcement officer would have given greater credibility to the inmate witnesses whose testimony inculpated Cummings and exculpated Mr. Gay. Return at 71, ¶ 171. Given that Shinn was sitting in court and purportedly listening as McGinnis testified to the contents of Cummings's statements at a hearing outside the presence of Mr. Gay's jury, the fact that he "made no effort to interview or present" McGinnis to have him repeat the statement before Mr. Gay's jury, is inexplicable. *See* Return at 41, ¶ 94; *id.* at 69, ¶ 167.

b. The frequency with which Cummings confessed to shooting Officer Verna would have given Mr. Gay's jury reason to doubt Mr. Gay's participation in the shooting.

Los Angeles Sheriff's Sergeant George Arthur was assigned to the 3000 module at the Los Angeles Men's County Jail. Rpt. at 31:21-22. Part

of Sergeant Arthur's duties was supervising deputies in the jail. Rpt. at 32:11-12. While Sergeant Arthur was escorting Raynard Cummings with Deputy McMullan, other inmates began taunting Cummings by chanting, "Dead man walking." Rpt. at 31:23-24. Cummings then responded, "I am no ghost. The only ghost I know is Verna. I put six in him." Rpt. at 31:25-26. Cummings then shouted at Sergeant Arthur, "He took six of mine." Rpt. at 32:1. In addition to this testimony, Arthur also would have testified that as a supervisor, he had received so many similar reports from sheriff's personnel that he declined to take any more formal reports of Cummings's frequent confessions. Rpt. at 32:12-14. If Shinn had followed up on the police reports that memorialized Cummings's custodial admissions, Mr. Gay's jury would have heard this critical testimony sponsored by a law enforcement officer.

On this point, acceptance of the referee's findings supports an additional claim for relief under *Brady v. Maryland*, 373 U.S. 83 (1963) based on Sergeant Arthur's failure to disclose an untold number of similar reports. Under *Brady v. Maryland*, suppression of exculpatory or impeaching evidence by the prosecution violates due process where the evidence is material to guilt. 373 U.S. at 87. Here, the referee found that Sergeant Arthur instructed a sheriff deputy in custody not to memorialize an exculpatory statement given by Raynard Cummings that he killed Officer Verna. Rpt. at 32:9-10. The evidence shows that Sergeant Arthur adopted a similar practice in response to ongoing reports from other law enforcement personnel. *Id.*; Ex. A161. As evidenced by the current record, there is further reason to believe that the reports Arthur instructed his subordinates not to preserve were likely to have had additional degrees of explicit detail indicating that Cummings alone was the shooter. Given respondent's admission that law enforcement witnesses would have been credible and

lent further credibility to the other witnesses who heard Cummings's confessions, Return at 71, ¶ 171, a confession from Raynard Cummings admitting to killing Officer Verna (and not disputing that he shot the officer five times in the back) was materially exculpatory as to Mr. Gay. Accordingly, Mr. Gay is entitled to relief.

c. The testimony of Deputy Lieutenant Nutt that Cummings admitted to killing Officer Verna would have given Mr. Gay's jury a reason to doubt Mr. Gay's guilt.

If Shinn had interviewed Sergeant Arthur about Cummings's statements, it is reasonably likely he would have learned that Lieutenant Richard Nutt was one of those sheriff's personnel who heard similar comments by Raynard Cummings.[14] Lieutenant Nutt was a new sheriff deputy working an overtime assignment at the Los Angeles County jail. Rpt. at 32:6-7. While Nutt escorted three high security inmates to and from the showers, Cummings spoke directly to him: "Hey Nutt. I killed Verna. He had about sixteen years on. When I get out of prison you will have about sixteen years on and I will kill you too." Rpt. at 32:9-10. As Mr. Gay noted in the Exceptions, upon hearing this, Nutt grew angry and responded that Cummings was a coward for shooting Officer Verna in the back five times, and that if Cummings wanted to hurt him to do it now. Ex. A161. Cummings said nothing to dispute Nutt's description of the number

[14] On this point, the referee found that Nutt's written statement would not have been available to Shinn since Nutt wrote down Cummings's statement in 2000. Rpt. at 37:16-17. But as Mr. Gay explained in the Exceptions, even though the written statement was not available in 1985, by interviewing Sergeant Arthur, Shinn or Payne would have learned that other deputies, including Deputy Lieutenant Nutt, made similar reports of Cummings's inculpatory statements. Shinn could have directed Payne to go interview Nutt. *See* Exceptions at 35-36.

of times Cummings shot the officer, which was an adoptive admission that he shot Officer Verna five times in the back. *See* Cal. Evid. Code § 1221.

The prejudice in failing to present the foregoing officers' testimony cannot be overstated. The prosecutor admitted that there was no evidence that Mr. Gay made any inculpatory statements to anyone while in custody. 92 RT 10613:21-22 ("In fact, I don't think Mr. Gay has confessed to anybody."); *id.* at 10614:12 (prosecutor stating there is "no evidence" in the record that Mr. Gay confessed). Conversely, the prosecutor repeatedly touted Cummings's confessions to Deputies McCurtain, McMullan, and La Casella as evidence he had participated in the homicide. *See* 91 RT 10373:1-7 ("You listen to . . . Deputy McCurtain, Deputy La Casella, Deputy McMullan. They are all saying the same thing. You think this is some sort of conspiracy where they make this up? Nonsense. Nonsense. All unalterable facts that you have to accept. Proud of it. No remorse.").

But the prosecutor was careful, and used the deputies' testimony at trial to argue that Mr. Gay was also guilty. *See* 95 RT 10912 ("[Raynard Cummings's statement to La Casella] is very strong against Mr. Cummings, but it says something by inference about Mr. Gay."). By highlighting the ambiguity in Cummings's statements to Mr. Gay's jury, the prosecutor was able to muddy up the statements and inculpate Mr. Gay along with Raynard Cummings. *See id.* at 10913 (arguing in closing that Cummings's statement to La Casella admitting to one gunshot meant that the jury should infer that "Mr. Gay put the other five in").

Had Shinn presented the testimony from Deputy McGinnis, Sergeant Arthur, and Lieutenant Nutt, Shinn could have emphasized two compelling points. First, Shinn could have cleared up the ambiguities the prosecution was trying to exploit. Shinn could have argued that yes, Cummings told La Casella that he shot "gunshot no. 6," but Cummings did not stop there,

because he also told McGinnis he put "three in the front . . . and two in the back," told Arthur that Officer Verna took "six of mine," and did not dispute Nutt's statement that Cummings shot the officer five times in the back. *See* Rpt. 31:13-32:11. Shinn could have then used Sergeant Arthur or Lieutenant Nutt's testimony to contrast Mr. Gay's lack of statements with Cummings's inability to restrain himself from confessing, given that so many similar statements were made that Sergeant Arthur, as a supervisor, declined memorializing any further reports. *See* Rpt. at 32:11-14.

Shinn could have also embraced what the referee labels as "cumulative" evidence as three separate reasons to doubt the prosecution's case *on top of* the prosecution's law enforcement witnesses. The additional testimony would have been virtually unimpeachable given the congruence with the prosecution's evidence against Mr. Cummings (but not Mr. Gay) at trial. Moreover, the additional testimony would have come from law enforcement witnesses, who would have testified with the imprimatur of the state and given an even stronger appearance of credibility. *See also* Return at 71, ¶ 171 (respondent admitting testimony from a law enforcement officer would have given greater credibility to the other inmate witnesses who also testified to Cummings's admissions to them). Shinn could have then piggy-backed on the prosecution's argument that it would be "nonsense" for law enforcement officers to "make [anything] up," and that Cummings was truthful in his admissions, because as the prosecutor argued in closing, "are you going to falsely confess . . . when you didn't [shoot the officer]?" 94 RT 10767.

Thus, because Mr. Gay's jury would have heard powerful exculpatory testimony from law enforcement witnesses, there is a reasonable probability the result of Mr. Gay's guilt phase would have been different given the foregoing testimony.

4. Shinn prejudicially failed to investigate and present inmate witnesses in custody who heard Raynard Cummings boast about the way he shot and killed Officer Verna in various detail.

In addition to Daye Shinn's failure to present the confessions Cummings made to law enforcement officers, Mr. Gay's jury did not hear evidence from four witnesses who were in custody with Cummings, and to whom Cummings also confessed that he alone shot Officer Verna. *See* Return at 62, ¶ 153 (respondent admitting Cummings made inculpatory statements to various inmates including John Jack Flores and James Jennings). Shinn received reports of these statements in discovery, but Shinn failed to interview or call any of the identified, readily available witnesses. Rpt. at 37:7-10; Return at 62, ¶¶ 152, 154-55 (respondent admitting Shinn's failure to investigate or call inmates at trial). If Shinn had interviewed and presented the following inmate witnesses, Mr. Gay's jury would have had four additional reasons to doubt his guilt.

a. Raynard Cummings's statement to James Jennings exonerated Mr. Gay.

As the referee recounted, James Jennings was in custody at the Los Angeles County Jail at the same time as Raynard Cummings. Rpt. at 29:19-21. While the two were riding the bus together to court, Cummings recounted details about the murder of Officer Verna:

> Cummings then stated that he had a .38 cal revolver hidden between his legs, and Verna asked him, Raynard, if he had I.D., Cummings stated, I've got I.D., pulled the gun from between his legs and shot Verna twice in the upper body, once in the neck or shoulder area, and once in the upper body area. According to statements made by Cummings, Verna then spun around, at which time Cummings stated he shot Verna in

the back.

Rpt. at 29:25-30:6. The referee noted that James Jennings was truthful when he told detectives about Cummings's statements. Rpt. at 29:23-24.

b. Raynard Cummings's statements to Norman Purnell revealed his plan to let Mr. Gay take the fall for shooting Officer Verna.

Norman Purnell was also in custody at the Los Angeles County jail with Raynard Cummings. Rpt. at 30:14-15. If Shinn had interviewed and presented his testimony to Mr. Gay's jury, Purnell would have recounted a conversation he had with Raynard Cummings when the two were in custody. Rpt. at 30:14-16. Cummings admitted to Purnell that he shot Officer Verna, and "if he (Cummings) was going down, his crime [crime partner] was going down, too." Rpt. at 30:16-17. Because Purnell felt it was "cruel" for Cummings to "take [Mr. Gay] down with [him]," despite Mr. Gay's innocence, Purnell decided to report Cummings's statement to a deputy sheriff. Rpt. at 30:18-20.

Purnell's account is entirely consistent with prosecution witness Gilbert Gutierrez's testimony in 1985, which also exonerates Mr. Gay. Gutierrez testified that Cummings said that after he shot the officer, he told Mr. Gay to get out of the car and retrieve his gun, which is how eyewitnesses noticed Mr. Gay. As a result, Cummings "said 'they were pinning it on Kenny, and that's cool.'" 64 RT 6999:14-15. According to Gutierrez, Cummings also "said all the witnesses said it looks like Kenny Gay, that it is his fault, you know." 64 RT 6999:19-20. Cummings's similar admissions to Purnell of his plan to let Mr. Gay take the fall for his crime strengthens the credibility of Purnell's testimony. Additionally, Gutierrez also testified that when Cummings was moved to the 1700 cellblock, Cummings was telling everyone that he alone shot the officer. 64

RT 6988. That Purnell was also housed in the 1700 cellblock further corroborates and strengthens the credibility of his testimony. *See* 12 EH RT 1608.

c. Raynard Cummings boasted to Jack John Flores that he emptied his gun into Officer Verna.

John Jack Flores was another inmate at Los Angeles County jail who was housed in a cell adjacent to Raynard Cummings. Rpt. at 30:22-23. Unlike Jennings and Purnell, John Jack Flores actually testified for the prosecution at trial, but only before Cummings's jury. The prosecution called Flores to testify about a plan Cummings devised to kill Robin and Kenneth Gay. 103 RT 11615. Cummings wanted both Robin and Kenneth Gay dead, and asked Flores to get cyanide into the jail so he could poison a set of stamps and send them off to the Gays. 103 RT 11617. During Flores's testimony, he stated that part of the reason he approached law enforcement about Cummings's plan was that he was concerned about Mr. Gay "in regards to the truth." 103 RT 11640 (testifying he did not know Mr. Gay, but he was concerned about him and "trying to protect" him "in regards to the truth").

On July 11, 1983, only a few weeks after the shooting, Flores recounted to District Attorney Investigator Robert Takua details about a conversation Flores had with Raynard Cummings. Rpt. at 30:23-26. As the referee noted, the statement is of note because of the amount of details in the statement and the early point in time in which the information was provided to the prosecution. Rpt. at 30:26-31:2. In the statement, Flores recounted how Cummings admitted to the following:

> Cummings fired one round which struck Officer Verna in the left chest (heart) area. Cummings said that this shot spun Officer Verna around and that he (Cummings) then exited the

> vehicle by way of the driver's door. Cummings said that Officer Verna had staggered about 1 1/2 steps back toward his motorcycle when he (Cummings) shot Officer Verna two (2) more times in the upper back. Cummings said that Officer Verna then fell face down (Verna's gun still in its holster) and that he (Cummings) then said, "Oh, you want more motherfucker!" and then emptied the remaining rounds into Officer Verna's back.

See Rpt. 30:24-26, 46:3-5 (referencing Flores's report at Ex. A173).

Cummings, who wanted Mr. Gay to be "going down" with him, also told Flores that he asked Mr. Gay whether he wanted to shoot the officer and Mr. Gay responded, "if it comes to it". As noted in the Exceptions at 60-61, that portion of Cummings's hearsay statement would have been inadmissible against Mr. Gay.[15] *People v. Aranda*, 63 Cal. 2d 518 (1965) (inculpatory extrajudicial statements of nontestifying codefendant are inadmissible against the other defendant in a joint trial); *Bruton v. United States*, 391 U.S. 123 (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."); *see also* Cal. Evid. Code § 1223.

d. Raynard Cummings's admission to David Elliott that he "shot and killed" Officer Verna.

Shinn also could have presented the testimony of David Elliott, who

---

[15] Shinn could have moved to have Mr. Gay's name and any reference to his existence redacted from the statement, and only submitted Cummings's inculpatory confession to Mr. Gay's jury. *See Richardson v. Marsh*, 481 U.S. 200 (1987). But as Daye Shinn admitted under oath in a subsequent deposition, he did not understand the *Bruton / Aranda* rule. *See* Ex. A9 at 47-48 (admitting that he did not understand the *Aranda* rule).

was also in custody with Raynard Cummings. Rpt. at 31:4-5. Cummings admitted to Elliott that "he was the person who shot and killed Officer Paul Verna." Rpt. at 31:8-9. As with Flores's report, Cummings made his admission less than two months after the shooting in June of 1983. Rpt. at 31:10-11.

The foregoing testimony undermines confidence in the prosecution's case. Significantly, Cummings's in-custody descriptions of the shooting, as reported by other inmates, meticulously lineup with 1) forensic evidence, 2) similar statements made to sheriff deputies and other witnesses, and 3) other eyewitness accounts. Therefore, any skepticism Mr. Gay's jury may have had about the testimony of inmate witnesses, would have been abated by the mutually reinforcing testimony from other, credible sources.

First, the inmate witness testimony was corroborated and reinforced by the forensic evidence. Cummings's statements about the sequence and order of the shots to Jack John Flores matches the sequence and distance of shots about which Drs. Fackler, Sherry, and Guinn could have testified. *Compare* Rpt. 30:24-26, 46:3-5 (citing Flores's report at Ex. A173) (officer struck in the left chest area, and two more times in the upper back area before he fell) *with* Resp. Ex. 739 at 3272 (entry wound no. 5 entered the chest, and Officer Verna was shot several times in his back before falling). James Jennings's testimony that Cummings killed Officer Verna with a ".38 cal revolver" is similarly corroborated by the forensic evidence. *Compare* Rpt. at 29:25 *with* 78 RT 8824:14-15 (Detective Arleigh McCree testimony that the officer was shot with .38 special, 357 caliber style bullets). James Jennings's testimony that Cummings admitted to shooting Officer Verna in the neck would have also been corroborated by the autopsy report, in addition to eyewitness Irma Esparza's description of events and Cummings's statement to Robin Gay. *Compare* Rpt. at 30:3 *with* Ex. A78

at 3561:11-13 (first gunshot entered the officer's neck) *and* Rpt. at 28:18 (Irma Esparza) ("I remember more him being shot in the neck and then being shot again.") *and* 3 Supp. CT 718:6-10, 23-24 (Robin Gay) (Cummings said he shot the officer and the officer "grabbed his neck" before Cummings got out to continue shooting).

Jack John Flores's account of Cummings's confession is also supported by other corroborating evidence. As with Irma Esparza, who testified to seeing the officer approach the car holding a white card, Jack John Flores's account contained a similar detail. *See* Ex. A173 at 2 (Raynard detailed to Flores that Pamela Cummings "gave a check cashing card for identification" to Officer Verna). Cummings told Flores that the officer had written Pamela's name on a piece of white paper and dropped it when he was shot, and Cummings "debated going back to the scene to retrieve the paper," but decided against it. *Compare* Ex. A173 at 3 *with* 1985 Trial Exhibit KKK-1, KKK-2 (photographs of crime scene that night which reveal card on the floor). This congruent testimony would have made Flores's testimony more credible to Mr. Gay's jury.

Similarly, the specific language that Raynard Cummings used when recounting the shooting to the inmate witnesses makes their collective testimony more credible. Cummings confessed to the same sequence of shots to both Jack John Flores and James Jennings, and even used similar language when describing his actions. *Compare* Rpt. at 30:5 (Cummings told Jennings the officer "spun around" before he delivered the remaining shots) *with* Rpt. at 46:3-5 (citing Flores's statement at Ex. A173 at 2) (Cummings's shot to Officer Verna's chest "spun [him] around") *and* 3 Supp. CT 718:6-10, 23-24 (Robin Gay, grand jury) (Cummings told Robin he shot the officer and the officer "grabbed his neck, [] spun around and went down to his knees" before Cummings continued shooting him).

James Jennings, through conversations with Raynard Cummings, knew details about the shooting that were unknown to any other witnesses besides those who spoke directly with Raynard Cummings. For example, Cummings told Jennings that when Officer Verna asked for his identification, Cummings told the officer, "I've got I.D." and pulled out the gun and shot him. Rpt. at 30:2. The jury thus could have heard that Cummings's statement to Jennings was corroborated by at least five other witnesses including, again, the prosecution's lead-off witness, Gilbert Gutierrez. *See* 64 RT 6954:4-5 (Gutierrez quoting Cummings as saying that after the officer fell, Cummings "emptied out the gun, told him, 'there's your fucking I.D.'"); 3 Supp. CT 663:3-5 (Debbie Warren testifying that Cummings told the officer, "Yes, sir, I have I.D." and pulled out a gun and started shooting the officer); 3 Supp. CT 718:18-19 (Robin Gay testifying that Cummings told the officer, "Yes, I have I.D. for you, you MF so-and-so" before he shot him); Ex. A134 at 5 (Pamela Cummings statement to Deborah Cantu that "Milton Cook" told the officer, "Yeah, I got I.D." and then proceeded "to pull his gun out and shoot him"); Ex. A173 at 2 (Jack John Flores's statement that Cummings told him that Cummings told the officer "You, do you want [my identification]?" and Cummings then raised his gun and said, "Here, motherfucker."). This language was such a strong fact for the prosecution that the prosecutor adopted this specific detail in his opening statement before Cummings's jury. *See* 64 RT 6916:11-13 (prosecutor says in opening statements that Cummings tells the officer, "here is my identification," when he pulled his gun up from between his legs to shoot him).

Similarly, the testimony of the inmate witnesses would have been further buttressed by the testimony of percipient eyewitnesses. Cummings's accounts to the inmates correspond to the eyewitness accounts of Irma

Esparza who recalled a dark-skinned shooter exiting the driver side after shooting the officer in the neck, Rpt. at 28:14-17; Martina Jimenez who saw a dark-complexioned black man shoot the officer, *id.* at 26:13; Walter Roberts who only saw one medium-complexioned shooter inside the car who exited the driver side to continue shooting, *id.* at 27:11-12; and Ejinio Rodriguez who saw a dark-skinned black man shooting the officer, *id.* at 28:2. The inmate witnesses accounts would have been further bolstered by *prosecution* eyewitnesses who described a similar account of events to Mr. Gay's jury. *See* 67 RT 7361 (Oscar Martin); 68 RT 7514-15 (Shequita Chamberlain); Ex. A45 at 1 (Robert Thompson earliest account); Ex. A134 at 14 (Pamela Cummings to Deborah Cantu hours after the shooting).

For the foregoing reasons, the additional inmate witness testimony would have given Mr. Gay's jury several reasons to doubt the prosecution's case. Nor was their custodial status a reason to forego such exculpatory evidence, which was supported by other, credible, congruent evidence. The prosecution also relied on several witnesses who had lengthy criminal records. The prosecution's lead witness, Gilbert Gutierrez, was serving a life sentence after receiving a reduction of capital murder charge to second-degree murder and openly admitted that he had some hope that his testimony for the prosecution would help his own legal situation. *See* 64 RT 6957, 6961 (admitting that he had asked for "something in return" for his testimony against Cummings); *see also* 64 RT 7007-11 (prosecution witness Alfred Montes, with lengthy criminal history for residential burglaries, in custody on burglary charge); 65 RT 7063-65 (prosecution witness Michael Kanan was a chronic heroin addict and in custody on a fugitive state warrant for a criminal case out of Texas). The fact that Norman Purnell, James Jennings, Jack John Flores and David Elliott also had criminal records merely served to explain why they were in custody

and in a position to hear Cummings's confession, and why Cummings may have felt comfortable confiding in them.

Moreover, the prosecution could not argue that the existence of prior convictions meant that only *certain* "snitches," but not others, were lying about Cummings's confessions, given the corroborating evidence of Purnell, Flores, and Jennings's testimony with key facts in the prosecution's case. Furthermore, the fact that Purnell and Jennings did not receive any favors or leniency after their initial reports of Cummings's inculpatory statements would have tended to make their testimony more credible than the prosecution witnesses who did. *Compare* Rpt. at 30:12-13 (Jennings did not receive any help with his case) *and id.* at 30:20-21 (Purnell did not receive any benefit from making the statement) *with* 64 RT 6957-58 (prosecutor wrote a letter on Gilbert Gutierrez's behalf to assist in his sentencing) *and* 91 RT 10361:1-8 (prosecutor admitted that Detective Holder promised Alfred Montes that he would testify at Montes's sentencing hearing). Finally, to the extent that the inmates' testimony could have been presented in conjunction with Deputy Sergeant McGinnis, Sergeant Arthur, and Deputy Lieutenant Nutt's testimony, the officers' testimony would have lent further credibility to the inmate testimony. *See* Return at 71, ¶ 171 (respondent admitting the testimony of a law enforcement officer would have given greater credibility to the inmate witnesses whose testimony inculpated Cummings).

Therefore, the testimony from these four inmate witnesses that Cummings acted alone in killing Officer Verna would have been powerful, credible testimony individually, collectively, and in relationship to the other sets of evidence presented in this case. In light of the prosecution's case against Raynard Cummings, which was comprised primarily of inmate and forensic testimony, the testimony from *additional* inmates about

Cummings's bragging about killing Officer Verna would have been inoculated from attack by the prosecution as more of the same evidence of Cummings's guilt, and credible evidence of Mr. Gay's innocence before his jury.

5. Shinn prejudicially failed to investigate and present Pamela Cummings's admissions to Deborah Cantu that Milton Cook, who closely resembled her husband, was the only suspect to exit the car and shoot the officer.

If Shinn had performed effectively, he would have presented exculpatory testimony from Deborah Cantu, Pamela Cummings's sister, describing how hours after the murder, Pamela Cummings called her and claimed that Milton Cook, an African-American man who closely resembled her husband Raynard Cummings, was the gunman who acted alone in killing Officer Verna.

Pamela Cummings ultimately testified at trial that it was Mr. Gay who exited the car through the driver side door and fired the remaining shots at the officer. 73 RT 8164-66. In the hours and days after the shooting, however, Pamela Cummings attempted to inculpate a man named Milton Cook as the shooter. Milton Cook and Raynard Cummings look nearly identical. *Compare* Ex. A101 (booking photo of Raynard Cummings) *with* Ex. A102 (booking photograph of Milton Cook). Had Shinn called Cantu to testify in Mr. Gay's defense, the picture Pamela Cummings tried to paint inculpating Mr. Gay as the outside shooter at trial would have completely changed.

Deborah Cantu was Pamela Cummings's sister. Rpt. at 32:24. Shortly after the shooting, Pamela called[16] Deborah Cantu. Rpt. at 33:3-4;

[16] Cantu's memory about her conversation with her sister was fresh; Cantu talked to police the day after the shooting and was able to recall exactly

Ex. A134 at 4:11-14 (hours after the shooting, Pamela called her scared and crying). Pamela explained that she was in the car with Kenneth Gay and a man named Milton Cook, when Pamela was pulled over by a police officer. Ex. A134 at 5:1-6. Pamela recounted to her sister that she got out of the car and was standing with the officer when he asked if the two men in the car had identification. Ex. A134 at 5:5-8. According to Pamela, the officer approached the car and asked Mr. Gay if he had identification, and Mr. Gay said yes. Ex. A134 at 5:10-11. The officer then asked "Milton," in the backseat, if he had any identification, and Milton said, "Yea, I got I.D." and shot the officer. Rpt. at 33:3-5; Ex. A134 at 5:13-15. Pamela continued reciting the events to her sister:

> It was then that the officer turned, and the guy in the backseat said, "I'm going to kill." And by then, Kenny Gay was so scared, he jumped out on the ground and the guy jumped out of the car and said, "Take this pig," and he unloaded his gun into him. And then, he, um, whatever lost it, but he threw the revolver and told my sister, "Okay, bitch. Don't you say a word. Just get in the car and drop me off."

Ex. A134 at 5:15-23. Pamela Cummings told her sister that she was terrified, because "Milton" was tall and medium-complexioned, and "she hope[d] to God that they didn't mistake [Milton] for her husband [Raynard Cummings] if they should come upon her." Rpt. at 33:5-7; Ex. A134 at 14:8-13. Cantu's testimony would have been corroborated by Pamela Cummings's anonymous phone call to the police in the hours after the shooting that "the man your [sic] looking for is 'Milton'." Ex. A136 (911 operator note).

Even if Shinn did not listen to this audiotape-recorded interview, he

---

what Pamela told her the night before. *See* Ex. A134 at 4:1-2 (referring to the shooting "last night").

should have read Cantu's grand jury testimony and presented Cantu as a defense witness. Ex. A137 (Cantu grand jury testimony). At the grand jury, Cantu testified to further conversations she had with her sister Pamela. Within the twenty-four hours following the shooting, Pamela called Cantu again. Ex. A137 at 14. Pamela reiterated the story, and again described Milton Cook 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.

But that was not the last time Pamela Cummings would try to substitute Milton Cook for her husband as the perpetrator. Cantu testified at the grand jury that after Pamela was arrested, Pamela called her from jail. Ex. A137 at 15:9-10. Pamela continued to protect Raynard and insisted that Milton Cook shot the police officer, even when Cantu pressed Pamela about Raynard's presence in the car. *See* Ex. A137 at 15 (testifying that she pressed Pamela about whether Raynard was there, and Pamela finally relented and admitted that he was, but "still stuck by the story that Milton was in the car and Milton did it"). Cantu testified before the grand jury that it was not until the suspects were all arraigned on murder charges that Pamela claimed Mr. Gay was the sole shooter. Ex. A137 at 15:23-26; *see also* Rpt. at 33:8-9 ("Pamela Cummings then falsely accused [Mr. Gay] after Milton Cook was able to establish an alibi"). In an effort to protect her husband, Pamela Cummings settled on the story for trial that Mr. Gay shot the officer, and that it was Mr. Gay who told her to say it was Milton Cook who shot the officer. Rpt. at 48:13-15.

Of course, Pamela Cummings's eventual testimony that it was Mr. Gay who devised the Milton Cook plan makes no sense and would have given Mr. Gay's jury a reason to doubt Pamela's trial testimony if Cantu had testified. If Mr. Gay had been the outside shooter, it would make no sense for him to devise a plan to blame the shooting on a dark-skinned, tall

black man who looked nothing like Mr. Gay. The only logical conclusion is that Raynard Cummings, a dark-skinned, tall black man, devised the plan. *See also* 77 RT 8696:10 (Pamela Cummings admitted that "we talked about [the Milton Cook plan] at the apartment"); 8 RT 713:5-11 (Raynard Cummings's statement after being arrested also named Milton Cook as the outside shooter); 3 Supp. CT 799-800 (Robin Gay) (Pamela and Raynard Cummings devised the Milton Cook plan because Cook was the "same height, same skin color, and the same attitude" as Raynard Cummings).

The fact that Pamela belatedly changed the story she told Cantu to shift blame to Mr. Gay for coming up with the Milton Cook plan is completely consistent with the defense that Shinn presented at trial. Shinn's entire defense theory was that Pamela Cummings was a liar. Shinn argued in his closing argument that Pamela Cummings was lying when she placed the blame on Mr. Gay because she was trying to protect her husband after she was arrested. 95 RT 10961. The conclusive evidence of this fact was that Pamela Cummings, in the hours and days after the shooting, was trying to place the blame on Milton Cook, Raynard's look-alike, to protect her husband; and only after everyone was arrested (including Milton Cook, whose broken foot was in a bandaged cast at the time of the offense), lied and placed the blame on Mr. Gay for both the murder and the Milton Cook plan. 95 RT 10959:23-26; 3 Supp. CT 784:24-28. Deborah Cantu would have provided compelling evidence to support this argument.

Putting aside the fact that Cantu's testimony would impeach Pamela Cummings's credibility, Cantu's testimony also would have been affirmative evidence that Raynard Cummings shot and killed the officer. Shinn could have used Cantu's testimony to argue that Pamela Cummings described the events exactly right: the dark-skinned man in the backseat pulled the trigger, got out the driver door, and continued firing the

subsequent shots. The only thing Pamela switched out was the perpetrator: Milton Cook in place of Raynard Cummings.

Equally significant, Deborah Cantu's testimony would have been virtually unimpeachable. Cantu, a civil employee of the Los Angeles Police Department, was actually called by the prosecution twice during Mr. Gay's trial to testify about Raynard Cummings's prior possession of a gun similar to the murder weapon and his threats about resisting arrest. Rpt. at 32:24-33:3; *id.* at 48:4. The prosecution even endorsed Deborah Cantu as a credible and honest witness in closing argument. 95 RT 10890 (the prosecution favorably referring to Cantu's testimony in closing argument); 91 RT 10385 (the prosecutor arguing in closing that Cantu has no "motive to lie"). Yet, Shinn inexplicably failed to cross-examine Cantu on the probative, exculpatory testimony of her conversations with Pamela Cummings. Rpt. at 33:9-11; *see also* Rpt. at 37:19-22 (Shinn received Cantu's statements as part of the discovery materials provided by the prosecution).

Thus, Mr. Gay could have presented powerful evidence that at the first opportunity to tell someone about what happened on June 2, 1983, Pamela Cummings *repeatedly* said that Milton Cook, someone who looked exactly like her husband Raynard Cummings, was the person who exited the car from the driver's seat and was the only one to shoot the officer multiple times. This evidence would have given Mr. Gay's jury significant reason to doubt the prosecution's case against Mr. Gay.

6. Shinn prejudicially failed to subject the prosecution's evidence to meaningful adversarial testing via expert evidence.

Shinn did not retain, consult, or present any expert witnesses at the guilt phase of Mr. Gay's trial. The failure to do so is particularly striking

given the "absence of physical evidence linking [Mr. Gay] to the shooting and the inconsistent physical and clothing descriptions given by prosecution eyewitness." *People v. Gay*, 42 Cal. 4th at 1226. Shinn was not ignorant of the need for expert assistance. Shinn's investigator, Payne, knew that the "reliability of the eyewitnesses" was a significant issue in the case and even suggested a name of an eyewitness expert to Shinn. Rpt. at 12:14. Payne also suggested to Shinn an accident reconstruction firm, Truesdail Laboratories, Rpt. at 39:3-4, but as Payne testified, he was unaware of any instance in which Shinn actually followed up on any suggested line of investigation or expert consultation, 3 EH RT 200:21-23. As the referee found, at the time of Mr. Gay's trial, lawyers were entitled to seek funds from the trial court for the appointment of experts, and Shinn was aware of this procedure. Rpt. at 64:6-9.

As this Court suspected, Shinn's failure to aggressively defend Mr. Gay may have been attributable to the capping scheme he had with penalty-phase experts Marcus McBroom and Fred Weaver. *In re Gay*, 19 Cal. 4th at 828. Pursuant to the capping scheme by which Shinn fraudulently engineered his appointment onto Mr. Gay's case, Shinn was required to hire McBroom and Weaver to perform expert services in the penalty phase of the case. *In re Gay*, 19 Cal. 4th at 796. Hiring experts who were helpful to Mr. Gay's guilt-phase defense jeopardized his arrangement with McBroom and Weaver. If Shinn was successful in the guilt phase and Mr. Gay was found not guilty, there would be no need for McBroom or Weaver in the penalty phase.

That Shinn failed to retain and present expert witnesses in Mr. Gay's case had immeasurable consequences. If Shinn had performed as the advocate the constitution guaranteed to Mr. Gay, Mr. Gay's jury would have had innumerable reasons to doubt the prosecution's "pass the gun"

theory. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (counsel's "complete lack of pretrial preparation puts at risk . . . the reliability of the adversarial testing process"). The referee found that Mr. Gay could have presented expert testimony in at least three main areas: eyewitness testimony, Rpt. at 33:16-34:14; forensic analysis including gunshot residue, firearm ballistics, and forensic pathology, *id.* at 36:11-20; and accident reconstruction, biomechanics and human factors, *id.* at 34:23-36:10.

a. Expert testimony regarding factors affecting accuracy of event memory and description.

Mr. Gay could have introduced the testimony of an eyewitness memory expert to inform the jurors of the "factors . . . that may affect the accuracy of an eyewitness identification of the defendant." Rpt. at 33:20-21 (citing *People v. McDonald*, 37 Cal. 3d 351 (1984)). At an *in camera* hearing before the trial court, Shinn informed the trial court that eyewitness testimony was "essential" and that he intended to call "two or three psychologists, eyewitness testimony" in Mr. Gay's defense. Rpt. at 34:7-8. But Shinn never consulted[17] or called such witnesses, even though it was clear that the prosecution's case against Mr. Gay centrally relied on eyewitness testimony. 95 RT 10853 (prosecutor arguing in closing argument that the eyewitness testimony of Gail Beasley, Marsha Holt, Shannon Roberts and Robert Thompson is "very important in this case") .

The utility of an eyewitness expert would have been critical in Mr.

[17] As explained in the Exceptions, the total of three hours Payne billed for generic "expert work" referred to a failed effort by Payne to respond to Shinn's "eleventh-hour" request, while in trial, to find a gunshot residue expert, not an eyewitness expert. *See* Exceptions at 30-31. Shinn's billing did not reflect any hours expended on consulting with experts in the guilt phase.

Gay's case. Of the dozen or so eyewitnesses, some identified Mr. Gay as the shooter and others identified Raynard Cummings. The witnesses disagreed as to what door the shooter exited and where the shooter was standing when the officer was shot. These circumstances created a major risk that the jury would overlook the significant consistency between Pamela Cummings's initial account of events – in which only a single, dark-skinned person did all the shooting – and Raynard Cummings's powerful, repeated admissions that he, alone, was responsible for the shooting; and that the jurors would, instead, credit the prosecution's more technical and illogical "pass the gun" theory.

Mr. Gay's defense would have been supported by expert testimony that explained how witnesses' observations of Mr. Gay's undisputed presence and actions at the scene (*e.g.*, jumping out the car to take cover and later retrieving the gun) could have been misperceived or inaccurately recalled by onlookers. Thus, it was critical that Mr. Gay explain to his jurors how these phenomenon may have occurred.

The referee found that an eyewitness expert would have helped Mr. Gay's defense that he did not participate in Officer Verna's murder. Rpt. at 33:16-34:2; *see also People v. Gay*, 42 Cal. 4th at 1215 (expert on eyewitness identifications could assist the jury in understanding the inconsistencies in the identifications made by Robert Thompson and other prosecution witnesses). The substantial evidence underlying this finding was Dr. Kathy Pezdek's testimony at the reference hearing. *See* 2 EH RT 12 *et seq.* At the evidentiary hearing, Dr. Pezdek testified about, *inter alia*, ten factors related to the accuracy of eyewitness testimony: distraction and changed blindness, unconscious transference, exposure time, suggestibility and double blind procedures, biased lineup, visual processing of information, cocaine use, in-court identifications, time delay and

confidence factor. *See* Pet. Br. at 28-45 (more fully laying out Dr. Pezdek's testimony). Expert testimony of this type would have allowed Mr. Gay's jury to draw the following critical conclusions.

First, Mr. Gay's jury would have learned about the theory of unconscious transference. Unconscious transference is a process where an eyewitness transfers the appearance of one person to another person. 2 EH RT 40:25-42:2. When a person looks at another person, they place a context tag or location tag on that person. 2 EH RT 41:9-12. If there are several people in any given situation, a person may incorrectly switch those context or location tags on the wrong person. 2 EH RT 43:1-3. This transference is unconscious, and people are completely unaware that they are incorrectly coding that memory. 2 EH RT 43:4-5.

Using this expert opinion, Shinn could have persuasively argued to the jury that Gail Beasley's description of the events is a prime example of unconscious transference. Given that Raynard Cummings wore a dark-colored or maroon shirt, and Kenneth Gay wore a white or gray shirt, Rpt. at 7:13-16, Gail Beasley's description of the shooter as wearing a red or burgundy shirt could have led the jurors to conclude – or at least entertain a doubt – that Beasley had unconsciously transferred the roles of the two men. *See also People v. Gay*, 42 Cal. 4th at 1226 (Mr. Gay wore clothing that other witnesses described Cummings as wearing). Instead, Shinn argued in closing argument that Mr. Gay's jury should conclude based on her description of Mr. Gay in a red shirt that Beasley "probably didn't see the shooting." Rpt. at 23:24; 95 RT 10953:9-10.

Mr. Gay's jury would have also learned about suggestibility and double blind procedures. Dr. Pezdek explained that a witness's memory is more accurate and more likely to be reliable closer to the event as opposed to later. 2 EH RT 29:15-16. Over time, that memory gets worse, not better.

2 EH RT 49:7-8. If a witness's account of what happened changes, becomes more detailed, or differs in any way from the initial account of what happened, trial counsel should investigate the details surrounding that change for possible external influences or suggestibility sources that may have accounted for the change. 2 EH RT 47:16-28.

An expert with Dr. Pezdek's expertise could have been particularly helpful and effective in explaining the two 180-degree changes in prosecution eyewitness Robert Thompson's statements. Robert Thompson gave at least three different versions of the shooting. His first, uncontaminated account was that the medium- to dark-complexioned backseat passenger exited the car and shot the officer. Ex. A45 at 1-8. At the live line-ups, Thompson noted two dark-skinned men as the possible shooters. Ex. A45 at 10-11. About a month later at the grand jury, Robert Thompson repeated his observation that it was the "medium shade black man" in the backseat who shot the officer. 2 Supp. CT 460:27-28.

But the day before his preliminary hearing testimony, Thompson met with Detective Holder and the prosecutor and was shown his composites. 3 CT 692-93 (testifying that he was shown a composite the day before he testified). The next day, Thompson's descriptions changed. He testified at the preliminary hearing that it was now the light-skinned black man who shot the officer, and that the dark-skinned black man "always [remained] in the backseat." 3 CT 686:25-27. The next time that Thompson testified was over a year later. But in those intervening months, Thompson met with detectives at least six additional times, which included a "walk-through" with Detective Holder at the actual crime scene with photographs to "talk[] about what happened." 68 RT 7609; Ex. A107 (chronicling the 6 visits). At the trial, Robert Thompson's testimony made another 180-degree change: it was now the dark-skinned black man who was first holding the

gun, and shortly thereafter, it was the light-skinned man who was exiting the car with the gun. 68 RT 7596. This account conveniently fit the prosecution's "pass the gun" theory perfectly.

An expert with Dr. Pezdek's qualifications and expertise would have informed Mr. Gay's jury that Thompson's "flip-flops" were very atypical and not what happens to normal memory. 2 EH RT 56:15-57:3. Over the course of two years, memories becomes less detailed and there is less information in the memory to recall. 2 EH RT 58:13-59:11. An expert would have encouraged Mr. Gay's jury to explore what happened between Thompson's first account of what happened to the second and even third account to learn what may have tainted his memory. 2 EH RT 56:19-22. The jury could have concluded that the two 180-degree changes in Thompson's testimony may have been attributed to the meetings and walk-throughs that he had with law enforcement, and could find that his identification of Mr. Gay was unreliable and tainted.

An expert witness would have put Robert Thompson's own trial testimony in context when he explicitly acknowledged that he changed his testimony "*because of* the walk-through" with Detective Holder, and that his "conversation with Mr. Holder might have had *some influence* on the way [he] remembered things." 68 RT 7609-10 (emphasis added). But when it was Shinn's turn to cross-examine Thompson, he inexplicably asked no questions about the 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's failure to ask Thompson a single question about the precipitating event for Thompson's "new" memory is incomprehensible.

Mr. Gay's jury would have also learned about distraction and a phenomenon called "change blindness," which affects the reliability of

eyewitness perception, memory, and reconstruction. 2 EH RT 32-33 (the more people and actions in a given sequence, the greater the potential for inaccurately perceiving and reconstructing what happened). Change blindness refers to an observer's failure to detect changes that occurred during a period of interruption between the observer's initial focus on an object or events and the observer's refocus after a momentary distraction. 2 EH RT 35:12-13.

Using this scientific knowledge, Daye Shinn could have argued to Mr. Gay's jury that the events on Hoyt Street were fraught with instances of distraction and change blindness including prosecution witness Shannon Roberts, whose descriptions were filled with indications of distraction and change blindness. *See* 2 Supp. CT 529:5-6 (Shannon Roberts) ("I jumped down under the fence" to hide after the shooting); 3 CT 719:2-4 (admitting that the sequences were interrupted because he hid "behind a brick wall"); 2 Supp. CT 531:9-10 (after the first sequence, he got up from hiding and ran toward the house). On this point, Shinn could have highlighted to Mr. Gay's jury that prosecution witness Shannon Roberts's "distraction and "change blindness" resulted in him exactly reversing the roles of the two suspects, saying that the light-skinned suspect shot the officer, and the dark-skinned suspect later got out of a car and retrieved the gun. Resp. Ex. 791; 69 RT 7815-16.

Therefore, there is no question that an eyewitness memory expert would have assisted Mr. Gay's jury in probing the testimony of the prosecution eyewitnesses, particularly after being armed with the scientific tools in which to appropriately challenge the evidence.

b. Expert testimony regarding conditions of visibility.

The referee also found that Mr. Gay could have presented an expert

on the conditions of visibility. Rpt. at 34:16-17; *see also id.* at 38:6 (study on dynamics of human vision was an accepted science at the time of Mr. Gay's trial). An expert informing Mr. Gay's jury about conditions of visibility would have been helpful in providing a critical analysis of the testimony of Marsha Holt and Gail Beasley. Rpt. at 34:18-20. The substantial evidence supporting the referee's finding was Dr. Paul Michel's testimony. *See* Rpt. at 34:18-19 (citing Ex. A21, Dr. Michel's report). At the reference hearing, Dr. Paul Michel, an optometrist and vision consultant, identified factors that may have undercut the reliability of eyewitnesses Marsha Holt and Gail Beasley. Rpt. at 34:16-22; *see also id.* at 51:9-15.

Foundationally, an expert on conditions of visibility would have explained to Mr. Gay's jury how human vision works and how certain conditions affect a person's ability to perceive events. 4 EH RT 322:8-323:6 (explaining peripheral vision and saccadic eye movements). In evaluating a person's ability to perceive events, there also may be certain external factors that affect human vision. 4 EH RT 323:13-28 (outlining various factors like lighting, distance, light of sight, and eye diseases that may affect human vision). An expert with Dr. Michel's qualifications could have visited Hoyt Street to determine the conditions of visibility of certain eyewitnesses. *See* 4 EH RT 325:25-27; *see also* Rpt. at 51:3-5 (finding that a visit to the crime scene was useful).

Specifically, Dr. Michel opined on prosecution eyewitness Marsha Holt's vantage point from 12127 Hoyt Street. 4 EH RT 326:13-15; Ex. A113. After replicating the conditions at the scene using police measurements and diagrams from June 2, 1983, Dr. Michel concluded that the view from the window at 12127 Hoyt Street that Marsha Holt was purportedly looking out was obstructed. *See also* Rpt. at 51:11-15 (noting

obstructions). The view from that window was confounded by the burglar bars, the fine mesh grating on the window, and the dividing cinderblock wall with wrought iron bars on the exterior of the property. *Id.*, *see also* 4 EH RT 334:14-22; *id.* at 336:18-21. If Marsha Holt were making observations from that window, and there was a lot of action out on the street, she would have to make several eye movements to re-center the field of activity. 4 EH RT 337:9-11.

But more critically, during his inspection of the replicated scene, Dr. Michel determined that from that window an observer would have been able to see only the very rear of a car positioned in the location of the suspect's vehicle. 4 EH RT 339:9-340:5; *see also* 4 EH RT 381:9-14. In reviewing Marsha Holt's accounts of the shooting, she purportedly saw Mr. Gay exit the front passenger door, walk around the front of the car, and fire a gun from the left front fender of the car. *See* 1 Supp. CT 216-18 (grand jury) (Mr. Gay walked around the front of the car); 68 RT 7532:23 (trial testimony) (Mr. Gay walked at "a normal pace" around the front of the car). But Dr. Michel determined it was impossible to have observed any of the things that Holt claimed to have seen, given that at the *best* vantage point from that window, a person could only see the rear bumper of the car. Ex. A114 (photograph of the line of sight); 4 EH RT 339:14-17, *id.* at 340:2-4; 14 EH RT 1950.

This testimony would have been significant at trial. The prosecutor argued in closing that Marsha Holt was an "important" witness to whom the jury should pay attention. 95 RT 10893:23-26, 10894-95 (arguing that Marsha Holt "is very important to you people" and that her "testimony alone is enough to convict [Mr. Gay]"). The prosecution even introduced a photograph exhibit of various viewpoints from 12127 Hoyt Street to represent the vantage point from that house to Mr. Gay's jury. Ex. A111,

No. B-C (1985 Trial Ex. 33). But an expert like Dr. Michel would have opined that the representation was factually incorrect given his staging. The jury would have then compared the difference in the vantage points when evaluating the description of events:

1985 Trial Exhibit 33.

Reference Hearing Ex. A114.

The jury would have used Exhibit A114 to probe whether, from that vantage point, Marsha Holt could have seen a passenger exit the front passenger door, walk around the front of the car, and continue shooting the officer.

The jury would been more likely to credit Gail Beasley's testimony and conclude that Marsha Holt did not see any of the shooting. Gail Beasley testified that when she entered the bedroom to tell Marsha an officer was shot, Marsha Holt was lying on the bed watching television with her mother, Celester Holt, and wanted to know what was happening. Rpt. at 25:1-2; 74 RT 8332:1-3; *see id.* at 8333:16-20 (Holt asked Beasley "what was going on").

Further, Shinn could have – but failed to – call Celester Holt and

Donald Anderson to testify that Marsha Holt did not see any of the shooting. Ex. A118 (Celester Holt police report describing how Gail Beasley (and not Marsha Holt) told her an officer was shot); Rpt. at 32:16-23 (Marsha Holt told Donald Anderson that she "didn't see anything"). Both Celester Holt and Gail Beasley would have testified that only after the shooting ended, did they all go to the window to look outside and see someone picking up a gun, thereby explaining why Marsha Holt was able to describe Mr. Gay (who was walking around the car and retrieving the gun) as the shooter. *See* 74 RT 8333; *see also* Ex. A118.

Therefore, based on the measured distance from the scene of the shooting, the bars and grating on the middle window, and the cinderblock wall that divided the two properties, coupled with the testimony of Celester Holt, Donald Anderson, and Gail Beasley, there is a reasonable probability that Mr. Gay's jury would have concluded that Holt's view was significantly limited, if not totally obstructed, and that she physically could not see the events that she purportedly testified to. *See* Rpt. at 34:18-19.

c. Expert testimony on the order, timing, and distance of the gunshots.

At trial, the prosecution did not offer any expert testimony to support the "pass the gun" theory of the case. Mr. Gay could have presented experts on gunshot residue analysis, firearm ballistics, and forensic pathology to support a defense that he did not participate in the shooting of the officer. Rpt. at 36:11-20. Mr. Gay would have been able to use "hard scientific evidence" to refute or call into question some of the percipient witness accounts. Rpt. at 36:13. If Shinn had independently tested the prosecution's evidence instead of relying on their forensic experts, he could have argued three critical points to Mr. Gay's jury. *Elmore v. Osmint,* 661 F.3d 783 (4th Cir. 2011) (reversing capital defendant's conviction where

counsel failed to investigate the state's forensic evidence).

First, as Dr. William Sherry opined in the reference hearing, the prosecution's forensic pathologist, Dr. Joseph Cogan, erred in describing the trajectories of bullet wound numbers four and five. Rpt. at 52:23-25; Resp. Ex. 739 at 3276. Using the corrected trajectories, an expert would have then sequenced the gunshots for the jury, explaining that Officer Verna was first shot in the neck, shot three times in the back (the last of the three severed his spinal cord and dropped him to the ground), and then shot two more times after the officer fell. *See* Ex. A78 (Dr. Fackler's testimony).[18]

Based on this sequencing, and using the gunshot residue analysis, Mr. Gay's jury would have heard evidence that the first gunshot (fired by Raynard Cummings from inside the car) entered the officer's neck, and was delivered from the *farthest* distance of all six shots. Ex. A78 at 3561; 81 RT 9306. After Officer Verna was shot in the neck, he was shot a second and third time in his back as he was standing up but moving away from the car. Ex. A78 at 3564-65. These shots were delivered approximately two feet away from the officer. *See* 81 RT 9306 *et seq*. (Dr. Guinn testimony); 1985 Trial Exhibit SS; Ex. A30 at 3 (Guinn report) (2.13 feet away, 2.44 feet away). The shooter then advanced on the officer, and delivered the remaining three shots within a foot from the officer. Ex. A30 at 3 (1.03, 1.00, and 1.01 feet away).

As the referee found, the distance between the shooter and the officer described by several prosecution eyewitnesses exceeds that supported by the forensic evidence. Rpt. at 36:17-18. Marsha Holt purportedly saw the shooter at the front of the car, approximately eight feet away from the

---

[18] Even though the referee found that Dr. Fackler personally would not have been available, Rpt. at 53:12-16, substantial evidence supports a finding that a gunshot wound ballistics expert was available at the time of trial. *See* Exceptions at 81.

officer. *See* 68 RT 7532 (trial testimony), 1 Supp. CT 220:5 (grand jury), 2 CT 328:18-19 (preliminary hearing). Shannon Roberts placed the shooter at the front fender, and Officer Verna "almost in the middle of the street." 2 Supp. CT 523:24 (grand jury); 03 CT 714:4, *id.* at 716:3 (preliminary hearing) (shooter walked around the front of the car and shot from the front bumper by the headlights); *see also* 69 RT 7784:18-21 (trial testimony) (shooter did not advance on the officer, but stood where he was as he fired).

Using this expert forensic testimony, Shinn could have refuted the prosecution witnesses who identified Mr. Gay as the shooter. *See Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1484 (1995) (to juries, "scientific evidence holds out the tempting possibility of extremely accurate factfinding and a reduction in the uncertainty that often accompanies legal decision making"). What the testimony of Drs. Sherry, Fackler and Guinn show is that after the first shot, the shooter had to exit the car quickly enough to be *within a foot or two* of Officer Verna to continue advancing on him and shooting him as he fell and rolled onto his right side. The forensic testimony would have cast doubt on the eyewitnesses who put the shooter at a considerable distance away from Officer Verna.

Shinn also could have used the forensic testimony to bolster the testimony of the eyewitnesses who saw the shooter very close to the officer when he was shot. Eyewitness Shequita Chamberlain testified that she saw a very dark-complexioned black man standing very close to the officer as the officer was being shot. *See* 3 CT 851:7 (preliminary hearing) (officer was "a couple feet" from the shooter); 68 RT 7515:6, *id.* at 7520:16-17 (trial testimony) (standing so close together they appeared to be having a conversation).

Before Robert Thompson was influenced to change his story 180

degrees in describing the shooter, he also placed the shooter and officer in close physical proximity. *See* Ex. A45 at 2 (police statement) (shooter walked up to the officer and fired the last round "at point blank range"); 02 Supp. CT 459:25-26 (grand jury) (shooter advanced on the officer and stood over him in the final shots); 3 CT 667:13-16 (preliminary hearing) (officer was backing up as the shooter was coming out of the car toward him); 68 RT 7599:4 (trial testimony) (shooter straddled the officer's waist before shooting him). Oscar Martin, who consistently testified that it was the medium-complexioned black man in the backseat who shot Officer Verna, gave an account of the events that was wholly consistent with the forensic evidence. *Compare* Ex. A36 at 1 (Martin police statement) (man shot the officer four times from "about a foot away") *with* Ex. 81 RT 9306 *et seq*. (Dr. Guinn testimony); 1985 Trial Exhibit SS; Ex. A30 at 3 (Guinn report) (final three shots fired within one foot of the officer).

Further, the available forensic evidence would have bolstered the testimony of the additional eyewitnesses who saw Raynard Cummings shoot the officer. Unlike prosecution witnesses Shannon Roberts and Marsha Holt, who saw the shooter fixed at the front fender of the car, Ejinio Rodriguez saw the shooter standing over the fallen police officer. Ex. A24 at ¶ 6. Irma Esparza also reported seeing both the dark-skinned male driver and the officer in close physical proximity to each other. Rpt. at 42:26-43:1 (appearing as if the shooter reached at the officer's gun in the holster). Walter Roberts reported seeing the medium-complexioned black driver exit the car, stand over the officer and fire down at him. Rpt. at 27:7-8. These multiple eyewitnesses all gave accounts consistent with the forensic evidence (and Pamela Cummings's initial reports) that the dark-skinned black male shot the officer at close range, the officer spun around, and the shooter continued to fire upon the officer until he fell, and then stood close

to the victim and continued shooting him.

Finally, as recited earlier, Shinn could have used this available forensic evidence to reinforce Cummings's own custodial confessions. *See supra* at 68-69 (explaining how the forensic evidence reinforces Cummings's own accounts of how he alone shot the officer).

If Shinn had 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 Raynard Cummings bragged about it happening – and how Oscar Martin, Shequita Chamberlain, Robert Thompson (initially), Pamela Cummings, Ejinio Rodriguez, Walter Roberts, and Irma Esparza saw it – the backseat, dark-skinned black man wearing a dark-colored shirt exited the driver door and fired the remaining five shots in close proximity to the officer.

d. Expert testimony in event reconstruction, biomechanics, and human factors analyses.

But for Daye Shinn's deficient performance, Mr. Gay's jury could have heard compelling expert testimony from a biomechanics, human factors and event reconstruction expert that it was highly probable that Raynard Cummings fired the first shot from the back seat, and emerged from the driver's door to continue firing the remaining shots in the very short period of time as described by most of the percipient witnesses. Rpt. at 35:23-36:1. Experts of this type were readily available for consultation and presentation at the time of Mr. Gay's trial. Rpt. at 38:24-39:4 (finding that investigator Payne even suggested an accident reconstruction firm to Daye Shinn for Mr. Gay's defense). At the reference hearing, Mr. Gay presented Dr. Kenneth Solomon, an expert in crime and accident reconstruction, human factors, and biomechanics. Rpt. at 35:9-10. As the referee noted, Dr. Solomon's full report and conclusions is located in the

record as Exhibit A17. Rpt. at 35:10-11.

The substantial evidence supporting the referee's conclusion that an accident reconstruction expert would have assisted Mr. Gay's defense demonstrates that an expert would have explained how individuals perceive and react to certain events, how scientific methods can provide objective measures of the accuracy of witnesses' account of events, and how empirical data using controlled experiments may determine the probabilities of a particular version of events.

Based on consideration of all known factors, including eyewitness reports, the ballistics report, gunshot residue analysis, the autopsy report, photographs of the crime scene, the actual 1979 Oldsmobile, and dimensions of known human factors (including how far Officer Verna traveled before falling to the pavement), Dr. Solomon calculated that the total elapsed time during which all six shots were fired was eight to ten seconds. *See, e.g.*, Ex. A17 at 7 (using these factors to breakdown sequence within the eight to ten seconds of shooting). This estimate is consistent with the prosecution's theory at trial and other percipient eyewitness accounts. *See* 58 RT 6233 (prosecutor arguing "Paul Verna was shot in a very, very short period of time. Just seconds."); Rpt. at 29:5-6 (Linda Orlik heard about five shots in three seconds); 73 RT 8164:11 (Pamela Cummings says there was a brief "one or two second" pause in between the first and remaining shots).

Given the ballistics and autopsy evidence, coupled with percipient witness Robert Thompson's initial descriptions of the first two shots, Dr. Solomon calculated that the maximum amount of time between the first two shots was 2.5 seconds, and within those 2.5 seconds, the officer had turned to his right and started moving back towards the rear of the vehicle. *See also* Ex. A17 at 5 (second shot was delivered approximately 2 feet

away).

Dr. Solomon then replicated the events using test subjects and the actual automobile, and ran and re-ran experiments timing the three different possibilities of egress: a test subject exiting from the backseat out through the driver door; from the front passenger seat across the driver seat and out through the driver door; and from the front passenger seat out through the passenger door and around the front of the car.[19] Using these experiments could test who – Cummings or Mr. Gay – could have physically fired the second shot in 2.5 seconds upon exiting the vehicle.

Based on these models and experiments using a test subject who was actually larger than Cummings in size and stature, Dr. Solomon determined that it could have taken Raynard Cummings 1.5 seconds to fire the second shot as he was exiting the car, and have his feet planted outside the car firing the third shot in 3.5 seconds.[20] Ex. A17 at 9-10. A still from Dr. Solomon's experiments demonstrates how Raynard Cummings could have fired the second shot in less than 2.5 seconds:

[19] As the referee found, Dr. Solomon used the same car driven by Pamela Cummings in 1983 to run and re-run a series of experiments of two individuals exiting the car in various ways, and timed those experiments and compared those times against how the hard data showed the events occurred. Rpt. at 35:18-22; 5 EH RT 556-58. Similar experiments were conducted at the reference hearing. Rpt. at 35:22-23.

[20] In fact, when respondent ran similar experiments at the reference hearing, the experiments yielded times that were faster than Dr. Solomon's in all but one replication. *See* 6 EH RT 744 (3.1 seconds, faster), 6 EH RT 751 (3.1 seconds, faster), 6 EH RT 752 (3 seconds, faster), 6 EH RT 762 (2.8 seconds, faster), 6 EH RT 744 (4.1 seconds, slower).

Ex. A125. In fact, this is exactly what Robert Thompson described within hours of witnessing the shooting: the shooter "was exiting rear seat driver's side while pointing and shooting weapon at officer." Ex. A45 at 2; *see also* Ex. 45 at 3 ("firing while exiting . . . gun in the right hand").

This expert analysis would have allowed Shinn to argue to Mr. Gay's jury that the testimony of the three witnesses with the greatest opportunity to see the early events, Oscar Martin, Robert Thompson, and Shequita Chamberlain, all confirm Dr. Solomon's experiments. *See, e.g.*, Rpt. at 35:23-36:1. Eyewitness Oscar Martin, who watched the car from his front window, was firm that it was Raynard Cummings who "came out of the backseat" to shoot the officer four times. *See* Ex. A135 (chronology of Oscar Martin's eyewitness statements). Robert Thompson, who was across the street and up on a ladder, consistently reported in hours, days and weeks following the shooting that it was a dark-complexioned black male who sprung from the back seat on the driver side and fired on the officer while he was exiting the backseat of the car. *See* Ex. A45 at 1-3. Shequita Chamberlain's testimony was very consistent with the physical evidence and other witness statements that she saw a tall, dark-skinned black man standing close by Officer Verna on the driver side of the car. 68 RT 7515.

Dr. Solomon's expert opinion also would have allowed Shinn to argue that Pamela Cummings's earliest account of the shooting is the most probable version of events, with the exception that she substitutes in Milton Cook for Raynard Cummings. Ex. A17 at 4. Her earliest account to her sister, Deborah Cantu, corresponds with the forensic data and Dr. Solomon's findings: after the first shot, the officer grabbed his shoulder and started walking back toward his motorcycle, and after a brief "one or two

second" pause, "Milton Cook" got out the driver door and continued shooting him. 73 RT 8164-66; *see also* 73 RT 8166, 8168 (the shooter was "a couple feet" from the officer), Ex. A134 (Cantu statement); *see also* Rpt. at 29:5 (Linda Orlik heard five shots in three seconds).

An expert in event reconstruction also could have highlighted errors in some percipient witnesses' observations. *See* Rpt. at 35:23-36:1; 5 EH RT 573:19-28 (explaining that "witnesses can make statements which violate physics"). None of the scientific data (including gunshot residue analysis and autopsy results) is consistent with a person who was seated in the right front passenger seat (Mr. Gay's position) having exited the passenger door and walked around the front of the car to be within two feet of Officer Verna on the driver side in any time close to 2.5 seconds. *See* Ex. A17 at 6 (Dr. Solomon's test results determine it would have taken Mr. Gay a minimum of 7 seconds to walk around the front of the car); *see also* 6 EH RT 770 (respondent's tests at the reference hearing yielded 9.75 seconds as the fastest time Mr. Gay could have walked around the front of the car). Yet, Marsha Holt, Gail Beasley and Shannon Roberts described Mr. Gay as walking around the front of the car, stopping at the left front fender, and shooting the officer. 68 RT 7527 (Marsha Holt); Ex. A12 at 3, 1 Supp CT 202:13 (Gail Beasley); 69 RT 7784:18-21 (Shannon Roberts). The referee noted that "[t]he distance described" by the three witnesses between the victim and the shooter, whom they placed at the left front fender of the car, "exceeds that supported by the gunshot residue analysis presented at trial." Rpt. at 36:17-18.

Finally, an expert with Dr. Solomon's qualifications could have explained that it was even more improbable that Mr. Gay could have moved that rapidly given the startling effect of the initial gunshot. When Cummings fired the first shot inside the car, Mr. Gay was sitting in a

confined space and his ears were not protected. Rpt. at 36:4-5. As the referee explained, an expert could have testified that Mr. Gay was "disorient[ed]" and "momentar[ily] confuse[ed]" by Cummings's first gunshot. Rpt. at 36:6; 5 EH RT 661 (anything above 70 or 80 decibels is somewhat uncomfortable, and a blast of about 120 to 130 decibels from a .38 caliber gun would have temporarily shut down some of Mr. Gay's normal sensory functions). That disorientation and confusion would have led to a "delayed reaction time," further slowing down Mr. Gay's movement, and thereby making the prosecution's pass the gun version of events more difficult to accomplish in the short period of time. Rpt. at 36:5-8. Given the 2.5 second window, and the disorientation Mr. Gay experienced after hearing a gunshot in a confined space, Rpt. at 36:5, it was impossible for Cummings to struggle to get out of the car after the first shot[21] and then pass the gun back to a disoriented Mr. Gay, who then got out of the car and walked around the front of the car to continue shooting in less than 2.5 seconds.

Therefore, an expert like Dr. Solomon would have allowed Shinn to argue to the jury that the prosecution had two sets of eyewitnesses: those that saw the shooter come around the front of the car from the passenger side and those that saw him exit from the driver side. Both could not be right. But instead of chalking the difference up to "trivial details" as the prosecution suggested, Shinn could have honed in on this major disparity,

---

[21] *See* 58 RT 6238:6-7 (prosecution opening statement that Cummings "didn't get out of the car, but he started to"); *see also* 58 RT 6238:11-19 ("Cummings didn't get all the way out. He was trying to get out . . . . This is the side [Cummings] was trying to get out, perhaps from the back seat, when he couldn't get out."); *see also* 58 RT 6238:20-23 ("I am later going to suggest to you that the reason Mr. Gay got out is because Mr. Cummings couldn't, and perhaps Mr. Cummings said, 'Quick, take the gun. Finish it off'").

and invited the jurors to make credibility determinations in light of what the science proved what could and could not have happened in that short window of time. Thus, Shinn could have argued that based on time, motion, and human behavior analyses, the prosecution's theory – that Raynard Cummings shot the officer, then found himself unable to exit the backseat of the car, decided instead to disarm himself and pass the gun to Mr. Gay, who then emerged from the vehicle and continued shooting the officer in less than three seconds – is contrary to the scientific evidence. At a minimum, there is a reasonable probability that such expert opinion evidence would have led the jury to entertain a reasonable doubt regarding the prosecution's version of events.

7. Shinn prejudicially failed to investigate and present impeachment witnesses who were readily available and who could have provided extensive impeachment evidence.

Finally, even if Daye Shinn did not present the foregoing additional evidence exculpating Mr. Gay, he had in his possession a trove of impeachment evidence to cast significant doubt on the prosecution witnesses who did testify including Robert Thompson, Marsha Holt, Pamela Cummings, Gail Beasley, and Shannon Roberts. What is worse, the impeachment evidence consisted of the prior inconsistent statements of the prosecution witnesses, and thus should have been known to Shinn and should have been easily utilized. *See, e.g.*, Rpt. at 10-11 (Shinn read witness statements and grand jury and preliminary hearing transcripts and used some of the information contained therein to impeach prosecution witnesses); *People v. Andrade,* 79 Cal. App. 4th 651, 657 (Cal. Ct. App. 2000) (finding counsel has a duty to impeach key prosecution witnesses with their prior statements). But Shinn's efforts to use prior statements or

other evidence to impeach prosecution witnesses was lackluster and disorganized. If he had been acting as the zealous advocate that Mr. Gay was entitled to, the jury would have heard the following additional evidence.

a. Robert Thompson's earliest accounts of the shooting exonerated Mr. Gay.

Robert Thompson was the only prosecution witness at trial who testified to seeing both the dark-skinned Raynard Cummings and light-skinned Mr. Gay shoot the officer. 68 RT 7590 *et seq.* In his account at trial, he described seeing the hand of a medium-complexioned black male holding a gun, and then upon looking back at the scene, described seeing the white front-seat passenger, Mr. Gay, climb over the driver seat and exit out the driver door to continue shooting the officer. 68 RT 7593-97. The prosecution relied on this critical testimony as circumstantial evidence of the gun being passed between the two men. 95 RT 10992:23 (arguing in rebuttal argument that this testimony is "strong circumstantial evidence" of the gun being passed).

But as respondent admits, Shinn failed to cross-examine Robert Thompson about his initial, consistent descriptions of the sole shooter as a dark-skinned black man. Return at 119, ¶ 289. In the hours following the shooting, Robert Thompson was interviewed at the Foothill police station about what he saw. Ex. A45 at 1. Thompson's recall of detail was meticulous. He identified the front passenger (Mr. Gay) as a white male, with a "thin to lip edge" mustache. *Id.* He described the shooter as the person in the backseat who was a medium- to dark-complexioned black male with "finger wave" hair and a "brown short-sleeve shirt." *Id.*; *see also* Return at 116, ¶ 284 (admitting to Thompson's description of the shooter). He noted that the female driver's hair was "parted and pulled back." Ex.

A45 at 1.

Thompson told Officer Lindquist that the gun was "a possible .22 revolver, black in color with a brown handle" and drew a diagram of the shooting with a play-by-play description of how the shooter physically exited the car while shooting. Ex. A45 at 3 (noting that the shooter was "def. a black man"). Given the detail in which he described the occupants of the car, Thompson sat with a sketch artist that night. The prosecution, however, only disclosed two of the three sketches of the suspects as described by Thompson. *See* Ex. A45 at 8 (Thompson's sketch of Pamela Cummings); Resp. Ex. 707 (Thompson's sketch of Kenneth Gay). The composite of the black male in the backseat has never been produced.

Robert Thompson's identification of a man resembling Raynard Cummings as the sole shooter persisted in the days and weeks following the shooting. At the live line-ups a few days later, Robert Thompson made possible identifications of two dark-skinned black men as the possible shooter. Ex. A45 at 10-11. And over a month later, Robert Thompson testified at the grand jury and repeated his consistent description: the man in the backseat of the car, who was "medium shade black" exited the car and shot the officer. 2 Supp. CT 460:5; *id.* at 460:26-28 (grand jury). Thus, Thompsons's three earliest accounts identified someone consistent with Raynard Cummings as the outside shooter. *See also People v. Gay*, 42 Cal. 4th at 1226 (noting the same).

But as respondent admits, Robert Thompson's recollection changed over time. Return at 111, ¶ 277; *see also People v. Gay*, 42 Cal. 4th at 1202-03 (delineating the changes in Thompson's testimony). Two years later at trial, Robert Thompson testified for the first time that the dark-skinned black man in the backseat was holding the gun, and when Thompson got off the ladder and looked back, the white front-seat

passenger, "Kenneth Gay, was getting out of the car." 68 RT 7596-97. In the intervening two years, Thompson met with law enforcement officers six times, including a walk-through of the crime scene using photographs with Detective Holder. 68 RT 7609. As Thompson admitted, he "changed [his] testimony about seeing Mr. Gay with a gun . . . because of the walk through that we went through" with Detective Holder. *Id.*; *see also* 68 RT 7610 ("Yes, I think my conversation with Mr. Holder might have had some influence on the way I remembered things.").

At this moment, Robert Thompson's trial recollection was vulnerable to textbook impeachment with his prior, inconsistent statements. He could have also moved to strike Thompson's testimony. Obviously, both of Thompson's diametrically opposed accounts could not have been accurate. Shinn should have taken Thompson's initial description of the shooter to the police hours after the shooting, his live line-up identifications, and his grand jury testimony and impeached Thompson with his three earliest descriptions of the outside shooter as matching Raynard Cummings. But that is not what Shinn did.

First, instead of highlighting to the jury through cross-examination that Thompson identified two dark-skinned black men as the possible shooter at the live line-ups, Shinn mistakenly suggested on cross-examination that Thompson could not identify anyone at the live line-ups. *Compare* Ex. A45 at 10-11 (identifying two dark-skinned black men in lineups #8 and #9) *with* 68 RT 7642:10-11 ("Q: Now, you didn't identify anyone at the lineup, is that correct? A: Yes.").

Instead of soliciting through cross-examination that at the grand jury Thompson repeatedly described the "medium dark" black man in the backseat of the car as the shooter, Shinn inexplicably asked Thompson to confirm that he made no identification at the grand jury. *Compare* 2 Supp.

CT 460:27-28 (grand jury testimony that the shooter was a "medium shade black" man) *with* 68 RT 7643:14-16 ("Q: In other words, you could not recognize anyone at that time, is that correct? A: I couldn't identify [anyone] at that time."). Inexplicably, Shin never once mentioned on cross-examination Thompson's descriptions mere hours after the shooting of the dark skinned man emerging from the backseat shooting the officer repeatedly. Return at 119, ¶ 289.

Instead of eliciting evidence that Thompson was correct when he initially identified the backseat dark-skinned black man as the outside shooter, Shinn took the position on cross-examination that Thompson knew all along that Mr. Gay shot the officer, but was too afraid to identify Mr. Gay early on in the process, and was lying about his identification. *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, [sic] 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."). In addition to presuming the accuracy of Thompson's identification of Mr. Gay as the shooter, that argument was actually contrary to the evidentiary record: Robert Thompson *had* repeatedly identified the shooter several times in the days and weeks after the shooting – someone who fit Raynard Cummings's description almost perfectly. Ex. A45 at 1. Shinn's argument that because Thompson was initially too afraid to (accurately) identify Mr. Gay as the shooter, meant that he should be found not credible once he overcame his fear and was willing to identify Mr. Gay, made no sense. *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).

Shinn's failure to competently cross-examine Thompson prevented

the jury from hearing and considering Thompson's three, earliest accounts of the shooting describing a dark-skinned Raynard Cummings as the outside shooter. Mr. Gay's jury would have then had evidence that Thompson's initial version of events was far more reliable and accurate than his subsequent versions that supported the prosecution's pass the gun theory. At a minimum, Shinn could have advanced the defense that the jury had good reasons to doubt that the subsequent *changes* in Thompson's original story were the product of reliable, independent recollection rather than the suggestible influences of police interviews and a purported "walk-through" of events.

b. Evidence that Marsha Holt never saw the actual shooting of the police officer.

In the prosecutor's closing argument, he argued that eyewitness Marsha Holt "is very important to you" and spent a significant portion of his closing argument on Holt's testimony. 95 RT 10893:25-26; *see also id.* at 10894-95 ("In court she said yeah, that's him (Mr. Gay). That testimony alone. She was very sure. She wasn't shaken in the questions that were asked of her . . . Her testimony alone is enough to convict [Mr. Gay]."). Shinn echoed this sentiment. He referred to Holt in his closing argument as a "sweet little girl". 95 RT 10946:3-4 ("That kind of cute little girl."). If Shinn had performed as the competent advocate to which Mr. Gay was entitled, Mr. Gay's jury would have had been convinced that Marsha Holt failed to see any of the actual shooting as she claimed.

First, Shinn could have argued that Marsha Holt's description of the shooting was contradicted by other witnesses. Marsha Holt maintained that she was at the window watching the shooting, and telling her mother, Celester Holt, who was in the doorway, what was happening. *See, e.g.*, 2 CT 324:10-11 ("Q: You were telling your mother what you could see? A:

Yes."). Prosecution witness Gail Beasley, however, testified that when she entered the bedroom where Marsha was after the shooting, she saw Marsha on the bed watching television with her mother, Celester Holt. 74 RT 8332:1-3. Only after Beasley told them an officer was shot did both Marsha and Celester Holt get up from the bed. *See also* 74 RT 8333:16-20 (Beasley testified that Holt "wanted to know what was going on," so Beasley explained that she just saw an officer get shot). If Shinn had investigated and presented Celester Holt, Celester would have confirmed Beasley's testimony: it was Gail Beasley who came into the room to tell them an officer had been shot. Ex. A118; 1 Supp. CT 281 (Celester Holt grand jury testimony) ("I didn't really hear the shots, you know. I was in the back of the house. And my niece [Gail Beasley] came in and told me what was going on outside."). Similarly, Donald Anderson[22] (who was married to Marsha Holt at the time) testified at the reference hearing that before the trial, his wife Marsha Holt admitted to him that she never saw the shooting, but only heard the gunshots. Rpt. at 32:20-21. Had Shinn presented a conditions of visibility expert like Dr. Michel, that expert testimony would have conclusively proven that Marsha Holt could not have seen any of the shooting as she described given that the best vantage point from the window she claimed to have been looking out affords no view of the majority of the car. *See supra* at 86-88 (conditions of visibility testimony). Shinn could have therefore argued that there were at least four reasons to doubt whether Marsha Holt even saw the actual shooting take place.

Second, Shinn could have argued that Marsha Holt's description of

---

[22] For the reasons enumerated in the Exceptions, Donald Anderson was as credible as prosecution witnesses who had criminal convictions, and his testimony would have been presented but for Shinn's misunderstanding of the hearsay rule. *In re Gay*, 19 Cal. 4th at 813.

the shooter and his movement matches what she would have seen when the car returned and Mr. Gay exited the passenger side, went around the car, and picked up the gun in the street by the officer. As Gail Beasley and Celester Holt both described, after Beasley told Celester and Marsha an officer was just shot, the three women "went to the front window" to see what was going on. 74 RT 8333:4-7. As Celester Holt told the police, when they looked out the window, she saw the light-skinned Mr. Gay retrieve a gun and run back around the passenger side of the car before driving westbound on Hoyt Street towards Gladstone. Ex. A118. Thus, Marsha Holt's description of a light-skinned black male going around a car and holding a gun over a fallen officer is consistent with Mr. Gay's retrieval of the gun.

Finally, Marsha Holt testified at the preliminary hearing and the trial that after the officer was shot, only the woman got back into the car and drove the car up the street. 68 RT 7530:26-7531:8; *see also* 2 CT 331 (preliminary hearing) ("the girl that was driving got back in the car and went up and made a u-turn and came down and the gun had the officer's gun."). Holt testified at the preliminary hearing that the light-skinned man remained in the middle of the street with the officer. 2 CT 331:20-24 ("No [the man who shot the policeman did not get in the car]. He was still in the street when she went to make the u-turn."). Holt then testified that the woman returned about thirty seconds later to pick up the shooter. 2 CT 332:7. This description of events contradicts all of the other eyewitness testimony since no other eyewitnesses reported this version of events. This description further suggests that she saw only the second sequence of Mr. Gay outside the car, retrieving the gun and getting back in the car. If Shinn had called an event reconstruction expert, this is precisely the type of evidence that Shinn could have pointed to as an example of eyewitness

accounts that defy physics and was totally unshared by any other eyewitness.

c. Evidence that Pamela Cummings admitted that Raynard Cummings alone shot and killed the officer.

In addition to presenting Deborah Cantu to impeach Pamela Cummings's testimony, Mr. Gay could have presented the testimony of Robin Gay and Debbie Warren to testify in Mr. Gay's trial. During the direct examination of Pamela Cummings, the prosecutor elicited damning evidence that Mr. Gay reenacted the shooting for Robin Gay, Raynard Cummings, and Pamela Cummings at Robin's apartment later that night. 73 RT 8184-85 ("Kenny reenacted it, showing what happened . . . He has his hand like this and he said, "Pow, pow, motherfucker. Take this."). In his closing argument, the prosecutor instructed the jury that Pamela's testimony was "important for you" because the reenactment back at the apartment was "very strong evidence" that Mr. Gay was guilty. 95 RT 10901:23-24. The prosecutor then read back Pamela Cummings's lengthy testimony to the jury about Mr. Gay's purported reenactment and argued that this was clear evidence that Kenneth Gay was "claiming responsibility, obviously because [he] did [the shooting]." 95 RT 10901-04 (reading Pamela Cummings's testimony back to Mr. Gay's jury).

Mr. Gay could have presented Robin Gay, or her grand jury testimony, to impeach Pamela Cummings's testimony about Mr. Gay's purported reenactment the night of the shooting. While the referee notes that Robin Gay declined to testify and that her grand jury testimony would not qualify as a prior record statement under Evidence Code section 1291, her testimony would have met the criteria of section 1291(a)(1) given that the testimony would have been used against the prosecution, *i.e.*, the "same person" who introduced the testimony at the grand jury, and she was

unavailable within the meaning of Evidence Code section 240. At a minimum, when the prosecution attempted to read into the record Robin Gay's grand jury testimony given her unavailability, Shinn should not have objected given her testimony would have exonerated Mr. Gay. 76 RT 8583:21.

Before the grand jury, Robin Gay testified about the same events that night in her apartment. 3 Supp. CT 716 *et seq*. Robin testified, through tears, that 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, he 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, 18-19 (Raynard was "in the room acting like a big cheese"). Robin Gay's testimony would have been more credible than Pamela Cummings, because she did not have any prior inconsistent statements that the prosecution could use to impeach her.

But even if the jury were to find that Robin Gay was motivated to place blame on Cummings and away from her own husband, Shinn could have corroborated Robin Gay's testimony by questioning Debbie Warren about her conversations with Pamela Cummings. At her grand jury testimony, Debbie Warren testified that the morning after the shooting, Pamela Cummings told her and Robin that it was Raynard who shot Officer Verna. 3 Supp. CT 662-63 (Pamela Cummings's account to Warren about the shooting). But when it was Shinn's turn to cross-examine Debbie Warren, he did not question her at all about her conversation with Pamela Cummings or Robin Gay in the hours following the shooting.

d. Evidence to impeach Gail Beasley's description of the shooter as consistent with Mr. Gay.

At trial, Beasley was initially deemed an unavailable witness and the prosecutor was allowed to have her highly prejudicial preliminary

testimony read to the jury. 74 RT 8272-73 (Shinn objecting to the trial court's determination because he wants an opportunity to cross-examine her). Before the close of the prosecution's case, Beasley was located and Shinn was given the opportunity to cross-examine her. 79 RT 8950. Shinn inexplicably declined to cross-examine her on that date and asked that she return to court on a date after the end of the guilt phase was over. *Id.* at 8951 (trial court warning that the trial will not be delayed if the guilt phase concluded before the date Beasley was to return). As a result, her testimony was allowed to stand uncontested. Thus, the jury did not hear a wealth of exculpatory evidence that could have been introduced through Beasley.

First, while Beasley identified the shooter as being light-skinned, she identified the clothing of the shooter as that worn by Raynard Cummings. Ex. A12 at 2 ("shooter: burgundy tank top, levis, blk dress shoes"). Her description of the shooter's clothing was unequivocal; she told the grand jurors, "I know [the shooter's] shirt was red." 1 Supp. CT 208:17. But because Shinn forewent any examination of Beasley, these prior, consistent identifications of the shooter in the dark-colored shirt were unexplored. *See also People v. Gay*, 42 Cal. 4th at 1226 ("Gail Beasley's description shortly after the murder of the shirt worn by the shooter – that it was burn orange or red – was likewise consistent with Raynard Cummings's clothing and inconsistent with [Mr. Gay's]."). If Shinn had presented this testimony in conjunction with an eyewitness memory expert, Mr. Gay's jury could have concluded that Beasley's observation was a quintessential example of the "unconscious transference" factor. *See supra* at 81-82. Instead, Shinn confusingly argued that Beasley's mix-up of the clothing was evidence that Beasley "probably didn't see the shooting." 95 RT 10953:9-10.

Second, Gail Beasley's earliest description of seeing all the three

individuals outside the car at the time of the shooting was critical. Beasley told police that in addition to the suspect shooter in the "burgundy" shirt, there was a "suspect that remained in the car then got out and back in." Ex. A12 at 2. Beasley described the clothing of this person as consistent with Mr. Gay: "grey tank top, grey gym-type shorts with white piping around the sides." *Id.* That a man in a grey shirt got out of the car and then "got back in" while the other suspect was shooting is consistent with what Mr. Gay said in his police interview, and consistent with Raynard Cummings shooting the officer. Rpt. at 6:15-16 ("Mr. Gay stated that after the first round was fired, Mr. Gay emerged from the front passenger seat via the passenger side door and stood next to the car" while Cummings continued shooting the officer).

Beasley's testimony would have also been consistent with the congruent evidence that Mr. Gay leapt out of the passenger side of the car and took cover while Cummings was shooting. 70 RT 7843 (Rose Perez testifying to seeing someone on the passenger side of the car while the officer was being shot on the driver side); Ex. A173 at 2 (Raynard Cummings tells Jack John Flores that Kenneth Gay got out of the car on the passenger side while Cummings was shooting the officer on the driver side); 64 RT 6996:1-6 (Raynard Cummings tells Gilbert Gutierrez that Kenneth Gay was "scared" on the outside of the passenger door); Ex. A134 at 5 (Pamela Cummings tells Deborah Cantu that Mr. Gay jumped out of the car when the officer was being shot because he was scared to death). But because Shinn declined to cross-examine Beasley, none of her earliest accounts of the shooting, including describing someone consistent with Mr. Gay taking cover while Cummings was shooting, were introduced into evidence.

Finally, as the referee found, an expert on conditions of visibility

would have opined that the cinder block wall and wrought iron fencing in between her vantage point and the scene would have partially obstructed her view. Rpt. at 34:16-22.

Given this additional evidence, there is little confidence in Gail Beasley's testimony to support the prosecution's case against Mr. Gay.

e. Evidence to impeach Shannon Roberts's descriptions of events.

Mr. Gay could have presented evidence that Shannon Roberts's description of the shooting appeared to be a mix of the last moments of the shooting and the retrieval of the gun. As Shannon Roberts testified, he was playing in a yard with some of his friends when he thought he heard the sound of fireworks. 69 RT 7779:23-24. Shannon looked down Hoyt Street to see a police officer falling backwards. 69 RT 7781:25-26. Because Shannon Roberts testified that his attention was drawn to the scene only *after* hearing the sound of multiple gunshots (which he mistook for fireworks), he could have not seen Mr. Gay exit the passenger door, walk around the front of the car, and stand at the front fender *before* hearing the gunshots. This description (of Mr. Gay walking around the front of the car) is more consistent with Mr. Gay's retrieval of the gun. That Shannon Roberts described a dark-skinned man as retrieving the gun is further evidence of his conflating the two scenarios. 2 Supp. CT 533:7-22; 69 RT 7815-16.

Shinn also could have presented the substance of Shannon's first, undirected police interview – including the purported fact that he saw the shooter at the front of the car – to discredit his testimony. Nothing about Shannon's first documented statement to the police describing the shooter's location and movements can be squared with the physical evidence that the shooter was within a foot of the officer when he was firing. 69 RT

7810:25-27 (positioning the shooter "right here in front" of the car). As the referee found, the distance described by Shannon Roberts between the shooter and the officer is not supported by the gunshot residue analysis, which places the shooter and the driver within a foot or two of each other. Rpt. at 36:15-20.

Shinn also could have introduced evidence via an eyewitness memory expert to show that Shannon's account of what happened that day grew exponentially and inexplicably more detailed at the time of the trial when compared to his initial statement to the police. *Compare* Resp. Ex. 791 (police statement giving a basic account that the passenger got out of the car and walked over to the officer and shot him three to four times) *with* 3 CT 718 *et seq.*; 2 Supp. CT 517; 69 RT 7777 *et seq.* (subsequent testimony that he saw the smoke from the gun, saw the gun was black, looked at the officer *before* the first shot was fired, said the shooter is "light-complected," and he recalled a second car that drove back after the U-turn on Prager). But because Shinn failed to present the foregoing testimony, Mr. Gay's jury had no reason to doubt Shannon Roberts's account of the shooting.

C. Shinn's Unreasonable and Prejudicial Performance Entitles Mr. Gay to Relief.

To say the additional evidence adduced at the reference hearing and cited by the referee undermines confidence in the prosecution's case against Mr. Gay, and the conviction for capital murder, would be an understatement. The additional, exculpatory evidence not only changes the picture from what was presented to Mr. Gay's jury in 1985, it completely changes a fair and accurate understanding of events.

The referee's findings, particularly concerning the paltry state of

Shinn's guilt-phase investigation, conclusively demonstrate that none of Shinn's decisions could have been the result of informed and reasoned judgments. Although the referee notes some circumstances that might have raised tactical considerations before presenting some of the additional, exculpatory evidence, Shinn's failure to investigate or interview these additional witnesses left him ignorant of such questions or any other basis for making an informed decision how to proceed. *See Williams v. Taylor*, 529 U.S. 362, 296 (2000) (finding counsel ineffective even though the additional evidence was not all favorable to petitioner because the record "clearly demonstrate[s] that trial counsel did not fulfill their obligation to conduct a thorough investigation" in the first place). Without adequate guilt-phase investigation, Shinn had *no basis* in which to form a tactical or strategic reason that this Court can credit. *In re Gay*, 19 Cal. 4th at 807 (reinforcing the idea that before counsel acts, he must "make a rational and informed decision on strategy and tactics founded on *adequate investigation and preparation* . . . fail[ing] to make such a decision, his action – no matter how unobjectionable in the abstract – is professionally deficient.") (emphasis added).

Equally important, even with the imprecisions or discrepancies identified by the referee, every single piece of additional evidence affirmatively exculpates Mr. Gay or impeaches the prosecution's case. At bottom, every single additional eyewitness would have testified to seeing a dark-skinned Raynard Cummings exit the car and shoot the officer that day; every single additional sheriff's deputy and inmate witness would have recounted Raynard Cummings confession to being solely responsible for shooting the officer: every single impeachment witness would have cast doubt on the prosecution's "pass the gun" theory; and every single expert witness would have given the jury reason to doubt the prosecution's case at

trial. *See Williams*, 529 U.S. at 296 (2000) (finding that even though "not all of the additional evidence was favorable to Williams" it did not defeat the showing of prejudice flowing from counsel's failure to present the "comparatively voluminous amount of evidence that did speak in Williams's favor").

On the crucial issue of who exited the car and shot the officer that day, any witness who testified that it was someone who looked like Raynard Cummings should have been investigated, presented, and reinforced over and over to Mr. Gay's jury at trial. *Brown v. Myers*, 137 F.3d 1154, 1157 (1998) (notwithstanding the imprecision of the witnesses' accounts, the additional testimony, at its core "buttressed . . . [a] crucial point" of the defense and created more equilibrium in the evidence presented to the jury, irrespective of the unhelpful portions). At the very least, having received the names and statements of numerous witnesses who could have testified to facts demonstrating Mr. Gay's innocence, Shinn was required to investigate and assess the evidence further. But he failed in that basic endeavor. And because the foregoing additional evidence was never investigated and presented, and because the exculpatory and impeaching value of the additional evidence necessarily dispels any confidence in the verdict, Mr. Gay is entitled to relief from the judgment of conviction.

III. DAYE SHINN WAS BURDENED BY ACTUAL CONFLICTS OF INTEREST THAT ADVERSELY AFFECTED HIS PURPORTED REPRESENTATION FOR MR. GAY.

A. Conflicts Arising Between Attorney's and Client's Interests.

The assistance of counsel guaranteed to criminal defendants by the

Sixth Amendment is essential to vindicating the due process right "to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). As a corollary, when trial counsel's performance fails to effectively ensure such fairness, the deficient representation constitutes a violation of the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). In general, the prejudice of a trial attorney's deficient performance is assessed by determining whether the record demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In contrast to the instances of deficient performance governed by *Strickland*, stricter standards of prejudice are necessary to safeguard fair trial rights whenever "the defendant's attorney actively represented conflicting interests." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *People v. Doolin*, 45 Cal. 4th 390, 418 (2009). In such situations, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary," and the *Strickland* showing of probable effect on the outcome is not required. *Id.* at 166, 174. 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) (finding a petitioner "need not demonstrate prejudice in order to obtain relief").

Where circumstances indicate the possibility of a conflict at the commencement of trial, counsel has an "obligation . . . to advise the court at once of the problem," and the court has an obligation to conduct an appropriate inquiry. *Holloway v. Arkansas*, 435 U.S. 475, 485, 488 (1978); *see also People v. Hung Thanh Mai*, 57 Cal. 4th 986, 1010 (2013), ("as the cases require," trial court appointed independent counsel and inquired into potential conflict at once). The purposes to be served by prompt reporting and inquiry are both to protect "the interest of a criminal defendant," as

well as "the institutional interest in the rendition of just verdicts in criminal cases." *Wheat v. United States*, 486 U.S. 153, 160 (1988); *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). Thus, where a "potential" conflict of interest raises the threat of unavoidable "ethical dilemmas," a court may relieve counsel, even over the client's objection. *Wheat,* 486 U.S. at 164; *see also Mickens*, 535 U.S. at 175, and n.6 (noting that Federal Rules of Criminal Procedure require "a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney").

When facts pointing to a potential conflict are not raised until *after* trial, reviewing courts undertake a retrospective inquiry to determine whether there was an "actual" conflict, *i.e.*, whether counsel's active representation of conflicting interests had an adverse effect on his or her performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980). On direct appeal, a court is limited to drawing inference from the appellate record: whether counsel failed to take actions or make arguments that would have been made by unconflicted counsel, and whether a legitimate, tactical reason may have explained counsel's omissions. *Doolin*, 45 Cal. 4th at 418.

Moreover, a conflict of interest is created by any situation "in which 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*." *People v. Cox*, 53 Cal. 3d 618, 653 (1991) (citation omitted; emphasis added), disapproved on other grounds by *Doolin*, 45 Cal. 4th at 417, n. 22.

B. Shinn was Burdened by Multiple Conflicts.

The record, including this Court's prior holdings in this case, respondent's admissions and the evidence and findings adduced at the reference hearing reveal that Daye Shinn's representation of Mr. Gay was burdened by multiple conflicts of interest.

1. Unlawful Capping Operation and Fraud on the Court.

This Court previously found, and respondent has admitted, that Shinn perpetrated fraud on Mr. Gay and the lower court to engineer his appointment as Mr. Gay's counsel. *See In re Gay,* 19 Cal. 4th 771, 794-95 (1998); Return at 2, ¶ 1. The fraudulent activity was part of a capping operation in which counsel used the services of Marcus McBroom to obtain clients, in exchange for which Shinn "funneled public monies" to McBroom and Dr. Fred Weaver for their purported expert assistance. Return at 6, ¶ 14. Trial counsel knew that Dr. Weaver "'was not willing to commit the time or to undertake the work necessary to perform an adequate assessment necessary to assist counsel in preparing a defense in a complicated case such as petitioner's.'" *Id.* at ¶ 15. The capping arrangement was the only factor that motivated trial counsel to retain Dr. Weaver in petitioner's case. *Id.* The Return further admits that Shinn knew his fraudulent conduct created a conflict between his financial interests and the interests of Mr. Gay; and that Shinn knew "he was acting unethically, unprofessionally, and contrary to petitioner's interests." *Id.* at 29, ¶ 78; *see also* California Rules of Professional Conduct, Rule 3-310 (Avoiding the Representation of Adverse Interests).

2. Criminal Investigation for Embezzlement.

A prime motivator for Shinn's fraudulent behavior in securing his

appointment to represent Mr. Gay was his need for cash to avoid criminal disciplinary penalties for a series of embezzlements he had committed in misappropriating clients' money. *See also In re Gay*, 19 Cal. 4th at 832 (Werdegar, J., concurring) ("I can only infer that Shinn sought appointment in this case to meet his own personal needs, presumably financial, and that he intended to – and did – exploit the appointment to meet those personal needs, rather than to represent his client as well as possible.").

a. The Korchin Embezzlement.

Alexander and Rebecca Korchin filed a complaint with the State Bar in July 1981 that Alexander Korchin had entrusted Shinn with over $90,000 Korchin recovered in an eminent domain proceeding in 1978. Ex. A163 at 1. Shinn convinced Korchin to allow Shinn to hold the funds as a means of both concealing the funds from Korchin's wife during their pending divorce proceedings, and evading payment of capital gains taxes. Ex. A163 at 2. Shinn promised to put the money in a "special" account where it would accrue interest for Korchin. *Id.*; *see also* Ex. A154 at 2. Korchin and his wife then reconciled and asked for the return of his money. Ex. A154 at 2. After two and a half years including Shinn's efforts to stall about returning the money, Korchin made a final request for his money plus interest, and an accounting of any fees or expenses claimed by Shinn. Although Shinn had performed virtually no legal services for Korchin, he deducted over $20,000 from Korchin's principal and gave him none of the accrued interest, which totaled nearly $40,000. Ex. A163 at 2-3. Rebecca Korchin demanded to know where the interest was and threatened to file a complaint with the State Bar Association. Shinn told her to go ahead and file the complaint. Ex. A154 at 2.

In a last ditch effort to avoid the State Bar complaint, however, Shinn

paid the Korchins approximately $70,000 he stole from another elderly couple, Oscar and Marjorie Dane. 7 EH RT 960:22-25; 17 EH RT 2286:18-2287:8; Ex. A33 at 17, n.12 (State Bar Decision noting, "The money used to pay Korchin, however, belonged to Dane").

According to the Deputy Los Angeles County District Attorney who eventually investigated the Dane embezzlement, at the time Shinn was attempting to get appointed in Mr. Gay's case, "the Korchin case looked like an excellent criminal case against [Shinn]. Everything [the prosecutor and detective] found pointed to what would appear to be a good criminal filing." 15 EH RT 2099:8-11.

b. The Dane Embezzlement.

Shortly before Shinn began representing Korchin, he was retained in 1978 by Oscar Dane and his wife, an elderly couple in Santa Monica whose house was being condemned in eminent domain proceedings. Ex. A33 at 2. In April 1979, the matter culminated in a net award of $198,623.48 to the Danes, which Oscar Dane thought was substantially less than the actual value of his home. Ex. A33 at 9-10; 16 EH RT 1981:12-13.

In January 1980, in response to Shinn's request and supporting declaration, the Los Angeles Superior Court ordered a warrant issued in the amount of $198,623.48 payable to Shinn, Oscar Dane, Marjorie Dane and Edith Dane Messing; and further directed that it be held in an interest-bearing trust account for the benefit of the payees until their respective interests were established by mutual agreement or further court order. Ex. A33 at 10; Ex. A35 at 3. Shinn attempted unsuccessfully to deposit the check in his client trust account without obtaining signatures of the other payees. Ex. A33 at 10. He then obtained a new check, payable in his name only, and deposited it in his client trust account on February 15, 1980. Ex.

A33 at 11; Ex. A98 at 4.

Almost immediately after that, on February 26, 1980, Shinn wrote a check for $190,000 of the Dane funds, made payable to "cash," and moved the money into another account. Ex. A33 11; 7 EH RT 945:2-13; Ex. A98 at 6 (copy of check). Over the course of the next twelve months Shinn moved Dane's funds between two accounts, loaned $50,000 of the money to his former law associate, issued a check for $2,000 payable to his wife, and diverted $16,000 for unknown purposes. 7 EH RT 946-58; Ex. A33 at 12-15; Ex. A119 at 1-2 (analysis of transactions).

In February 1981, Shinn then attempted to tender a check to Dane in the sum of $172,729.68. 7 EH RT 955:23-956:1. Dane declined the proffered check and instead asked Shinn for an accounting of all withdrawals and accrued interest. 7 EH RT 956:12-957:1; Ex. A98 at 49 (Los Angeles County Department of the Treasurer and Tax Collection) (request for "full detailed accounting form the bank and you including dates of deposit and withdrawal and daily interest earned"). Shinn did not comply with Dane's request and, instead, on February 20, 1981, redeposited the check 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 1-2.

In April of 1981, Shinn shifted the bulk of the Dane money, $170,000, into a fourth account, and began designating interest checks to himself. 7 EH RT 960:28-961:22; Ex. A119 at 2. In October of 1981, Shinn closed the fourth account and opened a fifth account from which he also skimmed off interest. 7 EH RT 964:3-10; 17 EH RT 2288:12-18; Ex. A119 at 2. Although Shinn initially maintained the pretense that the account was for the benefit of Oscar Dane, by June of 1983, Shinn had taken Dane's name off the certificates of deposit and made them payable only to Shinn. 17 EH RT 2289:5-15; Ex. A33 at 24.

In mid-October 1983, Shinn used the funds in the fifth account to purchase a certificate of deposit in the amount $141,872.25. Ex. A119 at 5. Shortly after that, in November 1983, Shinn became aware of the Los Angeles County Deputy District Attorney's criminal investigation into his theft of Dane's money. Ex. A33 at 31. Between then and March 1984 when Shinn met with the District Attorney, Deputy Sheriff Gibbons was investigating the case and making attempts to get an accounting of Dane's funds. Ex. A154 at 16. In January, Shinn used the proceeds to purchase a cashier's check in the amount of $145,285.88, which he intended to tender to Dane in January 1984. Ex. A33 at 25; Ex. A119 at 5.

In January 1984, two months after Shinn became aware of his criminal investigation (and while Shinn was actively representing Mr. Gay), he purchased a cashier's check in the amount of $145,285.88, made payable to his trust account and "Attn. Oscar Dane." Ex. A98 at 162. Shinn did not deliver the check, however, and claimed it was stolen by Linda Jones; and that his records for the Dane account were destroyed in an office fire set by Linda Jones, the wife of his landlord, Lewis Jones. Ex. A98 at 164; Ex. A34 at 14 (claiming he left copies of his accounting in the copy machine, and they were "all burned up" by the fire). This version of events was endorsed by the District Attorney, who presented Shinn as a cooperating witness in prosecuting Linda Jones for the murder of her husband. As discussed below, Shinn, who was aware that Deputy Gibbons was also investigating the Jones murder, considered himself to be a possible suspect in the homicide, and lied under oath at Linda Jones's trial in an effort to distance himself from the case. Ex. A34 at 148:10-23 ("[In] 1984? I think at that time [Deputy Gibbons] thought I was involved with Linda Jones in killing her husband or something to take the money.").

On February 22, 1985, approximately five years after Shinn took

possession of the Dane's money, and one week before the jury was sworn to try the capital murder charges against Mr. Gay, Shinn gave Marjorie Dane a cashier's check for $178,287.93. 7 EH RT 965:23-26.

Martin G. Laffer, a Certified Public Accountant who specializes in forensic accounting, calculated the losses to the Danes that resulted from Shinn's misappropriation and theft of their money. 7 EH RT 928:7-23, 966:1-7. In the period between February 1980 and February 1985, Laffer identified $62,515.43 in "errant," or unaccounted for funds. 7 EH RT 966:1-7; *see also* Ex. A119 (analysis of transactions). During the same period, Laffer calculated a total of $62,196.59 in accrued interest, which was not paid to the Danes. 7 EH RT 966:9-14. If Shinn had placed the $198,623.48 in an interest-earning account as the Superior Court had ordered him to do, and maintained it for the same five year period earning the average interest rate at the time of 15%, the funds would have increased to a total of $420,943.71. 7 EH RT 968:17-27. During this same period, the amount of interest earned would have more than doubled: $222,320.23. 7 EH RT 968:28-969:2.

Laffer, who also has experience as a special agent conducting investigations into tax evasions, subscribing false tax returns, and money laundering, prepared a schedule of Shinn's accounts and transactions and attempted to traced the route of the proceeds. 7 EH RT 930:23-28, 935:1-4, 937:7-938:4. Based on his analysis of the transactions, it was Laffer's opinion that it would have been reasonable for the District Attorney to open a criminal investigation of Shinn. 7 EH RT 990:12-24. According to Laffer, this was not a case of someone being "a little sloppy or absentminded with their bookkeeping," 7 EH RT 989:8-11, rather, the transactions Laffer reviewed, and as listed in Ex. A119, depicted "a classic misuse of trust accounts." 7 EH RT 990:12-24.

There was no question that Shinn stole the Danes' money. The only question was the magnitude of the theft. Laffer and the State Bar Court judge who recommended Shinn's disbarment noted, due to Shinn's convoluted transactions, it was "difficult to determine with any precision just how much money he misappropriated." 17 EH RT 2304:11-16. While Laffer calculated that Shinn skimmed off over $125,000 in errant funds and interest, the State Bar Court concluded that even "assuming, for the sake of argument," that Shinn was entitled to the $90,000 in attorney fees he contended he was 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).

Likewise, there is no dispute Shinn was aware of his liability and sought to avoid apprehension from the inception of the criminal investigation throughout Mr. Gay's trial and continuing for at least five years after that. During the investigation, Shinn told the district attorney "many lies" that the prosecutor "would consider a consciousness of guilt," and Shinn's lack of candor and inconsistent statements in the 1990 State Bar trial "demonstrated that his primary effort was to conceal his misconduct and/or to avoid criminal prosecution and culpability in these proceedings." 16 EH RT 2113:16-18; Ex. A33 at 53-54.

Marjorie Dane did not receive the cashier's check for $178,287.93 until February 1985, on the eve of the guilt phase in Mr. Gay's trial, and the District Attorney did not close the criminal investigation of Shinn until April 24, 1989. Resp. Ex. 737. In addition to the search warrants that Deputy Gibbons served to seize Shinn's bank account records on August 2, 1984 and October 29, 1984, he also executed search warrants for Shinn's records on May 6, 1985, September 23, 1985, November 1, 1985 and April 18, 1986. Ex A154 at 1, 8-9.

c. The Jones Murder Investigation.

On or about February 28, 1984, Daye Shinn's law partner, Lewis Jones, was murdered. Ex. A140 at 3. The case was initially investigated by Los Angeles Sheriff's Department homicide investigators Scully and Olsen. *Id.* Scully and Olsen were informed by Lt. Robert Flemming of the Sheriff's Department Forgery Division that Jones was also named as the victim of an embezzlement/forgery being investigated by Flemming. Ex. A140 at 6. A possible suspect in the embezzlement/forgery case was Marilyn (aka "Mickey") Lebens, who worked in Jones's law office. *Id.* According to Lt. Flemming, a $5,000 cashier's check, made payable to C. Altobella, was found in Lebens's desk. Carol Altobella was Lebens's sister-in-law. *Id.* Deputy Charles Gibbons, who was investigating Shinn's embezzlement, also worked with Sergeant Rod Lyons on the Jones investigation. *See, e.g.*, Ex. A139.

Two lawyers in Jones's office, Kathleen Mott and William Ramey, informed Sergeant Lyons and Deputy Gibbons that after Jones's death, they had found evidence of wide-scale forgery and embezzlement of at least $200,000 in funds from one of the firm's clients, Aetna Insurance Company. Ex. A139 at 1, 3.

In the course of the Jones murder investigation, Shinn asked to speak privately with Sergeant Lyons. Ex. A154 at 17. According to Sergeant Lyons, Shinn appeared to be "extremely nervous." *Id.* Shinn told Lyons that there was no need to check Shinn's bank accounts in the course of the investigation. *Id.* Sergeant Lyons thought Shinn's statement was strange because Sergeant Lyons had not done anything to indicate to Shinn that he was interested in examining Shinn's accounts. *Id.* Shinn also refused to disclose his bank accounts to Deputy Gibbons because Shinn was aware of the dual investigation into his own embezzlement case, as well as the Jones

murder and embezzlement case, and he was concerned that Deputy Gibbons thought he "was involved with Linda Jones in killing her husband or something to take the money." Ex. A34 at 148:10-23.

Harland Braun was Linda Jones's defense attorney in the Los Angeles District Attorney's prosecution of her for killing her husband. Braun also believed another attorney in Jones's office was involved in killing Lewis Jones as part of a plan to cover up the embezzlements. 14 EH RT 1814:16-20, *id.* at 1818:18-27; *see also* Ex. A148. Braun understood from the prosecution's evidence that, beginning in at least 1981, Lewis Jones was involved in the Aetna Insurance Company embezzlement scheme; and that his law partner was possibly involved as well. 14 EH RT 1830:16-22, *id.* at 1832:2-6. Braun theorized that Lewis Jones and his wife were living off "the float" of stealing Aetna's money, then replacing money stolen from one case with money obtained from later cases. 14 EH RT 1828:15-1829:9.

Shinn testified as a prosecution witness against Linda Jones, who was also accused of stealing a check for $145,000 that Shinn said he intended to give to the Danes in settlement of the money he owed them. Neither Shinn nor the prosecutor disclosed that at the time he testified Shinn was the target of a criminal investigation by the Los Angeles County District Attorney. 14 EH RT 1820:25-28, 1821:1. Nor was Jones's defense attorney informed of the "three-card Monte" pattern of financial transactions reflected in Shinn's banking records. *See* Ex. A119; *see also* 14 EH RT 1834:6-15. When Shinn testified, he lied "about only having known Lew[is] Jones for six or seven months as a tenant in the office space" before Jones was murdered. 14 EH RT 1835:20-1836:2. In fact, Shinn's banking records and correspondence with the Los Angeles Treasurer established that he had known Jones for years; Shinn had been practicing in Jones's law office as early as February 1980, and certainly by

February 1981; *i.e.*, by the time the prosecution's own evidence showed that Jones became involved in the Aetna Insurance Company embezzlement scheme. 14 EH RT 1836:14-23, 1838:2-16, 1840:16-28, 1841:10-1842:5.

Shinn also lied in claiming that the check for approximately $145,000, which Linda Jones was accused of stealing, was the only check payable to Oscar Dane that Shinn had ever received. 14 EH 1842:8-16; Ex. A66 at 13:12. In fact, beginning in February 1980, Shinn had received (and misappropriated) at least three other checks that were payable to Oscar Dane. 14 EH RT 1843:16-26, 1844:11-25, 1845:9-13; Ex. A93 at 1, 30, 48.

Shinn also misleadingly testified that he was merely a tenant in Lewis Jones's law offices and not one of his partners. 14 EH RT 1846:18-24. He only later acknowledged he was Jones's partner. 14 EH RT 1846:12-24.

In his testimony, Shinn disclaimed any familiarity with anyone named C. Altobello. 14 EH RT 1848:5-1849:11. "C. Altobello," was a recipient of funds named in the allegedly forged letter to Shinn's bank, specifying the distribution of proceeds from the check to Oscar Dane that Linda Jones was accused of stealing. *Id.* As mentioned above, Carol Altobello was also the sister-in-law of Marilyn (aka "Mickey") Lebens. Ex. A140 at 6. Lebens was a central figure in Lewis Jones's embezzlement scheme because she was the one who forged the name of the Aetna Insurance Company employee, Carol Rheaume, to the checks; and apparently used her sister-in-law as a conduit for the stolen proceeds. Ex. A138; Ex. A140 at 6. Although William Ramey professed shock at learning of the Aetna embezzlement scheme after Jones's death, when Lebens began admitting her role in the scheme to Deputy Gibbons and Sergeant Lyons, Ramey advised her to terminate the interview. Ex. A138.

Shinn would obviously have been aware of the familial connection between Lebens and Altobello despite his testimony at the Linda Jones trial

that he did not know a "C. Altobello." Any possible doubt on this point is dispelled by the fact that by the time Shinn testified at Linda Jones's trial, he had filed a lawsuit against those involved in the alleged theft of the Dane check, including named defendant, Marilyn Bevens, "aka Mickey Altobello." Ex. A35 at 42.

Respondent admits that "Shinn thought the district attorney's office and sheriff may have been investigating him in connection with the murder of Mr. Jones." Return at 18, ¶ 51.

Shinn had reason to fear that the police were looking into him as part of the sordid, corrupt scene involving his law partner and his whole office, for embezzlement and murder. Irrespective of whether Shinn was actually involved in Lewis Jones's murder, he knew information existed that could be uncovered in the ongoing investigation that would expose the full extent of his dishonest dealings. That explains why he was evasive about releasing his banking records, why he lied about not knowing who C. Altobella was, and why he lied under oath about being only a short-term tenant for Lewis Jones and receiving only one check for Dane. As MacKenzie testified, Shinn told "many lies, which [MacKenzie] would consider a consciousness of guilt." 15 EH RT 2113:16-18.

3. Each of These Became Actual Conflicts that Had Adverse Effects on Mr. Gay's Representation.

As a matter of law, the pending criminal investigations, and feared investigations, of Shinn by the same District Attorney's Office that was prosecuting his client created a conflict of interest. *See, e.g., People v. Gonzales*, 52 Cal. 4th 254, 308-11 (2010) (potential conflict of interest where defense counsel was implicated in family members' attempt to smuggle drugs to capital defendant). In *Gonzales*, the potential conflict was resolved by the trial court's inquiry and the prosecutor's assurances

that defense counsel was absolved of any wrong doing. *Id.* Similarly, in *People v. Mai*, 57 Cal. 4th at 1010, a potential conflict was created by the possible investigation of counsel by a different law enforcement agency's investigation of the defendant for plotting to kill a witness. Likewise, in *People v. Almanza*, 233 Cal. App. 4th 990, 1002 (2015), the court explained that it had:

> no trouble concluding there was a conflict of interest that was real, *not theoretical*. Any trial counsel in a criminal case who is worried that the prosecutor is scrutinizing his or her actions for *possible* criminal *investigation* and/or prosecution has a conflict with the interest of representing the client zealously – he or she does not want to antagonize the prosecutor.

(emphasis added).

Investigation of defense counsel gives rise to a potential conflict because the Sixth Amendment right to counsel entitles a criminal defendant at all times to have counsel's "undivided" loyalty in representing and protecting the defendant's interests. *Glasser v. United States*, 315 U.S. 60, 76 (1942), superseded by statute on other grounds, *Bourjailey v. United States*, 483 U.S. 171 (1987); *Harris v. Superior Court*, 225 Cal. App. 4th 1129, 1143 (2014). Thus, this Court has explained that "[w]hile the classic example of a conflict in criminal litigation is a lawyer's dual representation of codefendants, the constitutional principle is not narrowly confined to instances of this type," rather "[a] conflict may also 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; *see also United States v. Ellison*, 798 F.2d 1102, 1106-07 (7th Cir. 1986) ("[a]lthough the issue of a conflict typically arises in a case involving joint representation, it also may arise when a client's interest conflicts with that

of his attorney").[23]

Shinn's embezzlement of the Korchins' money, and the financial need to replace it to avoid or lessen his criminal liability, created an additional incentive to serve his own interests at the expense of Mr. Gay's by securing his appointment to represent Mr. Gay while concealing his conflicts from his client and the court. Thus, the District Attorney's pending criminal investigation had an adverse impact on Shinn's purported representation of Mr. Gay. The Sixth Amendment imposes on defense attorneys "the obligation, upon discovering a conflict of interests, to advise the court *at once* of the problem." *Holloway*, 435 U.S. at 485 (emphasis added). Shinn failed to discharge his duty to make such disclosure to either "the trial court or petitioner" at any time during his representation. Rpt. at 60:8-9. He thereby denied Mr. Gay the protection of having the trial court promptly discharge its "independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment," *Wheat v. United States*, 486 U.S. 153, 161 (1988), and deprived Mr. Gay of his entitlement to the "assistance of an attorney acting as his diligent

---

[23] Federal courts are in accord. *See*, e.g., *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 199-201 (D.C. Cir. 2013) (investigation of defense counsel for money laundering created conflict of interest); *United States v. Edelmann*, 458 F.3d 791, 806-08 (8th Cir. 2006) (pending investigation of defense counsel for fraud created conflict of interest); *Reyes-Vejerano v. United States*, 276 F.3d 94, 99 (1st Cir. 2002) ("a defense lawyer within the sights of a targeted criminal prosecution may find his personal interests at odds with his duty to a client."); *United States v. Levy*, 25 F.3d 146, 156 (2d Cir. 1994) ("most troubling" conflict created by pending investigation); *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987) ("actual conflict" where counsel was under investigation for bribery), overruled on other grounds, *United States v. Lane*, 474 U.S. 478 (1986); *United States v. Salinas*, 618 F.2d 1092, 1093 (5th Cir. 1980) (actual conflict where attorney was target of investigation related to charges against clients), cert. *denied*, 449 U.S. 961 (1980).

conscientious advocate." *In re Cordero*, 46 Cal. 3d 161, 180 (1988) (emphasis added). Shinn's intentional concealment of the potential conflict thus resulted in an actual conflict, as he advanced his personal interests at the expense of Mr. Gay's, and thus "actively represented conflicting interests." *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980).

The evidence demonstrates that Shinn's abandonment of Mr. Gay's interests stemmed directly from the conflict raised by the embezzlement investigation. As Justice Werdegar observed, it reasonably can only be inferred "that Shinn sought appointment in this case to meet his own personal needs, presumably financial, and that he intended to – and did – exploit the appointment to meet those personal needs, rather than to represent his client as well as possible." *In re Gay*, 19 Cal. 4th at 832 (Werdegar, J., concurring). Those needs drove his ongoing efforts at "robbing Peter to pay Paul" – by using a bewildering array of bank accounts to move and siphon clients funds to cover the tracks of his embezzlement of money from multiple clients, including Oscar and Marjorie Dane, and Alexander and Rebecca Korchin. 15 RT 2087:16-23. Respondent's counsel acknowledged at the reference hearing that when the banking records associated with Shinn's "three-card Monte" movement and diversion of funds were analyzed by an expert forensic accountant who "deserves great respect" and has "great credentials," the expert concluded that "Daye Shinn is a thief." 7 EH RT 960:8-21, 8 EH RT 1056:12-16, 17 EH RT 2307:9-10.

In turn, the criminal investigation gave Shinn a powerful incentive to remain involved in the mutual money-making activities of the capping scheme. This had at least two discernable, adverse impacts.

First, "Shinn did not consider retaining experts other than Weaver." *In re Gay*, 19 Cal. 4th at 796 (emphasis added). Thus, as a direct result of

Shinn's conflict, Mr. Gay was denied even the potential assistance of any qualified mental health professional. This also included the expertise of eyewitness identification experts who could have educated the jurors as to the factors affecting the reliability of eyewitness identifications and the contaminating effects of suggestive interview and identification techniques.

Under the circumstances of this case, any reasonably competent counsel would at least have considered retaining such experts. *See People v. Nation*, 26 Cal. 3d 169, 179 (1980) ("a penetrating concern as to the propriety of a pretrial identification should be a commonplace consideration to any attorney engaged in criminal trials"). As this Court has repeatedly observed in this case, the eyewitnesses' "'versions of the events and identifications of the shooter or shooters varied greatly.'" *People v. Gay*, 42 Cal. 4th 1195, 1226 (2008) (quoting *People v. Cummings*, 4 Cal. 4th 1233, 1259 (1993)).[24] In light of "the absence of physical evidence linking [Mr. Gay] to the shooting," *People v. Gay*, 42 Cal. 4th at 1226, eyewitness expert testimony would have enabled the jury to understand, in context, the significance of "the testimony that defendant

[24] More particularly, the Court noted: "Robert Thompson, for example, told police in the first few hours after the murder that the passenger in the rear seat had fired all the shots and this man['s]" physical description and clothing matched the co-defendant, Cummings. *People v. Gay*, 42 Cal. 4th at 1226. "Gail Beasley's description shortly after the murder of the shirt worn by the shooter – that it was burn orange or red – was likewise consistent with Raynard Cummings's clothing and inconsistent with defendant's. Marsha Holt, who said she was in the bedroom talking to her mother when the shooting began, described the shooter as" wearing clothing similar to Mr. Gay's, "but her account of the events was impeached by her mother's denial of being in the bedroom at the time as well as by her mother's testimony that she had been unaware of the shooting until Gail Beasley told her about it, . . . and by her inability to identify defendant in a lineup a few days after the murder. The remaining eyewitness to the shooting, Pamela Cummings, had an obvious interest in protecting her ex-husband." *Id.* at 1226-27.

nonetheless was the man who came out of the car to retrieve a weapon from the ground (thus offering an explanation why the prosecution eyewitnesses had been able to recognize him)." *Id.* at 1227.

Indeed, trial counsel explicitly acknowledged the necessity for retaining such defense experts. Shinn advised the trial court that "eyewitness testimony is going to be essential," and clearly acknowledged that competent representation of Mr. Gay under the circumstances of this case reasonably required the preparation and presentation of expert testimony on eyewitness identification. *See* Ex. A121 at 14 (March 7, 1985). Consistent with Shinn's pattern of fraudulent misconduct, he falsely informed the trial court that he was "going to put a psychologist – two or three psychologists – regarding eyewitness testimony" on the witness stand to testify on behalf of Mr. Gay. *Id.*

As this Court already has found, however, the capping scheme and Shinn's diversion of expert funds to Weaver and McBroom prevented him from even considering retaining qualified eyewitness experts; and Shinn presented none. Shinn's conflict thus had an actual and adverse impact on his representation. *See, e.g., People v. McDonald*, 37 Cal. 3d 351, 375 (1984), overruled on other grounds, *People v. Mendoza*, 23 Cal. 4th 896, 914 (2000) ("no other evidence connected defendant with the crime, the crucial factor in the case was the accuracy of the eyewitness identifications. Yet on that issue the evidence was far from clear").

Second, in addition to denying petitioner the assistance of competent experts, Shinn knowingly denied Petitioner any assistance from a competent attorney. The facts which this Court presumed to be true, and the Attorney General has admitted are in fact true, establish that Shinn did "not understand[] the rudimentary elements of the law.'" Return at 28, ¶ 76. Shinn's ignorance of legal fundamentals therefore made him manifestly

unqualified to handle a capital case. By defrauding the trial court to obtain appointment as counsel for Mr. Gay, Shinn violated his ethical obligation to forego undertaking representation in a case beyond his capabilities, and thereby prevented the court from appointing any attorney who was actually qualified to handle the matter.[25]

The record further demonstrates that Shinn's ongoing concealment of the conflict adversely affected his representation at trial, including interfering with the trial court's inquiry into the existence of a conflict of interest arising from Shinn incompetence in persuading Mr. Gay to confess to the charged and uncharged robberies. *In re Gay*, 19 Cal. 4th at 792. At the time the trial court allowed the taped confession to be presented to Mr. Gay's jury over Shinn's objection, the trial court declined to relieve Shinn as counsel because "there had been no prior claim that a conflict existed," and "Shinn's representation had been proper." *People v. Cummings*, 4 Cal. 4th at 1319-29. Shinn's silence misled the trial court on both scores. He knew there had been no "prior claim" of a conflict because he had failed to reveal it. He also knew that his failure to disclose the conflict as well as his perpetration of fraud on his client and the court in securing his appointment clearly constituted highly *im*proper representation.

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." *Wheat*, 486 U.S. at 160. Protection of both a defendant's

---

[25] *See* California Rules of Professional Conduct, Rule 3-110(C): "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Shinn did nothing to acquire the learning, skill, or assistance necessary to represent petitioner competently.

Sixth Amendment rights and the integrity of the judicial process requires a prospective assessment of the harm that reasonably might occur from a potential conflict. *See Wheat*, 486 U.S. at 164 (no abuse of discretion where district court denied motion to permit multiple representation in alleged drug conspiracy after considering potential conflicts that could arise from various scenarios, including potential plea bargains and the government's use of testimony from one defendant against another, thereby creating "ethical dilemma for" defense counsel). That is why counsel are required to disclose such conflict "at once." *Holloway*, 435 U.S. at 485.

4. Shinn as a Second Prosecutor.

This Court explained in *Doolin* that determining whether a conflict of interest "affected" counsel's performance "'requires an inquiry into . . . whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict.'" *Doolin*, 45 Cal. 4th at 418 (quoting *Cox*, 30 Cal. 4th at 948-49). The task is necessarily complicated by the fact that evidence showing explicitly that "counsel 'pulled his punches'" is not likely to be spread on the record. *Doolin*, 45 Cal. 4th at 418. Instead, reviewing courts may discern a connection between a conflict of interest and counsel's deficient performance by examining the available 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.

Id. Thus, where counsel's deficient performance is otherwise inexplicable, it may be attributed to the effect of the conflict of interest.

In this case, defense attorney Shinn repeatedly failed to take the most rudimentary and obvious measures to protect Mr. Gay's interests and the nature and number of such failures could not reasonably be ascribed to the actions of a conflict-free attorney. Nor can they be the product any tactical decision. The consistency of Shinn's ineptness and magnitude of his aggressively prejudicial behavior is incomprehensible to anyone remotely experienced with trial work. It is truly difficult to conceive of how he could have done more harm if he had an express contractual arrangement with the prosecution to throw the case.

To begin with: his omissions. As the Court is by now aware, Shinn did not call or even interview four clearly exculpatory eyewitnesses, at least three of whom had given one or more statements to the police. Even passing exposure to the witnesses' statements would have alerted reasonably competent counsel to the need to interview them. Shinn did nothing.

Shinn also failed to interview, let alone call, multiple law enforcement and inmate witnesses to whom Mr. Gay's co-defendant, Raynard Cummings, confessed that *he, not* Mr. Gay, was the lone perpetrator of the homicide.

Instead, Shinn ceded to the prosecution full control to decide who among the eyewitness would be called to describe the events in question, and identify the perpetrators.

Adding exponentially to the prejudice of what Shinn did not do were the things he did do. First, in his role, as aptly described by this Court as acting "as a second prosecutor," Shinn created Mr. Gay's unwitting, tape-recorded confession to charged and uncharged robberies. *In re Gay*, 19 Cal. 4th at 793. This devastating evidence of guilt, in turn, provided the prosecution with its *only* evidence of premeditation and deliberation for

first degree murder, and for an element of the special circumstance of killing a police officer to avoid arrest.

Second, as if to ensure the prejudice of that outrage was compounded, Shinn called one of the homicide investigators who conducted the interview to testify that the prosecution team *believed* Mr. Gay when he *admitted* the robberies, but thought he *lied* when he *denied* committing the murder. Shinn called investigator Jack Holder to establish that he, 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. 85 RT 9744:8-13. Shinn then elicited Holder's testimony that by the end of the robbery discussion Holder did not "have any doubts in [his] mind as to whether or not Mr. Gay was telling the truth." 85 RT 9744:19-22. Holder "thought he was telling the truth" about the robberies to which he confessed on tape. *Id.* at 9744:22-25. After the interview, Holder, Helvin and Watson also agreed among themselves, however, that Mr. Gay "was telling the truth in part of the tape and part of the tape he was lying." 85 RT 9745:21-28.

As this Court concisely summarized the thrust of the testimony, 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.

Third, for the apparent benefit of anyone who may have missed the prejudicial testimony, Shinn then repeated this fact that investigators thought Mr. Gay truthfully admitted the robberies, but lied about not committing the "murder" *three* times in his closing argument. 95 RT 10986.

Applying this Court's analysis as mandated in *Doolin* to evaluate the

source of these multiple, significant lapses leads to the conclusion that could not have been the product of conflict-free attorney pursuing legitimate tactical goals.

Accordingly, Shinn's catastrophic performance should be attributed to his multiple conflicts of interest, and Mr. Gay should be deemed to have been deprived of the assistance of counsel to which he was constitutionally entitled.

CONCLUSION

For the foregoing reasons, and those set forth in the Traverse, Mr. Gay is entitled to relief on Claims Two and Three of the Petition.

Dated: June 24, 2016

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____

Jennifer Molayem
Gary D. Sowards
Counsel for the Petitioner

CERTIFICATE AS TO LENGTH

I certify that this Reply to the Informal Response contains 41,353 words, verified through the use of the word processing program used to prepare this document.

Dated: June 24, 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 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:

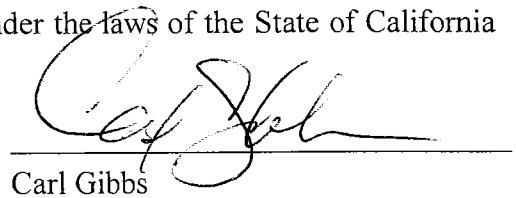
David Glassman
Deputy Attorney General
300 E. Spring Street, Ste. 1702
Los Angeles, CA 90013
Counsel for Respondent

Patricia Mulligan, Deputy Public Defender
Monnica Thelen, Deputy Public Defender
Law Offices of the Public Defender
900 Third Street, Second Floor
San Fernando, California 91340
Counsel for Petitioner

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: June 24, 2016



Carl Gibbs